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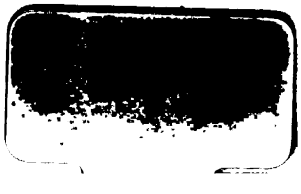

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REPORTS

OF

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CASES ARGUED AND DECIDED

IN

THE SUPREME COURT

OF

THE UNITED STATES.

COMPLETE EDITION, WITH NOTES AND REFERENCES

BY

STEPHEN K. WILLIAMS,
Counselor at Law.

BOOK XI.

Containing HOWARD, Vols. 1, 2, 3 and 4,

AND

GENERAL INDEX TO NOTES TO BOOKS I. TO XI.

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Mch. 3d, 1839..... 4 How. 402
Aug. 19th, 1841..... 1 How. 265–269, 276–281
Aug. 19th, 1841..... 2 How. 207–209
Aug. 19th, 1841, ch. 9.... 3 How. 311–332, 436
Aug. 30th, 1841..... 3 How. 108
Aug. 30th, 1842..... 4 How. 334
May 31st, 1844..... 3 How. 244–246
Feb. 26th, 1845..... 4 How. 332, 702

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REPORTS

OF

L. Cabell Williamson,
ATTORNEY AT LAW
490 Louisiana Ave.
WASHINGTON, D. C.

CASES

ARGUED AND ADJUDGED IN

THE

Supreme Court of the United States,

IN JANUARY TERM, 1843.

BY BENJAMIN C. HOWARD,

Counselor at Law, and Reporter of the Decisions of the Supreme Court of the United States.

VOLUME I.

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APPOINTMENT OF REPORTER.

IN pursuance of the Act of Congress approved August 26th, 1842, the court proceed to appoint a Reporter, and order that BENJAMIN C. HOWARD be, and he is hereby appointed Reporter, in the Supreme Court of the United States.

January 27th, 1843.

BENJAMIN C. HOWARD, Esquire, being appointed Reporter of the decisions of the Supreme Court of the United States under the Act of Congress of 26th of August, 1842, took in open court the following oath of office: "I do solemnly swear that I will faithfully and impartially discharge and perform all the duties of my said office, according to the best of my abilities and understanding, and that I will support the Constitution of the United States; so help me God;" and thereupon entered upon the discharge of his duties.

February 1st, 1843.

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JUDGES

OF THE

SUPREME COURT OF THE UNITED STATES

DURING THE TIME OF THESE REPORTS.

The Hon. ROGER B. TANEY, *Chief Justice.*
The Hon. JOSEPH STORY,* *Associate Justice.*
The Hon. SMITH THOMPSON,* *Associate Justice.*
The Hon. JOHN M'LEAN, *Associate Justice.*
The Hon. HENRY BALDWIN, *Associate Justice.*
The Hon. JAMES M. WAYNE, *Associate Justice.*
The Hon. JOHN CATRON, *Associate Justice.*
The Hon. JOHN M'KINLEY,* *Associate Justice.*
The Hon. PETER V. DANIEL, *Associate Justice.*

HUGH S. LEGARÉ, Esq., *Attorney-General.*

WILLIAM THOMAS CARROLL, Esq., *Clerk.*

BENJAMIN C. HOWARD, Esq., *Reporter.*

ALEXANDER HUNTER, Esq., *Marshal.*

*Mr. Justice STORY and Mr. Justice MCKINLEY were prevented attending court by indisposition; and Mr. Justice THOMPSON being compelled to leave Washington on the 6th of February, did not hear any arguments after that day.

ORDER OF COURT.

ORDERED by the court, that in obedience to the Act of Congress approved August 16th, 1842, the following allotment of circuits is made among the justices of the said court:
For the fourth circuit, ROGER B. TANEY, Chief Justice.
For the fifth circuit, JOHN MCKINLEY, Associate Justice.
For the sixth circuit, JAMES M. WAYNE, Associate Justice.
For the ninth circuit, PETER V. DANIEL, Associate Justice.
January 25th, 1843.

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L. Cabell Williamson,
ATTORNEY AT LAW
490 Louisiana Ave.
WASHINGTON, D. C.

THE DECISIONS

OF THE

Supreme Court of the United States,

AT JANUARY TERM, 1843.

1*] *WILLIAM H. WILLIAMS, *Plaintiff in Error*,

v.

JAMES ASH, *Defendant in Error*.

Last will—bequest of slaves in Maryland with proviso that in case of removal or sale they were to become free—bequest of freedom is a specific legacy.

Mrs. T. Greenfield, of Prince George's County, Maryland, bequeathed to her nephew, Gerard T. Greenfield, certain slaves, with a proviso in her will, "that he shall not carry them out of the State of Maryland, or sell them to anyone; in either of which events, I will and desire the said negroes shall be free for life." After the decease of the testator, in 1839, G. T. Greenfield sold one of the slaves, and a petition for freedom was thereupon filed in the Circuit Court of Washington County. The legatee continued to reside in Prince George's County, for two years after the decease of the testatrix, during which time the appellee was sold by him, and he afterwards removed to the State of Tennessee, where he had resided before the death of the testatrix. The Circuit Court instructed the jury, that by the sale, the petitioner became free. Held, that the instructions of the Circuit Court were correct.

A bequest of freedom to a slave, under the laws of Maryland, stands on the same principles with a bequest over to a third person. A bequest of freedom to a slave is a specific legacy.

The bequest of the testatrix of the slave to her nephew, under the restrictions imposed by the will, was not a restraint or alienation inconsistent with the right to the property bequeathed to the legatee. It was a conditional limitation of freedom, and took effect the moment the negro was sold.

IN error to the Circuit Court of the United States for the County of Washington, District of Columbia.

2*] *In the Circuit Court of the County of Washington, James Ash, a negro, presented a petition, stating that he was entitled to his freedom, and that he is held in custody and confined in the private jail of William H. Williams. He prayed a subpœna to James H. Williams, and that he may have a fair trial on his petition.

Mr. Williams appeared to the subpœna, and denied the title of the petitioner to his freedom.

Issue was joined on the pleadings, and the jury found a verdict for the petitioner, and that he was free and discharged from the service of Williams.

To the opinion of the court on the trial, a bill of exceptions was tendered by the counsel for Mr. Williams. The bill of exceptions stated, that on the trial the defendant produced, and gave in evidence to the jury, the last will and testament of Maria Ann T. Greenfield; and it was admitted that the said testatrix died at the County of Prince George's, in the State of Maryland, soon after the date of said will, in the year 1824; that upon her death, Gerard T. Greenfield, the executor named in the will, duly proved the same in the Orphans' Court of said county, where the slaves and property left by the testatrix were, and took letters testamentary as such executor.

The petitioner is one of the slaves named and demised in that clause of the will which is in the words following, to wit:

"I also give and bequeath to my nephew, Gerard T. Greenfield, all my negro slaves, namely: Ben, Mason, James Ash, Henry, George, Lewis, Rebecca, Kitty, Sophia, Mary Elizabeth, Nathaniel and Maria; also Tony, Billy, Betty, and Anne, provided he shall not carry them out of the State of Maryland, or sell them to anyone; in either of which events, I will and desire the said negroes to be free for life."

The petitioner was a slave born, and the property of the testatrix at the time of her death; that the said G. T. Greenfield, upon the death of said testatrix, took possession of the petitioner and the other slaves devised to him, and held the same as his slaves so devised to him, from that time till the 18th day of December last, when before the institution of this suit he sold the petitioner to the defendant; that G. T. Greenfield at the time of the date of said will, and ever since, resided in the State of Tennessee, *with an interval of between [*3 two and three years; that he sojourned after the death of the testatrix, in Prince George's County, for the purpose of settling his business. Thereupon the court was of opinion, and instructed the jury, that the fact of such sale of the petitioner the estate or property in the petitioner so devised to said G. T. Greenfield ceased and determined; and the petitioner thereupon became entitled to freedom as claimed in his said petition; to which opinion and instruction of the court the defendant, by his counsel, excepted.

Judgment was rendered for the plaintiff, and the defendant prosecuted this writ of error.

Mr. Marbury for the plaintiff in error.

Mr. Bradley for the defendant.

Mr. Marbury contended, that as to the first

NOTE.—The report of this case was accidentally omitted by the late reporter, and this report has been furnished by him.

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question presented on the bill of exceptions, whether Mr. Greenfield took an absolute estate, by the terms of the will, in the property bequeathed to him. A devise of personal estate in general terms, without words of limitation, vests in the legatee the absolute property in the thing bequeathed. If a testator says, "I give all my personal estate to A B," without other words, A B will take the absolute estate in all the personal property of which the testator may die possessed.

The language of the will, in the case before the court, is as general, comprehensive, and effective, for the purpose of passing the whole estate, as language can be; and gives to the legatee the whole estate, subject only to the restriction of the right of alienation.

There is here no limitation of the estate—no intention expressed to confine the legatee to an estate for life in the slaves, or to give him a mere personal benefit by the bequest.

Admitting the validity of the restriction, if he should neither remove the negroes or sell them, at his death they will go to his representatives, to be distributed among his next of kin, if he should die inestate; and to his legatee, if he should make a testamentary bequest.

It has been suggested that this very restriction will operate to limit the legatee to an estate for life; that it shows that it was not intended he should have the absolute power and control over the negroes. But a restriction on [*4] the right to sell never has been *construed into a limitation of the estate of the devisee, when the language of the will passed the fee.

The proviso is a restriction on the right of alienation. The property is given to the legatee absolutely, with a condition annexed, that he shall not sell; a condition which is repugnant to the nature of the estate, and therefore void. (Co. Lit., 206 *b*, 223 *a*.)

If there be a limitation over, on the breach of such condition, it does not alter the case. The condition itself being void, the estate limited upon it must be void also.

What is a conditional limitation, but an estate which is to vest on a certain condition, or the happening of a certain event, by which a preceding estate is to be devested? If, then, the condition on which the preceding estate is to be devested, be unlawful and repugnant, and therefore void, the preceding estate cannot be devested; can a man be deprived of his estate by refusing to do an unlawful thing, or by doing that which the law authorizes him to do with his own? (*Bradley* v. *Peixoto*, 3 Vesey, 324; 2 Caines' Reports, 348.)

It will be contended, on the part of the defendant in error, that there is something in the nature of the property which is the subject of this devise, that requires the application of a rule of law different from that which would be applied to a case arising on the title or ownership to any other kind of property.

Negroes, by the laws of Maryland, are property precisely as money in the funds, or household effects. The *jus disponendi* in the master is as absolute in the one case as in the other. How shall the court decide in favor of the freedom of the slave, without at the same time, and in the same judgment, deciding the right of property as claimed? (*Mima Queen* v. *Hepburn*, 7 Cranch, 295.)

If, on the breach of the condition not to sell, the testatrix had given the property in the negroes to a third person, the limitation over would have been declared void; because such a restriction would be on a condition repugnant and void.

But here is a bequest of freedom, on the same repugnant conclusion. How is it to take effect, without denying to the master that control over the negroes which he is by law entitled to exercise over them, and which he might exercise over any other *property in like circumstances, [*5 without subjecting himself to a forfeiture?

There is a class of cases in which it has been held that a testator may restrain the alienation of the interest given by the will, and limit the estate over in the case of alienation, whether voluntary or involuntary. This class of cases originated in the case of *Dommett* v. *Bedford* (3 Vesey, 149). The principle of this case has become a general rule of law, in the folowing cases: 18 Vesey, 404, 429; 3 Swanston, 505; 5 Mod., 515; 6 Maddox, 482.

In this class of cases, the estate is vested in trustees; and it is provided that the interest or income shall be received by the trustees, and a certain portion thereof be paid at certain periods to the legatees, unless they become bankrupts, or make voluntary assignments of the amounts respectively settled in said cases; whereupon, in each case, the annuity is to cease, and the estate is devised over. Such bequests are held to be short of a life estate, and to be intended for the mere personal benefit of the legatee.

The cases belonging to this class differ materially from that under consideration. In them the title to the estate is in trustees; in the legatee of the annuity, there is nothing but a right to receive payment of a sum of money, until the happening of a given event—his becoming bankrupt, or voluntarily parting with the right to receive it. The annuitant takes only a life estate—the gift was merely for his personal benefit.

By the will in this case the legatee took to himself the absolute property in the negroes bequeathed. The enjoyment of them is not limited to a mere personal benefit. The property does not cease at his death, but will pass to his representatives, to be disposed of, or distributed according to law.

Mr Bradley, for the defendant:

This is a will. The intention of the testatrix to be gathered from all the parts of the will is to be effected, if it can be, without contravening some settled principle of law. (*Smith* v. *Bell*, 6 Peters, 75, and the cases cited.)

What estate did Gerard take? What effect had the exportation and sale?

There are two bequests, one of property in the slaves, to Gerard, *supposed to be abso- [*6 lute; another of freedom to the slaves, upon the happening of either of two events, defeating the first devise, and therefore limiting it. If these events are repugnant to the devise to Gerard, does that prevent their happening? If they happened, must they not give rise to the devise over?

The intent of the testatrix is clear. She meant to give Gerard a qualified, not an absolute estate, and to limit it to the happening of the event she has prescribed.

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The bequest of freedom is not a condition annexed to the estate of Gerard; it is a conditional limitation of that estate, contingent until the event occurs, but becoming absolute so soon as that has happened. (Preston on Est., 40; Fearn. on Remain., 11, 14, 16.)

It might be void as a bare condition, as to Gerard; yet good as a limitation, as to the slaves.

She meant to give to the slaves a higher and nobler bequest. What is it? Property? The same interest she had given to Gerard? The same estate or power? If so, how is it to be estimated? By what law to be controlled?

Freedom is not to be valued. (*Lee* v. *Lee*, 8 Peters, 48.) A question of freedom is superior to any question of property. (*Allen* v. *Walkingsford*, 10 Peters, 583.) It is a question deserving the favor of courts. (*Fenwick* v. *Chapman*, 9 Peters, 476; *Isaacs* v. *Randolph's Executors*, 6 Rand., 652.)

In construing the will we must look to the subject matter of both devises. The first relates to property, the second to freedom, and yet both relate to the same subject. And what is it? Is it merely property? They are slaves; but they are human beings. They may acquire freedom by implication. (*Mullen* v. *Hall*, 5 Harris & Johns., 190; *Legrand* v. *Darnell*, 2 Peters, 664.) They are recognized as persons in the Constitution of the United States, art. 1, sec. 9, par. 1; sec. 2, part 3; art. 4, sec. 2, par. 3. They are so recognized by courts of justice. The law of common carriers does not apply to them. (*Boyce* v. *Anderson*, 2 Peters, 155.) Humanity forbids the separation of mothers from infant children, and the court will not sanction it. (*Fitzhugh et ux.* v. *Foote et al.*, 3 Call., 13.)

If, then, the character of the bequest over be different from that given to Gerard—superior 7*] to property—not to be valued—*deserving the favor of the courts, of a wholly different nature; and the intent of the testatrix in regard to this bequest over be clear, shall that intent be defeated by rules adopted solely for the regulation of property? Is there any precedent controlling this court.

It is conceded she might have given to Gerard a life estate, and freedom to the slaves upon his death. She could then certainly have granted a less estate, and have made this to depend upon a certain or uncertain event. Then it is immaterial how this event is brought about, by the act of Gerard, or operation of law.

She might have given a life estate in the usufruct, to be terminated by his aliening during his life, and remainder to the slaves. (*Dommett* v. *Bedford*, 6 T. R., 684; *Brandon* v. *Robinson*, 18 Vesey, 429; *Yarnold* v. *Morehouse*, 1 Russ. & Mylne, 364; *Legget* v. *Lear*, 2 Sim., 479; 4 Russ. & Mylne, 690.)

Did she intend to give Gerard during his life anything more than the usufruct?

If she had so expressed herself, that this restraint upon alienation amounts to a limitation of the previous estate, and there is a devise over, it is not necessarily so repugnant as to be void, but may be carried into effect. (*Wilkinson* v. *Wilkinson*, 3 Swan., 515; Coop. C. C., 259; 2 Wils. C. C., 47.)

She has so expressed herself, and it was her clear intent. Besides, upon this question of intent, we must look to the relation of the parties. The first taker is her nephew. She meant to aid him, but it must be in her own manner, by his taking a qualified estate to be held in Maryland. The others are her slaves, grown up around her, to whom she is attached—for whom she intends, as far as possible, to provide protection. She knows the laws, climate, customs under which they have been protected, and grown—she does not know whither they may be carried. She leaves them to the charge of this nephew, *sub modo*, qualifying and restraining his power over them. There is a great primary intent pervading the whole will, an intent controlling the rights conferred on Gerard, and that is the protection and preservation of these objects of her bounty, in what she thinks the best condition for them. Is this intent opposed by any settled principle of law?

*It is said the law in regard to slaves, [*8 and the rules of evidence in cases of freedom are the same as in all cases of personal property, and the case of *Mima Queen* (7 Cranch, 290) is relied on as sustaining this position. We deny it. The whole point of that case is as to the admissibility of hearsay evidence to prove a specific fact. We agree that the rules of evidence are and must be the same, and we invoke the aid of that principle. We apply it to ascertain the intent of the testatrix.

But are the laws of personal property applicable? Upon what principle? Upon what adjudicated case? What laws? Shall we go to England? To her system of villanage, as it once existed, in the only part of her political or judicial frame which was ever supposed to bear the least analogy to this? Trace out the analogies and see how few they are? In what do they resemble each other? Even under that condition, such a case as this could never have arisen. We can get no aid from her jurisprudence.

Shall we go to the laws of the several States? Our search would be equally vain here. The right which is held in a slave is so modified by statutory provisions, by local causes, by custom, by the common law, by the social condition, and by the local and political position of each State, that we can derive no important aid from them. It is emphatically a subject of peculiar regulation. But wherever we do find the right to manumit, we find this cardinal point, that suits for freedom are to be favored, pervading and controlling the judicial decisions.

The laws of personal property are not applicable.

Color, in a slave-holding State is a badge of slavery. It is not so where slavery does not exist. Accompanied by possession in the former State, it is evidence of title. An adverse possession of a slave for a period corresponding with the statute of limitations gives title in a slave. (*Hardeson* v. *Hays*, 4 Yerg., 507; *Partee* v. *Badget*, 4 Yerg., 174; *Brent* v. *Chapman*, 5 Cranch, 358; *Shelby* v. *Guy*, 11 Wheat., 361; *Garth's Executors* v. *Barksdale*, 5 Munf., 101; *Carter* v. *Carter*, 5 Munf., 108; *Newby* v. *Blakey*, 3 Hen. & Mun., 57; *Smart* v. *Baugh*, 3 J. J. Marsh., 363.)

But no length of possession, however open, notorious, and absolute, can prevail against a claim of freedom, where the claimant can trace back his descent from a free maternal ancestor (*Rawlings* v. *Boston*, 3 Harris & McHen., 139);

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9*] or if he can show *an acquired right to freedom, perfected in himself. (*Hunter* v. *Futener*, 1 Leigh, 172, and cases cited; *Burke* v. *Negro Joe*, 6 Gill & Johns., 136.)

By statutory provisions in Maryland, they are regarded as responsible and intellectual beings, as "persons" capable of contracting. In some cases they are entitled to trial by jury. (Maryland Act, 1751, chap. 14, sec. 4.) They may contract. (1715, ch. 44, sec. 11.) They may discharge the very responsible office of pilots. (1788, ch. 33.)

If, then, the laws of personal property apply, to what extent do they so apply?

Considered merely as personal property, they are subject to all the laws regulating that species of property; they may be the subject of contract, pass by gift or will, descend, or be taken in execution. Their gains belong to their owner; they can make no contract with third parties, without the owner's assent, and none with their owner, and the issue of the woman is part of the use, the property of the person to whom the mother belongs, for the time being. (1 Harr. & McH., 160, 352; 1 Harr. & Johns., 526; 6 Harr. & Johns., 16, 526.)

Considered as human beings capable of acquiring, under the laws, rights paramount to all individual claims, and to be controlled only by the sovereign in the State, from the exercise of which they have been rightfully debarred by law, they acquire a higher dignity.

In their former character they are to be considered as property. But here the very question is, are they property? To determine this, shall we assume that the laws of property apply, and by those laws determine their character, and a right immeasurably above them? Can property take property? Can a man be indicted for murder of property? Can property be entitled to a trial by jury, or commit a crime, or acquire a right? Yet all this may be done by a negro; and they all imply a reasoning faculty, a conscience, an immortal spirit, in which there can be no property?

We must look to the laws of Maryland. The statutes there give them power to take freedom by devise, to take effect immediately, or at a remote period, after a term of years or a life estate. (Act 1796 and 1809.) The decisions of the courts of Maryland are in favor of this 10*] capacity. The statutes direct two *modes of emancipation, by will or deed. The courts have extended it to implied manumission, as in *Dolly Mullen's* case, and to adverse possession or length of time, as in *Negro Joe* v. *Burke*.

Where, then, the intent of the testator clearly appears to secure to them liberty on the happening of an event, which has happened; or where a doubtful form of expression is used, which, in regard to mere personal property, might amount to a condition repugnant to the bequest, and thus be void, yet in favor of liberty, and having a regard to the subject of the bequest and the right intended to be conferred, the court will construe the will according to the intent, and take this to be a limitation of the estate.

Again. The intent of the testatrix is to give freedom to the slaves, unless they can be held in Maryland upon the terms she has herself declared. Now, if they cannot be so held in slavery, what is to be the effect? They are free.

Again. It has been said that restraint upon alienation is void. Yet in an executory devise this restraint exists, and has never been disputed. (*Moffat* v. *Strong*, 10 Johns., 12; *Cordle* v. *Cordle*, 6 Munf., 455.)

But, it is said, if the devise of freedom is to depend upon the happening of the event mentioned in the will, the first estate must vest, and then the condition is void. Not so. It does not necessarily follow. (*Stainham and Bell*, Lofft., 455; *Avelyn* v. *Ward*, 1 Ves., Sen., 420; in which last case the court says, if by any means the conditional limitation is removed, the devise over will take effect; see, also, *Simpson* v. *Vickers*, 14 Ves., 341, and particularly *Doe, ex dem. Smith*, v. *Hance*, 6 Halsted, 244, 252–254.)

Suppose the estate of Gerard to have vested. What was its extent and limitation? It was not intended to be absolute. The power to give or prevent freedom was not devised to him. That was already exercised. He had a qualified property. Slavery is the property which one man has in the labor of another, and the right to the custody and such limited use of the person of that other, as the particular laws allow. The power of the master is subordinate to the law of the land, and in some cases he is allowed by that law to give freedom in Maryland *in presenti* or *in futuro*. If the master once exercises this authority, *it is [*11 irrevocable, the subject of it can never be reduced again to the condition of a slave, unless by legislative provision.

Now, if any right in, or power over a thing granted be reserved to the grantor, or devised to a third person, the person taking has but a qualified or limited estate, it is not absolute. The grantor or devisor may annex to this qualified or limited estate, conditions by which it may be terminated at a period short of that to which it would otherwise run. The effect must be to give rise, in case of a devise over to the new estate, if there be one devised, or the property must revert. It cannot be that the tenant of the particular estate shall have the power to defeat the other and usurp the whole property to himself. Is not this the case here?

Without the proviso, the words are as absolute as in the case of *Smith* v. *Bell* (6 Peters, 74). But the proviso must operate to restrain the general words in the same manner as the devise over of the remainder in that case. She could grant a life estate, with freedom to take effect at its expiration, the life estate to be forfeited upon the happening of an event, and the devise over to take effect. *A fortiori* she might make this life estate to depend upon his keeping them in his own possession and in the State of Maryland. The uncertainty of the event can make no difference. It has happened. The happening of the event is during a single life, and, therefore, not too remote. We maintain, then, that this is not a naked condition annexed to an absolute estate and repugnant to it, and therefore void, but is a contingent limitation of a particular estate, with a devise over of a faculty or estate of the highest dignity and most absolute character, to take effect on the happening of a contingent event by which the particular estate was to be terminated, which event must occur during the lifetime of a person in being, and the event has happened.

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As to the distinction between a naked condition and a conditional limitation, see *Taylor* v. *Mason* (9 Wheat., 329), &c., and particularly *Smith* v. *Hance* (6 Halsted, 244, *et seq.*)

But, is a condition in restraint of alienation necessarily void? and are there not cases where it amounts to a limitation? The true distinction is, that where such a condition amounts to a limitation of the precedent particular estate, with a devise over, it is good. (*Doe, d. Duke Norfolk*, v. *Hawke*, 2 East, 481; and *Wilkinson* v. *Wilkinson*, 3 Swanst, 515.)

12*] *The reason of the rule is obvious, it is to prevent perpetuities, and therefore the *jus disponendi* in an absolute estate is not to be taken away, but even this may be qualified. (Litt., sec. 361; Shep. Touch., 129; *Gill* v. *Pearson*, 6 East, 173; S. C., 2 Smith, 295.) This last case is a clear case of a fee-simple, with a condition terminating it. If the power of disposal is not absolutely taken away, the condition restraining it may be good. *Jackson* v. *Sheetz*, 18 Johns., 175, and cases cited; *Mc Williams* v. *Nisby*, 2 Serg. & Rawle, 507.) Here he might at any time have disposed of his interest to the slaves themselves, by releasing it.

The case of *Bradley* v. *Piexoto*, as stated in the report, does not warrant the exposition of it in the opinion of the Master of the Rolls. We do not controvert his law, for if the gift was absolute of both principal and dividends, that case cannot illustrate this. If it was not absolute, the case is wholly inconsistent with *Wilkinson* v. *Wilkinson*, *Branden* v. *Robinson*, *Dummett* v. *Bedford*, *Legget* v. *Lear*, &c., already cited, and particularly *Bird* v. *Hudson* (3 Swanst, 342.)

We are considering a will. The intent is to govern. Every intent is to be effected if possible. The primary intent is to prevail. The particular intent was to give the nephew a qualified estate. The primary intent was to afford protection and security to the slaves. The restraint upon the nephew does not take away all power of alienation. The execution of every intent does not contravene any settled principle of law. The event to determine the estate of the first taker is not too remote.

Besides it is a case in favor of liberty, to be attained by the instruments, and in the mode pointed out by the statutes, a case involving one interest of the highest dignity, and depending on the happening of an event to terminate another interest of less importance.

Mr. Chief Justice TANEY delivered the opinion of the court:

This case is brought here by writ of error from the Circuit Court of the District of Columbia, for Washington County, and came before that court upon a petition for freedom.

It appeared on the trial, that the petitioner was the property of Mary Ann T. Greenfield, of Prince George's County, in the State of Maryland, who died in 1824, having first duly made 13*] her *last will and testament, whereby, among other things, she bequeathed the petitioner, with sundry other slaves, to her nephew, Gerard T. Greenfield, with a proviso in the following words: "Provided he shall not carry them out of the State of Maryland, or sell them to anyone; in either of which events I will and devise the said negroes to be free for life," and she appointed her said nephew her executor.

Upon the death of the testatrix, Gerard T. Greenfield took possession of the petitioner and the other slaves bequeathed to him, and held them from that time until December, 1839, when he sold the petitioner to the defendant; and the petition for freedom was filed shortly after the sale. At the time of the making of the will, and ever since, Gerard T. Greenfield resided in the State of Tennessee; with an interval of between two and three years, during which he sojourned in Prince George's County, after the death of the testatrix, for the purpose of settling his business.

Upon this evidence, the Circuit Court instructed the jury, that by the fact of such sale of the petitioner, the estate or property in the petitioner so bequeathed to Greenfield, ceased and determined, and he therefore became entitled to his freedom.

Under this direction of the court, the verdict was in favor of the petitioner.

By the laws of Maryland, as they stood at the date of this will, and at the time of the death of the testatrix, any person might, by deed, or last will and testament, declare his slave to be free after any given period of service, or at any particular age, or upon the performance of any condition, or on the event of any contingency.

This right is recognized in the Act of Assembly of 1809, ch. 171.

The contingency upon which the petitioner was to become free must, by the terms of the will, have happened in the lifetime of Gerard T. Greenfield; and if he had died without selling him, or conveying him out of the State of Maryland, the petitioner would have continued a slave for life. The event, therefore, upon which he was to become free, was not too remote.

It is said, however, that this was a restraint on alienation inconsistent with the right of property bequeathed by the will. But if, instead of giving freedom to the slave, he had been bequeathed to some third person, in the event of his being sold, or *removed out [*14 of the estate by the first taker, it is evident upon common law principles, that the limitation over would have been good. (2 East, 481.) Now, a bequest of freedom to the slave stands upon the same principles with a bequest over to a third person. It is said by the Chancellor of Maryland (2 Bland's Chancery Rep., 314), that the bequest of freedom to a slave is a specific legacy, and undoubtedly this is its true legal character.

And if a bequest over to a third person would not be regarded as an unlawful restraint upon alienation, there can be no reason for applying a different rule where the bequest over is freedom to the slave. In the one case, the restriction on alienation ceases as soon as the devise over takes effect; and in the other, the right of property ceases upon the happening of the contingency, and there is nothing to alien.

We think that the bequest in the will was a conditional limitation of freedom to the petitioner, and that it took effect the moment he was sold.

The judgment of the Circuit Court must therefore be affirmed.

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[1]GEORGE W. HAMMOND, Administrator *de bonis non* of THOMAS HAMMOND, Deceased, ET AL., *Appellants*,

v.

LORENZO LEWIS, Executor of LAWRENCE LEWIS, Deceased, who was the acting executor of GEN. GEORGE WASHINGTON, *Appellee.*

Legatees not liable for difference between nominal and actual value of mortgage assigned to him which was in excess of his share—due diligence.

In the distribution of the estate of a deceased person, an assignment, to one of the distributees, of a mortgage which is for a greater sum than his distributive share, does not make him responsible to the executors for the difference between his share and the nominal amount of the mortgage, in case the mortgaged premises sell for less than the amount of his share, where the distributee has, with proper diligence, and in good faith, subjected the mortgaged property to sale, and has not bound himself absolutely for the nominal sum secured by the mortgage.

15*] *THIS was an appeal from the Circuit Court of the United States for the District of Columbia, holden in and for the County of Alexandria.

The facts in the case were these:

General Washington, by his will, executed in 1799, devised all the rest and residue of his estate, real and personal, not before disposed of by said will, to be sold by his executors, at such time, in such manner, and on such credits (if an equal, valid, and satisfactory distribution of the specific property could not be made without), as in their judgment should be most conducive to the interest of the parties concerned; and the moneys arising therefrom to be divided into twenty-three equal parts.

On the 19th of July, 1802, the executors assembled the legatees, with a view to consult them upon certain questions arising under the will; and it was agreed that a certain portion of the personal estate should be sold, another portion divided, a certain portion of the lands divided, and the residue sold by the executors.

On the 6th of June, 1803, a meeting of the devisees was held, at which it was agreed that certain lands, lying on the eastern waters, should be sold, and, if purchased by the devisees, such purchaser should pay at three equal annual installments with six per cent. interest from the day of sale, but to be credited with his proportion of the sales which had there been made, and which were to be divided among the said devisees.

On the 7th of June, 1803, Burdett Ashton, who was entitled, in his own right, and that of his sister, to two thirds of a distributive share, purchased from the executors, property belonging to the estate, for the sum of $9,410.20; payable one third on demand, one third on the 7th of June, 1805, and one third on the 7th of June, 1806.

On the 12th of March, 1805, Ashton mortgaged to the executors three tracts of land in Jefferson County, Virginia, amounting in the whole to one thousand and seventy-six acres, to secure the payment of the purchase which he had made, as above stated.

On the 11th of March, 1806, the executors assigned the mortgage to Thomas Hammond, who was entitled to a full distributive share in right of his wife, and attached to the assignment the following memorandum: "The executors are not to be made personally liable, in any respect, or on any pretense, *wherein, [*16 for, or by reason of the above assignment, and further, the within-named Burdett Ashton, Jun., his heirs, executors and administrators, is to have credit for his proportion of $5,179.05, being the share of each legatee of said George Washington, of certain sales of real and personal estate made by the said executors, as well as for the proportion of the sister of the said Burdett, as her attorney in fact."

As it was thought that the distributive shares of the said Ashton and Hammond, when added together, would not quite exhaust the debt due from Ashton to the executors, the latter took from Hammond, on the same day on which they made the assignment, a deed by way of mortgage, in which it was stipulated that Hammond should indemnify the executors, and also should pay to the executors whatever surplus might remain, after deducting Hammond's and Ashton's distributive shares from the amount of Ashton's debt to the executors.

On the 2d of April, 1806, Hammond, being indebted to Smith, Calhoun & Co., of the city of Baltimore, in the sum of $5,604.64, assigned to them all his right to so much of the mortgaged premises as would be sufficient to satisfy the sum aforesaid. As speedily as possible, Smith, Calhoun & Co. obtained a decree in the high Court of Chancery, in Virginia, to foreclose Ashton's mortgage, who, at the time of such foreclosure, was insolvent, and died so. The result of such sale is thus stated in the opinion of the Circuit Court, delivered in a subsequent stage of the cause:

The property mortgaged by Ashton, sold under decree for (net proceeds) $3,908.46.	
The debt of Ashton was - - - -	$9,410.20
He had a right to retain - - - -	3,452.70
The real amount of Ashton's debt was - - - - - - - - - -	$5,957.50
Hammond's claim was - - - - -	5,179.05
Amount rec'd by Hammond's mort. to executors - - - - - - -	$778.45

At some period between 1819 and 1823, the executors addressed a circular letter to each of the legatees, who had by this time become very numerous, expressing a desire to close their executorial duties, and stating that a difficulty existed in the mode of calculating interest. They say, "there are but two *modes by which [*17 our objects can be attained—a reference of the accounts to arbitration, or a suit; the former we should prefer, as most consonant with the injunction of our testator, if it were not attended by insuperable difficulties, on account of the dispersed situation of the legatees, who consequently could scarcely be expected to agree upon the arbitrators; we therefore propose that the legatees should concur in instituting an

1.—In the progress of the cause, G. W. Hammond also died, and his administratrix became a party; but the suit having been an amicable one, this did not delay the proceedings. It is mentioned only because sometimes the one and sometimes the other is spoken of as the person interested.

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amicable suit in chancery, against us, to which we will immediately file an answer, and obtain an order of reference to the master, to adjust and report the precise sum to which each legatee is entitled; which being done, we can proceed with safety to pay such sums as fast as the money comes to our hands.

In 1823, the legatees, in conformity with the above suggestion, filed a bill in the Circuit Court for the District of Columbia, which the executors immediately answered, admitting the existence of a balance to be distributed, and submitting to any decree which the court might think proper to pass. A special auditor was appointed to state the accounts of the parties.

In 1825, the executors filed a cross-bill, alleging that all the parties were not in court, and praying that they might all be brought in. The proper proceedings were accordingly had as to the absentees, and in 1826 the Circuit Court passed a decree directing the sums to be paid to the several legatees, with the exception of the administratrix of Thomas Hammond and of Burdett Ashton. The auditor stated the account of Hammond upon two different principles; in one, giving him credit for $5,178.68, a distributive share, and charging him with $4,006.24, the gross amount of the proceeds of the mortgage sale; and bringing the executors in debt to Hammond upwards of $4,000; in the other, giving him credit for the same sum, but charging him with the balance of the debt due by Ashton, bringing him in debt to the executors upwards of $2,000. The Circuit Court adopted the latter, and decreed that the administratrix of Hammond should pay to the executors the sum of $2,158.56, with interest on $1,127.27, the principal sum due, from the 1st day of June, 1824.

From which decree, the administratrix appealed to this court.

Mr. Coxe for the appellant.

Mr. Jones for the appellees.

18*] *Mr. Justice* DANIEL delivered the opinion of the court:

This is the case of an appeal from a decree of the Circuit Court of the United States for the District of Columbia.

This suit was originally of an amicable character, and was instituted at the request of the executors of General George Washington, by the legatees under his will, with a view to a definitive settlement of the accounts of the executors and a distribution of the estate. Subsequently to its institution, a cross-bill was filed by the executors for the purpose of covering some of the legatees, who had been omitted in the prior proceedings, and the two causes were prosecuted and decreed upon as one suit. The facts out of which the questions now presented for consideration have arisen, are substantially the following:

General Washington, after having disposed of a portion of his estate, devised all the residue of his real and personal property to be sold by his executors, if it could not be equally and satisfactorily divided, and directed the proceeds to be divided into twenty-three equal shares, and distributed by shares and parts of shares, amongst twenty-nine persons named, and others not named, but designated by a collective description. Amongst those having an interest in the estate was Mildred Hammond, the wife of Thomas Hammond, in whose right the appellant claims one share of the twenty-third part of the residue. After a previous distribution by the executors of $7,000, the amount arising from further sales, and remaining for distribution at the commencement of this suit, was near $120,000.

Several of the residuary legatees became purchasers at the sales made by the executors, some for more, others for less than their shares or parts of shares to which they were entitled. They gave securities for the amount of their purchases, as other purchasers would have been required to do, with an understanding that their several shares of the estate, when ascertained, should be credited against the sales respectively made to them.

Among those legatees who purchased to an amount exceeding their shares was Burdett Ashton, who was entitled to one third of one share in his own right, and to one other third of a share in right of a sister, together equal to two thirds of one twenty-third or full share of the residuum subject to distribution. This interest of Ashton was subsequently ascertained to be $3,425.20. *He purchased property [*19 in June, 1803, to the amount of $9,410.20, payable in three annual installments; and for securing this debt, with interest from the date, executed to the executors a mortgage on the 12th day of March, 1805.

Thomas Hammond (the husband of the legatee, Mildred Hammond) obtained from the executors an assignment of the mortgage from Ashton for the $9,410.20, and executed to them an obligation to account for any surplus which he might receive from Ashton's mortgage, beyond the share of Mildred Hammond, amounting to $5,179.50 after crediting Ashton with two thirds of a share to which he was entitled. The consideration for the assignment to Hammond is stated to be "one dollar in hand paid, but principally on account" of the share of his wife in the residue of General Washington's estate; and they bargain, sell, and assign to the said Hammond, his heirs, &c., all the right, title, interest, estate, claim, and demand of the executors to the within mentioned land and premises, and to the deed within mentioned. At the foot of the assignment is a memorandum "that the executors are not to be personally liable in any respect, or on any pretense, for or by reason of the above assignment," and further, "that the within-named Burdett Ashton, his heirs, &c, shall have credit for his proportion, and for the proportion of his sister," in one share of the residuum of the estate, &c.

Within less than a month after receiving an assignment from the executors, Hammond assigned Ashton's mortgage to Smith, Buchanan and Calhoun, in consideration of a debt due from him to them. These last assignees filed their bill in the Supreme Court of Chancery in Virginia, to foreclose Ashton's mortgage, and to this bill the executors of Washington were made parties defendants. In their answer these executors admit the interests of Hammond and Ashton in the estate of their testator, the assignment by them to Hammond of Ashton's mortgage, and they ask nothing on their own account except this, that as certain funds of

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the estate upon the basis of which Ashton's proportion had in part been calculated, might turn out to be unavailable, he, Ashton, might be required to indemnify the executors against such a contingency.

The settlement of Ashton's account having been by the Court of Chancery referred to the master, a large balance was reported as due 20*] *from Ashton on the mortgage, after allowing him a credit for his own and his sister's shares of a legatee's proportion. The court decreed a foreclosure of the mortgage, and a sale of the mortgaged premises to raise the balance due from Ashton. The sale made under the decree produced a sum considerably less than the amount of the debt from Ashton to the executors of Washington.

In the record in this cause are found accounts stated under orders of the Circuit Court between the executors of Washington and the distributees, under the will of their testator. In the account of Burdett Ashton, after crediting him with the proceeds of the mortgage sale, a balance is struck against him of $6.197.70. The account with Hammond is stated under two aspects; under the first, in which he is charged with the net proceeds only of Ashton's mortgage, he is a creditor, by the sum of $4,084.-30; under the second, in which Hammond is charged with the entire balance due from Ashton, without regard to the actual proceeds of the mortgage, he is made a debtor. The Circuit Court, upon the hearing of this cause, being of the opinion that Hammond was absolutely bound to the executors of General Washington for whatever amount the mortgage debt of Ashton exceeded the share of Mrs. Hammond as a legatee, notwithstanding the failure of the mortgaged premises to produce the amount of the debt for which they were pledged; decreed, in conformity with the second statement of the master of Hammond's account (No. 11), that the administratrix of Hammond, out of the assets in her hands to be administered, should pay to the executors of George Washington the sum of $2,158.56, the balance appearing to be due to them by statement No. 11, with interest on $1,027.27, the principal sum due from the 1st day of June, 1824.

The basis of the above decree of the Circuit Court, and it is the foundation on which the argument for the appellees has been conducted, is the assumption that Hammond, in taking an assignment of Ashton's mortgage from the executors of Washington, undertook to guarantee the sufficiency of the mortgage subject to extinguish the amount for which that subject was pledged, and bound himself absolutely to be accountable for that entire sum.

It is difficult to reconcile such a course on 21*] the part of Hammond *with rules of common prudence or probability, nor can a claim to power in the executors to make such an exaction upon Hammond be viewed as consistent with fairness, or as called for by any obligation incumbent upon these executors. Hammond knew, when he took the assignment of Ashton's mortgage, that he was entitled to $5,179.50, admitted by the executors to be in their hands, or within their control. This is apparent, and is expressed both in the memorandum required by the executors to be appended to their assignment of Ashton's mortgage, and in the separate instrument of indemnity executed to the executors by Hammond, upon his receiving that assignment. Under such circumstances, what rational inducement could exist on the part of Hammond for binding himself for the solvency of Ashton, or for substituting himself with the executors as a debtor in Ashton's place? The court can perceive no such inducement, nor can recognize any right in the executors to require anything of this kind, with a full knowledge, on their part, of Hammond's interest in the estate, and with an admitted fund in their hands for its satisfaction. They had no power to impair in any degree his claim upon them, nor to impose a mean for its payment, less certain and safe than the assets acknowledged by them to be adequate. It is laid down by the Circuit Court, and insisted on in the argument here, that the terms of the assignment to Hammond, as well as those of the instrument of indemnity given to the executors upon receiving that assignment, constitute an agreement that Hammond should be unconditionally bound for Ashton's debt. We have shown that this conclusion is in accordance neither with prudence nor probability, in the transactions of life—that it was not sustained by any duty, or even by fairness on the part of the executors; let us see how far it is warranted by the language of the instruments referred to as amounting to express and positive contract. In the written assignment to Hammond, this is the language used: "Have bargained, sold, assigned, &c., all the right, title, &c., in and to the within-mentioned land and premises, and the deed within mentioned," &c. Such terms were indispensable in that assignment, in order to give to Hammond control of the mortgage, either for its enforcement in his own behalf or for its transfer to others nothing is said, in terms, in this assignment, about the debt intended *to be secured by the mortgage, [*22 neither in relation to any full equivalent for it, received by Hammond, which should bind him for it *in toto*, nor in relation to any entire and absolute transfer of it by the executors; and this, surely, was the place in which such terms, or conditions, if they really belonged to the contract, should have been expressed. The view here presented is fortified by the instrument of indemnity executed by Hammond to the executors contemporaneously with the assignment by the latter to him of Ashton's mortgage. This instrument of indemnity, after reciting that the executors had assigned, &c., a deed due them from Ashton, specifying no sum, no debt *in numeris;* after reciting, too, that Ashton was entitled to a portion of the assets, proceeds thus: "And whereas it is supposed that the amount of the said debt due from Burdett Ashton, after making the discounts aforesaid, to which he may be entitled, will exceed the said sum of $5,179.50, due to the said Thomas Hammond, as agreed; for which excess, the said Thomas Hammond is willing to give security; now, if the said Thomas Hammond shall well and truly pay, &c., such sum as the debt due from the said Burdett Ashton, shall exceed," &c. This portion of the instrument, beginning, "whereas it is supposed that the amount of the debt due from Ashton, after making the discounts to which he is entitled," &c. forcibly elucidates the meaning

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and objects of the parties to that contract. The amount of Hammond's interest in the estate, the amount, too, of Ashton's debt to the executors, and of the portion claimed in his own right, and in right of his sister, were all known. With regard to these, then, there was no uncertainty. The supposition, therefore, expressed in this instrument could have no applicability to matters thus ascertained; that supposition could have been designed to apply only to the contingency of the mortgage subject producing a sum greater than the distributive share of Hammond in the estate; in which event, he was to be responsible for the excess, and for nothing beyond it. This provision cannot be correctly interpreted as binding Hammond, however inadequate the mortgage subject might prove to meet his share of the assets, to carry into the estate and pay to the executors a sum he never had received, and which, from the nature of things, he could not possibly receive; in other words, to pay to 23*] these executors his own *money. Upon taking an assignment of Ashton's mortgage, Hammond was bound for good faith and ordinary diligence in prosecuting it. These obligations appear to have been fulfilled, for the executors who were made parties to the suit for foreclosure take no exception to anything that had been done or omitted in reference to the security they had transferred.

This court, therefore, while it will not decree against the executors the difference between the proceeds of Ashton's mortgage and the distributive share of Hammond, as stated in the report of the master, is very clear that Hammond can upon no correct principle be held responsible to the executors for the difference between those same proceeds and the amount of the debt due from Ashton, which the mortgage was designed to secure; and that in decreeing against the administratrix of Hammond for that difference, the Circuit Court has committed an error for which its decree should be reversed.

This court doth accordingly reverse the decree of the Circuit Court, with costs, and remand this cause thereto, to be proceeded in conformably to the principles of this decision.

ORDER.

This cause came on to be heard on the transcript of the record from the Circuit Court of the United States for the District of Columbia, holden in and for the County of Alexandria, and was argued by counsel; on consideration whereof, it is now here ordered, adjudged and decreed by this court, that the decree of the said Circuit Court in this cause be, and the same is hereby reversed with costs, and that this cause be, and the same is hereby remanded to the said Circuit Court, with directions to proceed therein conformably to the opinion of this court.

24*] *THE UNITED STATES, *Appellants*,

v.

DOMINGO ACOSTA, *Appellee*.

Spanish Governor of Florida—power to grant land—certificate evidence of grant—surveys made after treaty, valid as to grants made before.

The certificate of the secretary of the Spanish Governor of Florida is *prima facie* evidence of the existence of a grant of land.

The Spanish Governor had authority to issue such a grant.

In the case of a grant made before the 24th of January, 1818, it is valid, although the survey was not made until after that day, provided the survey was made before the exchange of flags.

It is not a good objection to such a grant that the metes and bounds were not set forth.

THE facts in this case are fully set forth in the opinion of the court.

It was submitted by *Mr. Legaré*, the Attorney-General, without argument, on the usual objections assigned, *pro forma*, for error.

Mr. Justice CATRON delivered the opinion of the court:

This is an appeal from the decree of the Superior Court of East Florida, confirming eight thousand acres of land to Domingo Acosta, under the acts of Congress for the adjustment of land claims in Florida.

The claim is founded on an alleged petition of Acosta, dated May 2, 1816, and a decree of Governor Coppinger thereon, dated the 20th day of the same month and year. The petition (record 8) sets forth: That by the certificates which he presented, signed by the commandants of Fernandina, who had governed it successively since 1808, his Excellency would be informed that he had been a permanent resident of the said town, engaged all the while in commerce, and had served (in all that had offered itself) the wishes of the government for the good of the province; and that he had been particularly prompt with his person, his funds, and his influence, for the defense, the support, and the advancement of the town; and that he had at no time had any stipend, recompense or renumeration, of his expenses, supplies, and losses, and had refrained from importuning the government with solicitations. He therefore prayed for a grant, in property, of eight thousand acres; but as he was ignorant of the lands that were vacant, and desirous to avoid interference and dissensions with any persons, he further prayed his Excellency would be pleased *to grant them at the places where the [*25 Surveyor-General might survey them as vacant lands!

The decree (record 8) states, that "in virtue of the certificates which this party presents, and it being the will of the sovereign that the merits of his subjects should be rewarded, the lands solicited in this instance are granted, with special charge to the Surveyor-General to survey them to him without injury to third persons."

The originals of the petition and decree were not produced in evidence, neither are they to be found in the archives at St. Agustine. A certified copy, dated 24th June, 1816, under the hand of Thomas de Aguilar, secretary of the government, stated to be faithfully drawn from the original in his office, was alone offered, and was objected to on the part of the appellants.

The appellee also offered the following plats and certificates of survey, purporting to be made by George J. F. Clark, Surveyor-General of the province:

No. 1. Dated 12th January, 1818, for one thousand acres of land, on Bowlegs' old plantation, and situated northwardly and contig-

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uous to the same Bowlegs' Prairie, westward of Payneston.

No. 2. Dated 15th January, 1818, for one thousand five hundred acres of land, in the hammock called Jobbin's Hammock, southwestwardly of the road called Ray's Trail, leading from the natural bridge of the Santa Fe, to the point of Alachua called Hogtown.

No. 3. Dated 14th February, 1818, for one thousand five hundred acres of land, northward of Dunn's Creek, running from Dunn's lake to the River St. John.

No. 4. Dated 20th January, 1820, for four thousand acres of land, on the west side of Indian River, and at a place called Flounder Creek.

After hearing testimony as to the manner in which muniments of title were kept in the archives at St. Augustine, the court made a decree confirming the four several tracts of land to the claimant; from which decree the present appeal is taken.

On the part of the United States it was contended that the said decree ought to be reversed on the following grounds:

1. That there is not sufficient evidence to show that Governor Coppinger ever made the alleged concession or grant.

26*] *2. That if Governor Coppinger made such a grant, it was made without authority.

3. That there is no description whatever in the said pretended grant, of the lands alleged to be granted, and no valid survey could be made so as to sever any lands from the public domain.

4. That there is no evidence of the surveys.

The foregoing statement, offered on part of the United States, presents the facts of the case, and the objections to the decree below.

In answer to the first, that there is not sufficient evidence the grant was made, we refer to the case of *Wiggins* (14 Peters), which determines that the official certificates of the secretary Aguilar was *prima facie* proof of the existence of the original grant at the date when the copy was made, and of its contents.

In this case, Alveraz proves the certificate of the secretary genuine, and that he was in office at the date of the certificate. It was in proof that no original could be found in the proper office where it should be on file. This was sufficient to let in a copy; and there being no proof to contradict, or impair the force of Aguilar's certificate, the court below properly held that the grant had been made by Governor Coppinger.

To the second objection, it is sufficient to say —that the governor, as the king's deputy, was the sole judge of the merits on which the claim is founded, and had undoubted power to reward the merits of the grantee; so this court has held in many cases.

3. Although there is no description of any place where the land granted shall be located, in the governor's decree; still it was binding so far as it went. The Surveyor-General was ordered to survey the lands solicited, on places vacant, and without injury to third persons. The acts of this subordinate officer came in aid of the decree; he had the authority conferred to sever the land granted from the public domain: had he done so before the 24th of January, 1818, then there could be no doubt the grantee took title to the particular lands; because, up to this date, all grants made by the King of Spain, in whatever form, are recognized as valid by the article of the treaty. The difficulty in this case is, that two of the surveys were made after the 24th of January, 1818; and, did the grant take effect from the date of the surveys, then, by the stipulations of the 8th article, *it would be void. This question was [*27 first presented in *Sibbald's* case (10 Peters, 321). It was thought by this court that the 8th article of the treaty operated on grants made by the governor after the 24th of January, 1818, but not on the subordinate acts of the surveyor in giving effect to the grant; and that surveys could be made at any time before the change of flags between this government and that of Spain. Still, had that officer failed to make the surveys, the grant would not be binding on this government. We followed the case of *Sibbald* in that of *Clarke* v. *Atkinson*, at the last term (16 Peters, 231). This construction was given to the 8th article of the treaty, in a spirit of liberality to this description of claimants, who could not be held justly responsible for the delays of the Surveyor-General; and because the incipient claim, by the governor's decree, was not cut off by the treaty. The Surveyor-General having executed the governor's decree, we are of opinion that the surveys made after the 24th of January, 1818, as well as those made before that date, are valid. That there are several surveys is no objection to their validity; the decree in this case obviously so contemplated.

4. It is objected, that no sufficient evidence is furnished by the record that the surveys were made. The cause was first submitted to the court below in 1834; then the two surveys last made were objected to and admitted by the court. The judge continued the cause on his own motion for further proofs, and it stood over on continuances until 1840, when the four surveys were read without objection. We think the proofs authorized the decree, and order that it be affirmed.

ORDER.

This cause came on to be heard on the transcript of the record from the Superior Court for the District of East Florida, and was argued by counsel; on consideration whereof, it is now here ordered, adjudged and decreed by this court, that the decree of the said Superior Court in this cause be, and the same is hereby affirmed, in all respects.

Cited—5 How., 475.

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*JOSEPH W. WALSH, Administrator [*28
of WILLIAM RECTOR, Deceased,
v.
THE UNITED STATES.

THIS case came up, by writ of error, from the Circuit Court of the United States for the District of Missouri.

On the motion of the Attorney-General, of counsel for the defendant in error in this cause, the plaintiff in error having been three times solemnly called by the marshal to come into court and prosecute this writ of error and fail-

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ing to do so: It is thereupon now here considered, ordered and adjudged by this court, that this writ of error to the Circuit Court of the United States for the District of Missouri be, and the same is hereby dismissed.

WALTER SMITH, JOHN CARTER, WILLIAM S. NICHOLLS, ET AL., Survivors of CLEMENT SMITH, Deceased, *Plaintiffs in Error*,

v.

DENNIS CONDRY.

Collision in English port—rights of parties determined by English statutes—interpretation of—measure of damages—evidence.

When a collision of vessels occurs in an English port, the rights of the parties depend upon the provisions of the British statutes then in force; and if doubts exist as to their true construction, this court will adopt that which is sanctioned by their own courts.

By the English statutes as interpreted in their courts, the master or owner of a vessel, trading to or from the port of Liverpool, is not answerable for damages occasioned by the fault of the pilot.

The actual damage sustained by the party at the time and place of injury, and not probable profits at the port of destination, ought to be the measure of value in damages, in cases of collision as well as in cases of insurance.

By whose fault the accident happened, is a question of fact for the jury, to be decided by them upon the whole of the evidence.

THIS came up, by writ of error, from the Circuit Court of the United States, for the District of Columbia, and was argued at January Term, 1842. The court held it under a *curia advisare vult*, and pronounced their decision at the present term.

The facts in the case were these:

The plaintiffs in error, who were also plaintiffs in the court below, were the owners of a 29*] vessel called the Francis Depau, *which was lying in the port of Liverpool, on the 15th of February, 1838, loaded and ready for sea. The bark Tasso, owned by the defendant, in coming out of the docks, ran foul of the Francis Depau and occasioned considerable damage. A suit was brought in consequence, and upon the trial the verdict of the jury was for the defendant. The following bills of exception were taken by the plaintiffs, upon which the case was brought up.

Plaintiffs' first bill of exceptions:

In the progress of this cause, the plaintiffs having offered evidence to prove that on the 15th of February, 1838, the bark Tasso, the property of defendant, in coming out of the dock at Liverpool, on her way to sea in the prosecution of her homeward voyage to the United States, ran foul of and occasioned damage to the Francis Depau, a ship belonging to plaintiffs, and inflicted damage and injury upon the vessel of the said plaintiffs; and having further given evidence tending to prove that said collision was the result of unskillful management on the part of the Tasso.

The defendant gave in evidence the statutes of 37 Geo. III., ch. 78; 52 Geo. III., ch. 39, and 6 Geo. IV., ch. 125; and further proved that there was on board the Tasso, at the time of her moving from the dock and until after said collision, a regularly licensed pilot of said port of Liverpool; that the said vessel was under the management and direction of said pilot, and that the directions and orders of said pilot were followed and obeyed on board said vessel, the Tasso; that the master of the Tasso was not on board her during the time of her moving from said dock into the river; and that such absence of the master was usual and customary on such occasions.

The defendant, upon said evidence, prayed the court to instruct the jury, that by the true construction of the statutes of Great Britain (37 Geo. III., ch. 78; 52 Geo. III., ch. 39, and the 6 Geo. IV., ch. 125), produced on the trial, the defendant is not responsible to the plaintiffs in this action for any damage occasioned by the default, negligence, or unskillfulness of the pilot proved to have been on board the Tasso; which opinion the court gave as prayed, to which the plaintiffs, by their counsel, excepted.

*Plaintiffs' second bill of exceptions: [*30

In the trial of this cause the plaintiffs produced a competent witness, and offered to prove that the ship of the plaintiff, mentioned in the declaration, at the time of the injury complained of, was loaded with salt and ready to sail for the Georgetown market, and that if the ship had then sailed she would in due course have arrived in Georgetown (as was intended when her lading was taken in) in due time for the sale of the cargo at the fishing season of the Potomac River, when there is a great demand

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NOTE.—*Collision—measure of damages for.*

The general rule is that in cases of collision, which is not willful, the owner of the injured vessel is entitled to receive as damages an amount which will place him in the situation in which he would have been but for the collision. Insurance is not to be deducted. The Rhode Island, Abb. Adm., 100; Williamson v. Barrett, 13 How., 101; Aff'g S. C., 4 McLean, 589; The Baltimore, 8 Wall., 377; New Eng. Mar. Ins. Co. v. Dunham, 3 Cliff., 332.

Actual injuries only are to be compensated. Hypothetical or consequential damages are not considered. The Blossom, Olcott, 188; The Narragansett, Olcott, 246.

But the owner is entitled to recover his entire loss. The Narragansett, Olcott, 246; The New Jersey, Olcott, 444.

Where the vessel is lost by a collision the measure of damages is the full value of the vessel and of her freight. The Ann Caroline, 2 Wall., 538; The Rebecca, Blatchf. & H., 347; The New Jersey, Olcott, 444; The America, 11 Blatchf., 285.

What she would have brought at an ordinary sale in market—not at forced sale. The Colorado, 1 Brown Adm., 411; McCloskey v. The Achilles, 4 Law & Eq. Reporter, 676.

And it is proper to allow the cost of raising the sunken vessel to ascertain the extent of the loss. The Mary Eveline, 14 Blatchf., 497.

But where she is injured, the measure of damages is the sum necessary to restore the vessel to as good condition as she was at the time of the injury. The Catharine v. Dickinson, 17 How., 170; The Granite State, 3 Wall., 310, and cases cited *supra*.

Loss of use of the vessel while making repairs, the freight a vessel was earning less expenses, the damage done to a vessel in saving her, the salvage and other necessary expenses paid in rescuing the vessel from the perils of the collision, wharfage while repairing, cost of raising and clearing the vessel, loss of profits while it was sunk, demurrage for time vessel is repairing, the value of the use of the vessel while laid up for repairs, are all items of damage that have been allowed in addition to the actual cost of repairs. Williamson v. Barrett, 13 How., 101; Aff'g S. C., 4 McLean, 589; The Narra-

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for salt; and that the loss occasioned by the injury in the delay of the vessel, preventing her arrival till after the fishing season, as she was compelled to unload and take in another cargo of salt, amounted to between 10 and 11 cents per bushel, making the loss in the whole cargo $2,101.20, and contended that they should be allowed to give this evidence and to recover damages for the said loss, estimating the salt by the price at Georgetown in the fishing season when the vessel would have arrived.

But the court refused to allow the said evidence to be given by the plaintiffs, to which the plaintiffs, by their counsel, excepted.

Plaintiffs' third bill of exceptions:

And the plaintiffs having, after the foregoing evidence, farther offered evidence to prove that it is the usage of vessels coming out of the docks of Liverpool into the river to have their anchors slung in a tackle ready to be thrust over the bows, and in a situation to be dropped immediately on passing through the lock connecting the dock with the basin, and before passing from the latter into the river; that the anchor was not put over the bow nor attempted to be so done in the present case, on board the Tasso, until this vessel had passed into the river and was approaching the Francis Depau; and the defendant having offered in evidence the deposition of Frederick Lewis to prove that the Tasso, in passing from the basin through the piers thereof into the river had the said vessel in check by a hawser extending therefrom to one of the said piers, which hawser parted as the vessel cleared the pier head, and that the fish pennant or tackle suspending the anchors of said vessel broke in the attempt to get them over the bow of the vessel as aforesaid, and they thereupon fell upon the deck of the vessel; and the plaintiffs having further offered evidence by the pilot of the Francis 31*] Depau, to prove that defendant's *vessel appeared badly furnished, and that the mate thereof (the master being absent) at the time, declared that he had not a rope on board fit to hang a cat.

And in a further trial of this cause, the plaintiffs, after the depositions for the plaintiffs and defendant were read, having offered evidence to show that in the management of a vessel when the fish tackle breaks, and it is important that the anchor should be thrown out, that it ought to be and can be accomplished in a short time by fixing another rope by a strop to the anchor and heaving it over the bows, and that such new fixture can be applied in a minute or two.

And the defendant having offered the following prayer:

"That if the jury shall believe from the evidence that the collision between the Tasso and the Francis Depau was occasioned by the breaking of her hawser and fish tackle, yet, from the said facts, the jury are not warranted in inferring that the said vessel, the Tasso, at the time of her sailing, was unseaworthy."

The court gave the instruction as prayed, to which the plaintiffs, by their counsel, excepted. And the plaintiffs then prayed the court to instruct the jury, that if they believe from the evidence that the collision took place as above stated, then such breaking of the said hawser and tackle is no excuse for the collision on the part of the defendants; which the court refused; to which refusal also the plaintiffs excepted.

Mr. Chief Justice TANEY delivered the opinion of the court:

This case arises from a collision in the port of Liverpool, between the bark Tasso and the ship Francis Depau, in which the latter sustained considerable injury. The vessels were both American; the Francis Depau being owned by the plaintiffs in error, and the Tasso by the defendant.

It appears from the evidence, that at the time the accident happened, the Tasso was in charge of a regular pilot, leaving the Prince's dock on her homeward voyage; and the Francis Depau was at anchor in the harbor, laden with salt, and ready to sail. And in order to prove that the injury arose from the unskillful management of the Tasso, the plaintiffs offered in evidence that it is the usage of vessels coming out of the docks of Liverpool into the river, to have their anchors slung in tackle, ready to be *thrust over the bows, and in a situation [*32 to be dropped immediately on passing through the lock which connects the dock with the basin, and before passing from the latter into the river; and that the anchor of the Tasso was not put over the bow, nor was it attempted to be done, until she had passed into the river, and was approaching the Francis Depau.

The defendant then offered testimony to show that in passing from the basin, between the piers into the river, the Tasso was held in check by a hawser fastened to one of the piers, but that the hawser broke just as the vessel cleared the pier head; and the pilot perceiving that she was approaching the plaintiffs' ship, thereupon gave orders to get an anchor ready. The anchors were accordingly fixed as soon as pos-

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gansett, 1 Blatchf., 211; The Rhode Island, Abb. Adm., 100; The Narragansett, Olcott, 388; Vantine v. The Lake, 2 Wall. C. C., 52; Swift v. Brownell, 1 Holmes, 467; The Morning Star, 4 Biss., 62; The Sunnyside, 1 Brown Adm. 415; The Mayflower, 1 Brown Adm., 376; The Transit, 4 Ben., 138; The Favorita, 4 Ben., 132; The Emily, 4 Ben., 235; The Mayflower, 5 Am. L. T. Rep., 367; 2 W. Rob., 279; 3 W. Rob., 283; 1 Wall., 269; 6 McLean, 238; 2 Ben. Rep., 125; 7 Blatchf., 385; 4 Blatchf., 489; 3 Duer, 466; 6 Duer, 315, 363; 3 Fost. (N. H.), 171; 16 N. Y., 489; The Stormless, 1 Low., 153.

Expected profits except where accident was intentional or malicious are not allowed. The Newhall, 3 Ware, 105.

But in cases of willful and malicious collision anticipated profits or a sum above the actual damage may be allowed as exemplary damages. *Ibid.*; Ralston v. The State Rights, Crabbe, 22.

For the loss of the cargo on board the vessel at the time of the collision the measure of damages is the value of the goods at the place of shipment. Smith v. Condry, 17 Pet., 20; The Joshua Barker, Abb. Adm., 215; The Mary J. Vaughan, 2 Ben., 47.

Cost of lading and interest added from time of collision. The Ocean Queen, 5 Blatchf., 498; Dyer v. Nat'l Nav. Co., 24 Int. Rev. Rec., 198.

The market price at port of delivery may be measure of damages where it appears that the collision prevented a delivery. The Joshua Barker, Abb. Adm., 215.

Damages were allowed in the following cases which were determined by the peculiar circumstances of the accident: The Ann Caroline, 2 Wall., 538; Halderman v. Beckwith, 4 McLean, 286; Brady v. The New Philadelphia, 19 How. Pr., 315; Naugatuck Transportation Co. v. The Rhode Island, 6 N. Y. Leg. Obs., 108.

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sible, in the manner that is customary in going out of the port; and an attempt was made to get one of them over the side, but the tackle broke, and both anchors fell on deck, and the vessel struck the Francis Depau, and thereby occasioned the injury for which this suit is brought; that everything was done on board the Tasso, according to the directions of the pilot, and every effort made to prevent the collision; but that it was blowing fresh, and the tide setting towards the plaintiffs' ship, and the Tasso would not mind her helm.

To rebut this testimony, the plaintiff offered in evidence, by the pilot, that the defendant's vessel appeared to be badly furnished, and that at the time the accident happened, the mate who had charge of her under the pilot (the master being absent), declared that he had not a rope on board fit to hang a cat; and further offered in evidence, that where the fish tackle breaks, and it is important that the anchor should be thrown out, it can be accomplished in a minute or two, by fixing another rope by a strop to the anchor and heaving it over the bows.

At the trial, several exceptions were taken by the plaintiffs to different instructions given by the court to the jury; and the verdict and judgment in the Circuit Court having been in favor of the defendant, the case has been brought here for revision by a writ of error sued out by the plaintiffs. We proceed to examine the directions excepted to, in the order in which they appear in the record.

Upon the evidence above stated, the defendant asked the court to instruct the jury that under the statutes of Great Britain, of the 37 33*] *Geo. III., ch. 78; 52 Geo. III., ch. 39, and 6th of Geo. IV., ch. 125, the defendant was not responsible for any damage occasioned by the default, negligence, or unskillfulness of the pilot. The court gave this instruction, and that is the subject of the first exception.

The collision having taken place in the port of Liverpool, the rights of the parties depend upon the provisions of the British statutes then in force; and if doubts exist as to the true construction, we must of course adopt that which is sanctioned by their own courts.

The 52 Geo. III., mentioned in this exception, is a general act for the regulation of pilots and pilotage, within the limits specified in the law, and requires the masters of vessels under a certain penalty to take a pilot, and provides that no owner or master shall be answerable for any loss or damage, nor be prevented from recovering on any contract of insurance, by reason of any default, or neglect on the part of the pilot. But this statute did not repeal the previous one of 37 Geo. III., for the regulation of pilots conducting ships into and out of the port of Liverpool; and the last-mentioned law required the master to pay full pilotage to the first who should offer his services, whether he was employed or not. This act did not, however, impose any penalty for refusal; and contained no clause exempting the master and owner from liability for loss or damage arising from the default of the pilot, where one was taken on board.

Upon these acts of Parliament, the Court of King's Bench held, in the case of *Caruthers* v. *Sydebotham* (4 Maule & Selw., 77), that the master or owner of a vessel trading to and from the port of Liverpool, was not answerable for damages occasioned by the fault of the pilot. But in the case of the *Attorney-General* v. *Case* (3 Price, 302), the same question was discussed in the argument before the Court of Exchequer, and it appears to have been the opinion of that court, that the master and owner were liable in the same manner as if the pilot had not been on board.

The question, it is true, did not necessarily arise in the last-mentioned case, for the vessel was at anchor in the River Mersey when the disaster happened; and a vessel at anchor was not bound to have a pilot on board. If in that situation the master thought proper to employ one, the pilot was undoubtedly his agent, and consequently he was responsible for his acts. But in *deciding the case, the court ex- [*34 pressed their opinions on the two statutes of Geo. III., before mentioned, in cases where pilots were required to be on board; and held that the provisions of the 52 Geo. III., exempting masters and owners from liability, did not extend to cases embraced by the local pilot act for Liverpool, and strongly intimated that there was a distinction between the obligation to take a pilot under a penalty, and the obligation to pay full pilotage to the first that offered, whether he was taken or not.

Since these decisions were made in the King's Bench and Exchequer, the 37th Geo. III. has been repealed by the 5th of Geo. IV., and the 52 Geo. III. has been repealed by the general pilot act of the 6th of Geo. IV.; and these two statutes of Geo. IV. were the laws in force at the time of the collision in question. But although some changes were made in the Liverpool pilot act in the first mentioned statute, and in the general pilot law by the second, yet in regard to the subject now under consideration, these two statutes are the same in substance with the preceding ones which they respectively repealed; and the adjudged cases above mentioned apply with the same force to the question before us, as if they had been made since the passage of the acts of Geo. IV.

In determining, however, the true construction of these acts of Parliament, we are not left to decide between the conflicting opinions of the King's Bench and Court of Exchequer. The same question has since, on more than one occasion, arisen in the British Court of Admiralty, and the decision in the King's Bench has been constantly sustained; and we presume it is now regarded as the settled construction of these pilot acts. (Abb. on Ship., Shee's edition, 184. *n. z.*; *The Maria*, 1 Rob. New Admiralty Reports, 95; *The Protector*, 1 Rob. New Adm. Rep., 45; *The Diana*, 1 Rob. New Adm. Rep.) We think, therefore, that the Circuit Court was right in the first instruction given to the jury.

The second also is free from objection. The question there was as to the rule of damages in case the plaintiffs should show themselves entitled to a verdict. They offered to prove that if the ship had not been prevented from sailing by the injury complained of, she would in due course have arrived in Georgetown (as was intended when the lading was taken in) in time for the sale of her cargo at the fishing season in the Potomac River, when *there is a [*35 great demand for salt; that the injury delayed

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her, and prevented her arrival until the season was over, and thereby made a difference of ten or eleven cents per bushel in the value of the salt at her home port, and occasioned a loss upon the cargo of $2,101.20. The defendant objected to this testimony, and the court refused to admit it.

It has been repeatedly decided in cases of insurance, that the insured cannot recover for the loss of probable profits at the port of destination, and that the value of the goods at the place of shipment is the measure of compensation. There can be no good reason for establishing a different rule in cases of loss by collision. It is the actual damage sustained by the party at the time and place of the injury that is the measure of damages.

The third and last exception was taken to an instruction given upon the prayer of the defendant, and also to the refusal of the court to give a direction asked for by the plaintiffs. The defendant prayed the court to instruct the jury, that if they believed that the collision was occasioned by the breaking of the hawser and fish tackle, yet from those facts the jury were not warranted in inferring that the Tasso at the time of her sailing was unseaworthy; which direction the court gave. And thereupon the plaintiff prayed the court to instruct the jury, that if they believed the collision took place as above stated, then such breaking of the hawser and tackle is no excuse for it on the part of the defendant; and this direction the court refused to give.

Now, these two prayers involve the same principles, and are both liable to the same objections. By whose fault the accident happened was a question of fact to be decided by the jury upon the whole evidence before them. And the error in the prayer on the part of the plaintiffs, as well as that offered by the defendant, consists in this, that it sought to withdraw from the jury the decision of the fact, and asked the court to instruct them, as a matter of law, upon the sufficiency or insufficiency of certain evidence offered to prove it; and both prayers are still more objectionable because each of them asks the instruction upon a part only of the testimony, leaving out of view various other portions of it which the jury were bound to consider in forming their verdict. If the collision was the fault of the pilot alone, then the owners of the Tasso are not 36*] answerable. But if it was altogether *or in part caused by the misconduct, negligence, or unskillfulness of the master or mariners, the owner is liable. And if the equipments and tackle were in this case insufficient, and not as strong and safe as those ordinarily used for such vessels in such cases, and thereby rendered the care and skill of the pilot unavailing, it was undoubtedly the fault of the master or owner; and is equally inexcusable as the omission to provide a competent crew. And it was for the jury upon the whole evidence to say whether it was the result of accident, arising from strong wind and tide, against which ordinary skill and care could not have guarded; or the fault of the pilot; or the misconduct, negligence, or unskillfulness of the crew; or the insufficiency of the hawser, ropes, or equipments with which the vessel was furnished. In the two first instances the owner of the Tasso is not answerable; in the two latter he is. The court, therefore, were right in refusing the direction asked for by the plaintiffs, but erred in giving the one before mentioned at the request of the defendants.

And for this reason the judgment of the Circuit Court must be reversed.

ORDER.

This cause came on to be heard on the transcript of the record from the Circuit Court of the United States for the District of Columbia, holden in and for the County of Washington, and was argued by counsel; on consideration whereof, it is now here ordered and adjudged by this court, that the judgment of the said Circuit Court in this cause be, and the same is hereby reversed with costs; and that this cause be, and the same is hereby remanded to the said Circuit Court, with directions to award a *venire facias de novo*.

Cited—5 How., 500, 503; 6 How., 435; 13 How., 113; 14 How., 538; 7 Wall., 64, 70; 8 Wall, 21; 1 Cliff., 348; 3 Biss., 27; 4 Biss., 72: Abb. Adm., 103, 104, 207; 2 Curt., 72; 1 Bond. 113; 2 Ben., 50; 7 Ben., 125, 128–132; 6 McLean, 182; 5 Blatchf., 494; 1 Brown, 180–183, 380, 381.

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*RICHARD B. ALEXANDER, *Plaintiff in Error*, [*37
v.
MOSES GRAHAM, *Defendant in Error.*

IN error to the Circuit Court of the United States for the District of Columbia, in and for the County of Washington.

The plaintiff in error having filed an order in writing, directing the clerk to dismiss this suit, it is thereupon now here considered, ordered and adjudged by this court, that this writ of error be, and the same is hereby dismissed with costs.

LESSEE OF JOHN MERCER, AND MARY SCOTT MERCER, His Wife, *Plaintiffs in Error*,
v.
WILLIAN CARY SELDEN, *Defendant.*

Ejectment—Virginia statute of limitations—adverse possession—disabilities of infant and feme coveri—tenancy by courtesy must arise from actual seisin during coverture.

The statute of limitation of Virginia, passed in 1785, barred the right of entry, unless suit was brought within twenty years next after the cause of action accrued. The savings are infancy, coverture, &c., and such persons are barred if they do not bring their action within ten years next after their disabilities shall be removed.

The circumstances under which the defendant held in this particular case, constitute an adverse possession.

Disabilities which bring a person within the exceptions of the statute cannot be piled one upon

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NOTE.—*As to adverse possession, and requisites of*, see note to Ricard v. Williams, 7 Wheat., 59.

That mortgagor's possession is not adverse, see to Higginson v. Mein, 4 Cranch, 415.

The occupancy necessary to constitute adverse possession. See note to Ewing v. Bennett, 11 Pet., 41.

Tenancy by the curtesy, what seisin is necessary for, and in what lands.

Tenancy by the curtesy is an estate for life, created by the act of law. When a man marries a

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another: but a party, claiming the benefit of a proviso, can only avail himself of the disability existing when the right of action first accrued.

The general rule of law is, that there must be an entry during coverture, to enable the husband to claim a tenancy by the courtesy.

THIS case was brought up by a writ of error from the Circuit Court of the United States for the Eastern District of Virginia.

The facts in the case are stated in the commencement of the opinion of the court, which the reader is requested to turn to and peruse, before referring to the sketch of the arguments of counsel.

The decision of the court being made to rest entirely upon the statute of limitations, all those branches of the argument relating to the 38*] *invalidity of the deed from Selden and wife to Dr. Mackay, on account of its having been read to her, and of a defect in its acknowledgment, are omitted.

Mr. Whipple and *Mr. Walter Jones* for the plaintiffs.

Mr. Chapman Johnson for defendant.

On the part of the plaintiffs, it was argued: 1. That Mrs. Swann and her children were within the express exceptions of the statute; under the double disability of infancy and coverture.

2. That no disseisin or adverse possession is operated by any length of continued possession, however hostile may be the new pretense of title under which possession is held over, if the possession were not tortious at its inception, but in subordination to or consistent with the true title.

3. That this is especially true where a husband, who having rightfully come into possession *jure uxoris*, holds out possession against her heir after descent cast by her death; however hostile the claim and strong the color of exclusive title asserted for himself; and though the heir be *sui juris*, and in no nearer relation to husband and wife than simply as her heir-at-law.

4. That the intrusion, even of a mere stranger, on lands descended to an infant, constitutes the intruder, *ipso facto*, a fiduciary possessor, *quasi* guardian, subject both at law and in equity to all the duties and liabilities of such fiduciary possessor, and utterly incapable of converting his fiduciary possession into a disseisin or adverse possession.

5. *Multo fortiore*, when, as in this case, the heirs were not only infants, but united in their persons all the relations of his step-children, of co-heirs to his wife, and his wards; when the guardian care and conservation of all their rights of property and of possession had devolved, as a strict legal duty, on him, *ex officio*.

6. That the right of action had never accrued when the infants had a right to sue, being restrained either by coverture or a tenancy by the courtesy.

On the part of the defendant, it was argued, that none of the exceptions in the statute have any application to this case, but those in favor of infants and *femes covert*. The right of entry of Mrs. Mercer's mother, and of her uncle, John Page, accrued at the death of Mrs. Selden, in 1787; or, at the latest, accrued to *John [*39 Page when he attained full age, prior to 1792, and to Mrs. Swann when she was married, in April, 1794.

First, as to John Page.

His disability of infancy being removed, and the guardianship account being settled in 1792, his right of entry, if any remained to him, certainly accrued as early as the 21st of December, 1792, when he was under no disability, and so he remained until his death in the year 1800.

The statute having begun to run against him in his lifetime, runs over all subsequent disabilities. (Adams on Ejectment, 59; 2 Preston on Abstracts, 339; Blanchard on Limitations, 19, in the first vol. of the Law Library, 10; *Jackson, dem. Colden*, v. *Moore*, 13 Johns., 518; *Jackson, dem. Livingston*, v. *Robbins*, 15 Johns., 169; *Fitzhugh* v. *Anderson*, 2 Hen. & Munf., 306; *Hudson* v. *Hudson's Adm.*, 6 Munf., 355; *Parson* v. *McCracken*, 9 Leigh., 501, 507.)

Second, as to Mrs. Swann.

Her right of entry accrued either when she was an infant and unmarried at the death of her

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woman, seized, at any time during the coverture, of an estate of inheritance, in severalty, in coparcenary, or in common, and hath issue by her born alive, during the life of the mother, and which might by possibility inherit the same estate as heir to the wife, and the wife dies in the lifetime of the husband, he holds the land during his life. 4 Kent's Com., 27; Litt., sec. 35, 53; Co. Litt., 29, *b.*; Paine's Case, 8 Co., 34; Barker v. Barker, 2 Sim., 249; 2 Black. Com., 128; Marsellis v. Thalimer, 2 Paige, 35.

Four things are requisite to an estate by the curtesy, viz., marriage, actual seizin of the wife, issue, and death of the wife. The law vests the estate in the husband immediately on the death of the wife, without entry. His estate is initiate on issue had, and consummate on the death of the wife. 2 Kent's Com., 28.

The wife, according to the English law, must have been seized in fact, and in deed, and not merely of a seisin in law of an estate of inheritance, to entitle the husband to his curtesy. Co. Litt., 29, *a.*; Tayloe v. Gould, 10 Barb. N. Y., 388; 4 Kent's Com., 29; 5 Cow., 74, 98; 13 Johns., 260; 16 Johns., 96; 3 Atk., 469; Cruise Dig., ch. 2, sec. 12-16; 23 Pick. 180; 7 Mass., 253; 8 N. H., 240; 5 N. H., 469; 1 Barb., 505; 1 Paige, 634; 5 Paige, 161; 1 Barb. Ch., 598.

The circumstances of this country have justly required some qualification of the strict letter of the rule relative to a seisin in fact by the wife; and if she be owner of waste uncultivated lands, not held adversely, she is deemed seized in fact, so as to entitle her husband to his right of curtesy. Adair v. Lott, 3 Hill, 182; Pond v. Bergh, 10 Paige, 140, 154; Jackson v. Sellick, 8 Johns., 262; Clay v. White, 1 Munf., 162; Green v. Liter, 8 Cranch, 249; Davis v. Mason, 1 Pet., 503; Smoot v. Lecatt, 1 Stew. Ala., 590; McConry v. King, 3 Humph. Tenn., 267.

The wife must have such seisin as will enable her issue to inherit; and therefore, if she claims by descent or devise, and dies before entry, the inheritance will go, not to her heir, but the heir of the person last seized, and the husband will not have his curtesy. Jackson v. Johnson, 5 Cow., 74; Adair v. Lott, 3 Hill, 182; 4 Kent's Com., 30.

It is sufficient for the claim of curtesy that the wife had title to the land, though she was not actually seized, nor deemed to be so. Bush v. Bradley, 4 Day, 298; Kline v. Beebe, 6 Conn., 495; DeGrey v. Richardson, 3 Atk., 469; Sterling v. Penlington, 7 Viner, 149, pl. 11; Ellsworth v. Cook, 8 Paige, 643.

The husband is tenant by the curtesy if the wife has an equitable estate of inheritance, notwithstanding the rents and profits are to be paid to her separate use during the coverture. So where she has a seizin in equity as a *cestui que trust*. Watts v. Ball, 1 P. Wms., 108; 1 Sumn., 128; Bennett v. Davis, 2 P. Wms., 316; Cochran v. O'Hern, 5 Watts., 113; Vrooman v. Shepherd, 14 Barb., 441. See Moore v. Webster, 3 L. R. Eq., 267; 35 L. J. Chanc., 549; 15 L. J. N. S., 460.

But the husband of a mortgagee in fee is not entitled to his curtesy, though the estate becomes absolute at law, unless there has been a foreclosure, or unless the mortgage has subsisted so long a

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mother, or when she was both an infant and a married woman, in April, 1794. Her disability of infancy ceased a few months after her marriage, and her disability of coverture ceased at her death, in 1812. But so far as regards her daughter, Mrs. Mercer, there has been a sucession of disabilities from the death of Mrs. Selden to the present day.

Can these disabilities be united so as to continue her protection?

The authorities relied upon to maintain the power of tacking disabilities, are Blanchard on Lim., 19, 20, in Law Library, 10. 11; 2 Preston on Abstracts, 349; *Cotterell* v. *Dutton*, (4 Taunton, 826). But even Blanchard's opinion is, that successive disabilities in different persons cannot be connected; and Preston states that the later decisions are, that successive disabilities cannot be united (2 vol., p. 341); and the following authorities prove that they cannot: Adams on Ejectment, 60; 6 East, 80; approved in *Tolson* v. *Kaye* (3 Broderip & Bingham, 223), decided in Common Pleas, in 1822; *Eager and wife* v. *Commonwealth* (4 Mass., 182), *Griswold* v. *Butler* (3 Conn. Rep., 227). *Floyd* v. *Johnson* (2 Littel, 114). *Clay's Heirs* v. *Miller* (3 Monroe, 148), *Thompson* v. *Smith* (7 Serg. & Rawle, 209), *Demarest* **40*]** *et *ux.* v. *Winkoop* (3 Johnson's Ch. Rep., 129), *Jackson* v. *Wheat* (18 Johns., 40), *Jackson* v. *Johnson* (5 Cowen, 74), *Bradstreet* v. *Clarke* (12 Wendell, 602), *Doe, dem. Lewis*, v. *Barksdale* (2 Brock., 436), *Parsons* v. *McCracken* (9 Leigh, 495). In the last case Judge Parker cites the case of *Swann* v. *Selden*, as authority for the same proposition, it having been recognized by Judges Cabell and Brockenborough.

If the plaintiffs are not within the exceptions to the statute, then the question is, whether, supposing them to be under no disability, they are within the principle of the statute; or, in other words, has there been an actual adversary possession in the defendant, and those under whom he claims, for fifteen years before bringing this suit?

Here it must be remembered that we are trying this question, not upon the testimony of witnesses, not upon the evidence of facts from which other facts may be inferred, but upon a special verdict finding all the facts, and leaving to the decision of the court the naked question of law, whether these facts constitute a possession which the statute of limitations will protect. In *Bradstreet* v. *Huntingdon* (5 Peters. 402), it is said, "Adverse possession is a legal idea, admits of a legal definition, and is therefore a question of law."

Taylor, dem. Atkins, v. *Horde* (1 Burrow, 60), was upon a special verdict finding the facts, and referring the law to the court; and in that case it being ascertained that the plaintiff's right of action had accrued more than twenty years before the bringing of the suit, he was regarded as having the *onus* thrown upon him of showing why he had not sooner entered. This case is reported also in Cowper, 689, and 6 Brown's P. C., 633; it is also stated in 3 Cruise's Dig., title 31, ch. 2 and 33.

In this case (*Taylor* v. *Horde*), the verdict did not find that the possession was adversary; but it found the facts upon which the court pronounced that the plaintiff's title was barred by the statute. The case seems to have been briefly this. There was tenant in tail with power to make leases for lives, and with remainder in tail to the right heirs of the grantor. The tenant in tail made leases for three lives, and afterwards suffered a common recovery with a view of barring the entail, and cutting off the remainders limited thereupon. The person entitled to the remainder *in fee died, [***41** having devised it to the lessor of the plaintiff. The tenant in tail afterwards died in the year 1711 without issue, and his heir, claiming under the common recovery, entered, and he and those claiming under him continued to hold the land till the year 1753. The survivor of the three lessees for life died in 1752, and then the devisee of the remainderman in fee entered and made the lease on which the action was brought. The defendants defended themselves upon two grounds: 1st. That the common recovery had barred the remainder in fee; and 2d. That if it had not, the statute of limitations had barred

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time as to create a bar to the redemption. Chaplin v. Chaplin, 7 Viner, 156, pl. 23; 2 Ves., Jun., 433; 4 Kent's Com., 32.

Though the wife's dower be lost by her adultery, no such misconduct on the part of the husband will work a forfeiture of his curtesy; nor will any forfeiture of estate by the wife defeat the curtesy. Buckworth v. Thrikell, 3 Bos. & Pull., 652, note; Butler's note 170 to Co. Litt., 241, *a*; Roper on Husb. and wife, 36, 37; 3 Preston on Abst. of Title, 384, 385; Park on Dower, 172, 186; 4 Kent's Com., 34.

When the estate by the curtesy is once vested in the husband, it becomes liable to his debts, and cannot be devested by his disclaimer. Watson v. Watson, 13 Conn., 82.

The creditors have a right to sell the same on execution at law. Lessee of Canby v. Porter, 12 Ohio, 79.

A voluntary settlement of that curtesy upon the wife by the husband, is void as to his creditors. Vanduzer v. Vanduzer, 6 Paige, 366; Wickes v. Clarke, 8 Paige, 161.

A common law seizin in fact was necessary, during the life of the wife, to enable the husband to claim as tenant by the curtesy. Barr v. Galloway, 1 McLean, 476.

In general, there must be an entry on the land of the wife by the husband, to enable him to claim as tenant by curtesy. Mercer v. Seldon, 17 Pet., 61, and *supra*.

An actual entry, *pedis possessio*, by the husband or wife, during coverture, is not necessary to create a tenancy by curtesy. 7 Wheat., 27; Buckley v. Buckley, 11 Barb., 43, 65.

And no entry on wild lands is necessary. Davis v. Mason, 1 Pet., 503; Barr v. Galloway, 1 McLean, 476.

A right of entry sufficient, where no adverse possession exists. Davis v. Mason, 1 Pet., 503.

A husband has curtesy of trust, as well as legal estates; of equity of redemption of a contingent use, or of money to be laid out in land. Gilb. Uses and Trusts, 2 Vern., 536; 1 P. W., 108; 1 Atk., 606; Robison v. Codman, 1 Sumn., 121; Dunscombe v. Dunscombe, 1 Johns. Ch., 508; 2 Cow., 439; Stoddard v. Gibbs, 1 Sumn., 263; Sweetapple v. Bindon, 2 Term, 536; Watts v. Ball, 1 P. Wms., 108; Chaplin v. Chaplin, 3 P. Wms., 229; Cashborne v. Scarf, 1 Atk., 603; Cunningham v. Moody, 1 Ves., 174; Dodson v. Hay, 3 Bro. C. C., 404.

The husband is tenant by the curtesy of a vested remainder in fee. Young v. Langbein, 7 Hun. N. Y., 151.

In order to give the husband a right of curtesy, the wife must be seized in fact of the premises. Gibbs v. Esty, 22 Hun. N. Y., 266.

Actual seisin, or, at least, a right of possession, in the wife during coverture, is in general necessary to support a tenancy by the curtesy. Ferguson v. Tweedy, 43 N. Y., 543.

In New York, tenancy by the curtesy is not affected by the enabling act, in reference to married women, passed in 1848, or amendments thereto, of 1849. Zimmerman v. Schoenfeldt, 3 Hun., N. Y., 642.

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the entry of the plaintiff. The plaintiff insisted that the common recovery was void for want of a proper tenant to the *præcipe*, and so the court held. The plaintiff also insisted that his right of action did not accrue till the death of the surviving lessee for life, so that there was no bar of his entry; but the court held that the lease for lives was void, so that the plaintiff's right of entry accrued in 1711, and was barred by the statute. This judgment of King's Bench was affirmed in House of Lords.

La Trombois v. *Jackson* (8 Cowen, 589) was also a case of a special verdict, finding the facts, which the court held to amount to an adverse possession. The facts which, in the opinion of the court, constituted an adverse possession in the defendant, were, long possession under a contract for a future conveyance from a person not shown to have had any title, improvement and cultivation. His long possession and enjoyment of the property, claiming it as his own, was held sufficient. The fact of possession, and the *quo animo* it was commenced and continued, were regarded as the tests of adversary possession. (See page 609.)

Clay v. *Ransome* (1 Munf., 454) was the case of a special verdict finding possession in the defendant. Held, that the defendant would have been protected if it had been found with certainty that such possession had continued twenty years, besides the five years and one hundred and seventy-four days, included by the act of Assembly on account of the war; and this being left uncertain, a *venire de novo* was awarded.

Let us examine what there is in our case which should make the possession of Dr. Selden and his son fiduciary.

Shall fraud or trust be imputed to its origin? Both these grounds have been fully investi-
42*] gated in the Court of Chancery, *and both repudiated by the final decree of that court, affirmed by the Court of Appeals.

But if they could be resorted to here, then the statute would run against the fraud from the time it was discovered, and would run in favor of the trustee from the time that the trust was openly repudiated.

As to fraud, see *Wamburzee* v. *Kennedy* (4 Desauss., 479), *Sweat* v. *Arrington* (2 Hayw., 129), *Thompson* v. *Blair* (3 Murphy, 583). *Van Rhyn* v. *Vincent* (1 McCord's Ch. R., 314).

As to trust. It is held that time will bar even an express voluntary trust, beginning to run from the period of its known disavowal. (See Blanchard on Lim., 75; 1 Law Library, 29; *Piper* v. *Lodge*, 4 Serg. & Rawle, 310; *Boone* v. *Chiles*, 10 Peters, 223; citing *Willison* v. *Watkins*, 3 Peters, 52; *Kane* v. *Bloodgood*, 7 Johns. Ch. R., 122; *Hovenden* v. *Lord Annesley*, 2 Sch. & Lef., 607, 636, 638.)

And as to constructive trusts, see the same case of *Boone* v. *Chiles* (10 Peters, 223), where it is said, "Though time does not bar a direct trust as between a trustee and *cestui que trust* till it is disavowed, yet where a constructive trust is made out in equity, time protects the trustee, though his conduct was originally fraudulent, and his purchase would have been repudiated for fraud. Citing for this, *Andrew* v. *Wrigley* (4 Bro. Ch. C., 188), *Beckford* v. *Wade* (17 Vesey, 97), *Townsend* v. *Townsend* (1 Bro. Ch. C., 554). So the Court of Appeals of Virginia, in the case of *Harrison* v. *Harrison* (1 Call, 428), hold this language: "The Act of Limitations does not run in favor of trustees, so long as the confidence may be fairly presumed to continue; but it runs both at law and in equity in favor of disseisors and tort-feisor shaving adverse possession."

So, though it is said in some cases in Johnson's Reports, cited on the part of the plaintiffs, that the adversary possession, to constitute a bar, must have been hostile in its inception, and so continued for twenty years; yet this phrase, "hostile in its inception," does not relate to the original entry of the defendant, but to the act by which the possession became adversary; in other words, whether the possession was originally hostile or not, it must have been hostile twenty years ago, and have continued so ever since. (See *Jackson* v. *Brink*, 5 Cowen, 483.)

*Shall the defendant be treated as ten- [*43
ant for life holding over, so as to make him tenant by sufferance? This is repelled by special verdict, which finds that he held under claim of title, and took the rents and profits to his own use. But an express and acknowledged tenancy, as soon as the tenancy is disavowed and the right of the landlord openly denied, will become adversary. (See *Willison* v. *Watkins*, 3 Peters, 49; *Peyton* v. *Stith*, 5 Peters, 485.) Cited, 1 Pet. Digest, p. 148, pl. 32; also the pertinent case, *Doe, dem. Parker*, v. *Gregory* (4 Neville & Manning, 308). Husband in possession, in right of his wife, held over after her death for more than twenty years; there being no evidence to show under what right he held or claimed to hold after her death, this possession barred the wife's heirs in ejectment.

Shall he be regarded as one entering under a void title, so that his possession would be regarded as subordinate to the title of the legal owner?

The special verdict ascertains that the fact is not so. For however ineffectual in law the conveyances may be to pass the legal title of Mrs. Selden, yet Dr. Selden did not enter under her deed, but under the deeds of Robert Mackay and Cary Selden, which, though they might not have conveyed a good title, are not void in law. Under this head the plaintiffs may rely upon the cases of *Jackson* v. *Waters* (12 Johns., 365), *Jackson* v. *Cairns* (20 Johns., 301); also, perhaps, on some other cases referred to in Adams on Ejectment (Appendix A, p. 464–468). After the decision of *Jackson* v. *Waters*, by the Supreme Court of New York, the case of *Jackson* v. *La Trombois* came before the same court, in respect to the same title, but between different parties. The Supreme Court thought the case not distinguishable from *Jackson* v. *Waters*, and held, accordingly, that the possession of the defendant was not adversary. But this last case coming before the Court of Errors of New York under the style of *La Trombois* v. *Jackson* (8 Cowen, 589), the judgment of the Supreme Court was unanimously reversed. The Court of Errors thought the case very distinguishable from *Jackson* v. *Waters*, which they did not profess to overrule; but the opinions of the judges on the doctrine of adversary possession produce the impression that they would have decided *Jackson* v. *Waters* differently.

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But these cases furnish no warrant for the 44*] proposition that a *possession commencing under a void title may not become adversary.

The case in 12 Johnson (*Jackson* v. *Waters*) repudiates all claim under the grant of the French Canadian government, as a government altogether foreign to the colonial government of New York; so as to liken the possession of one claiming under such a grant to the possession of one without claim—upon the ground that such a grant was notoriously void, and so known to be by the person in possession under it. But the possession in that case was manifestly such as not to have created a bar, even if it had been adversary, and there is a strong intimation that it might have been ripened into a complete bar to the action.

Jackson v. *Cairns* (20 Johns.) was the case of a conveyance in fee of the wife's lands by deed of husband and wife, not executed by the wife so as to be obligatory upon her, and an immediate re-conveyance of the property to the husband in fee. The husband thenceforward claimed the land as his own, and mortgaged it for the payment of his debts. The wife died in 1795, having had issue by the marriage, and afterwards the husband died in 1802. His son and heir took possession, and made another mortgage upon the lands. The mortgage made by the husband was foreclosed in 1805, and under the decree of foreclosure, sold to Cairns, who held possession under the purchase till the heir of the wife brought his action of ejectment in 1817. The court held that as the original conveyance was void as to the wife, it could be regarded as the conveyance of the husband alone; that under the statute 32 Henry VIII., and a similar statute in New York, the conveyance of the husband and wife operated to convey only his interest in the estate; that is, his tenancy by the courtesy, and produced no discontinuance of his wife's estate; that the reconveyance to him operated only to revest him with his former estate. That, in like manner, the mortgage produced no discontinuance of his wife's estate; so that, after her death, his possession was that of tenant by the courtesy. The title of his wife's heir to the possession had not yet accrued, and his possession could not be adversary to the heir. They intimated an opinion that the mortgage by his heir did not render the possession adversary, but did not decide this point, as it was unnecessary. They consider the possession as becoming adversary 45*] at *the time of Cairns's purchase, in 1805. But this was within the period of limitation; they therefore held that the action was not barred.

Here it is obvious that the right of entry never accrued to the wife's heirs until the death of the husband, who had good title as tenant by the courtesy; and as but fifteen years had elapsed after the right of entry had accrued, the statute presented no bar.

But we maintain that the doctrine which assumes that possession, commencing under a void title, cannot become adversary and be protected by the statute, is in conflict with the principle of the statute and all the authorities.

The principle of the statute is to quiet possessions, and to protect tenants, after a reasonable length of time, from the necessity of exhibiting any title whatever.

The following considerations and cases are illustrative of the policy of the statute of limitations, and the favor with which it is regarded by the courts.

1. The statute of limitations has been emphatically called a statute of repose, &c. (*Beatty's Adm.* v. *Burnes's Adm.*, 8 Cranch, 98; 3 Cond. R., 51.)

2. The statutes of limitation ought not to be viewed in an unfavorable light, as an unjust or discreditable defense, but should receive such support from the courts as would make it what it was intended to be—a statute of repose. It is a just and beneficial law, &c. (*Bell* v. *Morrison*, 1 Peters, 360.)

3. "Of late years the courts of England and in this country have considered statutes of limitation more favorably than formerly. They rest upon sound policy, and tend to the peace and welfare of society. The courts do not now, unless compelled by the force of former decisions, give a strained construction to evade the effect of those statutes. By requiring those who complain of injuries to seek redress by action at law within a reasonable time, a salutary vigilance is imposed, and an end is put to litigation." (*McClung* v. *Silliman*, 3 Peters, 270.)

4. "Statutes of limitation have been emphatically and justly denominated statutes of repose. The best interests of society require that causes of action should not be deferred an unreasonable time. This remark is peculiarly applicable to land titles. Nothing so much retards the growth or prosperity of a country *as insecurity of titles to real es- [*46 tate. Labor is paralyzed when the enjoyment of its fruits is uncertain; and litigation without limit produces ruinous consequences to individuals." The court therefore approves the Kentucky statutes of limitation. (*Bradstreet* v. *Huntington*, 5 Peters, 407.)

5. "From as early a date as the year 1705, Virginia has never been without an act of limitation; and no class of laws is more universally sanctioned by the practice of nations and the consent of mankind, than those laws which give peace and confidence to the actual possessor and tiller of the soil," &c. (*Hawkins et al.* v. *Barney's Lessee*, 5 Peters, 457.)

The course of Kentucky approved, even her "seven years law;" same case. And among English cases, see the modern one of *Tolson* v. *Kaye* (3 Bro. & Bing., 217), decided in Common Pleas in 1822.

The case of *Taylor* v. *Horde*, already cited, is an authority to prove that possession held under a void common recovery was protected by the statute of limitations.

In *Smith* v. *Bentis* (9 Johns., 180), Spencer, delivering the opinion of the court, said: "It has never been considered as necessary to constitute an adverse possession that there should be a rightful title. Whenever this defense is set up, the idea of right is excluded; the fact of possession and the *quo animo* it was commenced or continued, are the only tests, and it must necessarily be exclusive of all other rights."

In *Smith* v. *Lorillard* (10 Johns., 356), *Chief Justice* Kent said, in delivering the opinion of the court, that "after a continued possession for twenty years under pretense or claim of

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right, the actual possession ripens into a right of possession, which will toll an entry." (See also *La Trombois* v. *Jackson*, 8 Cowen, 589, especially the opinions of Jones, Chancellor, p. 602, 603; and Spencer, p. 609-611, citing *Jackson* v. *Wheat*, 18 Johns., 44; *Jackson* v. *Newton*, 18 Johns., 355; *Jackson* v. *Woodruff*, 1 Cowen, 286.)

In *Jackson* v. *Newton* (18 Johns., 355), the possession of the defendant was held under a defective deed, a deed without a seal, which, therefore, passed no title, yet was considered adverse, and having continued for twenty years, barred the plaintiff's entry.

Ewing v. *Bennett* (8 Peters, 41) holds that 47*] adverse possession *of twenty-one years under claim or color of title merely void, is a bar to a recovery under an elder title by deed, although the adverse holder may have had notice of the deed. This was the case of an uninclosed lot in Cincinnati.

Harpending v. *The Dutch Church* (16 Peters, 455), held that the title of a devisee, entering under a void devise, may be protected against the heirs by the statute of limitations. (See also *Hudson* v. *Hudson's Adm.*, 6 Munf., 355, and 5 Peters, 354; also *Patton's Lessee* v. *Easton*, 1 Wheat., 479.)

Lastly, shall Dr. Seldon be regarded as having entered as guardian, and therefore holding in subordination to the title of his wards?

This fact is also repudiated by the special verdict, which finds that he entered in his own right; and by the decree of the Court of Chancery, which has rejected all claims against him as guardian.

But if he did enter as guardian, that guardianship has been long since terminated and the accounts finally settled. There is no authority to prove that a guardian will not be protected by the statute of limitations after his guardianship has terminated. On the contrary, Littleton, sec. 124; Co. Litt., 896, 90 *a*; Cro. Car., 229; Cro. Jac., 219; which show that the guardian, whether *de jure* or *de facto*, whether *proprius tutor* or *alienus tutor*, is liable to the action of account on the part of his ward, show necessarily that he is entitled to the protection of the statute, because the action of account is expressly limited by the statute. It was so by the statute of James, and is so by that of Virginia.

So, too, in equity, where the guardian is held to account for rents and profits, the court will lay hold of "any such thing" as a waiver of the account after the infant came of age, to put an end to the claim. (*Morgan* v. *Morgan*, 1 Atkyns, 489.)

Why should not the possession of a former guardian under a claim of right in himself, and a long and notorious application of the profits to his own use, as effectually disseize his former wards, and entitle him to the protection of the statute, as the possession of a tenant in common, joint tenant, or coparcener, denying the right of his co-tenant, and applying the profits to his own use, would disseize his co-tenant, and entitle the disseisor to the protection of the statute of limitations? (See Adams 48*] on Ejectment, 56; *Blanchard on Lim., 9, 1 Law Lib., 5; *Fisher* v. *Prosser*, Cowper, 218; *Doe, dem. Stallings*, v. *Bird*, 11 East, 50.)

The case of *Swann* v. *Selden*, in the Court of Appeals, has decided the very question we are now considering. The opinions of Judges Brockenborough and Cabell, constituting the majority of the court, have held that the statute was a complete bar to all the equitable claims preferred in that cause. The case is not reported, but adduced in manuscript.

The opinion of the court was delivered by *Mr. Justice* McLEAN:

This case is brought before this court, from the Circuit Court of the Eastern District of Virginia, by a writ of error.

An action of ejectment was commenced by the lessors of the plaintiff, to recover possession of certain undivided interests in a tract of land in Loudon County.

On the trial, the jury found a statement of facts, on which the questions of law mainly arise.

Mary Mason Seldon was seized and possessed in fee-simple of certain tracts of land in the County of Loudon, estimated to contain four thousand acres, a part of which is the land in controversy. She intermarried with Mann Page, who died in 1779, leaving his wife and three infant children, John, William Byrd, and Jane Byrd. Mrs. Page continued a widow, seized in her own right, until 1782, when she married Wilson Cary Selden; who in right of his wife entered upon and held the lands. Soon after the marriage, Selden became guardian of the three infant children aforesaid, gave bonds, &c., and continued to act as guardian during the minorities of the two sons, and until the marriage of the daughter.

On the 22d December, 1784, Selden and wife conveyed in fee-simple to Cary Selden, father of the husband, the whole of the four thousand acres of land, with the exception of two thousand acres deeded to W. B. Page. Mrs. Selden was privily examined as the statute requires. This deed was acknowledged and recorded by Selden the 14th April, 1818, long after the decease of the grantee. On the 1st January, 1785, Cary Selden and wife re-conveyed the land, with the exception above stated, to Wilson C. Selden; which deed was also recorded the 14th April, 1818.

Selden and wife, previously to the execution of the above *deed to Cary Selden, made [*49 a deed to William Byrd Page, son of Mrs. Selden by her first marriage, for two thousand acres, part of the above tract of four thousand acres; which deed was never recorded, and cannot now be found. From the time of their marriage, Selden and wife had their permanent dwelling in the County of Gloucester, until they removed to the County of Elizabeth City, where they established their residence. In September, 1787, Mrs. Selden, being in a low state of health, accompanied by her husband on a return from the Springs, was taken extremely ill at Winchester, in Frederick County, Virginia, where she died on the 17th of that month. Two days previous to her death Mrs. Selden, with her husband, executed a second deed to William Byrd Page, for two thousand acres by certain metes and bounds, and also a deed to Doct. Robert Mackay for two thousand acres, being the residue of the four thousand acres in Loudon aforesaid. On the 17th, it being the day of her decease, the privy examination of

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Mrs. Selden was taken to the above deeds, by three justices of the peace of Frederick County, under a commission issued by the clerk of Loudon County. Selden, on the 8th October, 1787, acknowledged the above deeds, and they were ordered to be recorded. On the 17th September aforesaid, and after the decease of Mrs. Selden, Mackay re-conveyed the land conveyed to him as above stated, to Wilson C. Selden. This deed was recorded the 8th October ensuing.

From the time of his marriage to the decease of Mrs. Selden, Selden, in right of his wife, held possession of the premises in controversy. After her death he continued to hold possession, taking the rents, issues, and profits for his own use; claiming the land under the above deed. In 1818, when the legal sufficiency of that deed was questioned, he caused the deeds to and from his father to be recorded, as above stated, and so continued to claim the premises under both deeds, and to exercise acts of ownership over the land until his death, in 1835. Between the years 1796 and 1812, Selden sold, conveyed and delivered possession to different persons, and among others to Thomas Swann, who had intermarried with Jane Byrd Page, various parcels of the land.

In April, 1794, Jane Byrd Page, with the consent of her guardian, she being under twen-[*50] ty-one years of age, married* Thomas Swann; and died the 31st October, 1812, leaving seven infant children, her heirs-at-law. Among others, Mary Scott, one of the lessors of the plaintiff, who, in June, 1818, being under twenty-one years of age, intermarried with John Mercer, one of the lessors of the plaintiff. In 1796, having received from Selden £640, Thomas Swann executed a receipt, fully discharging him as guardian. John Page, the eldest son of Mrs. Selden, died in 1800, having devised all of his estate, real and personal, after the death of his widow, Elizabeth K. Page, to two of the children of his brother William Byrd Page, to wit: William B. Page and Mary M. Page, and to three of the children of his sister, Jane B. Swann, to wit: Edward, Mary, and Thomas, as tenants in common. Edward and Thomas died intestate, and without issue. Mary intermarried, as above stated, with John Mercer.

After John Page, the above testator, had attained full age, on the 21st December, 1792, he settled with Selden, his guardian, and executed to him a release from all demands.

Thomas Swann, surviving his wife, conveyed by deed duly executed all his interest in the premises to his surviving children.

After Wiliam Byrd Page had attained full age he made a claim against Selden, on account of inequality in the partition of the aforesaid four thousand acres of land, which claim was finally adjusted by the payment of one thousand pounds, and the purchase of five hundred acres of his land by Selden. And afterwards, on the 23d July, 1794, Page, having received full satisfaction from Selden as guardian, executed to him a release, &c.

From the death of Wilson Cary Selden up to the present time, the defendant, his son, has held the actual possession of the premises in dispute, claiming the same as his own, under the will of his father.

On the 6th December, 1819, the lessors of the plaintiff claiming as heirs of Mrs. Swann, with others, instituted their suit in the Superior Court of Chancery held at Winchester, against Wilson Cary Selden and others, claiming the lands now in controversy, upon certain defects in the conveyances under which Selden claimed, and upon alleged equities. Answers were filed, and upon the final hearing in October, 1830, a decree was pronounced, whereby the court, "disclaiming jurisdiction of the alleged imperfections in the conveyances aforesaid, but taking jurisdiction *of the matters of equity, [*51 adjudged and decreed that the plaintiffs' bill should be dismissed with costs, but without prejudice to any suit at law which the plaintiffs might be advised to prosecute on account of the alleged legal defects, or want of validity in the said deeds." This decree, on an appeal to the Supreme Court of Appeals, was affirmed the 17th of April, 1837.

This cause has been ably and elaborately argued. Some points have been made and illustrated with great research and ingenuity, which, from the view taken of the case by the court, are not essentially involved in the decision. Among these are the construction of the statutes under which the deed from Selden and wife to Cary Selden, in 1784, was executed and recorded: and also the deed from Selden and wife to Mackay, in 1787.

We will consider the case in reference to the statute of limitations.

The statute of 1785 bars the right of entry, unless suit be brought within twenty years next after the cause of action accrues. The savings are "infancy, coverture, *non compos mentis*, imprisonment, or not being within the commonwealth at the time the right of action accrued." And such persons are barred if they do not bring their action within ten years next after their disabilities shall be removed.

Selden took possession of the premises in controversy, claiming them as his own under the deed from Mackay, in the fall of 1787. Prior to that time, his possession was in right of his wife. Under the deed from Mackay his possession was adverse to the right of the lessors of the plaintiff. He avowed his ownership by placing the deed upon record, by enjoying the profits of the land, and by selling and conveying different parcels of it.

In no sense can he be considered as holding possession, in virtue of his rights as guardian of the heirs of his deceased wife, or as tenant by the courtesy. The right under which he held possession during the life of his wife terminated at her death, there being no issue of the marriage. From this time he possessed and claimed the premises as his own. This was notorious to the public, and especially to the heirs of his wife. John Page, in his lifetime, settled with Selden as guardian, and executed to him a release of all demands. William Byrd Page received from him one thousand pounds, the estimated difference in value between *the [*52 part of the four thousand acres conveyed to him over that which was conveyed to Page. Thomas Swann, the husband of Jane Byrd Page, actually purchased from Selden a part of the land conveyed to him by Mackay. Swann, at the time of the purchase, was a highly respectable lawyer, and not only knew that Selden claimed

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the land adversely, but he recognized the validity of such claim by the purchase.

Until his death in 1835, Selden continued in possession of the premises, and his son, the defendant, still holds the same adversely under his father's will. From these facts it is clear that the lessors of the plaintiff are barred by the statute, unless they shall bring themselves within its exceptions.

The right of action accrued in 1787. At that time Jane Byrd Page, being an infant, was within the exception of the statute, and it is insisted that her marriage with Swann before she was twenty-one years of age, added to her first disability that of coverture.

Mr. Preston, in his Abstracts (2 vol. 339), says: "If the right accrues to a person who is at that time under a disability, the fine will not begin to run against him till he shall be free from disability; and successive disabilities, without any intermission, will continue to him a protection against being barred by non-claim: but any cessation of disability will call the statute into operative force, and no subsequent disabilty will arrest the bar produced by the statute."

The saving in the Virginia statute is the same as that of the 21st of Jac. 1, but it has received in this country a different construction from that stated by Mr. Preston. In *Parsons v. McCracken and wife* (9 Leigh., 495), *Mr. Justice* Parker says, speaking of this statute, "I am of opinion that cumulative disabilities ought not to prevent its operation; and that upon a sound construction of the act, a party claiming the benefit of the proviso can only avail himself of the disability existing when the right of action first accrued; since, otherwise, the assertion of claims might be postponed for the period of the longest life, and possessions disturbed after sixty, eighty, or even a hundred years." In that case, as in the one under consideration, the female in whom the right vested, married before the disability of infancy had ceased.

53*] *In the same case *Mr. Justice* Brockenborough says: "If she married after she became of age, her subsequent coverture was not a disability which would obstruct the operation of the statute: and even if she married while yet an infant, we cannot mount one disability on another so as to prevent a continuous obstruction to its operation." *Mr. Justice* Tucker says: "It is true that Rebecca was an infant, but she came of age in 1824, when her disability ceased; for, notwithstanding some loose opinions to the contrary, she cannot tack the disability of marriage to that of infancy."

The same doctrine was recognized by the Court of Appeals, in the chancery case lately decided in that court, between the parties now before us. The same principle is sanctioned in 2 Hen. & Munf., 306; and in *Eager and wife v. Commonwealth* (4 Mass., 182); *Jackson v. Wheat* (18 Johns., 40); *Demarest v. Wynkoop* (3 Johns. Ch., 129).

Chancellor Kent says, in the last case cited, "I am clearly of opinion, that the party can only avail himself of the disabilities existing when the right of action first accrued." In 1 Plowd., 375, it is laid down that, "if several disabilities exist together at the time the right of action accrues, the statute does not begin to run until the party has survived them all." In *Doe v. Jesson* (6 East, 80), it was held that cumulative disabilities in different persons could not be added.

At the time of her marriage, in April, 1794, Mrs. Swann wanted about three months of being of full age. Of course, in July ensuing, she was of age, from which time the statute began to operate, and in twenty years would have barred her right of entry, had she survived. But her death in 1812 arrested the operation of the statute, and gave her heirs ten years within which to bring their action. The proviso in the statute, after enumerating the exceptions, among which are infancy and coverture, declares that "every such person, and his or her heirs, shall and may, notwithstanding the said twenty years are, or shall be expired, bring and maintain his action, or make his entry, within ten years next after such disabilities removed, or the death of the person so disabled, and not afterwards."

By the settled construction of this proviso, the heir has ten years to bring his action, where his ancestor is not barred. This *time is [*54 given him without reference to the time that has elapsed or the disabilities of his ancestor, if the right of entry has not been tolled.

But it is insisted that the right of entry did not devolve on the heirs of Mrs. Swann at her decease, as her husband became tenant by the courtesy.

In 1 Coke on Litt., 29, ch. 4, sec. 35, it is said: "Tenant by the courtesy of England is, where a man taketh a wife seized in fee-simple, or in fee-tail general, or seized as heir-in-tail special, and hath issue by the same wife, male or female, born alive, albeit the issue after dieth or liveth, yet if the wife dies, the husband shall hold the land during his life, by the laws of England."

"And first, of what seisin a man shall be tenant by the courtesy. There is in law a twofold seisin, viz., a seisin in deed and a seisin in law. And here Littleton intendeth a seisin in deed, if it may be attained unto, as if a man dieth seized of lands in fee-simple, or fee-tail general, and these lands descend to his daughter, and she taketh a husband and hath issue, and dieth before any entry, the husband shall not be tenant by the courtesy; and yet in this case she had a seisin in law; but if she or her husband had during her life entered, he should have been tenant by the courtesy."

The wife at common law was endowable where there had been no actual possession, and the reason is, that during coverture she could not take possession of the lands of her husband. But actual seisin was necessary to enable the husband to claim as tenant by the courtesy. This rule was not inflexible. It yielded to circumstances, as in the case of an advowson, or rent, or where an entry was prevented by force. (Litt., sec. 417, 418.) In like manner, if a man have a title of entry into lands, but does not enter for fear of bodily harm, and he approach as near the land as he dare, and claim the land as his own, he hath presently, by such claim, a possession and seisin in the land, as if he had entered in deed. (Litt., sec. 419.) And, under some circumstances, living within view of the land will give the feoffee a seisin in deed, as fully as if he had made an entry. It has been

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held that the husband may claim as tenant by the courtesy, without entry, wild lands of which his wife was seized, and which were not held adversely. But the general rule of law is, 55*] that *there must be an entry during coverture, to enable the husband to claim by the courtesy.

At no time during the life of Mrs. Swann, does it appear that there was an entry upon the premises in controversy by herself or her husband. On the contrary, it appears the defendant and his ancestor held the land adversely. It is clear, therefore, that Swann could not claim as tenant by the courtesy, and consequently no such right could interpose to prevent the entry of the heirs of his wife. They were bound, without regard to their infancy or other disabilities, to bring their action in ten years from the decease of their ancestor. This results from the fact that the right of action accrued in the lifetime of their ancestor, and the rule of law, which does not admit of cumulative disabilities.

By the same principles, the devisees of John Page, who died in 1800, are also barred. The statute also bars the right of entry in William Byrd Page.

From this view of the case, it can scarcely be necessary to notice the bill of exceptions taken on the trial by the plaintiff. So far as evidence was offered to disprove the consideration named in the deed to Mackay, with the view of rendering it invalid, the evidence was properly rejected. And so far as regards the circumstances which the plaintiff offered to prove, they could have no other, if any effect, than to create a suspicion of unfairness or fraud in the execution of the deed. All matters of fraud and trust arising out of this transaction were considered and decided in the case in equity lately brought before the Court of Appeals of Virginia, by the parties to the present suit. If that jurisdiction were rightfully exercised, it concludes all questions of fraud in this case.

Upon the whole, we affirm the judgment of the Circuit Court.

ORDER.

This cause came on to be heard on the transcript of the record from the Circuit Court of the United States for the Eastern District of Virginia, and was argued by counsel; on consideration whereof, it is now here ordered and adjudged by this court, that the judgment of the said Circuit Court in this cause be, and the same is hereby affirmed with costs.

Cited—7 How., 717; 4 Otto, 779; 12 Otto, 310; 2 Curt., 208, 210; 2 Sawy., 518.

56*] *JOHN BUCHANNON ET AL., *Complainants,*
v.
EDWIN UPSHAW, *Respondent.*

Sale and conveyance of lands by one having no title—subsequent purchase by grantor—action to compel true title—ejectment—injunction—contribution.

(Mr. Chief Justice TANEY did not sit in this cause.)

There were two titles to a tract of land, the senior title held by Upshaw, and the junior by Buckner, both derived from the same person who had sold to both.

Buckner soon afterwards sold to Buchannon, who paid Buckner and took possession.

Upshaw subsequently agreed to ratify the sale from the original holder to Buckner, upon receiving an assignment of Buckner's bond for the purchase money, not yet due, and other securities.

The bond not being paid, Upshaw brought an ejectment and obtained a judgment. Buckner's assignees filed a bill to obtain a perpetual injunction.

There is a privity of contract between them and Upshaw, and a perpetual injunction will be granted upon their fulfilling the obligations of Buckner, their assignor; it was not their duty, under the circumstances, to have tendered the money to Upshaw.

A power in Buckner to resell, and a sale made under that power, prior to Upshaw's giving his assent to the sale from the original holder to Buckner himself, did not extinguish the equitable right of Upshaw to receive the purchase money, or to proceed against the land.

Upshaw's right not destroyed by lapse of time, because he had brought suit on Buckner's bond and the other securities, and was not in a condition for a long time to make a valid title.

Upshaw, being held bound by his assent to the sale to Buckner, is entitled to the advantage which that paper gave him as to the application of part of the purchase money to one purchase in preference to another.

Interest must begin to run from the time when Upshaw asserted his claim to the land, and what is due to Upshaw must be made up by the present holders of the land, each one contributing in proportion to the price which he paid to Buckner.

THIS was an appeal from the Circuit Court of the United States for the District of Ohio, sitting as a court of chancery.

The case was this:

John Buchannon and others filed a bill in the Circuit Court of Ohio against Upshaw, stating that Upshaw had obtained a judgment in an action of ejectment against them, and praying for two things: 1. That he, Upshaw, might be perpetually enjoined from proceeding in execution upon said judgment; and, 2. That he might be compelled to convey by deed in fee-simple, the land *which had been the [*57 subject of the suit in ejectment. The Circuit Court, after various proceedings, decreed that the injunction which had been temporarily granted, restraining Upshaw from suing out executions upon his judgment in ejectment, should be dissolved; that the bill should be dismissed, and that Buchannon and others should pay to Upshaw a certain sum of money for the rents and profits, after deducting the value of the improvements made upon the land. From this decree an appeal was taken to this court.

On the 11th of December, 1789, Beverly Roy obtained from the Commonwealth of Virginia a patent for one thousand acres of land in the Virginia military district of Ohio, and within Clermont County. He sold three hundred acres of this tract to one Buchannon, and contracted to convey the remaining seven hundred (the land in controversy in the present suit) to Lyne Shackleford.

On the 10th April, 1797, Shackleford sold this tract of seven hundred acres to Upshaw, the defendant in the present appeal; but not having the legal title in himself at that time, he procured it to be made directly from Roy

NOTE.—*As to damages for breach of contract of sale of lands*, see note to Hopkins v. Lee, 6 Wheat., 109.

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to Upshaw, without passing through himself. On the 20th of July, 1797, Roy accordingly executed a conveyance to Upshaw for these seven hundred acres, and also a bond for further assurance.

On the 16th November, 1797, Shackleford, being thus destitute of the legal title, nevertheless sold to Philip Buckner the same tract of seven hundred acres which he had previously sold to Upshaw. It was alleged in the bill that this sale was made with Upshaw's consent, but no evidence of it was furnished, except that in the contract of 1801 his consent is stated to be given at sometime prior to 1801. At the same time, Shackleford sold also to Buckner another tract of one thousand acres. The price for both tracts was £1,020, without saying what was the sum for each tract. No part of it was to be paid in cash. A bond of Anderson for £900 held by Buckner was assigned to Shackleford; a claim against Coats for £250 was also assigned over; and for the balance Shackleford agreed to wait until Buckner sold the one thousand seven hundred acres, provided he sold it prior to January, 1799; if not, payment to be then made, or sooner if Buckner should sell.

In 1798 and 1799, Buckner sold to the com-
58*] plainants, or to those *under whom they claim, in several parcels, the whole of the seven hundred acres in question, who paid him in full therefor, received conveyances, and entered into possession.

On the 18th of April, 1801, Upshaw, having made some payments to Shackleford, entered into a new contract with him, which was indorsed on the original one, stating "that since the date of the within, Shackleford had, with the consent of Upshaw, sold the seven hundred acres of land to Buckner for £420, which sum is still due;" and it was agreed that Shackleford should assign Buckner's contract to Upshaw, who was to make a deed as soon as the money should be paid. But if, upon application, Buckner did not pay the said sum of money and interest. Upshaw was immediately to take proper steps to have the land sold to raise the money and interest.

On the 16th of May, 1803, Shackleford assigned to Upshaw the contract between Shackleford and Buckner, and authorized Upshaw to receive from Buckner the balance due on the same, amounting on that day to £530 9s., having previously assigned the claim upon Coats's bond, and an order which Buckner had given upon one Copland, the attorney who was charged with its collection. The result of that claim may be stated in a few words. Suit was brought in the Circuit Court of the United States at Richmond, by John Marshall, in 1798, against Coats: there was a judgment, a *ca. sa.*, another *ca. sa.*; and, finally, it got into chancery against Coats's widow and children. The plaintiff at last gave it up in 1820.

Upshaw made more than one effort to obtain the money from Buckner, which was due under the contract assigned by Shackleford. In April, 1804, he empowered John H. Upshaw, who was going to Kentucky, to receive from Buckner the sum due on his contract; and, on the payment of the money, the agent was authorized to make a deed.

The agent called on Buckner, who expressed much anxiety to comply with his contract, and induced the agent to remain some days, in the hope of raising the money. But he failed to pay any part of it. The agent, after authorizing John O'Bannon to receive the money from Buckner, and make him a deed, returned to Virginia.

Upshaw drew an order on John O'Bannon in April, 1807, for *the money, which [*59 was returned protested for non-acceptance. O'Bannon shortly after this died, and in the year 1813, or 1814, Upshaw obtained from his representatives the assigned contract of Buckner, which had been left with him, and on which was indorsed a credit for $100 on the 10th April, 1805, and another for the same amount, 18th April, 1806. On obtaining the contract, Upshaw caused an action to be brought on it against Buckner for the money. The suit being brought in the name of Upshaw, as asignee of Shackleford, there was a demurrer to the declaration; and at the May Term, 1815, the Circuit Court of the United States for Kentucky sustained the demurrer, and the action failed.

Shortly after this, Upshaw commenced an action of ejectment, in the Circuit Court of the United States for the District of Ohio, against Buchannon and others, who occupied the land, to recover possession of it, which, at May Term, 1816, failed, on the ground that the patent emanated from the State of Virginia, subsequently to the deed of cession from Virginia to the United States; and of course Upshaw was only invested with the equitable title to the land.

In August, 1817, Roy and wife executed another deed to Upshaw for the land, in compliance with the covenant for further assurance, which he had entered into in 1797.

Some short time prior to December, 1820, Buckner died. His will, made in February, 1817, contains bequests of real estate and some small legacies of personalty. The executor filed two accounts, one in 1822, and the other in 1823, the latter showing a balance in the hands of the executor of $50.18. It does not appear that any of his real estate was required to be sold to pay debts.

In 1826, Upshaw obtained from the United States a patent for the seven hundred acres.

In 1829, he brought another ejectment, in the Circuit Court of the United States for the District of Ohio, against Buchannon and others, occupiers of the land, and having now a patent from the United States, succeeded in obtaining judgment; upon which, Buchannon and others filed a bill upon the equity side of the same court, and obtained an injunction to stay proceedings. This is the bill mentioned in the commencement of this narrative, *which, [*60 upon hearing, was dismissed by the Circuit Court, and the injunction dissolved; and the case now came up by an appeal from that decree.

The proceedings in this case were diversified in its history, by two collateral chancery suits, one by John H. Upshaw against E. Upshaw, and another by E. Upshaw against Chamberlayne, the executor of Shackleford; but as the decision of this case does not rest upon any of the facts or principles disclosed in them, they are not further noticed.

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Mr. Stanberry and *Mr. Leonard*, for the appellants:

I. Roy, the original owner of the equitable title to the seven hundred acres, sold the land to Shackleford. Shackleford, on the 10th April, 1797, sold the land to Upshaw by title-bond, covenanting to make a deed. Afterwards, on the 16th July, 1797, Shackleford again sold the land to Buckner, by title-bond, received a part of the purchase money, and agreed to wait for the residue until the money could be raised by a resale by Buckner.

In this state of facts the equity to be then administered between the then parties was obvious. Upshaw, as the first purchaser of the equitable title, was to be preferred to Buckner, although he may have purchased from Shackleford without notice.

The rule *prior in tempore, potior in jure*, would then have applied, for there was no laches, acquiescence, or fraud chargeable to Upshaw.

Next in order was the resale by Buckner to the complainants, the payment in full to Buckner, execution of deeds by Buckner to the purchasers, and the taking possession of the lands by the purchasers.

Notwithstanding all this, at that point of time, so far as any fact is yet developed, Upshaw's equity was the best. He stood then upon his first purchase of this equity. The subsequent sale by Shackleford to Buckner was in fraud of his title, and he had given no authority for such subsequent sale, and stood wholly unaffected by it.

But after all this, on the 18th April, 1801, Upshaw enters into communication with Shackleford, the fraudulent vendor, and they enter into an agreement under seal, in which **61*]** it is recited, that the *sale made by Shackleford to Buckner had been made with Upshaw's consent; they cancel the prior agreement which witnessed the first sale from Shackleford to Upshaw; and Shackleford agrees to assign to Upshaw the contract with Buckner, and to authorize him to receive the money due from Buckner; that is, the £420, with interest at 5 per cent.

In conformity with this arrangement, on the 7th May, 1803, Shackleford delivered to Upshaw, Buckner's order on Copeland for the Coats money; and on the 16th of the same month assigns to Upshaw the contract with Buckner; and on the 17th of the same month, Upshaw releases Shackleford from the contract in which he had made the first sale to Upshaw.

After all this, there remains no question between different equities. The prior equitable title of Upshaw was extinguished. He could no longer assert his prior equitable title as superior to that of Buckner, but must stand in the shoes of Shackleford, and recognize the equity of Buckner. The bill alleges that Shackleford made the second sale to Buckner with Upshaw's consent. Upshaw denies any prior consent, but says he assented to it qualifiedly afterwards. I do not know that it makes much difference, as to the extinguishment of his prior equitable title, whether the assent was prior or subsequent to the second sale; but as the proof stands, the prior consent is established beyond all denial. He has acknowledged under his seal, that Shackleford had made the sale with his consent, and that stops him from saying the contrary.

And again, if the consent to the second sale, whether prior or subsequent, did not extinguish Upshaw's prior equity, it is extinguished by express release in the agreement between himself and Shackleford of the 17th May, 1803.

Upshaw, therefore, must stand upon the contract between Shackleford and Buckner. He must stand as the assignee of the vendor to Buckner.

Let us now examine that contract, and ascertain what interest passed by it to Buckner, or upon a resale by him to these complainants, and what interest remained in the vendor.

At the date of this contract, the legal title to this seven hundred acres was in the United States. A patent had been granted for it by the State of Virginia to Roy, the warrantee, but it *was wholly inoperative, being [***62** made years after the deed of cession.

The subject matter of sale was, therefore, an equitable interest in land. This interest passed effectually to Buckner by a written contract, sufficient to satisfy the statute of frauds; and this, notwithstanding the purchase money was not paid. (*Hampson* v. *Edelen*, 2 Harr. & Johns., 64.) It passed in the same manner upon the sale by Buckner to the complainants.

What remained in the vendor, Shackleford, or in Upshaw, his assignee? No title, no interest in the land. If anything remained, it was simply a lien for the unpaid purchase money, as against Buckner, while the land remained unsold by him.

Twenty-nine years after this sale to Buckner, Upshaw, pretending to be the owner of this equitable title, obtained a patent from the United States. If he had, at the time he so procured the patent, no title to the land, and no lien upon it for the purchase money, the consequence is irresistible that he holds it as trustee for the real owner.

I have shown he had no title to the land. Let us now inquire if he had a lien upon it.

The lien of the vendor for his unpaid purchase money arises as well upon the sale of an equitable interest as upon a conveyance of the legal title. It is a creature of equity raised between the immediate parties to the contract, and sustained only against subsequent purchasers when affected with notice of it.

There is no other lien or charge upon an estate so shadowy and so little obvious as this lien of the vendor. It is never to be found of record; it does not depend upon possession of the estate or the muniments of the title. It is not sustained by any matter of constructive notice, but only exists as to third persons fixed with actual notice.

The essence of this lien is that the vendor looks to the land alone for the money, or the land and the purchaser.

If he takes collateral security, such as the note of a third person, or if he takes simply a mortgage on the land for only a part of the purchase money, or if he does any other act manifestative of an intention to look primarily to any other fund than the land, *the lien [***63** never arises. Or when the lien has first attached, if he assigns the note of the vendee, or if he is guilty of laches, the lien is gone.

We claim no lien ever existed upon this

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land in favor of Shackleford, or Upshaw, his assignee.

1. Because the contract of sale looks to a resale, and to the fund arising upon such resale, as the fund for payment, and does not look to the land.

Shackleford agrees to wait for the unpaid purchase money until Buckner should sell the land. The moment the land is sold the purchase money becomes due; but, if it is not sold, the purchase money does not become payable until fourteen months after the date of the contract.

Whenever the contract contains such consent to a resale, and looks to the fund to be produced on a re-sale, there is no lien on the land. (Sugd. Vend., 552; *Ex-parte Parker*, Glyn & Jam., 228; *Coad* v. *Pollard*, 9 Price, 544; 10 Price, 109.)

We do not pretend that Buckner was the agent of Shackleford in making the resale, and that, therefore, payment to him was payment to his principal. We do not put this as a case between principal and attorney. The simple question is, after such a contract, after such an agreement, after a sale to a third person, and payment in full by that third person, can the vendor say to the new purchaser, "You have paid your immediate vendor just as I agreed you should, and I took his covenant. I relied upon his faith to pay me the money; but he has not done so, and I now require that the loss shall fall upon you and not upon me, and that you shall now pay me again for the same land which I consented you should first pay for to another!"

Now, putting the case in the strongest light for Upshaw, placing him in the situation of a vendor, not the mere assignee of the vendor, investing him with a legal title retained upon the sale to Buckner, yet, is it not clear that a court of equity would compel him at once to convey that legal title to the second vendee, who had fully paid his purchase money?

Whenever the holder of a legal title encourages a purchaser to deal with another for his estate, or invests another person with the means of imposing upon others as the true owner, or is silent when a purchaser is dealing with an-
64*] other for his estate, a court *of equity will never allow him afterwards to assert that legal title against the purchaser.

In a court of equity, when the conscience of the party is not affected, the holding of the legal title is everything. A satisfied mortgage, an outstanding term, a deed surreptitiously obtained, are equally available; but, where in reference to third persons the conduct of the holder of the legal title has been such as that it would be inequitable to assert it against the holder of the equitable title, then a legal title is no protection. (1 P. Williams, 393; 3 Russel, 1; Sugd. Vend., 728; Finch's Rep., 28.)

It is said the complainants were bound to know what sort of title Buckner had, that they must be taken to know that he held only by contract and had not paid his vendor.

Take it as granted, and suppose them to have had notice of the very article under which Buckner held, and what then? What is the language there held by Shackleford? "I consent that, in order to raise a fund to pay me what is yet due, you may sell this land to others; they are to pay for the land to you, not to me, and you are to pay it to me. I look, not to the land, but to the fund which is to come in place of the land, and I trust you to receive and pay it over to me. I give you fourteen months to pay the money, if you do not sooner sell the land; but the moment you sell it, if it be to-morrow, you are to take the money you receive and out of it pay me my debt."

We say, therefore, because of this clause of resale, there was no lien on the land.

II. Lien lost by laches.

But, if there was a lien for the purchase money after the sale to the complainants, we next claim that it was lost long ago by laches of Upshaw.

We have shown that Upshaw stood, not as vendor, but simply as his assignee of the debt due for the purchase money. He was once connected with this land as a purchaser; but we have shown that he released the interest so acquired to Shackleford, and agreed to take a certain sum of money instead of the land. He had, therefore, in fact, only a money claim. The land was never his, nor intended to become his.

We take it as granted, in this view of the case, that he might look to the land as security or means of payment, but he had *other [*65 security, the money due from Coats for a part, and the responsibility of Buckner for the whole. Time and laches would bar him of all these securities. The debt was the principal thing, the lien on the land the mere incident. Time would bar the debt. It would be most singular that after a lapse of thirty years we should find not only this debt yet valid, but the mere collateral lien which attended it also in full vigor. It would require sleepless vigilance to bring that about. Instead of this, there has been, so far at least as the lien is concerned, the most culpable negligence.

The Coats bond covered only part of the debt, £250 out of £420; for the difference, £170, Upshaw could look only to Buckner or the land. Nothing appears to show that any step was taken by Upshaw on the Coats claim. A suit had been brought upon it in 1798, three years before he became the assignee of Shackleford. Judgment was rendered on it in 1800, and the writ of *ca. sa.* had been in that year returned, not found. The original suit had been commenced by *capias*, bail given, but no suit appears even to have been brought on the bail-bond. An *alias ca. sa.* in 1801, never returned, is the last step taken upon the judgment. For the nine succeeding years no step is taken. On the 4th January, 1809, Buckner takes the matter in hand, and gives a power of attorney to Marshall to collect the money from Coats. In 1810, a bill is filed, in Buckner's name, against Coats's representatives, to set aside a fraudulent settlement, which is continued for ten years, and then dismissed upon the default of the plaintiff, December, 1820.

There is no evidence of the slightest action of Upshaw in these proceedings, nor is anything of the sort stated in the answer. The only statement in the answer is, that the suit against Coats "was diligently prosecuted." It is not said by whom. We have seen, however, how diligently.

Then as to the claim on Buckner. The steps taken by Buckner are the following:

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In April, 1804 (three years after the assignment from Shackleford), Upshaw sent by John H. Upshaw to demand the money. It was not paid, and the claim was put by John H. Upshaw in the hand of O'Bannon for collection, who received $200 from Buckner, but did nothing more.

66*] *In December, 1805, Upshaw assigned £500 of the Buckner debt to John H. Upshaw, and gave him an order on O'Bannon, April 1, 1807, to receive the money if collected. This order was protested for nonpayment. Nothing further is done for seven years; until February, 1814, when Upshaw commences a suit, in his own name, against Buckner, on the Shackleford contract. Buckner demurred to declaration, on the ground that the action should have been brought in Shackleford's name, and the demurrer was sustained, and judgment upon it against Upshaw at May Term, 1815. This was the end of all vigilance as to Buckner, who lived until 1820, and then died possessed of large real and personal estate. His estate has since been settled, and it appears it was not necessary to sell his real estate to pay his debts.

This is the sum total of vigilance as to Coats and Buckner, showing the most tardy proceedings, and those defeated by the gross ignorance of Upshaw's agents.

Now, it would be strange if all this delay has not wholly defeated all prospect of a recovery, of either the Coats claim or the debt against Buckner. In all probability the Kentucky statute has long since barred an action in favor of Shackleford or Buckner; or, if there be no limitation in that State as to specialty debts, as we believe it is the case, the presumption of payment is conclusive. And the Virginia statute has barred the action against Coats's bail, or against the sheriff for failing to return the last *ca. sa.* Or, if there was no bar by limitation or presumption, the assets of Coats and Buckner are beyond the reach of their creditors. One has been dead nearly forty years, the other (Buckner) twenty-two years.

With what conscience can Upshaw, after all this delay and loss, seek to make these purchasers from Buckner again pay for their lands? If he had come forward in good time, they undoubtedly might have re-imbursed themselves, by action against Buckner, either upon the covenants in his deed or (by subrogation) on the contract with Shackleford; but as it is, his negligence has put that beyond reasonable probability.

But if Upshaw had been vigilant against Coats and Buckner, it is no excuse for his laches as against these complainants. He did know, as early as 1799, that these complainants were in possession of these lands, claiming and 67*] improving them as their own. *Now, in 1815 he was pursuing Buckner for the money; and up to 1820 the suit in chancery was going forward as to the Coats claim. He still considered the contract as open, and never makes any demand of these complainants. In 1818 he seeks to turn them out of posession by an action of ejectment. He does not ask them for the money. He does not exhibit his right to receive it; but demands their land, and when he comes to show his right to that, he exhibits nothing but a void patent.

He then lies by for eight years, until 1826, and obtains a patent from the United States by means of his deed from Roy, the warrantee, which deed was obtained in confirmation of a contract which he had released and rescinded; and at last in 1829, after these complainants had been in peaceable possession, to his knowledge, for thirty years, he brings his last ejectment, and seeks to turn them off the land.

Now, so far as his right to make these complainants pay him Buckner's debt is concerned, there has been no demand for thirty years, and in the mean time, in consequence of his laches, these complainants have lost all chance of indemnity from Buckner.

Such laches will bar not only a mere equitable lien for purchase money, which is the most that Upshaw ever had, but in equity it would bar a legal title, especially one obtained from a mere trustee, under circumstances like the present.

The rule *prior in tempore* does not apply where the holder of the first equity is guilty of laches. (Sug. Vend., 728, 729.)

We claim, therefore, that Upshaw is not entitled to demand the Buckner debt from the complainants. If he is entitled to any relief against the complainants, it is only to that. But the decree of the Circuit Court goes quite beyond that, and gives him the land itself, and, in addition, a sum of money for rents and profits larger than the Buckner debt, principal and interest!

This part of the decree proceeds upon the idea that he sold this land—that he stands as vendor—his purchase money unpaid—guilty of no laches; and that these complainants, as purchasers, have refused to pay him their purchase money, or have wrongfully delayed it so long, that he can rescind it, and take back his land. I have already shown the gross laches on his part, so gross, that if he was the immediate vendor of the complainants, *and [68 they had agreed to pay him the purchase money, he could not recover it, but it would long ago have been barred, or presumed to be paid.

But the complainants, what have they done to lose their land to Upshaw?

He is not their vendor. He is (as has been shown) the mere assignee of a debt, never looking to this land but as a means of securing its payment. He has never demanded payment of them. With full knowledge, he allowed them to go on for thirty years, wasting the best of their lives in reclaiming this land from the wilderness. They have been guilty of no laches—of no bad faith. They say in their bill that they were in total ignorance of his claim, or of any defect in their title, until he recovered against them in the last ejectment; and all this Upshaw admits in his answer. They never refused to pay the Buckner debt, for it was never demanded of them.

And if they had refused, that refusal would not have prejudiced them; but they still would have saved their land, by application to equity. That debt was not of their contracting. It was *res inter alios.* They had a right to have it fully sifted in this court. No one can doubt this.

Again. If it were the case of vendor and vendee, before the vendor can count time and laches against the vendee, and go for a rescission, he must show himself ready and able to

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comply with his contract. (*Wilson* v. *Tappan*, 6 O. Rep., 175.)

Upshaw could not demand either money or land, until 1826, for he could never before that day make a title. And up to this moment he cannot perform that very contract, with which he is connected as assignee—the contract between Shackleford and Buckner. If these complainants are to pay the purchase money for Buckner, they can only be asked to do so upon having the benefit of that contract and a performance from the other party. Shackleford stipulates to make Buckner a warrantee deed, and that deed Upshaw has not yet produced. If Shackleford is dead, we must have such a deed from his representatives as binds his estate. Upshaw's deed will not satisfy the contract. We do not know what he may have done to encumber the title, or how safe we would be with his warantee. We are not bound to take it as of course.

69*] *Further, before Upshaw could rescind the contract and take the land, he must place us, as Buckner's assignees, in *statu quo*. He must give us the claim on Coats; he must transfer to us the claim on Buckner; and he must pay back to us the money he received from Buckner.

Lastly. The contract for the one thousand seven hundred acres is one; it must be rescinded *in toto*, or not at all; and as to the one thousand acres it can never be rescinded, for that part of it is performed.

III. If the court require the complainants to pay the Buckner debt, a question arises, whether a *pro rata* allowance be made for the £600 paid by the Anderson bond.

It is clearly right to allow that credit. Shackleford sold to Buckner two tracts as one, for an entire consideration of £1,020. The contract speaks of the two tracts; that is, the tract of one thousand acres, and of seven hundred acres, "as the one thousand seven hundred acres." There is no price fixed for one as distinct from the other; the sale is *in solido*. The £600 is paid and indorsed generally upon the contract. No application was made to one of the tracts by the parties at the time of the payment. Indeed, without the concurrence of both the parties, such special application could not be made. The contract did not admit it, for here was no case of two debts, or of two tracts of land, with distinct sums due for each. There was but one debt, due for two tracts of land, sold as one.

IV. As to the rents and profits and improvements.

If the court are of opinion that Upshaw is entitled to the land, the remaining question is upon that part of the decree of the Circuit Court which touches the allowance to be made to Upshaw for rents, and to the complainants for improvements.

The decree gives to the complainants their improvements made up to the year 1818, without interest; and to Upshaw the annual rents and interest from 1818 to 1840, by which, in addition to the land, now worth from $15,000 to $30,000, Upshaw recovers a decree against the complainants for $4,762.30, being a little more than the balance due upon the Buckner debt!

We claim the true rule to be, to allow improvements up to the time of bringing the ejectment upon which the land was recovered, and to charge rents from that time.

*This is according to the rule fixed by [*70 the occupying claimant law of Ohio.

It is said that law does not apply to this case, as the title of the complainants is not adverse to that of Upshaw.

It is shown that the complainants took the possession under a claim of the fee, having paid their vendor in full, and taken a conveyance in fee. They did not hold in subordination to any one. Their possession was therefore adverse. (*Jackson* v. *Ellis*, 13 Johns., 118.) The occupying claimant law, therefore, furnishes a rule of adjustment which this court will follow. (*Bank of Hamilton* v. *Dudley's Lessee*, 2 Peters, 526.)

Messrs. Morehead and *Cox* argued for the appellee upon the following grounds:

The appellants have not sustained by proof the material allegations in their bill.

1. The appellants in their bill charge that Shackleford was authorized by the appellee to sell the land to Buckner; the answer negatives the allegation, and there is no proof contradicting the answer.

2. The appellee, however, admits that in 1800 he gave his conditional assent to that sale; and if the condition had been complied with on the part of Buckner, his assent would in equity be construed as having relation back to the time of Shackleford's contract with Buckner, and have bound him to convey the land. The conditions on which his assent to that contract was obtained are, Shackleford agreed to assign him the contract made with Buckner, and give him full power and authority to receive from Buckner the £420 then due for the land, with interest thereon, at the rate of 5 per cent. per annum, from the 1st day of December, 1797, till paid, and Buckner was to pay him the money thus due; and, on those conditions being complied with, the appellee assented to the sale, and bound himself to convey the land to Buckner.

3. The conditions on the agreement to perform which the assent of the appellee was obtained, as aforesaid, so far as the same were to have been performed by Shackleford, were never performed by him until the 16th of May, 1803. Until those conditions were performed by Shackleford, the appellee had no power or *authority to apply to either Buckner or [*71 Coats for payment, or to receive and receipt for the purchase money, if the same had been tendered to him. The written order on Copeland, which Buckner gave to Shackleford, to which we have already referred, was never transferred by Shackleford to the appellee; so that the appellee never had anything to do with the collection of Coats's bond, or any authority to receive the money due thereon, had it been collected.

4. That part of the condition, namely, the payment of the £420, with interest, &c., which was to have been performed by Buckner, has never been performed, either by him or by any other person for him. The payments credited on the contract between Shackleford and Buckner, while the same remained in possession of O'Bannon, were never received by the appellee. O'Bannon had no authority from the appellee to receive from Buckner partial payments on the contract. His authority was limited and confined to the receipt of the en-

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tire sum due and the delivery of the deed. The allegation in the appellant's bill, that O'Bannon was duly authorized by John H. Upshaw, whom they charge was invested with power of substitution, to receive from Buckner partial payments on said contract, is positively denied by the appellee in his answer, and that denial is fully sustained by the depositions of John H. Upshaw and the receipt given by him to the appellee, for the said original contract left with O'Bannon, and power of attorney dated April 4, 1804, to which the court is respectfully referred. From that denial, and those depositions and receipts, we draw the conclusions: 1st. That the appellee executed a deed to Buckner, as an escrow, and placed the same in the hands of his agent, John H. Upshaw, for the purpose of being delivered to Buckner upon the receipt from him of the £530 9*s.*, the purchase money then due on the land. 2d. That, for the purpose of avoiding any difficulty with Buckner respecting the conveyance of said land, the appellee empowered his said agent, on the receipt of the said purchase money, to execute to Buckner such other or further conveyance or assurance as might be deemed necessary, in order to invest in Buckner a perfect title. 3d. That said agent was not empowered to receive partial payments on said contract, but was limited and confined to the receipt of the entire sum due. The words 72*] in the *power referred to in the said receipt are, "and to receive of said Buckner the sum of five hundred and thirty pounds," &c., "for the above land." The appellee was willing to confirm the contract upon being paid the entire sum due, but not otherwise. He was not, by the receipt of partial payments, willing to extend the time of payment of the residue to an indefinite period. 4th. That said agent was not, by his principal, invested with power of substitution. This is inferable from the fact that no such power is referred to in the receipt which he gave to his principal. 5th. That the power given to said agent by his principal does not contain, as charged in the appellant's bill, a clause authorizing him to receive any balance that might be due on said contract, if any was due. 6th. That the power given by said agent to O'Bannon was not greater than said agent himself possessed; for said agent deposes and says, "I certainly did not consider myself authorized to tender Buckner a title until the money was paid, and I certainly did not give to O'Bannon a power greater than the one possessed by myself." And, 7th. That O'Bannon was not the attorney of the appellee for the purposes charged in the appellant's bill. If these conclusions are sustained by the premises, it results that O'Bannon had no power derived from the appellee to receive partial payments on the contract, and that the credits indorsed on said contract by him must be laid out of the case. The *onus* of sustaining O'Bannon's authority to receive partial payments rests with the appellants, and they have totally failed in proving the truth of their allegation. The credits indorsed on the contract refer to receipts given to Buckner. The appellants claim under Buckner; why, then, if those payments were made on said contract by the authority of the appellee, do not the appellants produce those receipts, and the authority granted to O'Bannon, authorizing him to receive those partial payments? The appellants have presented no valid excuse for their nonproduction; and the very fact of keeping back those documents, if such really exist, raises a suspicion that all was not right, and that, if they were produced, they would prove the allegations in their bill to be untrue. The two payments indorsed without the authority of the appellee must, therefore, we respectfully submit, be laid out of the case.

The £600, the proceeds of Anderson's bond, was applied in *payment of the money [*73 due by Buckner to Shackleford on the one thousand acres of land surveyed for Javin Miller, and which was sold by the latter to the former, as aforesaid, and no part of that sum was applied in payment of the lands in question. This position is sustained from the following facts and circumstances:

1st. Shackleford, at the time he contracted with Buckner, was invested with the equitable title to this one thousand acres, but he was not invested with either the equitable or legal title to the seven hundred acres of land in question, and it is therefore reasonable to infer that he applied that sum to the payment of the debt due to himself.

3d. £600 was the precise sum which was to be paid by Buckner to Shackleford for that one thousand acres of land.

3d. In 1803, Shackleford procured Chamberlayne, the patentee of said one thousand acres of land, to execute a deed of conveyance for the same to Buckner, and the said deed and the patent which Chamberlayne had obtained for the land were afterwards transmitted to Buckner, by the hands of the appellee or his agent, John H. Upshaw. Would Shackleford have done that if any portion of the purchase money still remained due to him by Buckner?

4th. When Shackleford, in 1800, first informed the appellee that he had sold to Buckner the seven hundred acres of land in question, and agreed to assign to him the contract he had made with Buckner, he stipulated with him that the entire purchase money was still due for the land by Buckner.

5th. When Shackleford, in 1803, assigned to the appellee the contract he had made with Buckner (for the sale to him of the lands in question), he covenanted with the appellee that there was then due by Buckner, on said contract, the sum of £530 9*s.*

6th. When John H. Upshaw, as agent of the appellee, afterwards called upon Buckner for payment, he acknowledged that the entire sum was due, and promised to make payment in some short time, if said agent would wait. The said agent did wait, as requested, but no payments were made to him by Buckner.

We therefore assume it as an indisputable fact, that no part of the purchase money for the lands in question was ever paid by Buckner, either to Shackleford or to the appellee, or to any other person authorized by the appellee to receive and receipt for the *same. No [*74 money was ever collected, either by Shackleford or the appellee, on Coats's bond. The defense successfully made by Buckner in the Circuit Court of Kentucky to the action brought by the appellee, as assignee, to recover the purchase money due on the land, evinced a determination on his part not to perform the

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contract he had made with Shackleford, and, by that unequivocal act, the appellee had a right to declare the contract at an end, and no further obligatory on him; and he did so declare it, and immediately thereafter commenced an action of ejectment in the seventh Circuit Court of the United States, District of Ohio, against the tenants in possession, who claimed to have derived their title under Buckner. To that action, the appellants, or the persons under whom they claim, were admitted as defendants, and, on trial, a verdict and judgment were rendered in their favor, on the ground that the appellee, who was the lessor of the plaintiff, was only invested with the equitable title under and in virtue of the deed to him from Roy, which was based on a patent granted to him by the Commonwealth of Virginia, which bore date subsequent to the date of the deed of cession from Virginia to the United States. Being thus defeated in every attempt made by him, first, to recover the money for which the land had been sold by Shackleford to Buckner, and, second, to recover possession of the land itself, the appellee procured from Roy and wife a second deed of conveyance, and, in 1826, obtained from the United States a patent for the land, on which he instituted an action of ejectment against the appellants, and obtained a verdict and judgment of eviction against them; and in order to obtain a perpetual injunction against further proceedings on that judgment, and to compel a conveyence of the lands in question, the appellant filed the bill under which the decree complained of was rendered.

4. And the question here occurs, were this a suit prosecuted by Buckner or his legal representatives against the appellee, in order to compel the specific execution of the contract entered into between Shackleford and Buckner, for the sale and conveyance of the lands in question, would this court grant the relief asked? Buckner has neither paid nor tendered payment of the purchase money. Would this court, then, decree in his favor? Is it not a rule in equity, that where the party to a contract not only neg- [*75 lects *to perform it, but, by his conduct, evinces a determination not to perform it, that the opposite party is at liberty to put an end to it; and that where the purchaser neglects for an unreasonable length of time, although often requested, to pay the purchase money, and in the mean time, as in the present case, the land has increased in value tenfold, that a court of equity will not interpose in his behalf, by compelling the specific execution of the contract? If Buckner had made prompt payment, the appellee could readily have invested the avails of the sale in other western lands, which, at this day, would have been worth thousands of dollars more than the lands in question, with all the improvements which have been made on the lands by the appellants, and have avoided the trouble and expense of many long and wearisome journeys, and the expenditure of thousand of dollars in ineffectual attempts to recover his just rights. Is it not also a rule in equity, that he who asks must himself do equity to him against whom he asks it; and that he who claims the aid of a court of equity must show that he has not only been at all times ready, willing, anxious, and eager to perform the stipulations on his part, but that he has either actually performed or tendered performance on his part, and that the opposite party refused compliance on his part? These principles are so well understood, and have so often received the sanction of this court, that we do not deem it necessary to cite authorities in support of them. We therefore respectfully submit, that were Buckner or his heirs the parties complainant in this suit, that a specific execution of the contract in question would not be decreed by this honorable court.

6. Do the appellants, as against the appellee, stand upon more favorable ground in a court of equity than Buckner or his representative would have stood? No consideration ever moved from the appellants to the appellee as an inducement to the conveyances asked; they never tendered, nor do they, in their bill, offer to pay the consideration money contracted to be paid by Buckner. They were not parties to the contract made by Shackleford with Buckner, and consequently no privity of contracts exists between them and the appellee. Upon what ground or principle, then, are the appellants, as against the appellee, entitled to the relief prayed for in their bill? Upon the ground of privity of *contract, they are not en- [*76 titled to relief, because such privity existed. The appellants have, however, invoked the benefit of the contract between Shackleford and Buckner, which has been assigned to the appellee; but can that contract, if it were admitted they are entitled to its benefit, aid them? The terms of that contract were never performed by Buckner. If they are entitled to the aid of that contract, it must be on the ground, that in equity, though not at law, they must be considered as Buckner's assignees, and consequently, in reference to that contract, as standing in his shoes; and with reference to the appellee, as subject to the same equity to which it was subject in the hands of Buckner. As the assignees of Buckner, they acquired no better title in equity than was vested in Buckner at the time of the assignment. If, therefore, Buckner could not in equity compel the specific execution of the contract in question, neither can the appellants compel it. The assignee of a contract for the sale and conveyance of land, where he himself has neither performed nor tendered performance, must abide the fate which awaited the assignor, where he neither fulfilled nor offered to fulfil the terms of the contracts, the specific execution of which is sought. In *Stanley* v. *Gadsby* (10 Peters, 522), this court is reported to have said, "If a complainant does not aver in his bill his readiness to pay both principal and interest, he can have no standing in a court of equity." The payment or tender of the purchase money is indispensable on the part of him who asks the specific execution of a contract. (*Stratford* v. *Alborough*, Ridgeway's Ch. R., and 2 Bligh's R., 596, 4.) Again: both Buckner and the appellants have trifled with the appellee; and it seems to be a settled rule in equity, that where one party to an agreement trifles, and shows a backwardness to perform on his part, equity will not decree a specific performance in his favor. (*Harrington* v. *Wheeler*, 11 Ves., 856.) In the case of *Edwards* v. *Parker*, lately pending in Brown County, Ohio, which was a bill to enforce the specific execution of a contract, the Supreme

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Court of the State refused to decree in favor of the complainant, on account of the lapse of time since the contract should have been complied with. (*S. P. Mayo* v. *Deschamps*, 13 Ves., 25; *Grant* v. *Humphrey*, 8 Ves., 815; and *Highby* v. *Whittaker*, 8 Ohio, 201.) In this last case the purchaser of the land delayed payment of 77*] *the principal part of the purchase money for about ten years after it was due, and the court decided that he could not compel, in equity, the specific execution of the contract; that the trifling indisposition of the complainant, his want of integrity and intention to pay for the property, and his utter inability to do it, unquestionably gave to Burchard, under whom Whittaker claimed, the right to put an end to the contract; and that as the complainant had occupied the land sold, the fair rent of which was equal to the actual payment made, Brunce, the seller, had a right to rescind without offering to refund the amount received. (See, also, *Remington* v. *Kelly et al.*, 7 Ohio R., 103.) It is now more than forty-one years since the purchase money for the lands in question fell due, and during that whole period neither Buckner nor the appellants have either paid or offered to pay the purchase money; upon what ground, then, can they insist that the decree is erroneous? Every man is to suffer for his own delay or neglect. (*Speake* v. *Speake*, 1 Ves., 217.) The plaintiff in equity, if he either will not, or, through his own negligence, he cannot, perform the whole on his side, has no title in equity to the performance of the other party. (*Butcher* v. *Hinton*, 1 Ch. Ca., 302; *Keen* v. *Stukely*, Gil. R., 155; *Pope* v. *Roots*, 7 Bro. P. C., 184; *Earl of Evershap* v. *Watson*, Rep. Temp. Finch, 445; 2 Freeman, 35; *Hutton* v. *Long*, Temp. Finch, 12.) So, if the plaintiff has not performed his part of the agreement, he must, in equity, show that he was in no default in not performing it, but must also allege that he is still ready to perform it. (*Fields* v. *Hooker*, Merivale, 224; and *Fane* v. *Spencer*, Merivale, 430, in note.) And upon this reasoning it is, that when a man has trifled or shown a backwardness in performing his part of the contract, equity will not decree a specific contract in his favor, especially if circumstances are altered. (*Hayes* v. *Caryll*, Jan., 1792; 5 Vin. Abr., 538, pl. 18.) Neither will equity decree an agreement which appears afterwards to have been discharged by parol, though the original agreement was in writing. (*Goman* v. *Salisbury*, 1 Ves., 240; *Lord Milton* v. *Edgworth*, 6 Brown, P. C., 580; *Segal* v. *Miller*, 2 Ves., 299; *Inge* v. *Sippingwell*, Dick., 469; *Daved* v. *Simonds*, 1 Cox's R., 406; and *Stephens* v. *Cooper*, 1 Johns. Ch. R., 420, 430.) In the case of *Heafly* v. *Hill*, the specific performance of an agreement to grant 78*] a lease was refused, *the plaintiff having failed to file his bill for more than two years since notice from defendant of his intent not to perform his contract, on account of the plaintiff's non-fulfillment of his part of the agreement. In this case, at the time of service of the declarations in the first action of ejectment brought by the appellee against the appellants, the appellants had notice that the appellee did not intend to perform the agreement in question, on account of the neglect of Buckner in not paying the purchase money due on the land; and yet no payment or offer of payment was made by them, nor did they file their present bill until more than ten years had elapsed after the receipt of actual notice that the appellee considered the contract at an end, and no further obligatory on him. Even in the bill which the appellants have filed (but which they never filed until all their efforts to baffle the appellee at law had failed), they have not tendered payment of the purchase money, unless that clause in the prayer of their bill which asks for a decree upon such terms as the court may seem just can be construed as an offer to pay the purchase money due, with interest. To construe that clause in the prayer of the bill as an offer to pay would be giving to it a construction which is incompatible with the general frame of the bill, and the grounds on which the appellants have based their right to the relief invoked. The appellants have based their right to relief on three grounds: 1st. That Shackleford, or the appellee, neglected to collect the amount due on Coats's bond. 2d. If that be not true, that they, or one of them, neglected to collect the purchase money of Buckner. And, 3d. That the appellee never acquired his legal title until 1826. And, first, as to Coats's bond: Were it true, as charged, that it was through mismanagement or omission of Shackleford, or the appellee, or both of them, that Coats's bond was not collected, would the condition of the appellants be improved thereby? We think not. The balance due on Coats's bond was £250, and the entire sum due was £420. Consequently, there remained due, after deducting Coats's bond, £170, which fell due in 1799. This balance has never been either paid or tendered to the appellee. If, therefore, the balance on Coats's bond was lost through the negligence of Shackleford and the appellee, or one of them, that negligence only operated as a release *pro tanto* of the obligation of Buckner to pay, or tender payment *of [*79 the purchase money; and from thence it results, as the £170, with interest, was never paid or tendered, that the appellants are not entitled to the relief which they ask. But is it true that Shackleford and the appellee, or one of them, had the management of the claim against Coats; and that, through their mismanagement or neglect, or the mismanagement or neglect of any of them, said claim was lost? Coats's bond was never assigned by Buckner to Shackleford; nor did the parties stipulate that Shackleford should have the management or control of the suit which had been ordered on that bond. The stipulation on the part of Shackleford was to wait for the amount due on Coats's bond until judgment was obtained thereon. That stipulation was coupled with this condition, namely: that Buckner gave to him an order in writing, on the attorney in whose hands Coats's bond had been placed for collection, requesting him to pay over the money to Shackleford, when collected. Buckner did not give the written order which he covenanted to give, but gave to Shackleford an order of the description promised on Copeland, who never was employed, nor ever had anything to do in the collection of Coats's bond. Buckner's covenant was therefore broken; and so much of the purchase money as was to have been paid by the proceeds of Coats's bond became due on the day the contract between Buckner and Shackleford was

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executed. But if this be deemed too rigid a construction of Buckner's undertaking, as it respects the order, in writing, he obligated himself to give to Shackleford, yet it is clearly discoverable from the words as well as from the general scope and design of the parties, as expressed in the contract, that Shackleford only stipulated to wait for the £250 until judgment was rendered on Coats's bond. That judgment was rendered in May, 1800, and on that day, at all events, the remaining balance of the purchase money of the lands in question fell due. Buckner was informed by Shackleford when judgment would be rendered, and that Coats intended to enjoin the judgment. The evidence shows that neither Shackleford nor the appellee had any management or control of the suit on Coats's bond: that neither of them were guilty of any mismanagement or neglect in relation thereto; that the attorney having the management of that suit procured judgment to be rendered thereon at as early a day as practic-
[*80] able: that, after judgment, every reasonable effort was made to enforce collection, but without effect; that the insolvency of Coats was ultimately ascertained; that, from weighing the evidence with care, the inference is strong that Coats was insolvent in 1797, and that Buckner was duly notified of the result. We therefore respectfully submit, that the first ground assumed by the appellants, on which they assert their claim to relief, has no solid base on which to rest. Their second ground is equally unsustainable. What has the solvency or insolvency of Buckner, at certain periods, to do with this case? He stipulated with Shackleford to pay for the land a certain amount, and within certain periods—uncertain, it is true, at the time of contracting, but which were rendered certain by the happening of the events referred to in the contract. Shackleford waited until those events happened. The £170 fell due at all events in 1799, if not before, and the £250 in the May following, when judgment was rendered on Coats's bond. Shackleford did not stipulate to wait for the purchase money longer than those periods. If not paid then, he had a right to put an end to the contract. There is no clause in the contract which required him to sue for the purchase money in case Buckner failed to pay within the stipulated periods. It was therefore optional with Shackleford, on Buckner's neglecting or refusing to pay within the stipulated periods, either to put an end to the contract or to sue for the money due. If Buckner was able to pay, why did he not pay? Until he made payment, the equitable title to the land purchased, or rather contracted for, did not vest in him. There was no consideration to raise a case in him. If he was able to pay, why did not the appellants compel him to make payment? Why did they not see that the money they had contracted to pay Buckner for the land was applied to the payment of the purchase money which Buckner had contracted to pay Shackleford? The appellants claiming under Buckner are chargeable with notice of the fact, that he only held title under his contract with Shackleford, which obligated him to pay £420, with interest, before he could demand of Shackleford the legal title. Was it not, therefore, their duty to have seen that the purchase money paid by them was faithfully applied to the payment and discharge of Buckner's contract with Shackleford? Buckner's solvency or insolvency has therefore nothing to do with *the case. The consideration [*81 has never been paid or tendered, and consequently the appellants have no right in equity, as against the appellee.

But it is also insisted that the appellee never acquired the legal title to the lands in question until 1826; and consequently, until he did acquire the legal title, that neither Buckner nor those claiming under him were bound either to pay or tender the purchase money. But did they either pay or tender the purchase money when the legal title was obtained? No; they neither did the one nor the other. How, then, are they entitled to relief on that ground? They did not offer to do equity when every shadow of suspicion was removed from the appellee's title. But did the defect in the appellee's legal title excuse them from the strict performance, or at least a tender of performance, of the original contract between Shackleford and Buckner? We think not. The appellee's equitable title was perfect, and he, as well as Shackleford and Buckner, believed that he was also invested with the perfect legal title, in virtue of the deed of conveyance from Roy, who had obtained a patent for the land from the State of Virginia. The attorney who instituted the first action of ejectment for the appellee, and the appellee himself, must have been impressed with the belief that the appellee was at that time invested with the legal title, otherwise the conduct of the attorney was dishonorable and dishonest, and that of the appellee simple and foolish. Upon comparing dates, it was found that the patent had issued since the date of the deed of cession, and consequently that the appellee was not invested with the legal title. Did that discovery excuse the appellants from paying or tendering the purchase money, in pursuance of the terms of the original contract? The appellants either did or did not know, at the time the purchase money fell due, that the appellee was not invested with the legal title. If they did know, it was their duty to have tendered the money, demanded a good title, and, at the same time, to have informed the appellee of the defect which existed in the title; and, on the other hand, if they did not know of the defect, they have no excuse for the neglect in making payment. The appellants have presented no valid excuse for the nonpayment or tender of the purchase money, and consequenly are not entitled to the relief claimed.

*The conduct of the appellants, evinced [*82 by the institution and prosecution of their separate suits, in Clermont County, against the appellee, to which we have referred in the abstract, at the time this suit was pending in the Circuit Court, does not present them or their case in the most favorable point of view before a court of equity. He who asserts a claim in a court of equity ought to present himself with clean hands and a pure heart, if he expects to receive a favorable response to his petition.

Mr. Justice CATRON delivered the opinion of the court:

This is an injunction bill, to restrain the defendant from taking out a writ of possession

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and an execution for costs, on a recovery, of seven hundred acres of land, by Upshaw, in an action of ejectment against the complainants in the Circuit Court of Ohio. They ask a perpetual injunction of the execution, and a specific decree for title.

The complainants, and those under whom they claim, purchased from Philip Buckner, paid a full price, and took deeds dated in 1798 and 1799.

Buckner purchased from Lyne Shackleford in November, 1797, when the latter had no title to, or interest in the land; Upshaw, the respondent, being the owner. It had been granted to Beverly Roy by the Commonwealth of Virgina, in 1789, and sold by Roy to Shackleford. In April, 1797, Shackleford sold to Upshaw, and directed the title to be made to him. On the 20th of July, 1797, Roy conveyed to Upshaw; and in November afterwards, Shackleford sold a second time to Buckner.

To remedy this defect of title and want of good faith, in April, 1801, Shackleford entered into a covenant with Upshaw, by which the sale to Buckner, of November, 1797, was confirmed; and in May, 1803, Shackleford and Upshaw entered into another covenant, again confirming the contract between Shackleford and Buckner; and which is more specific in its terms than the first, of 1801.

By these contracts alone Upshaw was bound: and on them the bill is founded, and a specific decree asked. They must be taken together: so the complainants treat them in their bill; nor can the court do otherwise.

Upshaw, having stipulated to make title to Buckner, on receiving £420, the purchase money, took an assignment of the covenant [*83] *between Buckner and Shackleford; on which it appears by the covenant of 1803, £420 was remaining unpaid.

It is insisted that a bill for a specific performance of the contracts could not be maintained until the purchase money was tendered to Upshaw, the vendor; and of this opinion was the Circuit Court; and principally on this ground, taken in connection with other circumstances, dismissed the bill.

We are of opinion that if such a rule exists in any case, it has no application to the one before us. The complainants purchased from Buckner when he had no interest in the land; and at that time they acquired no equity against Upshaw; yet of this fact they had no knowledge, and rested confident that they were occupying and improving the land under a good title. Nor did they have any knowledge of the contracts between Shackleford and Upshaw, after their purchase from Buckner, for many years; probably not until about the time the recovery was had against them in the action of ejectment in 1831. It was not Buckner's interest to give the information; and Shackleford took no further trouble on himself in the matter after 1803; he and Upshaw residing in the remote parts of Virginia, five hundred miles from the complainants.

Upshaw admits, in his answer, that he did not know Buckner had sold the land; or that it was in the possession of the complainants, until about the time he brought his first action of ejectment, in October, 1818: that he sued for the land, because he had failed to obtain the purchase money from Buckner. The suit failed, because the patent from the Commonwealth of Virginia was void; the country having been ceded (north of the Ohio River) by Virginia to the United States, before the land was granted.

In 1826, Upshaw, on the production of the patent to Roy and his deed, obtained a patent from the United States, in confirmation of the Virginia grant. On this he brought another suit against the complainants; and in 1831 recovered the land. This is the judgment the bill seeks to enjoin.

During all this time, Upshaw was a stranger to the complainants; he set up no claim against them for the purchase money due from Buckner to him; he sought the land, and disavowed that Buckner's contract with the complainants bound him. And *so he continues to do. [*84

His principal defense in the answer to the bill is, "That having no contract, or privity of contract, with the purchasers from Buckner, he conceives they can have no right to come into a court of equity to enforce a specific performance of the contract with Buckner."

It is manifest that at no time were these complainants afforded the opportunity to pay the purchase money due from Buckner to Upshaw.

We therefore hold, that complainants were in no default prejudicial to their original equities, for failing to discharge, or offering to discharge, the bond of Buckner.

Nor could the complainants be justly charged with sleeping on their rights, had the true state of the facts been known to them. Until 1826, Upshaw was in no situation to comply with his part of the contract; that is, to make title. A court of chancery would have enjoined the payment of the purchase money before the patent issued from the United States—and set aside the contract, if the vendor could not have made title.

Neither can this be treated as a stale claim, for another reason. The complainants went into possession under Buckner's deeds, dwelt upon, and in good faith improved the land; and are now seeking to protect their possessions and homes, in affirmance of their deeds.

We also hold that there was privity of contract between Upshaw and the complainants. When he sanctioned Shackleford's contract with Buckner, he became a party to it; Buckner had assigned all its benefits to the complainants, and they must be treated as rightful assignees; with the modifications imposed by the contracts of 1801 and 1803, between Upshaw and Shackleford.

The equitable title being in the complainants by a contract complete in all its parts, they are entitled to a specific decree of course, on principles too familiar to require authorities to support them. On this part of the case the court has had neither doubt or difficulty in arriving at a conclusion favorable to a specific decree.

The complainants being entitled to relief, the next question is, on what terms? For as they ask the active aid of the court to coerce performance of the respondent's contracts, they can only have such aid on the terms that they do him equity. A rule *without an ex- [*85

ception, within our recollection. Having dealt

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for an equitable title, complainants took it subject to all the equities existing between their immediate vendor, Buchner, and his vendor, Upshaw. It follows they must perform the covenants favorable to the defendant found in the contracts on which they seek relief. Therefore, before Upshaw can be compelled to convey the land, he is entitled to receive the purchase money; unless his right is cut off by the contract, or has been forfeited by his subsequent conduct.

The first objection is, that in the contract between Shackleford and Buckner, there is a power given to the latter to sell; until which time Shackleford agreed to wait for a portion of the money: that is, as to £170; provided the resale was made by the 1st of January, 1799: before which time, the sale was made to some of the complainants. It is true in the nature of buying and selling, that where a power of resale is given to the vendee, he has conferred on him the corresponding power to receive payment. But this could not affect Upshaw's title; Buckner took no interest by his contract with Shackleford; nor did the complainants acquire any by their purchase from Buckner. Their equities originated with Upshaw's sanction, given after the power had expired. He might sanction the contract of Shackleford with Buckner, or not, at his election; and, of course, modify it to suit his own interest. Having the transaction in his power, he saw proper to become a party to the contract on the terms that he retained a lien on the land for the £420: First, by the covenant of 1801, he bound himself to Shackleford, to proceed against the land if he failed to receive payment from Buckner: and, second, by that of 1803 he bound himself to convey to Buckner on being paid the £420. The bill being founded on these contracts, Upshaw is entitled to be paid the purchase money, irrespective of the stipulation that Buckner was authorized to resell, by his contract with Shackleford.

In the covenants of 1801 and 1803, Upshaw admits that Shackleford sold to Buckner with his consent, and it is insisted for complainants that Upshaw must be held to have authorized Shackleford to sell before the contract of 1797 was made. All the evidence we find in the record of Upshaw's sanction, is found in the contracts of 1801 and 1803; by these he was not bound to convey until he received payment for the land; we think in this modified 86*] *form is Upshaw bound, and that he never intended simply to sanction Shackleford's sale to Buckner.

Next it is contended, respondent was negligent in not collecting a bond upon Coats, on which £250 was due. Upshaw's covenants have no reference to this security. It was delivered over to Shackleford by Buckner for collection; credit was to be given for the money, if collected, on Buckner's bond. The claim was diligently pursued, but Coats proved insolvent: so that there is nothing in this objection.

Again, it is contended, and with much force, that Upshaw was grossly negligent in failing to collect the £420 from Buckner. He received Buckner's covenant in 1803. In 1804 it was sent by John H. Upshaw from Virginia to Kentucky for collection; the agent was fully authorized to receive the money and to make title to the land on its payment; which Buckner evaded, and the contract was put into the hands of another agent, O'Bannon, who collected $200 from Buckner; and in 1814 Buckner was sued in Upshaw's name as assignee, and the suit failed because an assignee could not sue upon such an instrument. During this time Upshaw had no valid title to the land, although there can be no doubt he thought the Virginia patent valid; still he could not have coerced payment from Buckner until 1826, when the patent from the United States was obtained, had the latter resisted payment on this ground. Under all the circumstances we think Upshaw did not forfeit his right to demand the purchase money from the complainants.

Shackleford sold to Buckner two tracts of land; one of a thousand acres, and this in controversy of seven hundred acres, for the gross sum of £1,020; and obtained £600 on Anderson's bond in part payment It is insisted that this sum must be applied in discharge of the complainants, as seven hundred is to one thousand; and that they are only bound for the residue.

The complainants are compelled to rely on Upshaw's contracts of 1801 and 1803, to maintain their claim to relief, and to affirm them in all their parts. By these contracts it appears the seven hundred acre tract was estimated at £420, and that no part of the purchase money for this tract had then been paid by Buckner: he was concluded from asserting the contrary, and so are the complainants.

*The next question is, from what time [*87 are the complainants bound to pay interest on the unpaid purchase money? They insist from the time Upshaw obtained his patent from the United States, in 1826. Respondent insists he is entitled to interest from the time the debt fell due against Buckner, or the 1st of January, 1799. Until the complainants were notified that, as purchasers of Upshaw's title, they were responsible to him for the purchase money, and recognized as his debtors, they had no opportunity to make payment: as to them, the debt was payable on demand, express or implied. Respondent admits in the answer that he neither pursued the land, or the purchasers under Buckner, until he failed to obtain payment from the latter. His first assertion of claim, was by the suit in ejectment in 1818, after which the purchasers cannot be heard to say, they remained ignorant of the defects in their own title, or of Upshaw's rights; it was imposed upon them to trace up the outstanding equities, favorable and unfavorable. Had they done so, the contracts of 1801 and 1803 would have been discovered, and the state of the title explained; this complainants did in 1831; and it could have been done quite as conveniently in 1818. We therefore deem the suit equivalent to a demand.

That Upshaw had no legal title in 1818, is no excuse. The complainants entered upon, occupied, and enjoyed the fruits of the land, under his title; and could no more be allowed to disavow it while they remained in possession, than could a tenant for years be permitted to

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disavow his landlord's title. So in effect, this court held in *Galloway* v. *Finley* (12 Peters, 264). But being remote purchasers of Upshaw's title; not from him, but another; and only bound to pay the purchase money by the rules adopted by courts of chancery; by the same rules, the complainants are entitled to an abatement of interest in part, accruing on Buckner's contract; and as the right to receive interest depends on the time when Upshaw notified them that they were held responsible for Buckner's failure to pay; and the action of ejectment, of October, 1818, being equivalent to a demand of payment, legal interest accrued from that date.

This we deem a well-founded principle, where a personal demand existed upon real security, and is brought forward at a late 88*] *day. Interest may be allowed at the discretion of the court, only from the time of filing the bill, in such cases. The rule is established in the Court of Chancery in England, and can be properly applied in this case. (*Pickering* v. *Lord Stamford*, 2 Ves., Jun., 272, 582.) And under similar circumstances it equally applies where mesne profits are claimed. (*Acherly* v. *Roe*, 5 Ves., 565.)

We order that the $200 paid to O'Bannon be deducted from the £420; leaving $1,200 due: on this sum interest will be allowed from the 15th of October, 1818, until paid. As the record does not show when the action of ejectment was brought, we assume the middle of the month as the true time; the interest to be after the rate of six per cent. per annum.

The purchase money will be apportioned among the complainants, according to the original value of the several tracts when purchased from Buckner: and the price paid to him taken as the measure of value. Those claiming under Buckner's vendees will be governed by the same rule, of their vendor's. If the money is not paid in a limited time, sales will be ordered, of all, or any of the tracts, at the discretion of the Circuit Court, to raise the money.

The injunction at law, in so far as to restrain the writ of possession, will be made perpetual; but will be dissolved as to the judgment for costs, so that an execution may issue to collect them.

The costs of this suit in the Circuit Court will be equally divided between the complainants and the respondent, Upshaw; they paying half, and he the other half; and the complainants will contribute among each other, in the same proportion that they are bound to do in discharging the decree for the purchase money.

The appellee Upshaw will pay the costs of this court.

On the complainants discharging the purchase money, the contract between Buckner and Shackleford will be assigned to them by Upshaw, if he is required to do so; and he will also be decreed to execute deeds to the complainants for the tracts they respectively claim, in such form, and with such covenants, as the Circuit Court shall direct.

The decree of the Circuit Court for the mesne profits, falls of course by the reversal of the principal decree.

*ORDER. [*89

Edwin Upshaw, *Appellant*,
v.
Buchannon *et al.*

This cause came on to be heard on the transcript of the record from the Circuit Court of the United States for the District of Ohio, and on the cross appeal by Edwin Upshaw, and was argued by counsel; on consideration whereof, it is now here adjudged and decreed by this court, that the said appeal of Edwin Upshaw be, and the same is hereby dismissed, with costs.

Buchannon *et al.*, *Appellants*,
v.
Edwin Upshaw.

This cause came on to be heard on the transcript of the record from the Circuit Court of the United States for the District of Ohio, and was argued by counsel; on consideration whereof, it is now here ordered, adjudged and decreed by this court, that the decree of the said Circuit Court in this cause be, and the same is hereby reversed with costs, and that this cause be, and the same is hereby remanded to the said Circuit Court, with directions to proceed therein conformably to the opinion and decree of this court.

Cited—1 How., 196; 15 Wall., 379.

JONATHAN STROUT ET AL., *Libelants, &c., Appellants*,
v.
JAMES FOSTER ET AL., Claimants and Owners of the ship Louisville.

Ship at anchor damaged by ship under sail.

If a ship be at anchor, with no sails set, and in a proper place for anchoring, and another ship, under sail, occasions damage to her, the latter is liable.

But if the place of anchorage be an improper place, the owners of the vessel which is injured must abide the consequences of the misconduct of the master.

In this case, the anchored vessel was in the thoroughfare of the pass of the Mississippi River.

THIS case originated in the District Court of the United States for the Eastern District of Louisiana, was carried, by appeal, to the Circuit Court, and finally brought here.

*There was much contradictory evi- [*90
dence about some of the facts. Those which were not disputed were these:

The Harriet, a ship of about three hundred tons, sailed from New Orleans for London on the 25th of May, 1836. On the 26th she passed the bar of the southwest pass, at the mouth of the river, and came to anchor. The ship Louisville, of five hundred tons burthen or upwards, was coming in, and a collision ensued between the two vessels. The Harriet was so much damaged that she put back for repairs. Her owners, Jonathan Strout and others, libeled the Louisville. The District Court, after a hearing, decreed in favor of the libelants, and against the ship Louisville, her tackle, apparel, and furniture, in the sum of $2,701.07, and costs of suit. The defendants appealed.

The Circuit Court reversed the decree of the District Court, with costs; and remanded the

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case to the District Court, with instructions to dismiss the libel. The libelants appealed.

It was given in evidence on the trial below for the libelants, that, on the 26th of May, 1836, the Harriet was at anchor near the mouth of the southwest pass of the Mississippi, outside the bar, on the western side of it, with her sails all furled; that the Louisville was also lying at anchor with her sails furled, at some considerable distance to the eastward; that the Louisville got under weigh, and stood down to the southwest pass with all sails set, topsail, and jib, and spanker; that she got within a quarter of a mile of the Harriet, and let go her anchor; that there was no range of cable overhauled; that there was not more than enough cable to let the anchor out of sight; that when the Louisville dropped her anchor, her sails were all set; that she came afoul of the starboard bow of the Harriet, whose helm was hard to starboard, and the jib and fore-top mast stay-sail set to steer clear; that the people on board of the Harriet bore the Louisville off, and that she came afoul again; that they bore her off again; that instead of the Louisville making sail aft to bring her up, they set the fore-top sail, and the ship paid off, and came afoul of the Harriet across her bows; that aboard the Harriet they continued to pay out cable, to permit the vessel to go clear; that there was plenty of room for the Louisville to have passed to the eastward of the Harriet, and a good free wind; that the Harriet was lying out of the usual track; that two brigs came [*91] down and *went to sea to the eastward of the Harriet, after she had anchored; and that the wind was fresh from the S. E. or S. S. E.

On the part of the defendants, it was given in evidence, that the Harriet might have gone to sea when she anchored, as there was wind enough; that she was lying in the thoroughfare of vessels going in and out; that when the Louisville weighed anchor to come in, there was a fresh wind, and favorable for coming in; that as she approached the bar, the wind died away; that a strong current set out of the pass; that it was stronger than usual, in consequence of there having been a strong wind the night before from the south; that owing to the lightness of the wind the Louisville drifted; that there was a pilot on board the Louisville, who said some time before, that they would be obliged to go close to the Harriet on one side or the other; that as the Louisville neared the Harriet, the pilot ordered them to let go the anchor and take in sail; that they obeyed the order as soon as they could; that the anchor got afoul of the chain of the Harriet, which had a great scope out; that the chain of the Harriet was not forward of her, but off on the starboard bow; that the Harriet had met with a similar accident in and about the same place, on a former voyage; that the entrances of passes at the mouth of the Mississippi are very intricate and difficult, on account of the currents and counter-currents; that as vessels approach the bar, and the water becomes more shoal, they are apt to become unmanageable, particularly when the wind dies away; that when the water is shoal, the under-tow has a great effect, and frequently with the greatest efforts a vessel cannot be steered; that there is one flood-tide every twenty-four hours on the bar, and the under-tow is the consequence of the flood-tide setting in and the current out.

The opinion of the Circuit Court, as delivered by *Mr. Justice* MCKINLEY, was as follows:

This case comes before this court upon an appeal from the decree of the District Court for the Eastern District of Louisiana.

The appellees, owners of ship Harriet, filed their libel in the court below, for collision, and upon the trial the court rendered a decree in favor of the libelants for $2,701.07. By the evidence it appears that the Harriet had passed over the bar through one of the passes or outlets at the mouth of the Mississippi River, *outward bound, on the 26th of [*92 May, 1836, and came to anchor near the bar. The Louisville, lying below a distance of several miles, weighed anchor with a fresh and favorable wind for coming in, through the same pass; as she approached the bar the wind died away, and the current being stronger than usual, owing to a strong wind from the south the night before, she drifted and ran afoul of the Harriet. These passes, it appears, are intricate and difficult to navigate, and subject to counter and under-currents. If the wind die away when a ship is coming in, she is certain to drift and become unmanageable. Knowing these facts, a prudent master would never anchor his vessel in the thoroughfare of one of these passes. The evidence shows, however, that the master or the Harriet did anchor his vessel immediately in the thoroughfare, and that, too, after having been run afoul of by another vessel about a year before, at or near the same place.

There are four possibilities under which a collision may occur:

First. It may happen without blame being imputable to either party; as when the loss is occasioned by a storm, or any other *vis major*. In that case the misfortune must be borne by the party on whom it happens to light, the other not being responsible to him in any degree.

Second. When there has been a want of due diligence or skill on both sides, in such case the rule of law is, that the loss must be apportioned between them, as having been occasioned by the fault of both.

Third. It may happen by the misconduct of the suffering party only, and then the rule is, that the sufferer must bear his own burden.

Lastly. It may have been the fault of the ship which run the other down, and in this case, the injured party would be entitled to entire compensation from the other. (*The Woodrop Sims*, 2 Dodson's Rep., 83.)

The third rule here laid down, it seems to me, applies with great force to the case under consideration, the misconduct on the part of the master of the Harriet, in anchoring his ship immediately in the thoroughfare, is fully made out by the proof; while, on the contrary, there is no fault proved, going to show mismanagement, want of skill, or negligence on the part of the master of the Louisville. It is true that the opinions of some *nautical [*93 men, found in the evidence, show that it was possible for the Louisville to have avoided the collision, had everything been done that it was possible to do. But the law imposes no such

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diligence on the party in this case; so far as the Harriet was concerned, the Louisville was entitled to the full use of the thoroughfare of the pass; the master of the Harriet having obstructed it, with a full knowledge of the danger of doing so, has been guilty of such misconduct as to deprive the appellees of the right of action against the appellants. (3 Hunt's Con., 230.)

It was insisted by the counsel of the appellees, that the Harriet being at anchor, and the other ship under sail, that the latter was therefore liable. It is true, if a ship be at anchor, with no sails set and in a proper place for anchoring, and another ship under sail occasions damage to her, the latter is liable. But the place where the Harriet anchored was an improper place, and therefore the appellees must abide the consequences of the misconduct of the master. Wherefore, it is decreed and ordered that the decree of the District Court be reversed, and held for naught, and that the appellants recover of the appellees their costs in this behalf expended; and it is further decreed and ordered, that this case be remanded to the District Court, with instructions to dismiss the libel of the libelants.

Messrs. Dickens and *Hellen* for the appellants.

Mr. Coxe for the appellees.

The reporter was not present at the argument, and has been furnished only with the notes of Mr. Dickens

Mr. Dickens laid down the following propositions:

1. The sea is a public highway or thoroughfare, equally free to all persons and all nations.

2. All persons navigating the high seas have an equal right to sail through, or anchor in any portion of them.

3. All persons navigating the high seas, as aforesaid, are bound to take notice of all such vessels as may have come to an anchor, and so to navigate their vessel as not to run afoul, or otherwise injure those at anchor.

4. If a vessel under sail runs afoul of a vessel at anchor in the high seas, the vessel in motion is bound to pay all damages.

5. If the universal right of all vessels navigating the high seas to anchor in any part thereof **94*** has been restricted, either by law *or custom, and they are prohibited from coming to an anchor in certain places, unless at their own risk, it is incumbent upon the party claiming the benefit of such restriction or prohibition, to prove its existence clearly and conclusively; and also to prove, with equal clearness and certainty, the fact that the vessel complained of was anchored in such prohibited place, and that all ordinary diligence was used by those on board of the vessel in motion, to prevent the accident; otherwise, they will not be released from the payment of the damages sustained by the vessel at anchor.

6. The universal right of all persons navigating the high seas to anchor wherever they may happen to be, or in any place they may think proper, has never been and cannot be restricted, but in certain particular local jurisdictions.

7. And last. If a vessel under sail comes unawares upon one at anchor, they are both bound to use every possible exertion to prevent a collision; and if either is deficient in that respect, it is bound to bear the loss: but should a vessel under sail knowingly and voluntarily attempt to pass one at anchor, and, in so doing, run afoul of her, and thereby cause her to sustain loss or damage, the vessel under sail, although she may have used every possible exertion to prevent the damage, but at a time when it was too late to avoid the collision, is bound to pay all the losses sustained in consequence thereof by the vessel at anchor.

In support of the fourth proposition, he cited Jacobsen's Sea Laws, edition by William Frick, in 1818, p. 339: "A ship which, under full sail, occasions damage to another which has no sail set, is liable for all damages."

To sustain the fifth proposition he cited *Lock* v. *Seward* (4 Carrington & Payne, 106), and *Foot and Reynold* v. *Wiswall* (14 Johns., 304): and for the seventh, Jacobsen's Sea Laws, 107, art. 36; 1 Bell's Comm., 580; Story's Commentaries on Bailments, p. 385; 3 Kent's Com., 230; Story as above, 381, 382; *Collinson et al.* v. *Larkins* (3 Taunt., 1), *Haggitt* v. *Montgomery* (5 Bos. & Pull., 446). *Verplank et al.* v. *Miller et al.* (1 Moody & Malkin, 69), *Yates et al.* v. *Brown et al.* (8 Pick. Mass. Rep., 83), *Hawkins* v. *Dutchess and Orange Steamboat Company* (2 Wend., 452), *Snell, Stagg & Co.* v. *Rich* (1 Johns., 305), Dodson's Admiralty Cases, 471, the case of *The Neptune*.

*That all possible diligence should have [**95** been used by the Louisville, he cited Story on Bailments, 334; 3 Pardessus, 79, par. 652; 1 Wash. C. C. R., 142; *Stone et al.* v. *Retland* (4 Martin's La. Rep., new series, 399); *Martin et al.* v. *Blythe* (1 McCord, 360).

The court being equally divided, the judgment of the Circuit court was affirmed.

ORDER.

This cause came on to be heard on the transcript of the record from the Circuit Court of the United States for the Eastern District of Louisiana, and was argued by counsel; on consideration whereof, it is now here ordered, adjudged and decreed by this court, that the decree of the said Circuit Court in this cause be, and the same is hereby affirmed, with costs.

Cited—14 How., 538; 23 Wall., 14; 7 Otto, 315; Abb. Adm., 241; 1 Cliff., 413; 3 Cliff., 638; Newb., 235; 2 Ware (Da.), 361; 1 Abb. U. S., 463; 6 McLean, 230; 3 Woods., 667.

MAYOR AND ALDERMEN OF THE CITY OF MOBILE, *Plaintiffs*,

v.

J. EMANUEL AND G. S. GAINES, *Defendants*.

City of Mobile title in lands under Spanish grant.

The case of the City of Mobile v. Hallett, 16 Peters, 261, examined and confirmed.

Under the exception contained in the Act of Congress of 1824, no title passed to the city of Mobile, where the land was in the possession of a party claiming to hold it under a Spanish grant which had been confirmed by the United States.

THE case was brought up by writ of error from the Supreme Court of the State of Alabama, under the 25th section of the Judiciary Act of 1789.

The facts in the case were these:

On the 26th of September, 1807, the Spanish

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Governor of Florida granted to John Forbes a tract of land immediately adjacent to what is now the city of Mobile, and, indeed, constituting a part of it. The grant was founded upon, and confirmatory of, an older one issued to Richardson in 1767, by the British government, then in possession of the country. The land was upon the west side of the river Mobile. In 96*] the document issued *by the surveyor-general, it is said to be "bounded on the east by said river;" and in that issued by the intendant, to be "terminated by the bank of said river on the east side:" in both, there is a reservation of a "free passage on the bank of the river."

On the 2d of March, 1819, Congress passed "An Act to enable the people of the Alabama territory to form a constitution and State government, and for the admission of such State into the Union, on an equal footing with the original States," by the sixth section of which it was enacted, "That the following propositions be, and the same are hereby offered to the convention of the said territory of Alabama, when formed, for their free acceptance or rejection, which, if accepted by the convention, shall be, obligatory upon the United States." After enumerating many articles, the section concludes with this: "and that all navigable waters within the said State shall forever remain public highways, free to the citizens of said State and of the United States, without any tax, duty, impost, or toll therefor, imposed by the said State."

By the original plan of the town a street was laid off, called Water Street, on the margin of the river, running nearly north and south, which was afterwards filled up, and by the improvement the water, at high tide, was confined to the eastern edge of the street.

On the 26th of May, 1824, Congress passed "An Act granting certain lots of ground to the corporation of the city of Mobile, and to certain individuals of said city," which is as follows:

1. "That all the right and claim of the United States to the lots known as the hospital and bakehouse lots, containing about three fourths of an acre of land, in the city of Mobile, in the State of Alabama, and also all the right and claim of the United States to all the lots not sold or confirmed to individuals, either by this or any former act, and to which no equitable title exists in favor of any individual, under this or any former act, between high water-mark and the channel of the river, and between Church Street and North Boundary Street, in front of the said city, be, and the same are hereby vested in the mayor and aldermen of the said city of Mobile, for the time being, and their successors in office, for the sole use and benefit of the said city forever.

2. "That all the right and claim of the United 97*]States to so*many of the lots of ground east of Water Street, and between Church Street and North Boundary Street, now known as water-lots, as are situated between the channel of the river and the front of the lots known under the Spanish government as water-lots, in the said city of Mobile, whereon improvements have been made, be, and the same are hereby vested in the several proprietors and occupants of each of the lots heretofore fronting on the river Mobile, except in cases where such proprietor or occupant has alienated his right to any such lot now designated as a water-lot, or the Spanish government has made a new grant or order of survey for the same during the time at which they had the power to grant the same; in which case the rights and claims of the United States shall be, and is hereby vested in the person to whom such alienation, grant, or order of survey was made, or in his legal representative.

"Provided, that nothing in this act contained shall be construed to affect the claim or claims, if any such there be, of any individual or individuals, or of any body politic or corporate." (7 vol. Laws of the United States, 318; 1 vol. Land Laws, ed. 1838, 398.)

On the 8th of July, 1835, the mayor and aldermen of the city of Mobile brought an action of trespass to try title against Emanuel and Gaines in the State Circuit Court of Alabama, claiming several lots bounded on the west by Water Street, and running eastward to the channel of the river.

On the trial of the cause, the jury, under the instructions of the court, found the defendants "not guilty" of the trespass. The court charged the jury "that if the place in controversy was, subsequent to the admission of this State into the Union, below both high and low water-mark, then Congress had no right to grant it; and if defendants were in possession, the plaintiffs could not oust them, by virtue of the act of Congress.

"That the grant to Forbes extended to high water-mark, and that if the place claimed was between high water-mark and the channel, in front of the grant, and had been reclaimed by the defendants, then the plaintiffs could not recover in virtue of the act of Congress, and this, notwithstanding the reservation of the right of way specified in the confirmation of the grant to Forbes."

*Upon this charge a bill of exceptions [*98 was founded, and the case carried to the Supreme Court of the State of Alabama, where the judgment of the court below was affirmed.

It is necessary to refer to the opinion of the Supreme Court of the State of Alabama, in order to understand the ground upon which the dissentient opinion of *Mr. Justice* Catron is placed.

The Supreme Court of Alabama did not decide the first point raised in the bill of exceptions, viz.: "that Congress had no right to grant the land to the city of Mobile." But being of opinion that the grant to Forbes conveyed to him the intervening space between high water mark and the channel of the river (covering the property in dispute), and thus precluded the plaintiffs from ever recovering it; and being moreover of opinion that a judgment ought not to be reversed for a misdirection of the judge to the jury, if it appears that the party complaining could not have been injured, that court waived all examination into the correctness of the first point, and contented itself with affirming the judgment of the court below.

Mr. Test for the plaintiffs in error.

Mr. Sergeant for the defendants.

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Mr. Justice McLEAN delivered the opinion of the court:

This cause is brought to this court by a writ of error to the Supreme Court of Alabama.

An action of trespass to try the title to a certain lot or piece of ground in the city of Mobile, was commenced by the plaintiffs against the defendants, in the Circuit Court of the State. Issue being joined, a jury were impaneled, who rendered a verdict of not guilty. As the right of the plaintiffs was asserted, exclusively, under an act of Congress, and the decision being against that right, the plaintiffs, having excepted to certain rulings of the court on the trial, prosecuted this writ of error, under the 25th section of the Judiciary Act of 1789.

The bill of exceptions states that it was proved the defendants were in possession of the premises described in the declaration, at the time the suit was brought.

An act of Congress, entitled "An Act granting certain lots of ground to the corporation of the city of Mobile, and to certain individuals **99*]** *of said city," passed 20th May, 1824, was read; also "A resolution of the mayor and aldermen of the city of Mobile, passed the 23d day of April, 1834, in the following words: 'Resolved, That the map of the city as now shown to the board, be accepted and approved; and it is further resolved that the names of the streets be the same as heretofore established.'"

It was also proved by the plaintiffs that the map referred to was one published by Goodwin and Haise, a copperplate copy of which was offered in evidence; a copy of such parts of said map as is necessary to refer to is annexed.

It was also proved that there never had been a street in Mobile known as North Boundary Street. And also, that the premises in question were situate, in May, 1824, between Church Street, south of Adams Street, and below high water as well as low water-mark and the channel of the river. It was also proved that the premises were north of St. Louis Street, as laid out in said map, and that in 1824 Water Street did not extend to St. Louis Street, and that at that time buildings were few and scattered above St. Louis Street.

The defendant offered in evidence a grant from the Spanish government, and proved that they claimed title to the premises under that grant.

The court charged the jury that, if the place in controversy was, subsequent to the admission of this State into the Union, below both high and low water-mark, then Congress had no right to grant it; and if defendants were in possession, the plaintiffs could not oust them, by virtue of the act of Congress. That the grant to Forbes extended to high water-mark, and that if the place claimed was between high water-mark and the channel, in front of the grant, and had been reclaimed by the defendants, the plaintiffs could not recover in virtue of the act of Congress, and this, notwithstanding the reservation of the right of way specified in the confirmation of the grant to Forbes."

It appeared that on the 9th January, 1767, the English government, being then in possession of the country, had granted the land in controversy to William Richardson; and that a grant of the same land was made to John Forbes & Co., the assignees of Richardson, by the Spanish authority, the 26th September, 1807. In the British grant the land "was bounded east by the *river Mobile," and by the **[*100** Spanish "by the bank of the river," "leaving a free passage on the bank," &c.

The case was removed by writ of error from the Circuit Court to the Supreme Court of the State, in which judgment was affirmed.

The first section of the Act of 1824, referred to in the bill of exceptions, vests "in the mayor and aldermen of the city of Mobile, for the time being, and their successors in office, for the sole use and benefit of the city, forever, all the right and claim of the United States to all the lots not sold or confirmed to individuals, either by that or any former act, and to which no equitable title exists in favor of an individual under that or any other act, between high water-mark and the channel of the river, and between Church Street and North Boundary Street, in front of the city."

And the second section of the act "excepts from the operation of the law, cases where the Spanish government had made a new grant or order of survey for the same, during the time at which they had the power to grant the same; in which case the right and claim of the United States shall be, and is hereby vested in the person to whom such alienation, grant, or order of survey, was made, or in his legal representative."

In principle this case is similar to that of *The City of Mobile* v. *Hallett* (16 Peters, 261). In that cause the court say: "From the bill of exceptions, it appears that the defendant was in possession of the land in controversy under a Spanish grant, which was confirmed by the United States; and that the land extended to the Mobile River. It was then within the exception in the Act of 1824, and no right vested in the plaintiffs. We think, therefore, that the instruction of the Circuit Court to this effect was right." The same language is equally applicable to the case under consideration. And it appears that the judgment of the Circuit Court was affirmed by the Supreme Court of Alabama, on the ground that "there was no vacant space between high and low water-mark; all having been sold and confirmed to Forbes," under his Spanish grant.

The Spanish grant being an exception in the act, under which the plaintiffs claim, the instruction of the Circuit Court in favor of the defendant was correct. The judgment of the Supreme Court of Alabama is affirmed.

Mr. Justice CATRON dissented. **[*101**

The premises in controversy lie in front of the city of Mobile, and are claimed by the corporation, by virtue of the Act of Congress of May 20, 1824. They lie both below high and low water-mark.

The court charged the jury that, if the place in controversy was subsequent to the admission of this State into the Union, below both high and low water-mark, then Congress had no right to grant it, and if defendants were in possession, the plaintiffs could not oust them, by virtue of the act of Congress.

That the grant to Forbes extended to high water-mark, and that if the place claimed was between high water-mark and the channel in front of the grant, and had been

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reclaimed by defendant, then the plaintiffs could not recover in virtue of the act of Congress, and this, notwithstanding the reservation of the rights of way specified in the confirmation of the grant to Forbes.

To all of which charge the counsel of the plaintiffs excepted.

The jury found a general verdict of not guilty. As Alabama was admitted into the Union, December 14, 1819, the first instruction was conclusive of the plaintiffs' title. On the admitted fact that the land lay under the water in 1824, the court pronounced the act of Congress void.

The second instruction depends on the fact, "whether the defendant had reclaimed the land in front of the grant of Forbes." There is no evidence in the record that he had done so; and all the evidence purports to have been set out.

A writ of error was prosecuted to the Supreme Court of Alabama. That court simply affirmed the judgment of the Circuit Court; and from that affirmance a writ of error was prosecuted to this court, by the corporation of the city of Mobile, under the twenty-fifth section of the Judiciary Act.

One error assigned in the Supreme Court of Alabama was, "That the charge of the circuit judge denies that the United States had right and power to grant the premises in question."

On the general affirmance, can this court take jurisdiction and reverse, because the first instruction was erroneous? In the case of the same plaintiffs against Eslava (16 Peters, 246), the majority of the court held that the opinion of the Supreme Court of Alabama certified as part of the record, was no part of it.

102*] *Speaking of the opinion, the court says: "Their opinion constitutes no part of the record, and is not properly a part of the case. We must look to the points raised by the exceptions of the Circuit Court, as the only questions for our consideration and decision."

And so this court held, in even a stronger case (*Gordon* v. *Longest*, 16 Peters, 103), where there had been a general affirmance of the judgment below, by the Supreme Court of Kentucky.

In *Eslava's* case I thought the opinion of the Supreme Court of Alabama formed part of the record; in that case, as in this, the opinion was found in the paper book; but a majority of the court ruled it out, as no part of the record; to which decision I submit, of course.

Looking only to the points raised by the exceptions in the Circuit Court, and we find it established with a plainness admitting of no doubt, that Alabama claims to hold as her own; and does actually hold, by force of her judicial decisions, all the lands within the State, flowed by tide-water; and that this claim is founded on an implied cession of the lands under tide-water, by the United States to Alabama, as a consequence of the sanction given by Congress to the State constitution. The disastrous results of this assumption on part of the State courts of Alabama, I endeavored to point out (so far as pressure of circumstances would permit), in my opinions in the cases of these plaintiffs against Eslava and Hallet (16 Peters, 247 and 263).

That the United States had the undoubted title before the adoption of the constitution of Alabama, has never been denied by anyone; and that the State acquired title by that event has not been proved, nor can it be, as I think; nor is it perceived how the question can be avoided in the cause before us, unless we look beyond the record. I therefore believe the judgment should be reversed because there was error in the first instruction. For my reasons I refer to the opinions in the cases of *Eslava* and *Hallet*. To these I will add, that it is impossible for this court to follow the decisions of the Supreme Court of Alabama, without overruling the decision in *Pollard's Heirs* v. *Kibbie* (14 Peters, 353). William Pollard claimed a square of land below high water-mark fronting the city of Mobile; the claim was founded originally on a spanish concession, made in 1809. This *was merely void, **[*103** as was held in *Foster and Elam* v. *Neilson* (2 Peters, 254), and in *Garcia* v. *Lee* (12 Peters, 511). By the second sec. of the Act of 1824, the land was excepted from its operation, and did not pass to the city of Mobile, (14 Peters, 364, 365, 366.) The title to the square claimed by Pollard therefore remained in the United States until it was granted to his heirs, by a private Act of Congress, of 1836, and a patent founded on the act, dated in 1837. This court maintained the title, and a recovery was had on the Act of 1836, and the patent from the government.

If the Act of 1824 is void, because Congress had no power to grant the lands below the flow of the tides; so is equally, and as certainly, the Act of 1836, and the patent founded on it.

Forbes owned the land in front of the land granted to Pollard's heirs; Forbes' grant extended to high water mark, was dated in 1802, and was undisputed. This court held in effect that it was bounded, and could not extend by implication beyond the high water-mark. So is the undoubted construction of grants for lands fronting tide-waters. A grant of lands on each side of an arm of the sea, and embracing it, does not pass the land under the water by general words; there must be special words of grant, showing plainly the land covered with water was intended to be granted; without such explicit words of grant, the high lands only pass. Such is the settled doctrine of this court. (*Martin* v. *Waddell*, 16 Peters, 367.) Forbes, therefore, could not claim, as riparian owner, the land granted on his front to Pollard; to hold otherwise would overrule the decision of *Martin* v. *Waddell*.

In any aspect this controversy can be presented, it falls within the decision of *Pollard* v. *Kibbe;* that case must be overruled, if the doctrine of the courts of Alabama is maintained.

ORDER.

This cause came on to be heard on the transcript of the record from the Supreme Court of the State of Alabama, and was argued by counsel; on consideration whereof, it is now here ordered and adjudged by this court, that the judgment of the said Supreme Court in this cause be, and the same is hereby affirmed, with costs.

Aff'g 9 Port., 403.
Cited—3 How., 212.

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104*] *THE UNITED STATES,
Plaintiffs in Error,
v.
WILLIAM LINN ET AL.

Action ex delicto—ex contractu—nolle prosequi as to one defendant—plea alleging alteration of bond after delivery—construction of demurrer—date of surety's bond—pleadings.

A plaintiff may, in an action in form *ex delicto* against several defendants, enter a *nolle prosequi* against one of them. But in actions in form *ex contractu*, unless the defense be merely in the personal discharge of one of the defendants, a *nolle prosequi* cannot be entered as to one defendant without discharging the other.

Quære. Whether a plea which sets up new matter and concludes "to the country" is good.

A plea alleging merely that seals were affixed to a bond without the consent of the defendant, without also alleging that it was done with the knowledge, or by the authority or direction of the plaintiffs, is not sufficient.

A plea which has on the face of it two intendments, ought to be construed most strongly against the party who pleads it.

A party who claims under an instrument which appears on its face to have been altered, is bound to explain the alteration; but not so, when the alteration is averred by the opposite party, and it does not appear upon the face of the instrument.

Where the plea is bad and the demurrer is to the plea, the court, having the whole record before them, will go back to the first error.

Where the date of a surety bond is subsequent to the appointment of the principal to office, the declaration should allege that the money collected by the principal remained in his hands at the time when the surety bond was executed.

THIS case came up by writ of error from the Circuit Court of the United States for the District of Illinois, and is a sequel to the case between the same parties reported in 15 Peters, 291, *et seq.* The circumstances are sufficiently set forth in the opinion of the court.

Mr. Legaré, the Attorney-General, for the United States.

Mr. Coxe for the defendants.

Mr. Justice THOMPSON delivered the opinion of the court:

This case comes up on a writ of error from the Circuit Court of the United States for the District of Illinois. The writ or summons issued in the cause purports to be in a plea of debt for one hundred thousand dollars. And the declaration contains three counts upon the following instrument, which, upon oyer craved by the defendants, is set out upon the record:

105*] *"Know all men by these presents, that we, William Linn, David B. Waterman, Lemuel Lee, James M. Duncan, John Hall, William Walters, Asahel Lee, William L. D. Ewing, Alexander P. Field, and Joseph Duncan, are held and firmly bound unto the United States of America, in the full and just sum of one hundred thousand dollars, money of the United States, to which payment, well and truly to be made, we bind ourselves jointly and severally, our joint and several heirs, executors, and administrators, firmly by these presents, sealed with our seals, and dated this first day of August, in the year one thousand eight hundred and thirty-six." They also crave oyer of the condition of the said supposed writing obligatory, and it is read to them in these words: "The condition of the foregoing obligation is such, that whereas the President of the United States hath, pursuant to law, appointed the said William Linn receiver of public moneys for the district, of lands subject to sale at Vandalia, in the State of Illinois, for the term of four years, from the 12th day of January, 1835, by commission bearing date 12th February, 1835. Now, therefore, if the said William Linn shall faithfully execute and discharge the duties of his office, then the above obligation to be void and of none effect, otherwise it shall abide and remain in full force and virtue.

"Sealed and delivered in the presence of Presley G. Pollock, as to Wm. Linn, D. B. Waterman, Lemuel Lee, J. M. Duncan, John Hall, Wm. Walters, Asahel Lee, Wm. L. D. Ewing, and A. P. Field; A. Caldwell as to Joseph Duncan.

WILLIAM LINN, [L. S.]
LEMUEL LEE, [L. S.]
JOHN HALL, [L. S.]
ASAHEL LEE, [L. S.]
A. P. FIELD, [L. S.]
D. B. WATERMAN, [L. S.]
J. M. DUNCAN, [L. S.]
WM. WALTERS, [L. S.]
WM. L. D. EWING, [L. S.]
JOSEPH DUNCAN, [L. S.]

"GENERAL LAND OFFICE.
"Approved, August 30, 1836.
"ETHAN A. BROWN."

To the first count, which purports to be debt on the bond, the defendants plead jointly *non est factum* and several other pleas not necessary here to be noticed.

To the second and third counts which are upon the same instrument, not described, however, as a bond, but as a certain *instru- [*106
ment in writing. To these counts the defendant, Joseph Duncan, put in the following plea:

"And the said Joseph Duncan impleaded as aforesaid, by Logan and Brown, his attorneys, comes and defends the wrong and injury, when, &c. And as to the said second and third counts in the said plaintiffs' declaration contained, says that the said plaintiffs their said action on the said second and third counts ought not to have or maintain against him, this defendant; because, he says, that protesting that he executed the supposed written instrument declared upon in the said second and third counts of the plaintiffs' amended declaration, he says that after he had signed said instrument, and delivered it to his co-defendant, Linn, to be transmitted to the plaintiffs; and after the securities to the said written instrument had been affixed (approved) by the Hon. Nathaniel Pope, Judge of the District Court of the United States for the State of Illinois, it was, without the consent, direction, or authority of said Joseph Duncan, materially altered in this—that scrawls, by way of seals, were affixed to the signature of said Joseph Duncan to said written instrument, and to the signatures of the other parties to said written instrument, whereby the character and effect of the said written instrument, declared in the

NOTE.—*As to sureties on official and other bonds, and liability of*, see note to United States v. Giles, 9 Cranch, 212.

As to actions upon official and their construction, see note to Postmaster-General v. Early, 12 Wheat., 136.

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second and third counts aforesaid, was materially changed, and said instrument declared on, vitiated.

"And so said Duncan says, that the said supposed written instrument declared on in the second and third counts of plaintiffs' amended declaration, is not his act and instrument; and of this he puts himself upon the country."

To which plea there is interposed a special demurrer, and the court gave judgment for the defendant Joseph Duncan upon the demurrer, thereby adjudging that the plea was sufficient in law to bar the plaintiffs from maintaining their action against him. And issues being joined upon the pleas to the first count, the cause came on to be tried by a jury, and under the instructions of the court a verdict was found for the defendants upon the issues of fact. Exceptions were taken to the instructions of the court to the jury. And the correctness of such instructions is the first question presented on this writ of error.

Upon the trial, after reading the bond to the jury, the defendants called a witness, who testified, in substance, that he saw the bond after 107*] *it had been signed by the obligors, in the hands of William Linn, the obligor first named therein, after it had been returned from the district judge with his certificate indorsed of the sufficiency of the sureties. That the district judge, in a note in writing, accompanying the bond, had pointed out the omission of seals to the names of the signers of the instrument; and said Linn, saying he would obviate that difficulty, took a pen, and in the presence of the witness, added scrawls, by way of seals, to each name subscribed, as makers of the instrument. Other testimony was given, under the issues of fact, which it is not material to notice.

Upon this evidence the court gave the following instruction to the jury: "If they shall find from the evidence, that after the instrument upon which the action is brought, was signed by the defendants, it was altered by William Linn, one of the defendants, without the knowledge or assent of the other defendants, by adding to the names of the defendants the scrawl seals which now appear upon the face of the instrument, and such defendants have not at any time since the alteration sanctioned it, the instrument is not the deed of such defendants, and the jury will find a verdict in their favor." And the question is, whether this instruction was in point of law correct, under the pleadings and evidence in the cause. All the defendants united in a joint plea of *non est factum*, and the proof was that the scrawls were added by Linn to his own name and to the names of the other defendants. The adding the scrawl by Linn to his own name did not vitiate the instrument as to him: he had a right to add the seal, or at least, he can have no right to set up his own act in this respect to avoid his own deed. It was therefore his deed, and the plea of *non est factum* as to him is false. And the question is, whether it is not false as to all who joined him in the plea of *non est factum*. It is laid down by Chitty in his Treatise on Pleading, that a plea which is bad in part is bad *in toto*. If, therefore, two defendants join in a plea, which is sufficient for one but not for the other, the plea is bad as to both; for the court cannot sever it, and say that one is guilty, and that the other is not, when they put themselves on the same terms. (Chitty, 598.) A plaintiff may in an action in form *ex delicto* against several defendants, enter a *nolle prosequi* as to one of them. But in *actions in form [*108 *ex contractu*, unless the defense be merely in the personal discharge of one of the defendants, a *nolle prosequi* cannot be entered, as to one defendant, without discharging the other, for the cause of action is entire and indivisible. (Chitty, 599.) The rule laid down by Chitty is fully sustained by the English and American decisions. In *Smith* v. *Bonchin et al.* (2 Strange, 993), the action was trespass and false imprisonment; plea not guilty by all, and a justification as to eight days' imprisonment. And the court held, that although the officer and jailer might have been excused, if they had pleaded severally, but having joined in the plea with others who could not justify, they had forfeited their justification. In *Moore* v. *Parker et al.* (3 Massachusetts, 310), the action was trespass *de bonis asportatis* against several, and all join in the plea of not guilty, and also in a plea of justification. The court held that the bar set up was no justification for one of the defendants, and if several defendants join in pleading in bar, if the plea is bad as to one defendant it is bad as to all.

So in the case of *Schermerhorne et al.* v. *Tripp* (2 Caines, 108), which was in error from a court of common pleas. The action was trespass against a justice of the peace, the constable, and the plaintiff, and all joined in a plea of not guilty. The court said, the constable having joined with the others in the plea of the general issue, they are all equally trespassers. If he had pleaded separately, he would probably have been excused; but he has now involved himself with others, and we cannot separate their fates.

It is unnecessary to multiply authorities on this point, the books are full of them, and it is a well settled and established rule in pleading. The reason is, because the plea, being entire, cannot be good in part and bad in part, an entire plea not being divisible, and consequently, if the matter jointly pleaded be insufficient as to one of the parties, it is so *in toto*. (1 Saunders, 28, *n.* 2, and cases there cited.)

It has been suggested that this objection is waived by the following entry in the bill of exceptions: "A judgment having been obtained against Linn for the full amount of his defalcation, a judgment on this bond was not asked against him or any of the defendants, unless the jury shall find against all the defendants." *It is not perceived how this can be [*109 considered a waiver of any error. No judgment could have been given against Linn separately, the plea of *non est factum* being joint. But the plaintiffs, according to the express terms of this memorandum, did ask a verdict and judgment against all the defendants; and if from the pleadings and evidence they were entitled to judgment against all, as we think they were, there was no waiver that will justify the instructions given to the jury.

The next question arises upon the special demurrer to the plea of Joseph Duncan to the second and third counts of the declaration.

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This plea sets up new matter, to avoid the instrument upon which the action is founded, and concludes to the country. And it may well be questioned, whether upon the best and soundest rules of pleading it ought not to have concluded with a verification. Chitty, in his Treatise on Pleading (1 Chitty, 590), says it is an established rule in pleading, that whenever new matter is introduced on either side, the pleading must conclude with a verification, in order that the other party may have an opportunity of answering it. And this rule has the sanction of many adjudged cases. In the case of *Service* v. *Heermance* (1 Johns., 92), the court say there is no rule in pleading, better or more universally established, than, that whenever new matter is introduced the pleading must conclude with an averment. And the reason, say the court, is obvious, because the plaintiff might otherwise be precluded from setting forth matter which would maintain his action, although the matter pleaded by the defendant might be true. And in *Henderson* v. *Whilby et al.* (2 Durn. & East, 576), Buller, *Justice*, in giving the judgment of the court, said: By the rules of pleading, whenever new matter is introduced, the other party must have an opportunity of answering it. So that the replication setting up new matter concluded properly with an averment. Numerous authorities, both in England and in the United States, might be cited in support of this rule. But there is certainly no little confusion and diversity of opinion appearing in the books with respect to the question, when the pleadings ought to conclude to the country, and when with a verification. Many of these discrepancies may grow out of rules, said by Mr. Chitty, to have been recently established in the English courts relating to pleadings, which have not fallen under our 110*] *notice. We will, however, pass by the demurrer for that cause in the present case, and proceed to an examination of the special matter set up in the plea in bar of the action. If this mode of pleading be adopted, the special matter set up must, as in a special plea, be such, that if true in point of fact, it will bar the action and defeat the plaintiff's right to recover. The matter set up in this plea, when stripped of some circumlocution, is, that after he, Joseph Duncan, and the other parties to the instruments, had signed the same, it was, without his consent, direction, or authority, altered by affixing seals to their signatures. The plea does not indicate in any manner by whom the alteration was made. It does not allege that it was done with the knowledge or by the authority or direction of the plaintiffs; nor does it even deny that it was done with the knowledge of the defendant, Joseph Duncan. The plea does not contain any allegation inconsistent with the conclusion that it was altered by a stranger, without the knowledge or consent of the plaintiffs, and if so, it would not have affected the validity of the instrument. It is said that the demurrer admits the truth of the matter set up in the plea. The demurrer admits whatever is well pleaded. But it does not admit any more, and certainly does not admit what is not pleaded at all. The demurrer, then, admits nothing more than that the seals were affixed after the instrument had been signed by the parties and delivered to Linn to be transmitted to the plaintiffs, and that this was done, without the consent, direction, or authority of him, the said Joseph Duncan. Is this enough to avoid the instrument and bar the recovery? It certainly is not; for the seals might have been affixed by a stranger without the knowledge or authority of the plaintiffs, and would not have affected the validity of the instrument. The plea not alleging by whom the seals were affixed, it is open to two intendments. Either that this was made by the plaintiffs, which would make the instrument void, or that it was done by a stranger, which would not invalidate it. And what is the rule of construction of such a plea? It is, that it is to be construed most strongly against the defendant. This is the rule laid down by Chitty (1 Chitty, 578), and in which he is supported by numerous authorities. And the reason assigned for this rule of construction is, that it is a natural presumption, that the party pleading will *state his case as favorably as [*111 he can for himself. And if he do not state it with all its legal circumstances, the case is not in fact favorable to him; and the rule of construction in such case is, that if a plea has on the face of it two intendments, it shall be taken most strongly against the defendant; that is, says he, the most unfavorable meaning shall be put upon the plea; a rule which obtains also in other pleadings; and a number of cases are put, illustrating this rule. The present plea falls directly within it. The plea not alleging by whom the seals were affixed, it is left open to intendment, that it was done either by the plaintiffs or by a stranger. In the first case, it would make the deed void; in the last, it would not vitiate it. And under the rule that has been stated, the most unfavorable meaning must be put upon the plea; that is, that which will operate most against the party pleading it. And the alteration must be presumed to have been made so as not to vitiate the instrument, if the plea will admit of such construction. Suppose the plea had concluded with a verification, and the plaintiffs had replied that the affixing the seal was done without their knowledge, consent, or authority, and this state of the case had been sustained by the proof, it would not have avoided the instrument.

But, it is said, the law imposes upon the party who claims under the instrument the burden of explaining the alteration. This is the rule, undoubtedly, where the alteration appears on the face of the instrument, as an erasure, interlineation, and the like. In such case, the party having the possession of the instrument and claiming under it, ought to be called upon to explain it. It is presumed to have been done while in his possession. But, where no such *prima facie* evidence exists, there can be no good reason why this should devolve upon a party, simply because he claims under the instrument. The plea avers the alteration, and the defendant, therefore, holds the affirmative; and the general rule is, that he who holds the affirmative must prove it. And this, under the present plea, can impose no hardship on the defendant, for his affirming the fact of alteration affords a reasonable presumption that he knew by whom the alteration was made. And, in addition to this, it is a circumstance deserving considerable weight, that the defend-

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ant in his plea does not deny his having such knowledge. He avers that the seal was affixed 112*] without *his consent, direction, or authority; but he does not say it was done without his knowledge. And it is not an unreasonable inference that if he had, in his plea, disclosed by whom it was done, it would appear to have been done in a way that did not affect the validity of the instrument. There is not upon the face of this instrument anything indicating an alteration, or casting a suspicion upon its validity, that should put the plaintiffs upon inquiry. The instrument upon its face admits it was sealed with the seals of the defendants, and purports to have been sealed and delivered, in the common conclusion of a sealed bond. So that, when the instrument came into the possession of the plaintiffs, there was nothing on the face of it to raise a suspicion against its validity. The case of *Henman* v. *Dickinson* (5 Bingham, 183), has been relied upon to show that the *onus* of accounting for the alteration is thrown upon the plaintiffs. All that this case decides is, that the party who sues on an instrument which on the face of it appears to have been altered, it is for him to show that the alteration has not been improperly made. The circumstance of the alteration appearing on the face of the instrument is emphatically relied upon by the court to show that the party claiming under the instrument must account for the alteration. This was a question of evidence upon the trial, and did not arise upon the pleadings, and the report of the case does not furnish us with the pleadings. Many other cases might be cited to the same effect.

In the case of *Taylor* v. *Mosely* (6 Car. & Payne, 273), the bill upon which the suit was brought appeared on its face to have been altered, and there was no evidence on either side when or by whom the alteration was made; and the question was submitted to the jury by Lord Lyndhurst, with the remark, that it lay on the plaintiff to account for the suspicious form and obvious alteration of the note, and they must judge from the inspection of the instrument, and if they thought the alteration was made after the completion of the bill, the verdict must be for the defendant. In the case now before the court, the inspection of the instrument furnishes no ground of suspicion, and from the facts stated in the plea, there must have been a considerable distance of time after the instrument was signed by Duncan before it came into the possession of the plaintiffs. The plea alleges that it was delivered to Linn, one of the defendants, to be 113*] transmitted to the *plaintiffs. But the plea does not allege that the alteration was made after the instrument came into possession of the plaintiffs; and under this state of facts alleged in the plea, the *onus* of proving when and by whom altered, is more properly cast upon the defendant. We are accordingly of opinion that the plea is bad. But it is a settled rule that, when the demurrer is to the plea, the court having the whole record before them will go back to the first error: and when the demurrer is by the plaintiff, his own pleadings must be scrutinized, and the court will notice all exceptions to the declaration that might have been taken on general demurrer. We are accordingly thrown back on the record to examine the sufficiency of the declaration in the second and third counts.

The second count sets out the instrument as of the date of the 1st of April, 1836. That Linn's commission bears date the 12th of February, 1835, and that he was appointed receiver for four years from the 12th of January, 1835. And the count then alleges that after the making and delivering the said instrument in writing, and after the appointment of the said Linn, he entered upon the duties of his office; and that within four years from the said 12th day of January, and while he was receiver of public moneys, there came into his hands, as receiver, the sum of four millions of dollars, which it was his duty to pay over to the plaintiffs when requested, yet the said William Linn hath not, nor would he, although often requested so to do, to wit, on the 2d day of April, in the year 1838, account for and pay over to the said plaintiffs the said sums of money, or any part thereof, but hath wholly neglected and refused so to do. It is said this count is bad, because from the time stated in the count he might have received the money after the 12th day of January, 1835, the commencement of his office, and before the 1st day of April, 1836, when the instrument signed by the sureties bears date, and that the sureties cannot be responsible for any moneys received before they became sureties. The count alleges a demand of the money and a refusal to pay it on the 2d day of April, in the year 1838, long after the defendant became surety. In the case of *Farrar and Brown* v. *The United States* (5 Peters, 373), which was an action upon a bond given for the faithful discharge of the duties of a surveyor of the public lands, the breach assigned was, *that at the time [*114 of the execution of the bond, "there were in the hands of the surveyor large sums of money to be disbursed for the use of the United States, which he had neglected to do." And one of the questions which arose was, whether the sureties could be made liable for any moneys paid to the surveyor prior to the execution of the bond; and the court said there is but one ground on which the sureties can be made answerable, and that was on the assumption that the money was still remaining in his hands when the bond was given. And in the case of *The United States* v. *Boyd* (15 Peters, 208), the court said it matters not at what time the moneys had been received, if after the appointment of the officer they were held by him in trust for the United States, and so continued to be held at and after the date of the bond. In these cases there was a direct allegation that the money was in the hands of the officer at the date of the bond. In the case now before the court, there is no such direct allegation, and this count is therefore bad on this ground. The third count is also bad for the same reason.

The judgment of the Circuit Court must accordingly be reversed, and the cause sent back for further proceedings.

Mr. Justice McLEAN dissented.

The joint plea of *non est factum* to the first

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count in the declaration being bad against Linn, is undoubtedly bad against the other defendants. But this point was not raised in the Circuit Court. It was not intended to be raised. On the contrary, the counsel agreed to submit the question under the plea, whether the annexation of the seals by Linn vitiated the bond as against the sureties. And the reason for this was stated in the following entry on the record: "A judgment having been obtained against Linn for the full amount of his defalcation, a judgment on this bond was not asked against him or any of the defendants, unless the jury shall find against all the defendants."

This agreement was treated by the counsel on both sides, in the Circuit Court, as waiving any technical question arising on the pleading. No one could doubt that the bond was good against Linn. And it is equally clear that, technically, the plea was bad for the other defendants, it being bad as to Linn. And it was to avoid any technicalty of this kind that the **115*]** agreement *was entered into. It is less definite than it should have been, but still its object seems to be manifest. That a construction here would be given to the agreement different from that which was given to it by the United States Attorney in the Circuit Court, was not expected. His construction is shown from the fact of his not having suggested any objection to the court below arising on the joint plea.

The plea of Joseph Duncan as to the alteration of the bond is held to be bad, because it is not averred that it was altered by the plaintiffs or by their authority. At the same time it is admitted that, on the general issue, the person claiming under the deed must explain any interlineation or alteration upon its face, so as to show the bond is not vitiated. The reason of this is clear. The party having possession of the bond is presumed to have a knowledge of any alteration of it, and is therefore required to explain it. *Prima facie*, any material alteration vitiates the bond.

Now, the special plea in this case states a material alteration, by affixing the seals, after the instrument had been approved of by the district judge. The demurrer admits the facts stated in the plea. Does it not follow, then, that the plea is good, if the alteration alleged in it be a material one; such an one as vitiates the instrument unless explained? No rule in pleading is better settled than that a fact which is presumed to be known to the plaintiff, and is not presumed to be within the knowledge of the defendant, the defendant need not aver it in his plea, if he can without the averment set up a *prima facie* defense. Mr. Chitty says (1 vol. of Plead., 255), "It is also a general rule, that matter which should come more properly from the other side need not be stated. In other words, it is enough for each party to make out his own case or defense. He sufficiently substantiates the charge or answer for the purposes of pleading, if his pleading establish a *prima facie* charge or answer. He is not bound to anticipate, and therefore is not compelled to notice and remove in his declaration or plea every possible exception, answer, or objection which may exist, and with which the adversary may intend to oppose him." (Com. Dig. Pleader, ch. 81; Plowd., 376; 2 Saund., 62 *a*., *n*. 4; 1 Term Rep., 638; 8 Term Rep., 167; Stephen's Pl., 1st ed., 354.)

*No one can doubt that the altera- [***116** tion averred in the above plea, appearing on the face of the instrument, would vitiate it, unless explained by the holder. And it follows, then, that the plea stating the fact, which the demurrer admits, must be answered and explained.

The defendant must know whether an instrument which he has executed has been altered in a material part. But he is not presumed to know by whom it has been altered, while it is in the possession of the party who claims under it. If the defendant must aver this, he must prove it; and this would be impossible. But, on the other hand, the person claiming under the instrument, and who has always been in possession of it, may well be presumed to know by whom it has been altered, and, therefore, he, and he only, can explain it. Any other rule would be most unreasonable and contrary to any proper system of pleading.

The rules lately adopted by the courts of England in regard to pleading seem "not to have fallen under the notice of this court." This is to be regretted, as those rules have been published in the late editions of Mr. Chitty on Pleading, and are known to the profession throughout the country.

It is true, as the court say, that intendments are taken against the plea; but intendments must not only be practicable, but reasonable. If a fact in the plea be omitted, which the defendant cannot be presumed to know, and which must be known to the plaintiff, no intendment against the plea can be drawn.

Mr. Stephens, in his Treatise on pleading, 350, under the head that "it is not necessary to state matter which would come more properly from the other side," says, "this, which is the ordinary form of the rule, does not fully express its meaning. The meaning is, that it is not necessary to anticipate the answer of the adversary; which, according to Hale, *Ch. J.*, 'is like leaping before one comes to the stile.' It is sufficient that each pleading should in itself contain a good *prima facie* case, without reference to possible objections not yet urged." "Thus in pleading a devise of land by force of the statute of wills (32 Hen. VIII., ch. 1), it is sufficient to allege that such an one was seized of the land in fee, and devised it by his last will, in writing, without alleging that such devisor was of full age. For though the statute provides that wills made by *femes covert*, or persons within age, &c., shall not *be taken [***117** to be effectual; yet if the devisor were within age, it is for the other party to show this in his answer, and it need not be denied by anticipation."

"So where an action of debt was brought upon the statute 21 Hen. VI., against the bailiff of a town for not returning a burgess of that town for the last Parliament (the words of the statute being that the sheriff shall send his precept to the mayor, and if there be no mayor, then to the bailiff), the plaintiff declared that the sheriff had made his precept unto the bailiff, without averring that there was no mayor. And

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after verdict for the plaintiff, this was moved in arrest of judgment. But the court was of opinion, clearly, that the declaration was good; for we shall not intend that there was a mayor, except it be showed; if there were one, it should come more properly on the other side."

"Where the matter is such that its affirmation or denial is essential to the apparent or *prima facie* right of the party pleading, there it ought to be affirmed or denied." Now, the alteration of the instrument in a material part, after Duncan, the defendant, had signed it, without his consent or knowledge, did make a *prima facie* case. It made such a case as, upon the general issue, would have required the plaintiffs to show by whom it was altered. And this shows that the plea is good. It is the same principle whether it arise on the general issue or by special plea. The same order of proof is required. The plaintiffs, therefore, instead of demurring, should have pleaded over, and alleged that the alteration was made by a stranger, and, consequently, that it did not vitiate the instrument.

The plea should have concluded with a verification, and not to the country. But this could only be taken advantage of by special demurrer. This defect is not one of the causes assigned in the demurrer, and, therefore, cannot be objected to.

The second and third counts of the declaration being bad, as ruled by the court, the judgment of the Circuit Court should, on those counts, have been affirmed, and not reversed. Mr. Stephens, in his Pleading, 144, says again, "It is a rule, that on demurrer, the court will consider the whole record, and give judgment for the party who, on the whole, appears to be entitled to it." "Thus on demurrer to the replication, if the court think the replication bad, but perceive a substantial fault in the plea, they 118*] *will give judgment, not for the defendant, but for the plaintiff, provided the declaration be good; but if the declaration also be bad in substance, then, upon the same principle, judgment would be given for the defendant." (*Pegge's* case, 5 Rep., 29 *a*; *Bates* v. *Cost*, 2 Barn. & Cress., 474.)

I believe this case is the first exception to the above rule. Notwithstanding the above defective counts, judgment is given generally against the defendant. It is hoped that this ruling will not establish a precedent in other cases.

ORDER.

This cause came on to be heard on the transcript of the record from the Circuit Court of the United States for the District of Illinois, and was argued by counsel; on consideration whereof, it is now here ordered and adjudged by this court, that the judgment of the said Circuit Court in this cause be, and the same is hereby reversed; and that this cause be, and the same is hereby remanded to the said Circuit Court, with directions to proceed therein conformably to the opinion of this court.

Cited—2 Wall., 231; 1 Curt., 147; 6 Ben., 208.

THOMAS MORRIS *Complainant and Appellant,*

v.

MARIA NIXON, HENRY J. WILLIAMS, AND THOMAS BIDDLE; HENRY J. WILLIAMS AND MARIA NIXON, Executors of the Last Will and Testament of HENRY NIXON, Deceased, AND MARIA NIXON, Sole Devisee of the said Last Will and Testament of HENRY NIXON; AND MARY HUSBAND, AMELIA M. MORRIS, ROBERT MORRIS, WILLIAM P. MORRIS, CHARLOTTE E. MORRIS, HENRY MORRIS, SARAH MORRIS, Children and Heirs-at-Law of HENRY MORRIS, Deceased; AND CORNELIUS STEVENSON AND SAMUEL C. CLEMENTS, Administrators of said HENRY MORRIS, Deceased.

Chancery—deed absolute on its face, intended as security—loan as consideration—answer of one defendant not evidence in behalf of another—proof as to one document, throwing suspicion on others—redemption.

A deed, absolute on the face of it, declared to be a security for money loaned.

Where a bill substantially charges that there is a fraudulent attempt to hold property under a deed, absolute on the face of it, but intended as a security for money loaned, evidence will be admitted to ascertain the truth of the transaction.

Where there is proof of parties meeting upon the footing of borrowing and *lending with an [*119 offer to secure the lender by a mortgage upon particular property, if a deed of the property, absolute on the face of it, be given to the lender, and the lender also take a bond from the borrower, equity will interpret the deed to be a security for money loaned unless the lender shall show, by proofs, that the borrower and himself subsequently bargained upon another footing than a loan.

Where a loan is an inducement for the execution of a deed which is absolute on the face of it, though the loan is not recited as the consideration of the deed, or as any part of it, if the lender or grantee in the deed treats it substantially as the consideration, or a part of it, equity will declare the deed to be a security for money loaned.

The answer of one defendant in equity is not evidence in behalf of another defendant.

If, in equity, it is admitted or proved that one of the documents in a transaction was not intended to be what it purports, it subjects other documents in the same transaction to suspicion.

THIS was an appeal from the equity side of the Circuit Court of the United States in and for the Eastern District of Pennsylvania, and arose upon the following facts:

On the 2d of January, 1812, Jonathan Williams and Thomas Morris (the complainant) purchased from the Bank of North America a parcel of land upon the Schuylkill River,

NOTE.—*As to deed, with contract to reconvey, when a mortgage*, see note to Conway v. Alexander, 7 Cranch, 218.

That parol evidence is admissible to prove absolute deed a mortgage, see note to Hughes v. Edwards, 9 Wheat., 489; and, also, note to Conway v. Alexander, 7 Cranch, 218.

That action may be maintained to have a deed declared a mortgage, see notes to the two last cases.

Purchaser from equitable mortgagee, where deed to the latter is absolute on its face, when protected, see notes to above cases.

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near the city of Philadelpdia, for the sum of $80,000; $20,000 of which was to be cash, and the remaining $60,000 was divided into three payments of $20,000 each, which were to become due on the 25th of March, 1814, 1815, and 1816, respectively. The parties gave their joint and several bonds for these sums, with a warrant of attorney to confess judgment, and a mortgage upon the property. It afterwards appeared that Morris was not exclusively the owner of his moiety.

On the 27th June, 1812, Morris gave a power of attorney to Thomas Biddle and Henry Nixon, to manage the property for him.

In 1815 Williams died intestate, leaving Henry J. Williams and Christine, the wife of Thomas Biddle, his heirs-at-law.

In April, 1816, Morris and the representatives of Williams executed a power of attorney to Biddle and Nixon, authorizing them to enter into and take possession of the property, sell or lease it, receive the money, execute deeds, &c.

Under this power, they accordingly took possession and exercised all manner of ownership over it.

A great number of letters between the parties [*120] were given in *evidence, running from this time to the year 1822, relating to the condition and prospects of the property. One of the bonds had been paid out of the proceeds of sales, and considerable payments made on account of another. The third was wholly unsatisfied.

In 1822, Morris, residing in New York, applied to Nixon for a loan, under the circumstances stated so particularly in the opinion of the court that it is unnecessary to mention them here. Nixon declined making a loan, but took from Morris a deed, absolute upon the face of it, conveying the whole of Morris's interest to Nixon, and reciting that Nixon had always been interested in the purchase to the extent of three sixteenths of the whole, or three eighths of Morris's moiety. Nixon then loaned to Morris $5,000, for which he took his bond.

The deed also recited that there had been allowed to Nixon for his agency, the sum of $2,000; one half of which, or $1,000, had been paid by the representatives of Williams, but paid to Morris; and five eighths of the other $1,000 (or $625), were justly chargeable to Morris; thus bringing Morris in debt to him $1,625, which was released in the deed. It also contained other recitals, which are mentioned in the opinion of the court.

In 1836 Morris filed a bill on the equity side of the Circuit Court of the United States for the Eastern District of Pennsylvania, against Nixon and other parties, alleging that the deed was only a security for the money loaned; that, at the time of its execution, there was not, between himself and Nixon, any contract, agreement, understanding, or negotiation for a sale; that Nixon had furnished no account of his agency; and praying for an account and general relief. The parties all answered; and in April, 1841, the Circuit Court, after a hearing, dismissed the bill with costs. The complainant appealed to this court.

Mr. Wood for the appellant.

Messrs. Sergeant and *Williams* for the appellees.

Mr. Wood made the following points:

I. The deed of the 28th May, 1822, explained by the letter of the defendant, Nixon, to the plaintiff, would constitute, *per se*, a mortgage of the premises to secure the loan for $5,000.

II. The said deed was designed by the parties thereto to secure the said loan, and was designed in substance to be a mortgage *as- [*121] suming the shape of an absolute conveyance, only as a more effectual security for the loan.

III. If said Nixon designed otherwise, yet the complainant was led by his conduct, and by all the circumstances, to consider it a security for the loan, and it ought to be treated as such.

IV. A deed, though absolute on its face, may be shown, by parol evidence, to be designed as a security for a loan, or a mortgage, and more especially by written evidence furnished about the time the deed was given, and conducing to show the same.

V. If it should appear that said deed was designed by the parties to be an absolute conveyance in fee, it ought to be set aside, or modified and converted into a mere security for said loan. Because:

1. The consideration therein was grossly inadequate.

2. There was no negotiation for a sale between the parties thereto, either personally or through authorized agents, and no estimate of value.

3. The plaintiff, the grantor therein, was not in a condition to deal at arm's length—being much embarrassed, in want of money, and ignorant of the condition of the property—the grantee being a capitalist, having the property under his management, and fully acquainted with its condition and value.

4. The grantee did not fulfil his duty as steward and agent in apprizing the grantor, at the time of said conveyance, of the condition and value of said property.

5. Undue influence was exercised by the grantee upon the grantor, in pressing upon him a sale to himself in the condition in which said grantor was placed, and in the relative condition in which they stood at the time to the property and to each other, as lender and borrower, steward and principal.

VI. Lapse of time is no bar to the complainant's equity under the last-mentioned point. Because:

1. Such a bar is not set up and relied upon in pleading.

2. The influence and control of the said grantee in said deed, over the grantor, and the grantor's ignorance of the condition of the property, continued until a short time before exhibiting the bill of complaint.

3. The relationship in which the parties stood to each other *as steward and prin- [*122] cipal, lender and borrower, will prevent the bar from applying in equity to the relief sought for by the bill.

VII. Lapse of time is not a bar to the complainant's equity, for a full account and relief in regard to the matters arising, as well before as subsequently to the said deed. All which he is fully entitled to.

VIII. The agreement, for a conveyance from the complainant to Maria Nixon, should be modified, so as to embrace only one eighth of the plaintiff's moiety of the premises, and she should be decreed to be entitled only to the net proceeds of said one eighth part.

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Mr Justice WAYNE delivered the opinion of the court:

The complainant, besides other relief prayed for, asks the aid of this court to decree a deed made by him to Henry Nixon, and which is absolute on the face of it, to be a security for money advanced upon loan, and that he may be at liberty to redeem the premises conveyed, by paying to Nixon, or by allowing to him, on account of the transactions between them, the moneys loaned to him by Nixon and such as he may have advanced on account of the real estate purchased by the complainant and the late General Jonathan Williams from the Bank of North America; for the resale and improvement of which, the defendants, Henry Nixon and Thomas Biddle, were the attorneys and agents of the purchasers.

The surviving family, however, of General Williams, are in no way interested in this suit. The controversy is between Thomas Morris and the representatives of Henry Nixon, whose death has occurred since the bill was filed.

The deed from complainant to Henry Nixon bears date the 28th May, 1822.

It recites the purchase made by Williams and Morris; that certain portions of it had been sold and conveyed to other persons, and that parts had been let on ground-rents, so that the quantity remaining was about seventy acres. That the sales and income of the property had nearly re-imbursed the purchasers the first payment which they had made of $20,000; that there had been paid upon the purchase, out of the income and proceeds of sale, from time to time, enough to reduce the sum due by the 123*] *purchasers, to about $29,000, which was a charge upon the premises, to be borne by the owners thereof, in proportion to their respective interests. It then recites, that at the time of the execution of the indenture to Williams and Morris, Henry Nixon was, and had continued to be interested with Morris, to the extent of three eighth parts of the moiety, so as to entitle him to the benefits and subject him to the obligations of the purchase in that proportion. The consideration of the deed is then recited to be, one half part, " or thereabouts," of a debt due by the complainant to Thomas Biddle and John Wharton, which was originally $4.000, for the security of which the complainant had, with the assent of Henry Nixon, mortgaged a part of the moiety of the original purchase; then a debt claimed by Nixon to be due to him by the complainant of $1,625; $1,000 of which it is said the complainant received on account of Nixon's agency for the moiety of the purchase belonging to Williams, and $625 being the proportion justly chargeable to complainant for Nixon's agency for the other moiety. There was a further consideration amounting to $4,600, being the amount of two notes which had been discounted at the Bank of North America, for the accommodation of the complainant, with Nixon's indorsement.

The circumstances attending the execution of the deed are disclosed in the pleadings and by other proofs in the cause.

The complainant resided in New York, and Nixon lived in Philadelphia. The former, being in great pecuniary distress, and fearing greater within a few days, unless he could make a loan, sent his brother, Henry Morris, to Philadelphia, to obtain from their brother-in-law, Henry Nixon, an advance of $5,000, offering, as security, his interest in the property bought by himself and General Williams. Nixon says, in his answer, that his feelings being wrought upon by the representation, made by Henry Morris, of the urgent nature of his brother's wants, and the destructive consequences to be apprehended if he could not meet a demand there was upon him, he concluded to provide the money; that, however, before he finally agreed to do so he told Henry Morris that he must consult his counsel upon the subject.

After consulting counsel, he informed Henry Morris that he had determined to deal with the complainant upon no other terms than an absolute sale and conveyance of all his interest, *legal and equitable, in the premises [*124 bought by him and William; and as there would be a full consideration without it, that the loan would create a new debt, for which he would take a separate evidence or security; that he was advised by his counsel to write out in the deed at large the real consideration, so that the truth of the transaction might at all times appear upon the papers, and to take a bond for the loan, so that if the purchase should turn out well, he would not be bound to enforce the bond, but, in case of misfortune to the complainant, he would have evidence of his right as a creditor, and, if he should think fit, might use it for the benefit of the complainant or his family. In connection, however, with the foregoing statement, Nixon declares that in the course of his conversation with his counsel, he was asked, whether the interest of the complainant in the property was worth the incumbrances upon it, and what was already due by him to Nixon. To which he replied, as he truly believed, that it would not bring more; that nothing but the peculiarity of the circumstances would induce him to increase his interest, or become a purchaser of it; and that he determined, as he had been advised by his counsel, to buy out the complainant's interest entirely and absolutely, without any trust, direct or indirect, express or implied; nor any understanding whatever, that the complainant or any other person was to have a claim or benefit therefrom, and that he would deal with him on no other terms.

Henry Morris arrived in Philadelphia on the 23d of May. His first conversation with Nixon concerning his errand was on that day; on the 24th, Nixon consulted counsel, informed Henry Morris of the result, and on the same day, the same counsel made a draft of the deed. On the same day, too, Nixon wrote to the complainant the following letter:

DEAR MORRIS: Henry arrived here early yesterday morning. Having had a conversation with him on the subject of a loan, I have only to say my best exertions will be to obtain this object, and to enable me to do which, Henry will immediately call on you to advise the only mode that he or I can suggest to achieve it.

You, I am sure, will have confidence in me as to the mode proposed, which Henry will communicate; and be assured my sincere prayers will be, and best exertions to promote this all-important point. In haste, yours truly,

H. NIXON.

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125*] *This letter was written after Nixon had consulted counsel; for he says in his answer, after he had done so, he thereupon returned to Henry Morris, and informed him of the determination he had come to, of dealing upon no other terms than an absolute conveyance, without any trust, and taking a bond for the loan. And in the letter it is stated, that "Henry will immediately call on you to advise you of the only mode that he or I can suggest to achieve it."

The draft of the deed being made on the 24th May, it was afterwards engrossed by the witness Cash, and he was sent with it to New York. He arrived there on the 28th, the deed was signed by Morris and his wife, Cash and Henry Morris being witnesses. On the same day, Cash left New York on his return to Philadelphia. On the following morning, the 29th May, as it appears by a letter of that date from Nixon to the complainant, Henry Morris arrived again in Philadelphia. He says in his answer, that he found Nixon resolved to do nothing in the business unless the conveyance was absolute and *bona fide*, and he was therefore obliged to deliver the deed without any promises of trust. And Nixon declares that Henry Morris delivered to him the deed, and at the same time a bond, in the handwriting of the complainant, for $5,000.

It is in proof, also, that when the deed was delivered, there were unadjusted accounts growing out of Nixon's and Biddle's agency for the property. That no account had been furnished to the complainant since 1816, except an abstract of one Innes's account of the excavation and sales of stone and gravel, sent to him by the defendant, Henry J. Williams, in May, 1819.

The recital in the deed shows that the accounts were unascertained, for it speaks of the $20,000 which was first paid by Williams and Morris on their purchase as being nearly reimbursed, and that there remained due on the purchase about $29,000.

Two years before the deed was executed, the complainant made an agreement with David Walker and Henry Morris, to convey to them in trust for his sister, Maria Nixon, a fourth part of her moiety, upon the terms stated in the agreement, in pursuance of his original intention when Williams and himself made the purchase.

126*] *It was urged in the argument, that the recitals in the deed relating to the sum then due upon the purchase of Morris and Williams, that of Nixon's interest in it, and the debt claimed by Nixon to be due to him on account of his agency, were incorrect. We shall not, however, consider these objections, or those which were made against the validity of the deed on account of inadequacy of price, undue influence, and surprise.

Our object is to dispose of this case for the present, by assigning to the deed its true character in equity, under all the circumstances attending its execution.

The charge against Nixon is, substantially, a fraudulent attempt to convert that into an absolute sale which was originally meant, by himself and the complainant, to be a security for a loan. It is in this view of the case that the evidence is admitted to ascertain the truth of the transaction, though the deed be absolute on its face. The transaction was begun by Morris, with the request of a loan from Nixon, for which he offered a security upon the property, for the management of which, Nixon was his agent. It ended by Morris giving to Nixon a deed for the property, absolute on its face, and also a bond for a loan of $5,000. Unless, then, some proof has been given to show that they truly bargained upon another footing, and that the loan did not form the chief inducement for the execution of the deed, and had not been treated by both parties as a substantial part of the consideration, though not expressed in the recital, equity will interpret it to be a security for money loaned.

Is there any such proof in this case? None that we can see, even if the defendants are allowed to use as evidence, as they contend they have a right to do, the answer of their co-defendant, Henry Morris. His account of the transaction is, that in an interview with Nixon succeeding that when he made the application for a loan, and when Nixon declined lending, stating that his own embarrassments required all the funds he could command; that Nixon said, it was very doubtful if the "Hills property" would more than pay the claims upon it, and he could not consent to make the loan, unless Morris would convey the property to him; and he added, if the property should eventually turn out well, he would account to Thomas Morris for it, and share it with him. And in the third interview Nixon told him that his counsel had *advised him upon no [*127 account to let the complainant have the money, unless an absolute and *bona fide* conveyance of the whole premises was made; that, upon receiving his answer, he returned to New York, and communicated the determination of Nixon to his brother; and that, upon his return to Philadelphia, he was obliged to deliver the deed without any promises of trust, as he found Nixon resolved to do nothing in the business, unless the conveyance was absolute and *bona fide*. He says, however, he was satisfied in his own mind that, if the property turned out well, Nixon would give a handsome share of it to the complainant; and that, in consequence of this impression, he always wrote to him as if he was still interested in the successful result of the purchase. We are in no way, though, influenced by the answer of Henry Morris in coming to our conclusion as to the character of the deed. It has been introduced because it was strongly urged to be good evidence in behalf of the defendants, by their counsel; and with the view of showing, even though the facts stated had been proved, that they would not take the case out of the principle that a deed absolute on the face of it, for property, offered to secure a loan in a case in which the parties originally met upon the footing of borrowing and lending, will be considered a deed in the nature of a mortgage, to secure a loan, though another consideration shall be in the recital of the deed than the loan, unless it shall be proved that the parties afterwards bargained for the property independently of the loan; or if it shall appear that the chief inducement of the grantor in making the deed, was to procure the loan; or that the grantee, after the execution of the conveyance, treated the money which he had

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advanced as a substantial part of the consideration, and not as a loan. There is no proof in this case that the parties bargained without a reference to an advance by Nixon of $5,000, and it does appear that Morris was only induced to make the deed from the offer of Nixon to make the advance of that sum, and that Nixon treated it substantially as a part of the consideration to be given for the property, as he took a bond from Morris for the amount, and says it was only to be contingently enforced, for the benefit of Morris or his family, in the event of Morris falling into misfortune.

Courts of equity will not permit so uncertain 128*] a benefit as is *here expressed to weigh at all in their consideration of cases like this; for, if they did, it might become a contrivance to give plausible coloring to an originally meditated fraud, or to one induced by the temptation of subsequent gain.

But besides the transaction itself, as it appears in the pleadings, there were relations of interest and of agency, between Thomas Morris and Henry Nixon, in respect to the property; and such as grew out of the embarrassments of the former, and also out of his particular condition to the recitals of consideration in the deed, which combine to raise a violent presumption of a secret trust, and that the deed was meant to secure Nixon's advances, loans, and indorsements for Morris.

Nixon claimed an interest in the property, besides the one fourth of the moiety which Morris had agreed to convey to Walker and Henry Morris, in trust for Mrs. Nixon. For the former, Nixon had not such satisfactory evidence as he could rely upon. This appears from his correspondence. Morris was much embarrassed; no one knew his pecuniary difficulties better than Nixon did. He remembered, too, that Morris, without consulting him, had offered to mortgage the property to the United States. He feared, from the disclosures made by Henry Morris of the pressing necessity of his brother, that he might mortgage the property to raise the sum he then stood in need of, to some other person if Nixon did not advance it; so that, at some other time, urged by want of money or the demands of creditors, he might be induced to convey to others an interest in the concern. That new parties might interfere with the management of it, to the injury of all who were originally interested; that the bank, by any change in the ownership, and the course which might be pursued in respect to the property, might not continue to be so indulgent as it had been, in postponing the payment of the purchase money still due. Besides, sales of this property to individuals and purchases from the city were then anticipated! the latter a slow, but sure speculation; almost at the price of the owners, from the contiguity of public works, which could not be abandoned; nor could they be carried on without more of the property than the city had already bought. Add the embarrassed condition of Morris; the connection and close intimacy between the parties; their excited expectations, extended by 129*] exaggerated *representations to the females of the family, that all concerned would realize great pecuniary advantages from the property; the certain interest, also, of Mrs. Nixon in it, and the certainty that, by keeping it under their own control, it would be managed in their own way; all these considerations were cogent inducements with Nixon to get a legal title from Morris, and the moment when Henry Morris presented himself to solicit a loan for his brother was the occasion upon which it could certainly be obtained.

But further, Morris's condition, in respect to the consideration recited in the deed, was not such as to induce him to wish to part with the property. Nor does Nixon's assumption of the particular debts of Morris, recited in it, bear the aspect of a genuine purchase. It was not a present payment of anything; and, if genuine, was the purchase of Morris's speculation, by an advance of $5.000, which, according to the face of the transaction, was to be repaid. And may we not say, when in the same transaction we have it admitted that one of the documents was not meant by the parties to be what it purports, that another of them by this fact is subjected to suspicion?

But we have said, though Morris was embarrassed, that he was not pressed by any of the particulars recited in the deed as a consideration.

The purchase money remaining due to the bank on the property, the bank had permitted to remain unpaid, finding no doubt its advantage in the interest. Both principal and interest were ultimately paid, not by Nixon, but by sales of the property.

The debt due to Biddle and Wharton was secured by a mortgage upon a part of the property, given by Morris with Nixon's consent. The notes discounted at the bank for the accomodation of Morris with Nixon's indorsement, had been renewed, and were running as an accommodation, to be renewed again and again, as they were in fact, without any change of names to the paper, after the deed was executed. Nixon could not press for the commissions claimed as agent of the property, or did not intend to do so; for we find him writing to Morris on the 21st May, two days before Henry Morris arrived in Philadelphia on his errand for the loan, and seven before the deed was executed, to make himself easy as to commissions, as it had not been his intention to ask for them; or acknowledging he had no right to *do so, until "the final closing of the [*130 accounts, agreeably to the first agreement when the Hills were bought."

Such was the situation of Morris, in respect to the debts named in the deed as the consideration for which an absolute title was to pass. He was an embarrassed man, and hard pressed at that moment for $5,000, and though destructive consequences were to assail him if he could not get it, is it likely that Nixon then could have been insensible to the ties which had united them, and could have made his distress the means of coercing from him an absolute conveyance, without a secret trust of all that he had left, upon which he could rest a hope to raise himself a little above his ruined fortune? We cannot think so. If we did, it would be our duty to give another aspect to this transaction, from which the defendants would derive no benefit.

If a doubt remained upon our minds in respect to the character which should be given to the deed, the letter from Nixon to Morris, of the 24th May, would remove it.

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It may be considered, either as having been intended by the writer to put Morris at ease in respect to the conveyance and bond which were required, or as a letter calculated to mislead Morris in respect to the use which Nixon would make of the conveyance. The letter might be, either the artifice of the writer to accomplish an unjust intent, or the language of the letter and manner of using it might innocently mislead. In either event, if the letter is such as is likely to mislead and from which it can be fairly implied, that it induced a confidence that the receiver of it would have any benefit from or interest in the property, he was required to convey contrary to the terms of the deed, it would be fatal to it as an absolute deed.

Nixon and Morris were brothers-in-law. There seems to have been between them fraternal intimacy and confidence. It appears to have been unlimited in all the relations of social life and of business. The confidence of Morris was unwavering, and dependent, from the superior business ability of Nixon. Nor can it be denied that it was met by him in Morris's difficulties by acts of timely assistance and kindness. Nixon had been his agent in the management of the property from 1812. He claimed an equitable interest in it, besides the proportion of Mrs. Nixon. There were unascertained accounts of Nixon's agency when **131*]** the *deed was made. Morris had received no account since 1816, except an abstract of sales of some stone and gravel, furnished to him by one of the defendants in 1819. He did not know particularly what had been the proceeds of the sales and income of the property, or how they had been applied. No examination or estimate of the value of the residue of the property, as it then stood, was made. No communication had been given by the agent of the effect of public and private improvements upon it, in respect to its then, or prospective value. Nothing was said between Morris and Nixon as to the price that the taker was to give In this situation, being greatly embarrassed, Morris asked a loan from his agent. The agent says: 'I am aware of your embarrassment. There are certain claims upon this property which you will have to pay, and other responsibilities of yours for which I am also answerable. I will provide the money of which you stand in need, will take a bond from you for it, which I am not to enforce against you, unless you should fall into misfortune, and then only, should I see fit to do so, for the benefit of yourself or your family, if you will give me an absolute conveyance of the property.' The conveyance is given, the bond is taken, and now it is said the transaction was intended to be an absolute sale, and not a security for a loan. We do not think that the connection between the bond and the deed can be dismembered. Nor can we reconcile it with what we believe would have been the ordinary conduct of men in like circumstances, to suppose, that an agent so situated to a principal and friend in distress, could have intended, by asking for an absolute conveyance, to use it for any other purpose than to secure himself in the sum he was about to advance and his other responsibilities for his principal. Morris was a ruined man. Nixon knew it, and treated with him in this instance as if the crisis had come when creditors would no longer be satisfied with postponed promises. It was natural for Nixon, nor was it wrong in the then state of real property, and as he was about to advance to his brother-in-law $5,000, to take the most efficient way to secure himself from loss, and to put it out of the power of Morris to interfere with his security, by subsequently giving to others an interest in the property. We find upon a preceding occasion when Morris was pressed, and had offered to mortgage this property, *that Nixon suggested that it **[*132** should be put into his hands, with the trust expressed of what was intended. His object then was, that the original intention of the purchase might be carried out for the benefit of all concerned. Nixon's inducement to do so was greater than it had been at that time. Mrs. Nixon's interest of one fourth in the moiety of the property had been in the meantime secured to her by her brother.

We will now turn to the letter of the 24th May from Nixon to Morris, to confirm the view we have of this transaction. It begins,

"DEAR MORRIS: Henry arrived here early yesterday morning. Having had a conversation with him on the subject of a loan, I have only to say, my best exertions will be to obtain this object, and to enable me to do which, Henry will immediately call upon you to advise you of the only mode that he or I can suggest to achieve it."

It must be remembered that the letter was written on the day that Nixon consulted his counsel, after the consultation had been had. The answer of Nixon shows this. He says, that he had concluded to provide the money, but that he must consult counsel before he finally agreed. And then that he thereupon returned to Henry Morris, and informed him of the determination he had come to of dealing upon no other terms than an absolute sale and conveyance, and taking a bond for the loan. When, then, Nixon says in the letter, "Henry will immediately call upon you to advise you of the only mode that he or I can suggest to achieve it," it is manifest that the mode had been a subject of conversation between them; and as he mentions in the letter, the loan in connection with the mode, which Henry was to communicate to his brother, this contemporary letter must be called on to ascertain what Nixon intended by the mode; and more especially so, as it seems the contents of the letter had not been told to Henry Morris.

The mode was an absolute conveyance of the property and a bond. But there is, in conection with the mode, the declaration of an intention, coupled with an ability, in consequence of the mode, to achieve a loan. It would, then, be a very strained inference, from the words of the letter, to say that Nixon did not mean that Morris, to whom he was writing, should understand *that he meant a loan, to be se- **[*133** cured by a conveyance of the property, as well as by a bond; or that he meant, that the loan which he could achieve by the mode was to depend upon Morris making to him an absolute sale of the property for the considerations expressed in the deed. If such had been his meaning, it could have been plainly said. But we think there can be no doubt concerning what

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the writer of this letter meant or the construction which, in a court of equity, should be put upon it, when we find him saying: "You, I am sure, will have confidence in me as to the mode proposed, which Henry will communicate: and be assured my sincere prayers will be and best exertions to promote this all-important point." This language indicates a sincere desire in Nixon at that time to relieve the distress of his brother-in-law. That he intended to solicit his confidence as to the mode proposed, to secure himself from loss, without depriving Morris of a participation in the prospective advantages which they had mutually indulged for ten years in respect to the property, and which, it cannot be denied, had in a great degree been excited by the representations of Nixon. In Morris's situation it was a great point gained for the benefit of all concerned in the property, that the legal control of it should be taken from him and vested in Nixon.

This letter we think a part of the entire transaction, and stamps its character in a court of equity. It could only have been intended to put Morris at ease in respect to the absolute conveyance which Nixon required; or it was designed to mislead and deceive Morris, by expressions of sympathy which were not felt, and a solicitation of confidence not deserved. If the latter, we should feel bound to pronounce the transaction a meditated fraud, successfully accomplished. We adopt the first as most probable, and in that view of the case decree the conveyance of the 24th May, 1822, to be a deed, with a secret trust, for the security of moneys loaned and advanced by Nixon to the grantor. This conclusion makes it unnecessary for us to consider the effect of time upon the rights in controversy.

We order the decree of the Circuit Court to be reversed, and that the cause be remanded, with instructions to the court to have an account taken, and that the complainant be al-134*] lowed his *proportion at the rate of an interest of five eighths in a moiety of the original purchase of Morris and Williams, and that the court shall take such other proceedings in the cause as equity may require.

ORDER.

This cause came on to be heard on the transcript of the record from the Circuit Court of the United States for the Eastern District of Pennsylvania, and was argued by counsel; on consideration whereof, it is now here considered, ordered and decreed by this court, that the decree of the said Circuit Court in this cause be, and the same is hereby reversed, with costs; and that this cause be, and the same is hereby remanded to the said Circuit Court, with instructions to that court to have an account taken; and that the complainant be allowed his proportion at the rate of an interest of five eighths in a moiety of the original purchase of Morris and Williams, and that the said court shall take such other proceedings in the cause as equity may require.

Cited—12 How., 147, 148; 19 How., 290; 12 Wall., 320; 2 Wood. & M., 200, 443, 445; 3 Wood. & M., 407, 408, 511; 2 Cliff., 55; 3 Cliff., 530; 3 Story, 289, 293; 2 Curt., 388.

THE PRESIDENT, DIRECTORS AND COMPANY OF THE BANK OF THE UNITED STATES, AND THE UNITED STATES,

v.

JAMES B. BEVERLY AND JANE, HIS WIFE, WILLIAM RAMSAY AND ELIZABETH, HIS WIFE, HAMILTON AND JAMES PETER, heirs of DAVID PETER, Deceased, AND GEORGE PETER, Surviving Executor of DAVID PETER, Deceased.

Chancery—testator's disposition of personal property to purposes other than debts, with creditor's consent charges debts on real property—pleading judgment—proof must be by exhibit of record—limitations.

The case in 10 Peters, 562, reviewed and confirmed.

A fact tried and decided by a court of competent jurisdiction cannot be contested again between the same parties; and there is no difference in this respect between a verdict and judgment at common law and a decree of a court of equity.

But an answer in chancery setting up, as a defense, the dismission of a former bill filed by the same complainants, is not sufficient unless the record be exhibited.

A disposition by a testator of his personal property to purposes other than the payment of his debts, with the assent of creditors, is in itself a charge on the real estate, subjecting it to the payment of the debts of the estate, although no such charge is created by the words of the will.

*Lapse of time is no defense where there [*135 is an unexecuted trust to pay debts, which this court, in 1836, decided to be unpaid in point of fact.

THIS case grew out of that of *Peter* v. *Beverly*, which came before this court in 1836, on an appeal from the Circuit Court of the District of Columbia, in decreeing an injunction on the proceedings of the then complainants, to sell a part of the real estate of David Peter, deceased. A full report of that case will be found in 10 Peters, 532, *et seq.*, wherein all the facts and circumstances attending it are fully set forth in the opinion of the court, and do not require repetition now. The result of that opinion was a reversal of the decree below; a dissolution of the injunction; an order that the bill of the complainants be dismissed, and that the cause be remanded to the Circuit Court, with directions to carry the decree of this court into effect. This was done, and the decree consummated by a sale of the property in controversy, which consisted of those parts of the real estate of David Peter which he had by his will charged with the payment of his debts; but they being insufficient for the purpose, the present bill was filed in order to subject the residue of the estate, not so charged directly by the will, to the payment of the residue of the debts of the estate.

In March, 1836, the heirs or devisees of David Peter executed a deed to John Marbury, authorizing him to sell certain property, which he

NOTE.—*As to when debts and legacies are chargeable on the real estate of the testator*, see note to Wright v. Denn, 10 Wheat., 204; and note to Stump's Ex'rs v. Deneale, 1 Pet., 585.

As to when statute of limitations and lapse of time as a defense, is applicable to trusts, see note to

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accordingly did; the amount of sales being $38,722.32.

At a subsequent period of 1836, the Bank of the United States, in behalf of the said bank, and of the United States, and of such of the creditors of the estate of David Peter as should come into court and contribute to the expenses of the suit, filed a bill against George Peter, surviving executor, against the heirs or devisees of David Peter, and against John Marbury, trustee as aforesaid, stating that the personal estate of the said testator had been applied to the use and benefit of the heirs by the executors, in the fulfillment of the trust created by the will, and claiming that the real estate of the said testator, or the proceeds thereof, or as much as might be necessary, should be applied to pay whatever balance might remain due to the creditors, after selling and applying to that purpose the proceeds of the city lots and the land upon which Dulin lived. It prayed, also, an injunction against Marbury, and for other and general relief.

136*] *In April, 1836, the following agreement was made between the counsel of the respective parties, and filed in the cause:

AGREEMENT OF COUNSEL.

It is agreed by the parties in this cause, by their counsel, that the Bank of the United States and George Peter, who claim to be creditors of the estate of the late David Peter, for a balance of debt which may remain to them after the application of the trust estate provided in the will of the late David Peter for the payment of his debts, shall, if such balance be established against the defendants, the heirs and devisees of David Peter, as to so much of David Peter's real estate as is conveyed to John Marbury, by deed filed as an exhibit with complainant's bill, look to the proceeds of sales of said real estate so conveyed to the said John Marbury, in lieu and stead of the said real estate itself.

It is further agreed, that as soon as the purchase money of said real estate shall become payable and be collected by said John Marbury, he shall invest the same in his own name, as trustee in Pennsylvania State stock, bearing interest at the rate of 5 per cent., first deducting therefrom the necessary expenses, taxes due on the said property, to the day of sale, and the commissioners provided for in the said deed; the whole of the proceeds of the said sales, after such deductions made, to be subject to the order and decree of this court in this cause for the disposal thereof, whether the said order or decree be for the payment of debts due from the said estate of David Peter to the Bank of the United States, or to George Peter, or other person, or from the said heirs and devisees, or either of them, to the said Bank of the United States, or George Peter, or either of them, on account of any portion of the personal estate of said David Peter, used or retained by them severally; provided, also, that it is the true intent and meaning of this agreement, that the part, portion, or interest of each of said heirs and devisees, should be responsible only for so much of the claims and debts of said heirs and devisees, to said Bank of the United States, or George Peter, as he or she shall be personally responsible for; and that no one shall be held or deemed responsible for any other than him or herself.

It is further agreed, that the Bank of the United States, or George Peter, or either of them, by themselves or their agent, may *stop or postpone the sale of any [*137 portion, or the whole, of the property advertised for the 15th inst., or any future attempted sale of property so conveyed to said John Marbury, if they, or either of them should be dissatisfied with the prices bid or offered for said property or any portion thereof; provided, however, that all the said property shall be sold during the present year, unless the said bank and George Peter consent to further delay.

It is further agreed, that the three story brick house and lots appurtenant in Washington city,

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Thomas v. Harvie, 10 Wheat., 146; and note to Prevost v. Gratz, 6 Wheat., 481; and note to Pratt v. Carroll, 8 Cranch, 471.

Res adjudicata or conclusiveness of judgments.

Wherever a tribunal has decided upon a matter within its regular jurisdiction, its decision must be presumed proper, and is binding until reversed by a superior tribunal. It cannot be affected, nor can the rights of persons dependent upon it be impaired, by any collateral proceeding. Locke v. Halsey, 16 Pet., 71; Warburton v. Aken, 1 McLean, 460; French v. Lafayette Ins. Co., 5 McLean, 461; Farmer's Loan & Trust Co. of New York v. McKinney, 6 McLean, 1; Campbell v. Strong, Hempst., 265.

Where a cause has been tried on the merits, and judgment has passed thereupon for either party, such judgment, while it remains in force, must be a bar to any other suit for the same cause of action, though the declaration be so imperfectly drawn that it would not stand the test of a demurrer. Hughes v. Blake, 1 Mass., 515; 6 Wheat., 453.

It is equally and universally true of all actions, whatsoever their subject matter, that an allegation on record, on which issue has once been taken and found, is, between the parties taking it and their privies, conclusive, according to the finding thereof so as to estop the parties respectively from again litigating that fact once tried and found. Sturdey v. Jackaway, 4 Wall., 174.

The rule applies equally to a verdict and judgment in a court of common law, and a decree of a court of equity. They both stand on the same footing. Hopkins v. Lee, 6 Wheat., 109.

If a judgment is set up in a collateral action, against a party who had not opportunity to plead to the action in which it was recovered, because no notice was given to him of its pendency, it may be avoided by proof of fraud, or it may be shown to be void on its face. Webster v. Reid, 11 How., 437; Pratt v. Northam, 5 Mason, 95.

That the validity of a judgment may be inquired into collaterally, when a want of jurisdiction appears upon the record. Harris v. Hardeman, 14 How., 334; Shumway v. Stillman, 6 Wend., 447; Bradway v. Heath, 13 Wend., 407.

The judgments and decrees of the courts of the United States are binding until reversed, although their jurisdiction is not shown on the record. Although courts of limited jurisdiction, they are not technically inferior courts. McCormick v. Sullivant, 10 Wheat., 192; Kennedy v. Georgia State B'k, 8 How., 586.

The judgment of a court of one of the United States must receive, in the courts of every other State, the same faith and credit which is awarded it in the State wherein it was rendered. Warren M'f'g Co. v. Ætna Insurance Co., 2 Paine, 501; Green v. Sarmiento, 1 Pet. C. C., 74; 3 Wash. C. C., 17; Jacquette v. Hugunon, 2 McLean, 129; Lincoln v. Tower, 2 McLean, 473.

A judgment or decree of a court of competent jurisdiction, directly upon the point, is conclusive between the same parties or their privies, upon the same matter coming directly in question in another court of concurrent jurisdiction. Blount v. Darrach, 4 Wash. C. C., 650; Geiston v. Hoyt, 1 Johns. Ch., 543; Simpson v. Hart, 1 Johns. Ch., 91; Brinkerhoff v. Marvin, 5 Johns. Ch., 325; Hawley v. Mancius, 7 Johns. Ch., 174; VanWyck v. Seward, 1 Edwards, 327; Ingham v. Bellows, 2 Vt., 575; Kingsland

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set forth in said deed to John Marbury, as devised in trust for William H. Peter, shall be sold jointly by the said John Marbury and the said George Peter, Sen., executor of David Peter, and upon the terms mentioned in the deed to said John Marbury; and that the proceeds of the sale of the said house and lots appurtenant, after deducting expenses and taxes, shall, when the same becomes due and is collected, be invested by the said John Marbury and George Peter, in their joint names as trustees, in five per cent. stock of the State of Pennsylvania, to abide the order of this court for the disposal of the same. The said John Marbury to charge no commission on the proceeds of said sale, if the court shall be of opinion that the said house and lots appurtenant be part of the real estate of David Peter; and the said George Peter to have no commission on the proceeds thereof, if the court be of opinion that the same is the property of the estate of William H. Peter, deceased.

It is understood and agreed, that nothing herein contained is to be taken to amount to an admission by the defendants, the said heirs and devisees, or either of them, that any debt is due from them, or either of them, to the said complainants or the said George Peter; or to prevent them, or either of them, from having the benefit of the statute of limitation, by plea or answer, or any other defense, legal or equitable, against the enforcement of the claims of the complainants, or George Peter, except that the said defendants, the said heirs and devisees, do hereby waive any exception to the jurisdiction of the court, as to the personal estate in this agreement mentioned.

F. S. KEY, for United States Bank.

JAS. DUNLOP, Solicitor and Trustee for Geo. Peter.

JOHN MARBURY, Sol'r for heirs, and devisees, and himself.

April 12th, 1836.

138*] *Afterwards all the defendants answered. George Peter, the executor, claimed to be a creditor of the estate; Marbury admitted the execution of the deed to him and the sales under it; and the devisees, Beverly and others, pleaded the lapse of time and the statute of limitations as a full and complete bar against the claim of the complainants. They also denied all knowledge of an arrangement with the Bank of Columbia; required proof of it; denied the authority of the executors to cast any further burden upon the real estate, than such as would result from a deficiency in the personal estate; denied that the executors applied to the bank for indulgence; averred that the negligence of the executors alone prevented the recovery of the purchase money of the farm from Magruder; averred that the children of David Peter were minors at the time of his death, and incapable of consenting to any arrangement whatever with the banks; that Beverly had no knowledge of, or interest in, the property until 1819, when his marriage took place; that they were never able to acquire any information, and never did, of the complicated affairs of the estate; praying that the decree of the court, dismissing a similar bill in 1827, may be as effectual as if formally pleaded; averring that any agreement with the banks could affect nothing more than the trust part of the real estate; they deny the authority of the court to decree a sale of property situated in Maryland; aver that the executors received large sums of money for which they have rendered no account; that no part of the personal estate came into the possession of Beverly since his marriage; that if any part of it came into the possession of his wife before her marriage, it was very inconsiderable indeed; and that the personal estate continued principally in the possession of George Peter, the executor, by whom it was used, wasted, and otherwise disposed of.

On motion of the complainants, by their solicitor, the Circuit Court ordered "That the decree of the Supreme Court, and the bill, answers, exhibits, depositions, and proofs in the case of *Beverly* v. *Peter* in the said record, and

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v. Spalding, 2 Barb. Ch. R., 341; Monroe v. Douglass, 4 Sandf. Ch. R., 126; Steele v. Lineberger, 59 Penn. St., 309, 313; Manigault v. Deas, 1 Bail. Eq., 283.

But a decision of a court of law, on motion and affidavit, is not such a *res judicata* as will conclude another court from inquiring into the case. Arden v. Patterson, 5 Johns. Ch. R., 52; Simpson v. Hart, 14 Johns., 63.

How far a judgment at law is a bar to a subsequent suit at law, or in equity, against the party in whose favor such judgment was rendered. Saunders v. Marshall, 4 Hen. & Munf., 455.

A person not a party to a judgment, is not bound by it, in law or equity, merely on the ground that he was present, and cross-examined the witnesses. Turpin v. Thomas, 2 Hen. & Munf., 139.

Parties and privies to a decree or judgment are bound thereby, and cannot re-discuss the same matter in another suit. Allin v. Hall, 4 A. K. Marsh., 526; McChord v. McClintock, 5 Litt., 304; Garner v. Strode, 5 Litt., 314; Riley v. Miami Export Co., 5 Hammond, 333; Rogers v. Coleman, Hard., 413.

In a suit by a purchaser under an execution, the original judgment cannot be controverted. Starr v. Starr, 1 Hammond, 326.

In chancery, a judgment recovered in a court of law is considered as binding upon the real parties in the suit, although not the nominal parties on the record. Southgate v. Montgomery, 1 Paige, 41.

The executor or administrator is bound by a judgment in favor of, or against, the decedent, or his predecessor in administration. Steele v. Lineberger, 59 Penn. St., 309, 313; Manigault v. Deas, 1 Bail. Eq., 283, 295.

A judgment for or against the ancestor is competent evidence for or against the heir, in actions relating to the inheritance. Lock v. Norbone, 3 Mod., 142; Freemen on Judgments, sec. 168.

A judgment for or against an executor or administrator is not conclusive against the heirs or devisees; nor is a judgment against the heir or devisee conclusive against the executor or administrator. Dale v. Roosevelt, 1 Paige, 35; McCoy v. Nichols, 4 How. Miss., 31; Vernon v. Valk., 2 Hill Ch., 257; Collinson v. Owens, 6 Gill & J., 4; Robertson v. Wright, 17 Gratt., 534; Early v. Garland, 13 Gratt., 1; Stewart v. Montgomery, 23 Penn. St., 410; Dorr v. Stockdale, 19 Iowa, 269; Combs v. Tarlton, 2 Dana, 464.

A judgment or verdict against the executor or administrator is not even competent evidence against the heir or devisee of the debt, or other facts established thereby. A judgment for or against the heir does not bind the devisees, nor conversely. Kent v. Kent, 62 N. Y., 560, and cases cited; Robertson v. Wright, 17 Gratt., 534; Laidley v. Kline, 8 West Va., 218, 230. *Contra*, Harvey v. Wilde, L. R., 14 Eq., 438; S. C., 3 Moak's Eng., 811; Compare Early v. Garland, 13 Gratt., 1; Garnett v. Macon, 6 Call., 308, 337; Cowart v. Williams, 34 Ga., 167.

A judgment or verdict against one individual does not estop him as trustee. Rathbone v. Hooney, 58 N. Y., 463.

But an adjudication against him as trustee estops him in respect to his private right as a *cestui que trust* held at the time of the former action, or acquired from persons then holding it. Corcoran v. Chesapeake, &c., Canal Co., 94 U. S., 4 Otto, 741, 745.

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on file in the said cause, be read and made use of in the hearing of this cause."

In January, 1840, the papers in the cause, with the evidence already taken and on file, were referred to the auditor to state an account between the parties upon the principles of his former report, and in November, 1840, he reported as follows:

139*] *AUDITOR'S REPORT.

The Bank of the United States and Peter, v. The Estate of David Peter, Deceased. } In chancery.

The undersigned auditor of the Chancery Court for Washington County, District of Columbia, has had the papers filed in this cause under examination, and now submits the following report:

That the claim of the Bank of the United States against the estate of David Peter, with interest to the 12th day of November, 1840, and costs, is $46,119.75; and that the claim of George Peter, per statement herewith, is $26,607.78. That the net proceeds of the sales of property sold by George Peter, as executor, is $17,513.66, to which may be added the estimated value of two thousand acres of land in Montgomery County, Maryland, called Dulin's (which originally sold for a little upwards of $20,000), $7,500; of vacant lots in the city of Washington, $1,500, and $2,873.15 being the amount awarded to the proprietor of Dulin's farm by the Chesapeake and Ohio Canal Company, for damages done by running said canal through that farm, which sum has never been paid by the executor of David Peter. These several items, if the property brings this estimated value, will make the sum of $29,386.81 for trust estate.

That the sales made by John Marbury, under an agreement made by the parties to this cause, as per report of sales, amount to $41,731.86, but owing to the non-compliance with the terms of sale, of some of the purchasers, the corrected sales as specified in Mr. Marbury's account No. 2, the amount is reduced to $38,722.32; the whole amount of the payments received by Mr. Marbury up to the 20th April, 1838, is $21,711.16, from which deduct, for expenses, taxes, surveying, auctioneer's bills, and the trustee's commission, $1,804.76, leaving in the hands of the trustee, $19,906.40, which amount, according to his report, has been vested in the stock of the State of Pennsylvania, bearing interest at 5 per cent. per annum. The corrected sales, as above, amount to $38,722.32, to which may be added as follows: Wm. Ramsay's purchase of lots, $2,084, and Wm. Stewart's, $501, which still remain for the trustee to dispose of, and if they bring the same at which they were struck off at to Ramsay and Stewart, will make, when added **140*]** to the $38,722.32, the *sum of $41,307.32 as gross sales; in addition to this sum, there remains twenty-four acres of land, near the city of Washington, bought at the sale by Mr. Upton, who never complied with the terms of sale, and never has paid for, which it is believed will sell for $1,000; this will make the trustee's sales amount to $42,307.32, and taking the expenses, commissions, &c., as before mentioned, it will leave in the hands of the trustee the sum of $40,502.56. That it thus appears that the sales of George Peter, acting under the will of David Peter, amount, if the sales shall be equal to the estimate here given, will be $29,386.81, and those by Mr. Marbury, $40,502.56. To these sums are to be added the amount of interest received on the notes given in payment, and the interest on the Pennsylvania stock.

The auditor has read and considered the pleas of limitation put forth by the answers of the heirs of David Peter, and by John Marbury, Esquire, as their solicitor in this cause, and is of opinion that it is not available, under the circumstance of this case, as it respects either of the creditors.

Submitted by

JOSEPH FORREST, Auditor.

10th November, 1840.

In the audit of the 10th December, 1833, the executors are charged with the following, being for property sold in the city of Washington to sundry persons, viz.: Shaw and Elliot, lots, $1,000; J. Kuhn, $796.86, and Francis Dodge, $175, making in the whole $1,971.86. It is contended by George Peter, the surviving executor, that he never received this amount, or any part thereof, but that the same was received by the heirs; as Major Peter gave deeds to the purchasers, the auditor is of opinion that it was rightfully charged in said audit. This amount the executor can bring into his settlement with the heirs, but not into a settlement with the creditors of the estate.

JOSEPH FORREST, Auditor.

10th December, 1840.

Whereupon the complainants, by their solicitor aforesaid, filed the following exceptions to the auditor's report:

COMPLAINANTS' EXCEPTIONS.

Because the auditor has charged George Peter, surviving executor, with the purchase money of the lots sold to Kuhn and *Birth, [***141** when it was proved that the same was not received by him, but by James B. Beverly, or was applied by him to the payment of debts of the deceased, for which the executor is not credited.

F. S. KEY, for complainant.

Whereupon the said defendants, by their solicitor aforesaid, filed the following exceptions to the auditor s said report, to wit:

DEFENDANTS' BILL OF EXCEPTIONS TO AUDITOR'S REPORT.

Exceptions on the part of the heirs-at-law and devisees of David Peter, defendants in the above cause, to the report of Joseph Forrest, Esq., auditor, made in this cause, and filed the day of November, in the year 1840. The said defendants except to the said report—

1. Because the auditor has allowed a claim or debt of $46,119.25, in favor of the complainants, the Bank of the United States, against the estate of the said David Peter and the defendants, his heirs and devisees, without legal, competent, and proper evidence of the existence of such debt, or of any debt whatsoever, due from the said David Peter, in his lifetime, and with the payment of which these defendants ought to be charged in this suit.

2. Because, in stating the said pretended debt

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or account, between the complainants and the said defendants, the heirs and devisees of the said David Peter, the auditor has allowed compound interest, and thus, unjustly, illegally, and oppressively increased the said pretended debt.

3. Because, if any such debt was due from the said David Peter in his lifetime, and at the time of his death, which happened in the year 1812, the recovery of the same against these defendants, as the heirs and devisees of the said David Peter, in consideration of any real estate descended from, or devised by the said David, to these defendants, was barred by lapse of time and the provisions of the act of limitations; and although these defendants, in their answer to the bill of complaint, and at the hearing before the auditor, insisted on the lapse of time and the provisions of the act of limitations, in bar of the said debt or demand of the complainants, the auditor rejected their said defense, and allowed the said debt or demand.

4. Because George Peter, the surviving executor of David Peter, and one of the defend-
142*] ants to the said bill of complaint, *having elected to come in and contribute, with the complainants, to the expenses of this suit, filed an account as a creditor of the estate of the said David Peter, amounting to the sum of $26,607.78, which said sum of $26,607.78, the auditor has allowed as a just and proper charge against the estate of the said David Peter, and for the payment of which, the real estate, devised by the said David to these defendants, ought to be sold. Whereas, these defendants say that there is no evidence in the cause to prove the same, or any part thereof, to have existed as a debt against the said David Peter in his lifetime, or to authorize a decree for the sale of the real estate devised to these defendants, by the said David, for the payment of the same.

5. Because each and every one of the items of charge contained in the account of the said George Peter, so allowed by the auditor, was of more than three years' standing before the filing of the said account, by the said George Peter, with the auditor, and before the filing of the bill of complaint in this cause by the Bank of the United States, against these defendants and the said George Peter, and was, at the time of the filing of the said bill of complaint, barred by lapse of time and the provisions of the act of limitations; and these defendants, at the hearing before the auditor, and before the making of his said report, as appears by the said report, insisted on the lapse of time, and the provisions of the act of limitations, as a bar to the claim of the said George Peter; notwithstanding which, the auditor allowed the same.

6. Because the report of the auditor and the account accompanying the same, are not in pursuance of the order of reference to the auditor, but relate to claims and accounts not embraced in such reference.

7. Because the said report, accounts and statements, accompanying the same, are unsupported by legal and competent evidence in the cause, and therefore ought to be set aside.

8. Because the sum allowed by George Peter, as surviving executor of David Peter, by the auditor, is for a general balance on the settlement of the executor's account, as is alleged, for that amount overpaid the proceeds of the estate which came to the hands of the executors, to be administered: and the defendants, as heirs and devisees of the real estate of the said David Peter, *are not chargea-[*143
ble by the executors, or the survivor of them, with the payment of such balance.

JOHN MARBURY,
Solicitor for the heirs and devisees of David Peter.

On the 21st of January, 1841, the cause came on for hearing on the exceptions to the auditor's report, and the bill, answers and exhibits, depositions and proofs and general replication; when the court decreed that the exceptions to the auditor's report, made by complainants, be overruled, and the exceptions of defendants to the auditor's report be confirmed; and that the bill of the complainants be dismissed with costs.

From that decree the complainants appealed to this court.

Messrs. Jones and *Sergeant* for the appellants.

Messrs. Cox and *Reverdy Johnson* for the appellees.

The counsel for the appellants made the following points: That the court erred—

1. In overruling the exception of complainants.

2. In confirming the exceptions of defendants, the claims of the bank and of George Peter being sustained in the record by the proof as reported by the auditor.

3. In dismissing the bill.

Because: 1. The bill filed in 1827, and the proceedings thereon, were no bar to the relief now sought.

2. Lapse of time and the statute of limitations could not, under the circumstances of the case, operate as a bar.

3. Under the arrangement made between the banks and the executors for the benefit of the heirs, and according to the provisions of the will, the personal estate might properly be applied to the maintenance of the heirs.

4. If so applied (as it was) the real estate was liable to the debts, whether specifically so directed by the will or not.

5. On that part of the real estate specifically directed to be sold for the payment of the debts appearing to be insufficient, the rest of the real estate was liable; and it was not necessary, in such case, to wait till an actual sale ascertained the extent of the insufficiency.

6. All these grounds were maintained in the opinion of this court in the former case between these parties.

In that case the court determined that the real estate specifically *directed to be [*144
sold to pay debts, was liable to be sold for that purpose.

This bill avers the insufficiency of that part of the real estate (it having been sold) to pay the debts; which is not denied in the answer. And the appellants contend that, under the will and by the laws of Maryland, the residue of the real estate is liable to the extent of the insufficiency.

Mr. Jones argued that the Act of Maryland of 1785 gave to simple contract creditors the same remedy against heirs as specialty creditors. The heirs and devisees in this case consumed the personal fund, and the testator in-

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tended it should be so. He had, in effect, alienated his personal estate from the payment of his debts. Where the legatees have a lien, they must resort to it. (1 P. W., 679; 2 Powell on Devises, 654.) The executor can come in as a creditor. (3 P. W., 398; 3 Gill & Johnson, 324; 6 Gill & Johnson, 4.) The plea of limitations cannot avail, because the will creates a trust to pay debts which consists mainly in a charge upon the real estate. The form of making the trust is not material. If there is a charge upon the land and no trustee, the court will appoint one. (13 No. of Law Library, page 10.)

Mr. Coxe, contra.

The proceeding is exclusively upon the statute of Maryland of 1785, and not upon that of George II., making real estate subject to execution. But the debt must be in existence at the death of the testator, and the executor's claim, here, has arisen since. (See 1 Harris & Johnson, 469; 2 Bland's Chancery, 327.) In 1 Harris & Gill, 504, the petition was dismissed because it did not aver a deficiency of personal assets. The Court of Appeals reversed this, but only upon the ground that the deficiency might have been proved. But here it is neither averred nor proved. (See 1 Bland, 415; 2 Bland, 250, 472; 4 Gill & Johnson, 296.) In 8 Peters, 144, the court consider this Act of 1785 as an enlargement of chancery powers, and say that the real estate is to be sold only when there are no personal assets. This claim was not against the testator; he died in 1812, and the Bank of the United States was not chartered until 1816. If it be by assignment, none is shown. If a guardian to the infants had been appointed, he could not have touched the real estate. How, then, can the executor **145*]** *involve it? (Law Reporter of March, 1840, page 1.) As to limitations, there is only a general replication filed, and no special matter set forth in avoidance of the plea. The argument on the other side cannot therefore come in. 6 Peters, 64, says, "where the statute is pleaded, replication or amended bill must set forth the facts to take it out of the statute." (As to the effect of limitations, 1 Bland, 91, 470; 2 Bland, 366; 8 Peters, 528; 3 Cond. Ch. Rep., 155; 4 Harris & Gill, 126, 270; 2 Gill & Johns., 491. As to a trust reviving a debt barred by statute, 1 Russell & Mylne, 255, or 4 Cond. Ch. Rep., 413.) The bill does not aver a trust; and if there be one, who is the trustee? If it is the executor, the bill ought to have been against him alone. (2 Johnson's Ch. Rep., 614, 623, and authorities there cited.)

Mr. R. Johnson, same side, examined,

1. Whether the case as presented by the bill could be sustained, supposing the creditors to be the creditors of the testator at his death.

2. Whether they were in fact such creditors.

3. Whether the answer and proof did not meet the averments of the bill.

4. Whether the complainants could come upon the real estate either upon the ground of an assigned claim to the bank, or that the executor had overpaid.

1. The complainants can succeed only upon one of two grounds—upon the Act of 1785, or that there was a general trust created. It is settled in Maryland, that under the Act of 1785 there must be an averment and proof of a deficiency of personal assets. (1 Harris & Gill, 504.) But here the bill says there was a large personal estate. As to a general trust—how can that be, when there is a particular part of the estate devised to pay debts, if necessary? Testator died in 1812, and bill filed in 1836; in the meantime the debt has accumulated, by interest, to $46,000; the executor is a creditor to $26,000, making $72,000. The trust property is estimated at $29,000; the personal estate, which the testator thought might be insufficient, all gone, and the general estate is to make up $43,000. The whole estate will not pay the debt.

2. They were not creditors of the original estate. The executor's account begins in 1813, after testator's death, and the *other [***146** creditors claim by assignment; but none is shown. (See 7 Harris & Johns., 134; 4 Gill & Johns., 303; 6 Gill & Johns., 4.)

3. Answers rely upon limitations and lapse of time. *Morrison* v. *Bell* (1 Peters) decided that the court would not try to get out of the statute, and in *Gray et al.* (1 Harris & Gill), adopts the same principle. Can the creation of a trust upon a part of the estate prevent the statute from protecting the rest? Did not the testator intend that his debts should be soon paid, and the residue of his estate go to his children, free from debt? Between the *cestui que trust* and the trustee, the statute stops; but if other parties are brought in, it is different. If it is the law which makes this property responsible, then it is not the intention of the testator; and if so, there was no trust, and the statute must run. (2 Story's Equity, 735, *note;* 2 Sch. & Lef., 630.)

4. The dismissal of a former bill is a bar to this. (2 Story's Equity, 740; Cooper's Pleading, 269–271; Mitford, 237.)

Mr. Sergeant, in reply, for appellants:

The hardship of this case is not on the side of the defendants; it is one of obstinate ingenuity on their side. Debt has never been paid, and children have had the benefit of the personal estate. No mismanagement of the fund anywhere. The creditors are worse off than the family. The Bank of Columbia broke long ago; if it had exacted its debt immediately, it would have been called a Shylock. The respondents are residuary devisees; the testator first provides for his wife and then for his debts, and the will is the law of the case. (Mr. S. here gave a history of the case.) The bill does not profess to be under the Act of 1785. There was a special agreement of counsel, in which the defendants waived any objection to the jurisdiction of the court, &c.; they cannot now deny that the debt was due by the testator. We were entitled to the real, in aid of the personal, in 1813, and are so still. A devise of a part of the land to pay debts does not exempt the rest. Whoever takes the land takes it as a trustee. *Jones* v. *Scott* (1 Russell & Mylne) says, that the intention of a testator to make a trust prevents the statute from running. (See 2 Story's Equity, 737, 741.) The question in the case is, whether the executor shall be ruined, and the legatees *get [***147** the land for nothing. The family all concurred in what was done: the heirs and devisees had as much right as we had to go into chancery and have the estate settled up. As to the

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former suit being a bar, the record does not show anything but the answer, or whether it was dismissed "without prejudice."

Mr. Justice BALDWIN delivered the opinion of the court:

A summary of the points decided, and principles settled in the former case between these parties, will save much time in the investigation of those which are involved in this.

After taking a condensed view of the will of David Peter, the court declare that he had unquestionable right, so far as respected his children, to charge the payment of his debts upon any part of his estate he might think proper, and that none but a creditor could control his will in that respect; that he had constituted his widow the trustee of the proceeds of all his estate, for the maintenance and education of his children; and invested her with unlimited discretion in this respect, so far as the proceeds of his estate would go. Whereby the surviving executor is not accountable for anything so applied by her, even if she would be chargeable with a *devastavit*, and that the proceeds of all his estate being thus vested in the widow, would render it necessary, independent of any express direction in the will, that recourse be had to the real estate for the payment of the debts. (10 Peters, 562, 563.) The court then decide, that the surviving executor had power to sell, and that it was impossible to draw any other conclusion than that it was the intention of the testator that the sale should be so made. (10 Peters, 566.) On the inquiry whether there is any subsisting debt due from the estate of David Peter to the banks, the court say, there is no pretense that they have been paid in fact, and if not, the trust remains unexecuted, and the land still remains charged with it. If the executors have paid the banks, or the banks have accepted their notes in payment of the notes of the testator, the only effect is that the executors became the creditors instead of the banks, and may resort to the trust fund to satisfy the debt. But the court also say, that under the circumstances of the case there is no ground for considering the debt of the banks to be extinguished, and they then proceed to state the result of their consideration to be this:

148*] *That the will created a power coupled with an interest that survives; that the surviving executor is the person authorized to execute that power and fulfil that trust; that the debt due the banks has not been extinguished, or the estate in any way discharged from the payment. That the executors are not chargeable with negligence or such misapplication of the personal estate as to make them responsible for the payment of these debts; and that from the auditor's report on the accounts of the executors, exhibited to, and allowed by him, there has at all times been, and now is, a considerable balance in favor of the executors against the estate. The court then refer to the exceptions taken to the auditor's report, and declare them to have been properly overruled by the court below, and proceed to render their decree as before referred to. (10 Peters, 569, 570.)

So far, then, as related to the construction of the will, the disposition of the personal property, the charge of existing debts on the real estate, the power of the executor, the existence of a trust, and their duty to execute it by a sale of the property charged by the will, the decision of the court has settled the rules and principles on which the present controversy must be determined if they are applicable; it was made on great consideration, founded on authority, and nothing which has been urged in the argument of this case has caused us to entertain the least doubt of its entire conformity to the well established law of equity. So far as the evidence and facts of that case were considered and adjudicated, the decree of this court is final and conclusive; the parties and the subjects of controversy between them were the same as are now before us; negligence and misapplication of assets were charged on the executors, the existence of debts to them or the banks was denied by the then complainants, and now defendants, and both facts adjudged and decided adversely to them; and the auditor's report was confirmed, whereby every fact it contained became established and binding on the parties in any future controversy, as to any matter thus adjudicated.

In *Hopkins* v. *Lee*, this court state the settled law of all courts to be, that, as a general rule, a fact which has been directly tried and decided by a court of competent jurisdiction, cannot be contested again between the same parties in the same or any other court. Hence a verdict and judgment of a court of record, or a *decree in chancery, although not binding on strangers, puts an end to all further controversy concerning the points thus decided between the parties to such suit. In this, there is, and ought to be, no difference between a verdict and judgment in a court of common law and a decree of a court of equity. They both stand on the same footing. (6 Wheat., 113, 114; S. P., 1 Wheat., 355; 12 Peters, 492.) Whatever, therefore, our opinion might now be as to the facts adjudicated in the former case, the judicial power is incompetent to revise the evidence on which the decree was rendered, on any ground now set up in the answer of the defendants, or apparent on the present record, and they must be taken to be beyond all controversy in this or any future case between the parties. Before proceeding to consider the questions appropriate to this cause, a reference to the case of *Fenwick* v. *Chapman* (9 Peters, 466) will be useful, in order to ascertain what principles were there laid down and are applicable to the present controversy. Adopting the general rule that the personal estate of a testator shall in all cases be primarily applied to the discharge of his personal debts or general legacies, unless he by express words or manifest intention exempt it, the court thus qualify the rule; where the testator's intention clearly appears that a legacy shall be paid at all events, the real estate is made liable on a deficiency of personal assets. So where without any assistance from the will, the nature of the thing to be done may clearly show the intention to charge the real estate with a debt; as, where the thing to be done cannot be partially performed by the executor, without defeating the instruction which directs it, and the thing itself. On this principle the court holds that the manumission of slaves [*149

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pursuant to the directions of a will under the law of Maryland (which is the law of the eastern part of this district) operates as a specific legacy to the slaves, and to charge the real estate with the payment of the debts of the testator, even though he may have, at the time of his death, no other personal property than slaves. (9 Peters, 471, 478.) That the creditor may be carried into a court of equity, or voluntarily resort to it to obtain his debt, either from the lands or the personalty, when the testator leaves it doubtful from what fund his debts are to be paid; that lands devised for the payment of debts, or which have become chargeable by implication, constitute a fund 150*] *for the payment of debts, and an ample and plain remedy is admitted to exist in the law of Maryland, so to apply them.

"The will is the executor's law, and he is no more than the testator's representative in all things lawful in the will. A special legacy of all the personal property is a law to him;" if there is an insufficiency of "personal assets to pay debts, it is the executor's duty to file a bill against the creditors and all interested in the estate;" "praying that the lands may be made liable to the payment of debts, that equity may be done to all concerned, according to the law of equity." (9 Peters, 474, 475.) When he is charged with the sale of the testator's lands for the payment of debts, it is his duty to execute the whole of the testator's will, and in such a case the creditors have as good a right to look to the land through him for the payment of their debts, as they have to look to the goods and chattels through him (9 Peters, 477); and they must pursue their claims in equity, or according to the statutes of Maryland subjecting real estate to the payment of debts, to make their debts out of the land. (9 Peters, 481, 482.) These statutes are the 4 Geo. II. adopted in Maryland, and the Act of 1785 (ch. 72, sec. 5), which is recited in *The Bank of the United States v. Ritchie*, (8 Peters, 143), and which this court there declare has been construed in that State to be an enlargement of jurisdiction, and that decrees for selling the lands of minors and lunatics, in the cases prescribed by it, have been treated by the Court of Appeals as the exercise of other equity powers. That these opinions of this court are in accordance as well with the statutes of Maryland and the established rules of equity in cases of this description, we have no doubt; nor of their application to the present. It must therefore be taken to be a settled point, that a disposition by a testator of his personal property to purposes other than the payment of his debts, with the assent of creditors, is in itself a charge on the real estate, subjecting it to the payment of the debts of the estate, though no such charge is created by the words of the will. A trust is thereby raised which devolves on the executor, who may execute it by his own authority, or be compelled to do it by a bill filed by the creditors, either under the statute of 1785, or in virtue of the powers of a court of equity in relation to the execution of trusts, as the case may be; in this case there was such a trust fastened on the property in 151*] *controversy by implication of law, and the presumed intention of the testator, which can be enforced by these complainants, unless some valid objection has been made out by the respondents.

It has been contended that the frame of the bill is too defective to justify any action upon it, for the want of necessary averments, but when we take it in connection with the former cause to which it refers, the agreement of the parties on file, and the answer of the defendants, we think that a satisfactory answer is at hand. The object of the bill is clearly stated; such averments are set forth as on its face shows some equity which requires an answer; informal as they may be, they would stand the test of a demurrer, especially with the aid of the agreement, by which it appears that the defendants fully understood the nature of the plaintiff's case, the object sought, and the evidence on which they would rely. The answer is full to every matter of fact or law which could be averred in the best drawn bill; there has been no allegation of surprise, or any want of notice of the grounds on which the plaintiff rested his case, and the parties went to the hearing on the bill as it stood, fully prepared to contest their respective claims, as they had done in the first case, of which this was well known to be the consequence. Under such circumstances the objection is entitled to no favor, and is not sustainable as an obstacle to our action upon the merits of the cause.

The answer sets up the dismission of a bill filed by the complainants in 1827, against the defendants, for the same relief as is prayed for in the present bill, as a bar thereto: but no record of such case is set out or exhibited, so that, however true the answer may be in fact, it cannot avail in law. In this respect it is not responsive to the bill; it sets up distinct affirmative matter of defense and bar, which the defendants must prove, or it can have no effect for either purpose.

The statutes of limitations, and the loss of time from the death of David Peter to the filing of the bill, are also pleaded and relied on as a bar, but we think that neither can apply to this case, which is an unexecuted trust for the payment of debts adjudged by this court in 1836, to be unpaid in point of fact, and then existing in favor of the banks and executor, and the present bill was filed soon after the decision was made. The confirmation of the auditor's *report, made in that case, is [*152 conclusive to show the amount of such debts at that time; so is his report in this case as to their present amount: we cannot look through these reports for the evidence on which they were made; they have passed to judgment, and have the sanctity of records.

The remaining objections to the relief prayed for by the bill, which are founded on the principles of the law or the rules of equity, are covered by the former decisons of this court; those which arise from the evidence in the cause as to matters of fact material to our decision, are no longer open to controversy, and we are clearly of opinion that the complainants have made out their case in point of law and fact.

The decree of the Circuit Court must consequently be reversed. The cause is remanded with directions to make a decree in conformity with this opinion, by ordering a sale of the property in controversy, and consistently with

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the agreement of the parties filed of record, and the rules of equity as to the time of disposing of the several parts thereof, specifically devised by the will of David Peter. It is also directed, that the Circuit Court decree on the report of an auditor, or as they may think proper, to what part or items of the account of George Peter a preference ought to be given in payment over the other creditors of the estate of the testator, and make a final order thereon according to law and equity.

ORDER.

This cause came on to be heard on the transcript of the record from the Circuit Court of the United States for the District of Columbia, holden in and for the County of Washington, and was argued by the counsel; on consideration whereof, it is now here ordered and decreed by this court, that the decree of the said Circuit Court in this cause be, and the same is hereby reversed, with costs; and that this cause be, and the same is hereby remanded to the said Circuit Court, with directions to proceed therein according to the opinion of this court, and in conformity to the principles of law and justice.

Cited—22 How., 17; 1 Curt., 488; 1 Cliff., 244; 2 Wood. & M., 134.

153*] *JOHN LLOYD, *Plaintiff in Error*,

v.

GEORGE S. HOUGH.

Action of assumpsit does not lie in case adverse possession—landlord and tenant.

The action of *assumpsit* for the use and occupation of lands and houses, existed in Virginia anterior to the cession of the District of Columbia to the United States.

But this action is founded upon contract, either express or implied, and will not lie where the possession has been acquired and maintained under a different or adverse title, or where it was tortious and makes the holder a trespasser.

THIS case was brought up, by writ of error, from the Circuit Court of the United States for the District of Columbia, holden in and for the County of Alexandria.

The facts in the case, and bills of exceptions, are stated in the opinion of the court, to which the reader is referred.

Mr. Semmes for the plaintiff in error.

Mr. Neale for the defendant.

Mr. Semmes, for the plaintiff, raised the following points:

First bill of exceptions. There was error in the opinion and instructions of the court:

1. Because the instruction was not given upon the whole of the evidence of the witness, Isaac Robbins, but upon only part, which he gave upon cross-examination by the defendant in error.

2. Because the court allowed parol evidence of title to real estate to go to the jury.

3. Because in the opinion and instruction they gave on this portion of the evidence, the court directed the jury, if they believed the testimony therein stated, they "must" find for the defendant.

Second bill of exception. The court ought to have instructed the jury, that if they believed the evidence therein stated to be true, the plaintiff, being the fee-simple owner of the tenement, could recover on the implied contract as stated in the second count of the declaration, without any proof of an actual entry into the premises on the part of the plaintiff, or acknowledgment on the part of the defendant that he considered the plaintiff his landlord, or without any proof that the defendant had actual notice of the legal and fee-simple title of the plaintiff to the premises.

*Third bill of exception. Evidence [*154 ought to have been admitted to show the notoriety of Lloyd's claim and title, tending, with other circumstances, to bring the knowledge of it home to the defendant.

Fourth bill. Governed by same principles as second.

On the right of the jury to weigh evidence, he cited Greenleaf, p. 292, 445, 446, 568; 1 Call, 161; 2 Mod., 478.

That an action will lie on an implied promise, 16 East, 104; 1 Levins, 179; 2 Campb., 18; 1 Campb., 466. Debt lies for use and occupation. (6 T. R., 62; 4 Day, 228.)

Mr. Neale, for the defendant, cited several authorities to show that interest could not be recovered upon rent in arrear; and to prove that this action would not lie where there was no privity of contract, cited 1 Esp., 57, 59, 61; 2 Nott & McCord, 156; 3 Serg. & Rawle, 500; 6 Conn. Rep., 1; Chitty on Contracts, 3d Am. ed. by Troubat, 106; 2 Tuck. Com., Book III., ch. 1, p. 19, 20; 2 Campb., 11, 12; 1 Campb., 466; Buller *N. P.*, 139.

As to the court directing the jury they must find for the defendant, 5 Peters, 197; 14 Peters, 327; 1 Cranch, 300; 4 Cranch, 71; 4 Leigh, 114; 1 Wash., 5, 6; 5 Rand., 145, 194.

Mr. Justice DANIEL delivered the opinion of the court:

This cause is brought before this court upon a writ of errror to the Circuit Court of the United States for the District of Columbia. The questions for consideration here arise upon the following statement. The plaintiff in error instituted, in the Circuit Court for the District of Columbia, an action of *assumpsit* against the defendant for the use and occupation of a house in the town of Alexandria. The declaration contains two counts, the first declaring upon an express agreement between the parties for the occupation and rent, and the second counting upon an occupation by the defendant by the permission of the plaintiff, and upon a promise in consideration thereof. The account filed with the declaration claims an annual rent of $175, from the 1st of January, 1826, to the 1st of January, 1839, inclusive, with interest after the expiration of each year. Upon the above declaration, there was a judgment by default, and a jury being impaneled upon a writ of inquiry assessed damages against the defendant to the *full amount of the plaint- [*155 iff's demand for rent and interest. This verdict the court on motion of the defendant set aside; annexing to its order the condition, that

NOTE—*As to what constitutes adverse possession*, see note to Ricard v. Williams, 7 Wheat., 59; and see note to Ewing v. Bennett, 11 Pet., 41.

Tenant cannot dispute landlord's title and disclaimer by tenant. See note to Willison v. Watkins, 3 Pet., 43.

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the defendant should not plead the statute of limitations; and issue being joined between the parties on the plea of *non assumpsit*, a jury sworn to try that issue on the 10th of May, 1841, returned a verdict for the defendant; and thereupon the court gave judgment against the plaintiff with costs.

At the trial instructions to the jury were prayed on behalf both of plaintiff and defendant, and exceptions taken to the rulings of the court in reference to those instructions.

The first bill of exceptions states that the defendant, having offered to prove by competent and credible witnesses that during the entire period of his occupation of the premises, he had remaining thereon property sufficient to answer the rent, had the plaintiff chosen to distrain or sue for the same; he thereupon prayed the court to instruct the jury, should they believe from the evidence that there had always been upon the premises, while occupied by the defendant, property and effects of his sufficient to have satisfied the rent, then that the plaintiff failing or neglecting to sue or distrain for those rents, was not entitled in this action to recover interest on the rent in arrear, whatever it might be, from a period earlier than the date of the writ sued out in this cause. But the court refused the instructions so prayed for; to which refusal the defendant excepted.

In the second bill of exceptions it is stated that the defendant, by cross-examination of Isaac Robbins, the plaintiff's witness, proved that in the spring of 1820 defendant entered the premises as tenant, from year to year, under a parol demise from said Robbins as trustee of John Swayne, an insolvent debtor, and at the annual rent of $175, and continued to occupy the premises under said demise, paying the rent as it became due to Robbins, as trustee of Swayne, till the spring of 1824. That Robbins, in character of trustee of Swayne; paid a portion of the rents collected of the defendant to A. C. Cazenove, and a part of them to the plaintiff, but without the knowledge of the defendant; that since the spring of 1824, the defendant had paid no rent to Robbins, assigning as a reason for refusing to pay, that the collector of the port of Alexandria had forbid-
156*] den such payment; that the *defendant was still the occupant of the premises of which the plaintiff in this cause had never, to his knowledge, taken actual possession; that Robbins resided in Alexandria and had so resided for the last thirty-seven years; that the defendant also read in evidence a deed from Jonathan Scholfield and wife, to A. C. Cazenove, bearing date on the 13th of June, 1814, and duly recorded in Alexandria County, which deed (made a part of the exceptions) conveyed the premises occupied by the defendant. That upon these proofs the defendant prayed the court to instruct the jury, should they believe that the defendant originally entered, and used and occupied the premises by a parol demise thereof from Robbins, as trustee of Swayne, in 1820, and, as tenant of Robbins, paid him the rent until 1824, after which period Robbins ceased to collect the rent for the reason above stated, although the defendant continued to use and occupy the premises from 1824, and still occupied them; and that the defendant did not hold and occupy the premises either under a written or parol demise from the plaintiff prior or subsequently to his holding under Robbins, or prior to the institution of this suit, but that the defendant held and occupied the premises exclusively under the original parol demise from Robbins as trustee as aforesaid, and that the defendant had no notice of any title in the plaintiff to the premises beyond what might be presumed from the fact then shown in evidence; that a deed had been made for the premises from Robert I. Taylor to the plaintiff and had been admitted to record; that then the jury must find for the defendant; which instruction the court accordingly gave, and the plaintiff excepted.

By the third bill of exceptions it is recited in substance that the plaintiff having offered in evidence a deed to him for the premises, dated March the 10th, 1817, from Robert I. Taylor, trustee in a deed from Jonathan Scholfield and wife, conveying the same property to said Taylor on the 26th of June, 1814 (both which deeds are parts of this exception), and having farther proved by Isaac Robbins that from the year 1820 to the year 1824 the defendant used and occupied the premises in the declaration mentioned under a verbal renting from Robbins, claiming as trustee of Swayne under the insolvent law, and that said renting by Robbins was without the knowledge or consent of the plaintiff *(no title having been shown [*157 by the defendant in Swayne or in Robbins claiming as his trustee under the insolvent law), and that Robbins collected the rent of the premises from 1820 to 1824 inclusive, claiming as lessor of the defendant, and as trustee of Swayne; that he had paid over a portion of the rent thus collected to A. C. Cazenove, and a portion of it to the plaintiff, who was the owner of the fee-simple under the deed from Taylor, of March the 10th, 1817; the witness not knowing whether the defendant knew of the disposition so made of the rent collected of him, and that he, Robbins, had not claimed rent for the premises from the defendant since April, 1824, having been informed that defendant had been forbidden by the collector of the customs of the port of Alexandria, to pay rent to anyone, other than the United States, and not having shown that the defendant had, at any time, paid rent either to the collector or the United States.

Whereupon, the plaintiff prayed the court to instruct the jury, should they believe the evidence aforesaid, that then the plaintiff had made out such a case as entitled him to recover on the second count for the use and occupation of the premises, for such time as the plaintiff should prove that the defendant had used and occupied the same, after the 15th day of April, 1824, by permission of the plaintiff. This instruction the court also refused to give, being of opinion that from the evidence so stated, it was not competent for the jury to infer that such occupation by the defendant was by the permission of the plaintiff; to which opinion and refusal the plaintiff excepted.

Fourth bill of exceptions. The plaintiff offered to prove that the claim of the plaintiff to the premises, for the rent of which this suit was instituted, was a subject of general notoriety in the neighborhood about the year 1820 and since; which being objected, the counsel

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for the plaintiff insisted he had a right to ask the question objected to, it being introductory to another question designed to bring home to the defendant knowledge of the fact that the plaintiff claimed the premises used and occupied by the defendant during the time he so used and occupied them. The court refused to permit the question; to which refusal the plaintiff excepted.

By the fifth and last bill of exceptions it appears that the plaintiff moved the following instructions: That if the jury should be- [*158 lieve, *from the evidence stated in the preceding bills of exception in this cause, that there was a deed from Jonathan Scholfield and wife (said Scholfield being admitted to have been at the time seized of a legal estate in fee of the premises) to Robert I. Taylor, which deed conveyed the fee in the premises, for the use and occupation whereof this suit was brought, and if the jury should further believe that Taylor by a deed, subsequent thereto, and set out in the plaintiff's second bill of exceptions, conveyed the said premises to the plaintiff and his heirs, then, by the legal operation of the deed from Taylor to the plaintiff, there was such a possession transferred to the use thereby limited and conveyed, as dispensed with proof on the part of the plaintiff, that he had actual entry on, and possession of, the premises; and that the said deed gave to the plaintiff such a legal title thereto, and possession thereof, as could not be devested by a leasing of said premises to the defendant by Isaac Robbins, a stranger, so as to deprive the plaintiff of his remedy against the defendant, tenant of the premises, occupying and using them, though originally leased to him by said Robbins without the plaintiff's consent; which instruction the court refused to give, and the plaintiff excepted.

Although it has been deemed necessary to an accurate description and correct understanding of the points in the case, to state the several bills of exception in the record, yet it is obvious that the four bills sealed at the instance of the plaintiff, and making the second, third, fourth, and fifth in the order of the proceedings, may be embraced within the same view, as they all relate to the establishment of one and the same conclusion, viz., the necessity of establishing an agreement either express or implied by law for the payment of rent by the defendant to the plaintiff.

In the argument of this cause, the counsel for the plaintiff has supposed himself called on to anticipate an objection to the remedy by action of *assumpsit*, for use and occupation of lands and houses, as not having existed in Virginia anterior to the cession of the District of Columbia to the federal government. Such an objection is regarded without just foundation, this remedy having been declared by the Supreme Court of Virginia to be always a part of the jurisprudence of that State, and having been likewise recognized in her legislation, not as a remedy created by statute, but as one enlarged and favored, by making it a transitory [*159 action instead *of a local action. (*Vide Sutton* v. *Mandeville*, 1 Munf., 407; *Eppes* v. *Cole*, 4 Hen. & Munf., 161; Sessions Acts, February, 1816, ch. 15, sec. 6; Tate's Dig., 465, sec. 28.)

But whenever the action of *assumpsit* for use and occupation has been allowed, it has been founded, and would seem necessarily to be founded, upon contract either express or implied. The very term *assumpsit* presupposes a contract. Whatever, then, excludes all idea of a contract, excludes, at the same time, a remedy which can spring from contract only, which affirms it, and seeks its enforcement. To maintain the action for use and occupation, therefore, there must be established the relation of landlord and tenant, a holding by the defendant under a knowledge of the plaintiff's title or claim; and under circumstances which amount to an acknowledgment of, or acquiescence in, such title or claim, and an agreement or permission on the part of the plaintiff. The action will not lie where the possession has been acquired and maintained under a different or adverse title, or where it was tortious and makes the holder a trespasser.

In *Birch* v. *Wright* (1 T. R., 387), Buller, *Justice*, declares "that the action for use and occupation is founded in contract, and unless this be a contract express or implied, the action could not be maintained, as was held by Lord Mansfield in the case cited at the bar, of *Carmur* v. *Mercer*, which was tried about two years ago." The same principle is ruled in *Smith* v. *Stewart* (6 Johns. 46). In the case of *Henwood* v. *Cheeseman* (3 Serg. & Rawle, 500), it is said by the Supreme Court of Pennsylvania, "If the defendant occupied land by consent and permission of the plaintiff, the jury may presume a promise to pay a reasonable rent;" again, "the action for use and occupation is founded on privity of contract, not on privity of estate." In 2 Nott and McCord's Reports, 156, in the case of *Ryan* v. *Marsh*, the law is thus laid down: "It was argued that a contract might be implied, and certainly as long as the character of the act done by the defendant was doubtful, a contract might be implied; but when it is admitted that the possession was tortious, every characteristic of contract was excluded. No action for use and occupation will lie, when possession has been adverse and tortious, for such excludes the idea of a contract, which, in all cases of this action, must be express or implied."

*Authorities upon this point might [*160 doubtless be multiplied. We will add two others to those already cited, viz., the cases of *Stockett* v. *Watkins' Administrators* (2 Harr. & Johns., 326; the opinion of the court on pp. 338, 339); and of *Stoddert* v. *Newman* (7 Harr. & Johns., 251). The principles ruled in the authorities above referred to, appear to be strictly applicable to the case under consideration, and decisive of its fate. Upon an examination of the testimony, introduced by the plaintiffs, as set forth in his four bills of exception, it cannot fail to be perceived that it imports throughout no proof of a contract between the plaintiff and defendant of a holding by the latter under the former, of any acquiescence in, or knowledge of title in the plaintiff, or of permission by him for the occupation of the defendant. So far from establishing these requisites for sustaining the plaintiff's demand, it excludes each and all of them. This evidence proves, beyond dispute, a possession and holding by the defendant under an agreement with Robbins, as trustee of Swayne, an insolvent debtor; payment of

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rent to this trustee in pursuance of such agreement, until a claim was interposed on behalf of the United States, as creditors of the insolvent debtor; it further proves a failure or forbearance by the plaintiff to assert any interest or right to the subject, anterior to the year 1839, about the time of the institution of the plaintiff's action, and so far as a negative is capable of proof, a total ignorance on the part of the defendant of any right of the plaintiff, either to the rents or to the subject from which they were to issue. Upon the above view of the evidence as disclosed in the second, third, fourth, and fifth bills of exceptions, we hold the opinion of the Circuit Court to be correct; it is therefore affirmed.

ORDER.

This cause came on to be heard on the transcript of the record from the Circuit Court of the United States for the District of Columbia, holden in and for the County of Alexandria, and was argued by counsel; on consideration whereof, it is now here ordered and adjudged by this court, that the judgment of the said Supreme Court in this cause be, and the same is hereby affirmed, with costs.

Cited—8 How., 413.

161*] *CHARLES McKNIGHT, *Appellant*,

v.

LAWRENCE B. TAYLOR, Trustee, &c.

Court of Equity—stale claim—refusal to interfere after considerable lapse of time.

There must be conscience, good faith, and reasonable diligence, to call into action the powers of a court of equity.

In matters of account, where they are not barred by the Act of Limitations, courts of equity refuse to interfere, after a considerable lapse of time, from consideration of public policy, and from the difficulty of doing entire justice, when the original transactions have become obscure by time, and the evidence may be lost.

THIS was an appeal from the equity side of the Circuit Court of the United States for the District of Columbia, holden in and for the County of Alexandria.

The facts in the case are fully stated in the opinion of the court, to which the reader is referred.

Messrs. Semmes and *Jones* for the appellant.

Messrs. Lee and *Bradley* for the appellee.

Mr. Semmes, for the appellant, contended that the decree of the court below was erroneous, and should be reversed for the following, among other reasons:

1. Because there is no equity in the bill or supplemental bill and no case made for the interference of the court.

2. Because it decrees debts to be paid which the record shows has already been paid.

3. Because it decrees the debt mentioned in the schedule as that due to Thomas Janney & Co., to be paid to John Lloyd, who claims by virtue of various assignments named in said decree.

4. Because it did not allow the appellant a lien on or *pro rata* dividend out of the trust fund for the debts paid off, and assigned for his use, as shown in the record.

5. Because the court should have presumed payment of the debts, in the absence of all evidence showing them still due, after the great lapse of time; or, if the court believed them still unpaid, they should have presumed an abandonment of the claims by the creditors from their laches and the lapse of time; and therefore erred in decreeing relief to claimants whose demands were stale, and who had knowingly slept upon their rights.

6. *Because the court should, for like [*162 reason, have presumed a performance of the covenant contained in the deed of trust executed between the appellant and Robert I. Taylor, for payment of the schedule debts—a release of the same, or that it was abandoned or extinguished.

7. Because, if the said covenant was any part of the grounds or foundation of their decree, the court erred in decreeing upon it in favor of parties between whom and the covenantor there was no privity; or, if there was any such privity, then, because the covenant was a personal matter, disconnected from the trust, and upon which the remedy was by action at law; and more especially as there was no prayer in the bill for an enforcement of the covenant.

8. Because, if it was right under the circumstances to give any relief at all, the court should have decreed only the principal of the debts found due, and should, on account of the laches, have refused to allow any interest, on the principle on which the account of profits was denied in *Acherly* v. *Roe* (5 Ves., 565); or, upon the principle of *Pickering* v. *Lord Stamford* (2 Ves., Jun., 272, 581), interest should have been allowed only from the filing of the bill; the plaintiffs having gone into equity for general relief, and not for an enforcement of the covenant in the deed, on which there was full remedy at law.

On the subject of the lapse of time, he cited 5 Leigh, 850; 6 Wheat., 481; 4 Johns., 1; 9 Peters, 416; 5 Leigh, 881; 7 Johns., 556; 2 Nott & McCord, 860; 9 Leigh, 393; 2 Baldwin, 477; Cowper, 109.

Mr. Bradley, for appellee:

As to lapse of time, there was a covenant between McKnight and Taylor, the consideration of which was the forbearance of creditors to sue, and they did forbear. (3 Swanston, 417). As to the presumption of payment, it is not well settled whether it is a matter of fact or law. (*Hughes* v. *Edwards*, 9 Wheat.; same case in Cond. Rep., 654, 655; *Elmendorf* v. *Taylor*, 10 Wheat., 152; same case in Cond. Rep., 55, 56; see, also, 10 Leigh, 284.)

Mr. Jones, for appellant:

A decree must follow the equity of the bill, but the court below has not done it. *Hellary* v. *Waller* (12 Vesey) settles the rule that a *court of equity will put itself in the [*163 position of a court and jury. The trustee here had full legal power to sell without coming to equity, and courts act on different principles when called upon to lend their aid, than when

NOTE.—*As to lapse of time and statute of limitations, when a defense in equity cases*, see note to Prevost v. Gratz, 6 Wheat., 481; and note to Thomas v. Harvie, 10 Wheat., 146; and note to Pratt v. Carroll, 8 Cranch, 471.

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acting regularly. (Ambler, 645.) The creditors, generally, do not answer or take any notice, but appear to have abandoned the claim. Only one acts. This circumstance ought to be coupled with the staleness of the demand.

Mr. Chief Justice TANEY delivered the opinion of the court:

This is an appeal from the decree of the Circuit Court of the District of Columbia, for the County of Alexandria, sitting in chancery.

It appears from the record that the appellant, Charles McKnight, by deed bearing date the 29th day of September, 1813, conveyed to Robert I. Taylor certain real property described in the deed, situate in the town of Alexandria, upon trust, to permit the appellant to occupy the same, and to receive the rents and profits without account, until a sale should become necessary, under the terms of the deed; and if he, the said Charles McKnight, should not on the 1st day of April, 1818, have paid the several creditors named in a schedule, annexed to the deed, the debts therein mentioned, with interest, then the said Robert I. Taylor should, on notice of such default from any one of the said creditors or his representatives, proceed to sell the said property, or so much thereof as might be necessary, for cash at public auction, after giving three weeks' notice of the time and place of sale, by advertisement in any paper published in Alexandria, and after defraying the reasonable expenses of sale, discharge the aforesaid debts with all interest due thereon.

The bill in this case was filed in August, 1837, by Robert I. Taylor, the trustee above mentioned, and after setting forth the deed of trust, proceeds to state that Thomas Janney & Co. (who are named as creditors in the schedule) had assigned the debt due to them, to Joseph Janney, in trust for the payment of their creditors; and that Joseph Janney, under a provision in the deed of assignment, afterwards transferred the same to George Johnson, in trust for the same purpose; and that the complainant had been required by the said George John-
164*] son, and by certain *other creditors named in the schedule (but who are not named in the bill), to sell the premises, so as aforesaid conveyed to him in execution of the trust; that the debts mentioned in the schedule were due from McKnight, the appellant, and John Stewart, who had been trading under the firm of McKnight & Stewart, and that no part of any of them had been paid. The bill further states that before the execution of this deed, the appellant had, on the 30th of April, 1808, conveyed a part of the same premises to a certain Jacob Hoffman, in order to secure Thomas Janney, against his responsibility as indorser on two notes discounted at the Bank of Alexandria and the Bank of Potomac; and that the said notes had been long before paid, although the property had not been reconveyed to the appellant; that McKnight was giving out that the debts in the schedule had been all paid, and threatened to withhold possession if the trustee proceeded to sell under the deed, and that from these declarations of the appellant, and the outstanding legal title, the sale could not be made without injury to the interests of the parties concerned, without the aid of the Court of Chancery; and prays process against the heirs of Hoffman (he being dead), and against McKnight and Stewart, and all of the creditors named in the schedule; and, among the rest, against George Johnson, in order that they may be compelled to appear and answer the several matters charged in the bill. A supplemental bill was afterwards filed, in order to make additional parties, and for other purposes; but in the view which the court take of this subject it is unnecessary to state its contents. The creditors secured by the deed of trust are eleven in number, their respective claims varying in amount: the lowest being $85.72, and the highest $1,227.19. The trustee, Robert I. Taylor, is himself one, and the debt due him stated to be $214.54.

To this bill Hugh Smith, one of the creditors, whose debt was $151, answered, saying merely that his claim is still due.

James Carson, another of the creditors, whose claim was $85.72, answered and admitted that he had been paid.

The heirs of Hoffman also answered, and admitted that the notes intended to be secured by the conveyance to their father had been paid; and submit themselves to such decree as the court may deem just.

The answer of the appellant, so far as it is material to set forth *its contents, states [*165 that the claim of Thomas Janney & Co., which was $1,022.69, was due upon open account, and that the respondent was entitled to a deduction of considerably more than $300 for money overpaid by mistake on the settlement of a former account, but that he cannot find a memorandum in writing to establish it, which he knows did once exist; and that after the execution of the deed of trust he transferred to Thomas Janney on account of this debt, the note of a certain Jonathan Mandeville, for $467.08, due on the 20th of January, 1815, which, from what Janney himself afterwards told him, he believes to have been paid; and in respect to this item, his answer is responsive to the bill. He also specifies several creditors whose claims he states that he has paid, and among them the trustee, Robert I. Taylor, and he sets forth the manner in which he satisfied that debt. Some of the creditors mentioned in the schedule are not, however, named in his answer; and he mentions three whom he admits that he has not paid, and makes the same admission as to the small balance which would be due to Thomas Janney & Co., after deducting the credits claimed by him as above stated; but he does not admit that these debts are yet due, and insists that there is every reason to believe that they were paid by his former partner, Stewart, who was equally liable with himself; or, if not paid, that it was owing to the negligence and laches of the creditors in not proceeding against him; the respondent alleging that Stewart, after the dissolution of the partnership with him, removed to Martinsburg, in Virginia, about the year 1812, where he carried on a prosperous business until his death in 1825, and was fully able to pay these debts if the creditors had used proper diligence to recover them; and he relies upon the lapse of time as a good defense upon principles of equity against this proceeding.

There is a general replication to this answer; and it appears in evidence that upon the dissolution of the partnership of McKnight and Stew-

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art, in 1812, a notice of it was published in the newspapers, stating that McKnight was authorized to collect the debts and settle the business of the concern. And a witness was also examined on the part of the complainant, who states, that from a perfect knowledge of the pecuniary situation of Stewart, from 1812 until his death, **166*]** he knows that he was insolvent *when he removed from Alexandria to Martinsburg, and that he continued and died insolvent; that he had no property he could call his own, and out of which an old debt of $100 or $200 could have been made.

It also appears in evidence, that Thomas Janney & Co., on the 30th of April, 1823, assigned all their effects and claims to Joseph Janney, in trust to pay their debts. That by virtue of a provision contained in this deed of assignment, Joseph Janney afterwards, on the 10th of August, 1829, renounced the further execution of the trust, and transferred all the property and claims that remained in his hands to George Johnson, in trust for the same purposes for which they have been conveyed to him. And on the 14th of November, 1837, after this bill was filed, Johnson sold and assigned all the effects and claims which he then held as trustee of Thomas Janney & Co., to John Lloyd, of Alexandria; and on the same day executed a power of attorney in his favor, authorizing him to receive whatever might be recovered in this suit or on any other claims of Thomas Janney & Co., and to compromise and settle them in any manner he might think proper. The consideration paid by Lloyd is not stated, nor, indeed, does it appear by the assignment that any consideration whatever was paid. The deed of assignment merely states that Johnson had sold these effects and claims to Lloyd, and authorizes him to collect, compromise, and settle them.

The bill was taken *pro confesso* against all of the creditors who had not appeared and answered, and the Circuit Court proceeded on final hearing to decree that the appellant should pay the full amount of the debts mentioned in the schedule, with interest, by a certain day specified in the decree, except those of Joseph Janney, John Leo, and James Carson, which were admitted to have been paid; and in default of payment by the day limited in the decree, the property was directed to be sold and the proceeds applied to discharge the aforesaid debts.

This is the case in its material parts, as presented in the record. The omission of the creditors to appear and answer, upon which the bill as against them was taken *pro confesso*, was not, of course, regarded by the Circuit Court as establishing their claims. The decree, we presume, proceeded upon the ground that the creditors mentioned in the schedule were entitled to **167*]** the aid of the court *to enforce the payment of the whole amount originally admitted to be due, unless the appellant could show by legal proofs that the debt had been since discharged.

Now, of the eight creditors in whose favor the decree was made, five of them seem to have taken no concern in these proceedings, and for aught that appears in the record, may not have known that it was pending; certainly there is nothing to show that they ask or desire the interposition of the court in the manner sought for by the bill. Of the remaining three, one has answered and stated that his claim is still due, but does not ask for a sale, nor say anything that sanctions, on his part, the proceedings of the trustee; and the trustee himself does not ground the bill upon his own claim, nor allege its nonpayment as the foundation of the suit, but places it entirely upon the notice and request of George Johnson and other creditors, and his own duty upon such an application to proceed to sell according to the provisions in the deed of trust. But although the application is alleged to be made by other creditors, as well as George Johnson, yet no other creditor has appeared to claim the execution of the trust; and, as they were all made defendants and called to answer, and have refused or neglected to appear, the bill under the provisions of the deed must be regarded as founded exclusively upon the application of the creditor named in it; and as instituted and conducted without the co-operation or request of any other creditor.

In relation to this claim, it appears that nineteen years and three months were suffered to elapse before any application was made for the execution of the trust by which it had been secured. No reason is assigned for this delay; nor is it alleged to have been occasioned in any degree by obstacles thrown in the way by the appellant. As the record stands, it would seem to have been the result of mere negligence and laches. The original creditors were in business ten years after the deed was made, and five years after the expiration of the credit which it gave to McKnight and Stewart. And as they became insolvent in 1823, it must be presumed that in the last-mentioned period they were themselves pressed for money. The property is situated in the town of Alexandria, where the laws of Virginia have been adopted by Congress; and the trustee, under these laws, had an undoubted right to sell, upon the application of any creditor, as soon *as [***168** default was made, without asking the interposition of the Court of Chancery. Such delay, under such circumstances, by the original creditors, followed by fourteen years more by the assignees who afterwards had charge of this claim, can, perhaps, hardly be accounted for without supposing that this debt had been nearly, if not altogether, satisfied in the manner suggested in the answer of the appellant. If, indeed, the suit had been postponed a few months longer, twenty years would have expired, and in that case, according to the whole current of authorities, the debts in the schedule would all have been presumed to be paid. But we do not found our judgment upon the presumption of payment. For it is not merely on the presumption of payment, or in analogy to the statute of limitations, that a court of chancery refuses to lend its aid to stale demands. There must be conscience, good faith, and reasonable diligence, to call into action the powers of the court. In matters of account, where they are not barred by the act of limitations, courts of equity refuse to interfere after a considerable lapse of time, from considerations of public policy, and from the difficulty of doing entire justice when the original transactions have become obscure by time, and the evidence may be lost. The rule upon this

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subject must be considered as settled by the decision of this court in the case of *Piatt* v. *Vattier* (9 Peters, 416); and that nothing can call a court of chancery into activity but conscience, good faith, and reasonable diligence; and where these are wanting, the court is passive and does nothing; and therefore, from the beginning of equity jurisdiction, there was always a limitation of suit in that court.

It certainly cannot be said that there has been anything like reasonable diligence by any of the creditors in the case before us; and at this distance of time, when many of the parties originally concerned are dead, we should hardly do justice between them if we required the appellant to pay the whole amount stated in the schedule, unless he can establish the credits he claims by legal proofs. In fact, but one of the creditors appears to have called for this proceeding, or to have sanctioned the institution of this suit; and the party who now holds that claim and seeks to enforce it, has obviously no equitable ground upon which he can ask for a relaxation of the rule in his favor. When the assignment was made to him he knew it 169*] was a disputed claim in actual* litigation at the time, which had been allowed to sleep for almost twenty years, and for which it does not even appear that he paid any valuable consideration. And as to all of the creditors named in the schedule, they had originally an easy and simple remedy in their own hands, to be used or not at their own pleasure; and if they have suffered it to be lost by the lapse of time, their own negligence can give them no right to call into action the powers of the Court of Chancery.

The decree of the Circuit Court must therefore be reversed, and the bill be dismissed with costs.

ORDER.

This cause came on to be heard on the transcript of the record from the Circuit Court of the United States for the District of Columbia, holden in and for the County of Alexandria, and was argued by counsel; on consideration whereof, it is now here ordered and decreed by this court, that the decree of the said Circuit Court in this cause be, and the same is hereby reversed with costs; and that this cause be, and the same is hereby remanded to the said Circuit Court, with directions to dismiss the bill of the complainant with costs.

Cited—8 How., 222; 9 Otto, 211; 1 Wood. & M., 148, 149; 1 Biss., 188.

JAMES C. BELL AND ROBERT GRANT,
Plaintiffs in Error,
v.
MATTHIAS BRUEN.

Construction of instrument signed in New York and to be executed in England, laws governing—evidence—bonds limited by recitals preceding conditions—construction of commercial letters—court will consider only matters presented to court below.

A letter of guaranty, written in the United States, and addressed to a house in England, must be construed according to the laws of that country.

Extrinsic evidence may be used to ascertain the true import of such an agreement, and its construction is matter of law for the court.

In bonds, with conditions for the performance of duties, preceded by recitals, the undertaking, although general in its terms, is limited by the recital.

Commercial letters are not to be construed upon the same principle as bonds, but ought to receive a fair and reasonable interpretation according to the true import of the terms, to what is fairly to be presumed to have been the understanding of the parties; and the presumption is to be ascertained from the facts and circumstances accompanying the entire transaction.

The court will not express an opinion upon a matter of defense which was not brought to the consideration of the court below.

*THIS case was brought up by writ [*170 of error from the Circuit Court for the District of New York.

The plaintiffs in this court, who were also plaintiffs below, were merchants and partners, trading under the name and firm of Bell & Grant, and resided in London. The action was brought to recover the value of five several sets of bills of exchange, amounting respectively to £385, £318 12*s.* 6*d.*, £1,500, £140, and £3,500, which, it was alleged, were guaranteed by the defendant.

At the trial of the case in the Circuit Court, the defendant pleaded *non assumpsit* and the statute of limitations; but the questions arising under the latter plea were not argued, as the opinion of the court upon the guaranty was against the plaintiffs.

The facts of the case, according to the evidence, were as follows:

Prior to the year 1830, George W. and H. Bruen, two sons of the defendant, had been carrying on commercial business under the partnership name of G. W. & H. Bruen, in the city of New York. In that year they failed, and William H. Thorn succeeded to the business of the house; George W. Bruen, one of the former partners, being interested in the business of the said Thorn.

In the year 1831, George W. Bruen also transacted business at New York, in the name of his father, the defendant. There was no regular established house in the name of the defendant, although subsequently adventures were conducted in his name. This agency was carried on under two very extensive powers of attorney, which were duly recorded in New York, throughout the years 1831-2-3-4, and part of 1835, when the defendant was preparing to go to Europe, and the powers of attorney were revoked.

Early in the year 1831, Thorn had credits furnished to him by Bell & Grant, upon houses in Trieste, Messina, Leghorn, and Marseilles. On the 23d February, 1831, he wrote to Bell & Grant, and among other things said, "My friends in Marseilles might secure many consignments for me, if I could put them in a situation to make the necessary advances, and I therefore hope you will oblige me by opening the credit I ask for, and if you require it, Mr.

NOTE—*As to continuing, and other guarantees, and the effect and construction of*, see note to Drummond v. Preston, 12 Wheat., 16; and note to Edmondston v. Drake, 5 Pet., 624; and note to Mauran v. Bullus, 16 Pet., 528.

Lex loci, as to contracts, and their interpretation and validity. See note to Slocum v. Pomery, 6 Cranch, 122.

In general, the law of the place where the contract is made, and not where the action is brought,

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M. Bruen will give you his guaranty. I inclose a letter for Messrs. Archias & Co., which you 171*] will forward to *them, should you think proper to open the credit; otherwise I do not wish you to send it, as it relates entirely to this credit, and the manner in which the advances are to be made; it is understood that no more than £2,000 are to be drawn for at any one time, and that the credit is then to be considered at an end, until your advances are covered by remittances from me, when you will again renew it."

On the 22d of March, 1831, Bell & Grant acknowledged the receipt of the above, by a letter from which the following is an extract: "We have received, since the above, your letter of the 23d ult., with an inclosure for Messrs. Archias & Co., of Marseilles, which we forward to them to-day, with a confirmation of the credit you give them upon us to the amount of £2,000, for the purpose of making advances on consignments, and which we will accordingly thank you to have guarantied to us, as you propose, by Mr. Matthias Bruen."

On the 23d April, 1831, Mr. Matthias Bruen, the defendant, wrote the following letter to Bell & Grant:

"NEW YORK, 23d April, 1831.

"DEAR SIR: Our mutual friend, Mr. Wm. H. Thorn, has informed me that he has a credit for £2,000, given by you in his favor with Messrs. Archias & Co., to give facilities to his business at Marseilles. In expressing my obligations to you for the continuation of your friendship to this gentleman, I take occasion to state, that you may consider this, as well as any and every other credit you may open in his favor, as being under my guarantee."

On the same day, the 23d of April, Thorn wrote to Bell & Grant a letter, from which the following is an extract: "Inclosed you will find Mr. M. Bruen's guaranty, and as you are now fully secured in any credit you may open for me, I hope you will consider on the propriety of allowing me to make insurance here on any goods that may be shipped for my account."

On the 14th June, 1831, Bell & Grant acknowledged the receipt of Bruen's letter as follows:

"MATTHIAS BRUEN, ESQ., New York: We are in receipt of your favor of the 23d April, guarantying the credit opened on behalf of Mr. W. H. Thorn, with Messrs. Archias & Co., of Marseilles, for £2,000, for the purpose of facilitating his business *with that place. [*172 and moreover, desiring us to consider, as under your guaranty, also, all credits existing, or that we may hereafter open for said friend, of which we take due note. And we trust that Mr. Thorn, as well as your good self, will have every reason to be satisfied with the confidence which we feel a pleasure in assigning to both of you.

It was given in evidence that from 1831 to 1837, Thorn, by means of the credits opened for him at various places, received consignments from those places, upon which advances had been made, and sent remittances, from time to time, to Bell & Grant in London.

On the 3d of March, 1834, Thorn wrote to Bell & Grant as follows: "I have informed Messrs. R. Anderson & Co. and Messrs. Archias & Co. that the times are such as to render consignments no longer desirable, which I hope will reach them in time to prevent any further draft on you."

On the 7th of March, 1834, Bell & Grant wrote to Thorn: "We beg your reference to the foregoing copy of our letter of yesterday, and have only at present to add thereto an extract of what we write to-day (while communicating with them on other business), to Messrs. Archias & Co., of Marseilles, recommending their refraining from pressing shipments to you on consignment, until the state of commercial matters in the United States shall make business more acceptable than, under the recent circumstances, we may presume it would be to you.

"We trust that the next accounts from your side will be less gloomy, and may enable us, as we shall most readily do in such case, to place business for you on its former footing."

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is to govern in enforcing and expounding the contract, unless the parties have a view to its being executed elsewhere, in which case it is to be governed according to the law of the place where it is to be executed. Chapman v. Robinson, 6 Paige, 627; Hosford v. Nichols, 1 Paige, 221; Hyde v. Goodnow, 3 Comst., 266; Pomeroy v. Ainsworth, 22 Barb., 120; Curtiss v. Leavitt, 1 E. P. Smith, 14; 2 Burr., 1077; 4 T. R., 182; 7 *Id.*, 242; 2 Johns., 241; 4 *Id.*, 285; Cox v. U. S., 6 Pet., 172; B'k of U. S. v. Daniel, 12 Pet., 32; Green v. Sarmiento, Pet. C. C., 74; Van Reimsdyk v. Kane, 1 Gall., 371; Cook v. Moffat, 5 How., 295, 307; Ladd v. Dulaney, 1 Cranch C. C., 582; Boyle v. Zacharie, 6 Pet., 635; 3 Johns. Ch., 587; 17 Johns., 511; disapproving 4 Johns., 125; 20 Johns., 102; 8 Pick., 260; Grant v. Healey, 3 Sumn., 523; Bulkley v. Honold, 19 How., 390; 5 East, 123; 12 Johns., 142; 3 Mass., 77; McClintick v. Cummins, 3 McLean, 158; Dundas v. Bowler, 3 McLean, 397; Balme v. Wambaugh, 38 Barb., 362.

A contract is governed by the law of the country where it is made, and it may be enforced by foreign tribunals according to their own forms of proceeding, but in such a manner as to give effect to the contract according to the laws which gave it validity. Camfranque v. Burnell, 1 Wash. C. C., 340; Courtois v. Carpenter, 1 Wash. C. C., 376; Webster v. Massey, 2 Wash. C. C., 157; Golden v. Price, 3 Wash. C. C., 313; Bainbridge v. Wilcocks, 1 Baldw., 536; Nicolls v. Rodgers, 2 Paine, 437.

A contract which is valid where it is made is to be held valid everywhere. And on the other hand, if void or illegal by the law of the place where made, it is void everywhere. Trimby v. Viguier, 1 Bing. N. C., 151; De Sobry v. De Laistre, 2 H. & Johns., 191; Willings v. Consequa, Pet. C. C., 317; Pearsall v. Dwight, 2 Mass., 88; Smith v. Mead, 3 Conn., 253; Medbury v. Hopkins, 3 Conn., 472; Houghton v. Page, 2 N. H. 42; Dyer v. Hunt, 5 N. H., 401; Whiston v. Stodder, 8 Mart., 95; Andrews v. His creditors, 11 La., 464; B'k of U. S. v. Donally, 8 Pet., 361; Andrews v. Pond, 13 Pet., 65; Wilcox v. Hunt, 13 Pet., 378; Van Reimsdyk v. Kane, 1 Gall., 371; Touro v. Cassin, N. & McCord, 173; Robinson v. Bland, 2 Burr., 1077; Burrows v. Jemino, 2 Str., 733; La June Eugenie, 2 Mason, 459; Alves v. Hodgson, 7 T. R., 241; Clegg v. Levy, 3 Campb., 166.

The rule which requires that every contract should be construed according to the law of the place where it was made, is very nearly universal. 2 Pars. on Cont., 89.

Where the contract is made in one place, but is to be performed in another, then, in general, although, perhaps, not always, and for all purposes, the place of payment or performance is the place of the contract. Strother v. Lucas, 12 Pet., 410, 436; Le Breton v. Miles, 8 Paige, 261; Prentiss v. Savage, 13 Mass., 23; Thompson v. Ketchum, 8 Johns., 189; Cox v. United States, 6 Pet., 172; Fanning v. Consequa, 17 Johns., 511; Andrews v. Pond, 13 Pet., 65; Pars. on Cont., 94, 95.

If a note be made *bona fide*, in one place, express-

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On the 24th April, 1834, Thorn wrote to Bell & Grant: "I have read what you have been pleased to write to Messrs. Archias & Co. on the subject of consignments under advances, which meets my warmest approbation, as you will have seen by my letter of March 3d."

On the 21st of October, 1834, Bell & Grant wrote to Thorn: "Messrs. Archias & Co., of Marseilles, having inquired of us, under date 9th inst., whether you had opened a credit in their favor upon us, to make advances on shipments to your address, as you have mentioned to them as your intention of doing, and adding that they did so in consequence of the prospect 173*] they then *had of influencing a consignment to you; we told them, by return of post, that, although we should be ready at any time to confirm any such arrangement, and were yet without your authority to that effect, they might consider themselves at liberty to value upon us for your account to the extent of £2,000 sterling, on handing us the customary shipping documents (as we would have been sorry to see such business pass your door for want of the facilities in question), expressing a hope at the same time that they would only grant such advances on property, the sale of which, they felt assured by their latest advices, would be of ready sale in the New York market; all of which we trust will meet your entire approbation. We should have extended the credit in question to the former sum of £3,000, but that for the present we conceived you would be better pleased with the lesser amount; you have, however, only to let us know your wishes in this respect to insure our conformity thereto."

On the 31st October, 1834, Thorn wrote to Bell & Grant: "I have to request that you will open the following credits for my account: To Messrs. R. Anderson & Co., Gibraltar, for the purpose of making advances, per my account, £4.000; to Messrs. Archias & Co. for the same purpose, £4.000; to Messrs. Francia, Brothers & Co., of Gibraltar, £2,500."

On the 3d of December, 1834, Bell & Grant wrote to Thorn: "We have now the pleasure of acknowledging the receipt of your much esteemed favor of the 31st October, in compliance with which we have immediately increased the credits already opened for your accounts with Messrs. Robert Anderson & Co., of Gibraltar, and Messrs. Archias & Co., of Marseilles, to the sum of £4,000 each, and opened fresh ones of £2,500, say two thousand five hundred pounds in favor of Messrs. Francia, Brothers & Co., of Gibraltar, to enable them to grant advances on consignments to you from thence and from Malaga.

"And it is moreover understood, that so soon as the credits in favor of the three first named houses have been used and remitted for by you, we are to re-open the same accordingly, which shall be attended to."

One of the bills upon which the suit was brought, was drawn under the above credit by R. Anderson & Co. upon the plaintiffs, dated *on the 16th December, 1836, for £318 [*174 12s. 6d., at ninety days after date, which bill was paid by the plaintiffs.

On the 31st of March, 1836, Thorn wrote to Bell & Grant: "I have sold a large parcel of San Lucas wine, consigned to me by Messrs. La Cave & Echicopar, per Lurin, which may lead to further shipments; and as they will require a credit opened to enable them to make advances, you will please authorize them to draw on you, on the usual conditions, to the extent of £2,500, say two thousand five hundred pounds."

Another of the bills upon which the suit was brought, was drawn under this credit by La Cave & Echicopar upon the plaintiffs, dated on the 22d November, 1836, for £385 sterling, which was paid by the plaintiffs at maturity.

On the 15th of August, 1836, Thorn wrote to Bell & Grant: "I intend to send a vessel to Smyrna for an assorted cargo, and will thank you to open a credit to Messrs. G. Amac, Zipcey & Co., of that place, to the extent of £8,500."

Two other of the bills upon which the suit was brought, were drawn upon the credit thus opened, by Amac, Zipcey & Co. upon the plaint-

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ly bearing an interest legal there, and payable in another place in which so high a rate of interest is not allowed, it may be sued in the place where payable, and the interest expressed recovered. Depau v. Humphreys, 20 Mart., 1; Story's Confl. of Laws, sec. 292, 298; Peck v. Mayo, 14 Vt., 33; Chapman v. Robertson, 6 Paige, 627; 2 Kent's Com., 457; Quince v. Callender, 1 Desaus., 160; Scofield v. Day, 20 Johns., 102; Pars. on Cont., 92 Connor v. Bellamont, 2 Atk., 382; Stapleton v. Conway, 1 Ves., 427; 3 Atk., 727; Elkins v. East India Co., 1 P. Wms., 395; Anonymous, 3 Bing., 193; Ferguson v. Fyffe, 8 Cl. & Fin., 121; Harvey v. Archbold, Ry. & Mood., 184; Winthrop v. Carleton, 12 Mass., 4; Dewar v. Span, 3 T. R., 425; Bank of the State of Georgia v. Lewin, 25 Barb., 340; Balme v. Wambaugh, 35 *Id.*, 362; 1 Page, 230; 22 Barb., 120.

A contract valid by the law of the place where it is made, is, generally speaking, valid everywhere, *jure gentium*, and by tacit assent. The *lex loci contractus* controls the nature, construction and validity of the contract: and on this broad foundation the law of contracts, founded on necessity and commercial convenience, is said to have been originally established. 3 Kent's Com., 454; Prather v. Everhart, 3 Gill & J., 234; Pickering v. Fisk, 6 Vt., 102; Story on Confl. of Laws, 201, 202.

So also the personal incompetency of individuals to contract, as in the case of infancy and the general capacity of parties to contract, depend, as a general rule, upon the law of the place of the contract. Male v. Roberts, 3 Esp. N. P., 163; *Ex-parte* Lewis, 1 Ves., 297; Henry on Foreign Law, 96; Saul v. His Creditors, 17 Martin's La. R., 596, 598; Story on Conflict of Laws, 97; Pickering v. Fisk, 6 Vt. R., 102; Polydore v. Prince, Ware, 402.

The *lex loci* operates not only in respect to the nature, obligation and construction of contracts, and the formalities and authentications requisite to the valid execution of them, but also to their discharge. It is a general rule, that whatever constitutes a good defense, by the law of the place where the contract is made, or is to be performed, is equally good in every other place where the question may be litigated. Ballantine v. Goulding, 1 Cooke's B. L., 347. 1st edit.; Potter v. Brown, 5 East, 124; Van Raugh v. Van Arsdale, 3 Caines, 154; Smith v. Smith, 2 Johns., 235; Hicks v. Brown, 12 Johns., 142; Blanchard v. Russell, 13 Mass., 1; Bradford v. Farrand, *Ibid.*, 18; Prentiss v. Savage, *Ibid.*, 20; Van Reimsdyk v. Kane, 1 Gall., 371; Le Roy v. Crowninshield, 2 Mason, 151; Green v. Samiento, 1 Pet., 74; 2 Kent's Com., 459; Harrison v. Edwards, 12 Vt., 648.

All the foreign jurists agree, that every contract must conform to the formalities and solemnities required by the *lex loci*, in respect to their valid execution; and the like doctrine is recognized in Alves v. Hodges, 7 Term R., 241; Clegg v. Levy, 3 Camp., 166; Vidal v. Thompson, 11 Martin's La., 23; Depau v. Humphreys, 20 *Id.*, 1, 22; Wynne v. Jackson, 2 Russell, 351; James v. Catherwood, 3 Dowl. & Ry., 190.

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iffs, dated on the 7th of January, 1837, one for £1,590, and the other for £140, which were paid at maturity.

In November, 1836, the defendant went to Europe, and did not return until the following August. During his absence he was in London, where he saw the plaintiffs several times.

On the 16th of February, 1837, G. F. Darby, the agent of the plaintiffs residing in New York, drew bills of exchange upon them to the amount of £4,000 sterling, which bills he loaned to Thorn, upon collateral security and the guaranty of G W. Bruen.

On the 8th of March, 1837, Thorn wrote to Bell & Grant: "As this remittance will very nearly balance my old account, I have prevailed on Mr. Darby to open me a credit similar to the last, and on the same conditions, for £3,500, which shall be punctually provided for on the 8th May next, if not sooner."

On the same day, four of the bills upon which the suit was brought were drawn upon the credit thus opened, which amounted in the whole to £3,500, and were accepted and paid when due by the plaintiffs. These bills were guarantied by George W. Bruen, the same person who had guarantied the loaned bills for £4,-[*175] 000, *and who, at this time, was in good credit, and could have raised £4,000 on his notes.

On the 10th of April, 1837, Thorn failed and was insolvent, and the means of his house exhausted.

On the 26th of November, 1839, Grant, then in New York, wrote to the defendant, applying to him for the balance due to his London firm, and saying, "Any further explanation you may require I am ready to give, but I must request your attention in the mean while to the above claim, which I make under your letter of guaranty to Bell & Grant, for any credits they might open in favor of Mr. Thorn, and of which letter I sent you a copy, at your request, last February twelve-month."

In the trial of the cause in the court below, the plaintiffs proved by the evidence of one Schenck, that he was for many years the cashier of Bell & Grant, and greatly in their confidence; that he was well acquainted with their daily mercantile operations; that, as well from his perusal, at the time, of the letters which were received and written by them on the subject of their account and transactions with Thorn, as also from various conversations which he had with them, and the directions which he received with regard to the bills, he had no doubt whatever but that the credits given to the various houses who drew the bills, were given by Bell & Grant in full reliance on the letter of guaranty which had been written to them by the defendant.

The evidence being closed in the court below, the counsel of the defendant prayed the court to instruct the jury, among other things, as matter of law, that the letter of guaranty, of April 23, 1831, was void, as not expressing a consideration; that the said letter of guaranty was confined to credits to be opened to the house of Archais & Co., or other houses with whom Thorn might deal at Marseilles, and therefore could not cover the advances upon the bills of exchange given in evidence. And thereupon the judges did declare their opinion and decide, as matter of law, that by the true construction of the said letter of guaranty, of April 23, 1831, the same only embraced credits which should be opened for account of William H. Thorn to the house of Archais & Co., of Marseilles, and that the evidence *of [*176 the other matters in that behalf proved, did not give the said letter of guaranty a more enlarged application; and, therefore, that the jury ought to find a verdict for the defendant.

To this instruction the plaintiffs' counsel excepted.

Messrs. Lord and *Sergeant* for the plaintiffs in error.

Mr. Choate for the appellees.

Mr. Lord, for the plaintiffs, said that the consideration was sufficient, as the defendant's son was a partner in the house whose prosperity was to be increased. (9 Cranch, 348; 6 Binney, 201; 15 Peters, 314.)

In the guaranty there is no limitation of time or amount, as to the credit with Archais & Co. Why limit it to others and not to them? The defendant relied upon his supervision over the house, and his being able to revoke the credit whenever he might apprehend danger.

Such guarantees are not the subject of technical criticism; they are not the work of lawyers, but merchants in the course of business, and are not to be judged by the strict rules of the common law. Being of a continuing character, they involve the highest expression of confidence.

The doctrine of construction never arises until some ambiguity exists. Bruen, the son, had the entire confidence of his father, as the powers of attorney show. If the words, "any and every, &c.," do not mean what we say, they mean nothing. "Any" means "some"—"every" takes in all, and what does "other" mean? (3 Camp., 220.)

What was the construction that Bell & Grant placed upon it? Their letter shows, and if defendant thought it was not the correct one, he ought so to have informed them.

As to the legal construction, 12 East, 227, says, words must be taken as strongly against the party giving the guaranty as the case will admit. (See, also, 2 Meriv., 280; 6 Binn., 244; 12 Wheat., 517; 7 Peters, 113; 10 Peters, 492; 16 Peters, 528, 536; 12 East, 237; 2 Campb., 413; 1 Metcalf, 225; 12 East, 227; 6 Bingh., 244; 6 Mecson & Wilsby, Exchequer, 605; 3 Campb., 220; 2 Campb., 39.)

The court erred in determining the question, absolutely, as a *question of law, and [*177 declaring that the other circumstances did not allow of an extended view of the guaranty. If these circumstances were admitted, their effect was for the jury.

Mr. Choate, for defendant, made the following points:

1. That the defendant's letter of April 21, 1831, was a contract, preceded by a recital, and that the engagement extends no further than the recital.

2. The recital introduces in direct terms, or by reference, the entire arrangement made between plaintiffs and Thorn, by the letters of the 23d of February, 1831, and March 22, 1831; and the words "this credit," in the defendant's letter of 23d April, 1831, mean the first £2,000; and the words "and any and every other

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credit," mean the subsequent credits, to be opened under the same arrangement.

3. The court will adopt the construction which, under all the circumstances of the case, ascribes the most reasonable, probable, and natural conduct to the parties, and this requires the adoption of the defendant's construction.

4. The plaintiffs never relied upon this guaranty for the credits, the subject of this suit.

5. They gave no such notice to the defendant, of the opening of the credits, which are the subject of this suit, as is required to charge the defendant.

6. They did not, within a reasonable time after the grant of the credits, and after the bills were paid, demand payment of the defendant, or give him notice that they looked to him.

7. The original arrangement made between the plaintiffs and Thorn, in March, 1831, was subsequently, in the spring of 1834, abandoned and deserted; and in the autumn following, a new and inconsistent one, enlarging the credits to be given, and diminishing the security, was made, rendering notice to the defendant necessary, but to which no notice could have given legal effect to charge the defendant for subsequent credits.

8. The apparent diversity of terms between the recital and the engagement in the defendant's letter, raises a doubt upon the face of the guaranty as to its true extent; and upon that doubt, thus raised, the construction will be in favor of the surety.

178*] *Mr. *Choate* then discussed the two constructions to be placed upon the letter. There is no proof that Bruen, the son, was a partner in the house. Record only says, "interested and conversant." He might have had a contingent salary. If he was a partner, there is no proof that defendant knew it.

In March, 1834, the arrangement was abandoned, and in the following October, the plaintiffs and Thorn made a new one.

In October, 1836 and 1837, plaintiffs made another arrangement with Thorn, opening credits for $50,000. In April, 1837, Thorn failed, and in June, 1837, Bell became embarrassed; and yet the defendant was not notified until 1839.

As to the letter of 23d April, its language must be limited by the recital and the circumstances. (Sheph., 86.) Courts habitually so limit instruments. (1 Domat, 248; 3 Ch. Cases, 101; Sheph., 76; Bac. Abr., title "Fait;" 9 Mass. Rep., 235; Theobald on Surety, 66; 1 Law Lib., 39.)

Condition, when larger than the recital, is limited by it. (Fell on Guarantees, 116; 1 Williams's Saunders, 415, *note;* Aleyn, 10; 1 Strange, 227; 2 Saunders, 412, a leading case; 4 East, 507; 2 Smith, 655; 2 New Rep., 175, referred to in Fell, 125; 2 Barn. & Ald., 431; 2 Maule & Sel., 363; 4 Taunt., 593.)

Reason of the rule is, that it is supposed to reach the true meaning of the parties, as it is more likely that men will use language improperly than act foolishly. (Hobart, 304; Sheph. Touch., 86.)

So in the civil law; the court looks to probability. (1 Domat., 248.) So in 16 Peters, 534, reference is had to the circumstances of the case. (12 Wheat., 518; 2 Pick., 235; 17 Wend. Rep., 425; 1 Metcalf, 25; 8 Taunt. Rep., 208.)

Reason is stronger in the case of a surety. He is a favorite of courts, and his contract is *stricti juris*. Where the terms are clear, they are not to be extended; where they are doubtful, the court will adopt the narrower sense, provided it be reasonable and probable. (Pothier on Oblig., p. 2, ch. 6, sec. 4; Code Napoleon, tit. 14, ch. 1, arts. 2011, 2015, p. 401; 7 Cranch, 90, never repealed. 7 Peters, 122, does not conflict with it, but adopts it. 1 Mason, 336, that the language should be strong to make a continuing guarantee; in case of doubt, construction in favor of surety. (16 Peters, 537; *Ludlow* v. *Simonds*, 2 Caines's Cases in Error, *1; 10 Johns. Rep., 311, 325; 8 Wend., [*179 516; 17 Wend., 422; 2 Pick., 224.)

The law in England is so now. In the cases cited on the other side, there is a plain meaning against the surety. (1 Starkie, 192; 8 Taunt., 224; 3 Barn. & Ald., 594, 595; Nicholson & Paget, 52; 6 Mearn, Exchequer Reports, 613; 1 T. R., 287; 2 T. R., 370; 3 East, 484; 8 Moore, 588, 582; 1 Perry & Davidson, 249; 10 Ad. & Ellis, 30.)

This letter is a contract preceded by a recital of the circumstances. A recital is a prefatory statement to make the meaning plain. The purpose of the credit is stated, and the writer must have referred to the renewed credit. (2 Bos. & Pull., 238.) There is only one case carrying the engagement beyond the recital, and that is 2 Campbell *N. P.* Rep., 39. But that was different from the present case, the engagement there being for anything "due on any other account," and inconsistent with the recital; but here it is not. No one asked defendant for an unlimited guaranty. Conduct of plaintiffs not likely to excite suspicion, because they merely echoed defendant's own letter.

The plaintiffs ought to have notified defendant when they opened new credits. (5 Peters, 624; 12 Peters, 213; 4 Greenl., 525; 22 Pick. R., 223; 17 Johns., 140.) Notice of default, at all events, is indispensable. (14 Pick., 353; 18 Pick., 536; 8 Pick., 423; 22 Pick., 223; 3 Wheat., 144; 9 Serg. & Rawle, 202.)

The court below was right in deciding the question as a point of law. (1 Peters, 182; 5 Cranch, 190; Paine's C. C. R., 545; 20 Pick., 156.)

Mr. Sergeant, for plaintiffs, in reply, said that he had not had time, since yesterday, to look at all the authorities cited on both sides, there being about one hundred and fifty. This court have settled the law (in 13 Peters, 89) as to the exclusion or admission of parol evidence of circumstances. In *Moran* v. *Bullitt* (16 Peters) they decided that when there is a valuable consideration, an indorser, though often a mere surety, is governed by the law merchant, and not the common law rules as to sureties.

1. The written guaranty by itself.

2. As explained by evidence.

1. By itself. Every letter is written to some one; but does *not bind until accepted [*180 by the other party. Then the two letters constitute one contract. If the acceptance varies from the offer, the offering party ought to say so. It is a law of correspondence to speak the truth plainly; and hence, if there be ambiguity, the construction must be against the writer.

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It may be an intentional trap. The case in 16 Peters turned upon this. Bell & Grant answered the letter, saying what they thought of it; but the charge of the court below was given upon only one of these two letters.

In 2 Campbell, 39, the recital in a bond did not limit the engagement, because it was a commercial transaction. In 1831 Bruen came forward voluntarily. Bell did not ask him nor inquire his motives. A guaranty always implies that the thing would not be done without it. If Bruen intended what we say, he would have used the very words he did. There is no ambiguity, and why construe it in? All the cases accept that in Campbell were bonds with collateral conditions. Lord Ellenborough treats them all as bonds given in appointments to office. These are common law instruments, and the recital is put in on purpose to explain. But not so with commercial contracts. There is no recital in a letter or conversation. In the bond cases there is a contradiction, but there is none here.

The jury could have inferred Bruen the son's partnership in Thorn's house. He was interested in "the business." What business? Bruen, from bankruptcy, had become worth £4,000 in seven years. The defendant therefore wished to sustain his son.

The question of notice ought to have gone to the jury. *Douglas* v. *Reynolds* (7 Peters) is decisive that notice is a question of fact.

Thorn failed on 10th April, 1837; this dispenses with notice of the default. (12 Peters, 213.)

Mr. Justice CATRON delivered the opinion of the court:

The original action was founded upon a guaranty given by Matthias Bruen to Bell & Grant, in favor of Wm. H. Thorn, by the following letter:

NEW YORK, 23d April, 1831.

MESSRS. BELL & GRANT, *London*—DEAR SIRS: —Our mutual friend, Mr. Wm. H. Thorn, has informed me that he has a credit for £2,000, given by you in his favor with Messrs. Archias 181*] *& Co., to give facilities to his business at Marseilles. In expressing my obligations to you for the continuation of your friendship to this gentleman, I take occasion to state, that you may consider this, as well as any and every other credit you may open in his favor, as being under my guarantee.

I am, dear sirs, your friend and servant,

M. BRUEN.

To this letter the following answer was given by Bell & Grant:

LONDON, 14th June, 1831.

MATTHIAS BRUEN, Esq., New York: We are in the receipt of your favor of the 23d April, guarantying the credit opened on behalf of Mr. Wm. H. Thorn with Messrs. Archias & Co., of Marseilles, for £2,000, for the purpose of facilitating his business with that place; and, moreover, desiring us to consider as under your guaranty, also, all credits existing, or that we may hereafter open for said friend, of which we take due note. And we trust that Mr. Thorn, as well as your good self, will have every reason to be satisfied with the confidence which we feel a pleasure in assigning to both of you."

The declaration contains four counts:

1. That the plaintiffs, on the 31st of March, 1836, were requested by Thorn to open a credit in his favor, authorizing the firm of La Cave & Echicopar, of Cadiz, to draw on the plaintiffs to the extent of £2,500. That on the 22d November, 1836, La C. & E. drew for £385; which was advanced on the 12th February, 1837, by the plaintiffs, according to Thorn's request.

2. That on the 10th of October, 1834, at the request of Thorn, a credit was opened in his favor, authorizing R. Anderson & Co., of Gibraltar, to draw for £4,000. On the 16th December, 1834, Anderson & Co. drew for £318 12*s.* 6*d.*; which plaintiffs paid, 19th March, 1837.

3. That on the 15th of August, 1836, the plaintiffs opened a credit in favor of Thorn, authorizing Amac, Zipcey & Co., of Smyrna, to draw for £3,500. Of this sum, the house at Smyrna drew £1,640; which plaintiffs paid, 8th April, 1837.

4. That on the 8th March, 1837, plaintiffs opened a credit to Thorn, himself, for £3,500, for which amount he drew bills; and which were paid, 17th June, 1837.

Much other correspondence and evidence was given to the *jury, that need not at [*182 present be referred to; but which appears in the statement of the case made out by the reporter, and presented to us.

The evidence being closed, the defendant prayed the Circuit Court to instruct the jury, as matter of law, that the letter of guaranty of April 23d, 1831, was confined to credits to be opened to the house of Archias & Co., or other houses with whom Thorn might deal at Marseilles; and therefore the plaintiffs could not recover from the defendant the advances made upon the bills of exchange, given in evidence: being for the sums paid, as stated in the four counts of the declaration.

Thereupon the court did decide, as matter of law, "that by the true construction of the said letter of guaranty, of April 23d, 1831, the same only embraced credits which should be opened for account of Wm. H. Thorn to the house of Archias & Co., of Marseilles; and that the evidence of the other matters in this behalf proved, did not give the said letter of guaranty a more enlarged application. And therefore, that the jury ought to find a verdict for the defendant."

The jury found accordingly: and it is this instruction of the court alone that we are called upon to examine and revise. Does the letter of guaranty extend to, and cover the debts of Wm. H. Thorn sued for? is the question. It was an engagement to be executed in England, and must be construed and have effect, according to the laws of that country. (*Bank of the United States* v. *Daniel*, 12 Peters, 54, 55.) But it is necessary to remark that the law governing the agreement is the same in this country and in England; had it been made between merchants of different States of this Union, and intended to be executed at home, the same rules of construction would be adopted; and the same adjudications would apply.

It is insisted for the plaintiffs, that the Circuit Court erred in determining the question absolutely as a question of law, upon the construction of the letter; that it also erred in declaring the other circumstances did not allow

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of an application of the guaranty to the transactions in question; such other circumstances, being admitted, their effect on the extent and application of the guaranty was for the jury; and by deciding on their effect as matter of law, they were withdrawn from the jury.

183*] *The letter of Bruen was an agreement to pay the debt of another on his making default: by the statute of frauds (29 Chs. II.), such agreement must be in writing, and signed by the party to be charged; it cannot be added to, by verbal evidence; nor by written, either, if not signed by the guarantor, unless the written evidence is, by a reference in the letter, adopted as part of it.

But as the statute does not prescribe the form of a binding agreement, it is sufficient that the natural parts of it appear either expressed, or clearly to be implied; and correspondence and other evidence may be used to ascertain the true import and application of the agreement; by the aid of which extrinsic evidence, the proper construction may be made. Such is the doctrine of this court, as will be seen by reference to the cases of *Drummond* v. *Prestman* (12 Wheat.). *Douglass* v. *Reynolds* (7 Peters), *Lee* v. *Dick* (10 Peters).

In the present instance, the question having arisen, and construction been called for, the matters referred to in the letter of the defendant were considered (as circumstances attending the transaction) to aid the court in arriving at a proper understanding of the engagement; so soon as it was understood, its construction belonged to the court, and was "matter of law," within the general rule applicable to all written instruments. It rested with the court to decide whether the guaranty extended to, and covered the credits set forth in the declaration; and was the common case of asking the court to instruct the jury that the plaintiff had not proved enough to entitle him to recover, admitting all his evidence to be true. In England, the same end is attained, by moving for a nonsuit.

For the defendant it is contended: That the letter of April 21, 1831, is a contract, preceded by a recital, and that the engagement extends no further than the recital.

The recital introduces in direct terms, or by reference, the entire arrangement made between plaintiffs and Thorn, by the letters of the 23d of February, 1831, and March 22, 1831; and the words "this credit," in the defendant's letter of 23d April, 1831, mean the first £2,000; and the words "and any and every other credit," mean the subsequent credits, to be opened under the same arrangement.

The general rule is well settled in controver-

184*] sies arising on the *construction of bonds, with conditions for the performance of duties, preceded by recitals: that where the undertaking is general, it shall be restrained, and its obligatory force limited within the recitals. The leading case is *Arlington* v. *Merricke* (2 Saund. R., 403). It has been followed by many others; *Liverpool Water-work Co.* v. *Hamphey* (6 East, 507), *Wardens, &c.*, v. *Bostock* (3 Bos. & Pull., 175), *Leadley* v. *Evans* (2 Bingh. R., 32), *Pepin* v. *Cooper* (2 Barn. & A., 431), are some of the principal cases affirming the rule.

Where a mercantile guaranty is preceded by a recital, definite in its terms; and to which the general words obviously refer, the same rule applies, of limiting the liability within the terms of the recital, in restraint of the general words. We find the courts constantly referring to the cases arising on bonds with conditions for the rule of construction, and applying it to commercial guaranties; the most approved text writers on this subject do the same; does the engagement before us fall within the rule? It recites:

"Our mutual friend, William H. Thorn, has informed me that he has a credit for two thousand pounds, given by you in his favor with Messrs. Archias & Co., to give facilities to his business at Marseilles." The agreement is: "I take occasion to state, that you may consider this, as well as any and every other credit you may open in his favor, as being under my guarantee."

We are of opinion that the engagement should be construed as if it read: "You may consider this credit with Archias & Co. as being under my guarantee: as well as any and every other credit you may open in favor of William H. Thorn with any and every other person, as also being under my guaranty." And that therefore the first branch of the undertaking has reference to the recital; and that the latter part is independent of it. To hold otherwise, would reject the general words—"as well as any and every other credit"—as unmeaning and useless: the agreement having the same effect, by the construction claimed for the defendant, if these words were struck out, as if they are left in it.

The general words, it is insisted, related to the character of the credit opened with Archias & Co., because it was an open and continuing credit for £2,000. That this appears by the letters *of Thorn to Bell & Grant, and [*185 to Archias & Co.; which are sufficiently referred to in the recital of the letter to make them part thereof, and to extend it to the continuing credit with Archias & Co.

That the two letters of Thorn were sufficiently referred to, and could be read to establish the nature of the credit; and that it was open, we have no doubt; but their adoption was just as certain without the general words, as with them. The special reference to the recital, adopting it as explained by the letters, leaves the general words still without meaning unless the guaranty extends beyond the credit opened with Archias & Co.

To make a proper application of the general words, it becomes necessary to lay down a definite rule of construction applicable to them; as the authorities are in conflict, and to say the least, in considerable confusion, on the subject. The arguments are in direct conflict.

For the plaintiffs in error (Bell & Grant) it is contended: "That the guaranty by letters is to be taken, in case of doubt, or ambiguity, on its face or otherwise, in the broadest sense which its language allows, and in which it has been acted on by the parties." *Drummond* v. *Prestman* (12 Wheat.), *Douglass* v. *Reynolds* (7 Peters), *Dick* v. *Lee* (10 Peters), *Mauran* v. *Bullus* (16 Peters), *Mason* v. *Pritchard* (12 East), *Merle* v. *Wells* (2 Campb. R., 413), *Bent* v. *Hartshorne* (1 Metcalfe R.), *Hargreave* v. *Smee* (6 Bingh. R.; 10 Eng. Com. Law Rep., 69),

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Mayer v. *Isaac* (6 Mess. & Wels. Exch. R.), and *Bastow* v. *Bennet* (3 Campb. R.), are relied on to support the construction claimed as the true one.

On part of the defendant (Bruen) it is insisted, "That the apparent diversity of terms, between the recital and the engagement in the defendant's letter, raises a doubt upon the face of the guarantee as to its true extent; and upon the doubt, thus raised, the construction will be in favor of the surety.

The following authorities are relied on to sustain the construction here claimed: Pothier on Obligations, part 2, sec. 84; Code Napoleon, art. 2011, 2015; *Russell* v. *Clarke* (7 Cranch); 1 Mason, 336; 2 Caines' Cases in Error, 29, 49; 10 Johns. R., 180, 825; 8 Wend. R., 516; 7 Wend., 422; 2 Pick. R., 234; 16 Peters, 537; 1 Stark. R., 192; 8 Taunt., 224; 3 B. & A., 594, 595; 1 Cromp. & Mees., 52, 54; 3 Wilson, 186*] 530; 1 Term R., 287; 2 So., 370; *3 East, 484; 4 Taunt., 673; 8 Moore, 588; 1 Perry & D., 249; 10 Adolph. & Ellis, 30.

The adjudged cases referred to, giving a construction to bonds with conditions, and contracts made directly between debtor and creditor, afford little aid in arriving at the true understanding of a commercial guaranty. Bonds, &c., are entered into with caution, and often after taking legal advice; they contain the entire contract, beyond which the courts rarely look for circumstances to aid in their construction. And if there be sureties bound by them, and the meaning is doubtful, the construction is restricted, and made most favorable to the sureties. Such is the result of the authorities cited for the defendant.

On the other hand, letters of guaranty are (usually) written by merchants; rarely with caution, and scarcely ever with precision; they refer in most cases, as in the present, to various circumstances, and extensive commercial dealings, in the briefest, and most casual manner, without any regard to form; leaving much to inference, and their meaning open to ascertainment from extrinsic circumstances, and facts, accompanying the transaction: without referring to which, they could rarely be properly understood by merchants, or by courts of justice. The attempt, therefore, to bring them to a standard of construction, founded on principles neither known, or regarded, by the writers, could not do otherwise than produce confusion. Such has been the consequence of the attempt to subject this description of commercial engagement to the same rules of interpretation applicable to bonds, and similar precise contracts. Of the fallacy of which attempt, the investigation of this cause has furnished a striking and instructive instance. These are considerations applicable to both of the arguments.

The construction contended for as the true one on part of the plaintiffs is: That the letter of the defendant must be taken in the broadest sense which its language allows; thereby, to widen its application. To assert this as a general principle, would so often, and so surely, violate the intention of the guarantor, that it is rejected. We think the court should adopt the construction which, under all the circumstances of the case, ascribes the most reasonable, probable, and natural conduct to the parties. In the language of this court, in *Douglass* v. *Reynolds* (7 Peters, 122), "Every *instrument of this sort ought to [*187 receive a fair and reasonable interpretation according to the true import of its terms. It being an engagement for the debt of another, there is certainly no reason for giving it an expanded signification, or liberal construction beyond the fair import of the terms." Or, it is "to be construed according to what is fairly to be presumed to have been the understanding of the parties, without any strict technical nicety;" as declared in *Dick* v. *Lee* (10 Peters, 493). The presumption is of course to be ascertained from the facts and circumstances accompanying the entire transaction. We hold these to be the proper rules of interpretation, applicable to the letter before us.

The general words not being restricted by the recital, they fairly import that Matthias Bruen was bound to Bell and Grant for the credits they opened in favor of William H. Thorn with Archias & Co.: and for the credits also, they opened in favor of Thorn, with any and every other person; covering those set forth in the three first counts in the declaration; and we think that the Circuit Court erred by instructing the jury to the contrary.

Whether the guaranty covered the credit extended to Thorn himself, directly, it is not thought necessary to inquire; as no argument was founded on such an assumption; Thorn, who was introduced as a witness in the Circuit Court by the plaintiffs, on his cross-examination, declared that the £3,500 mentioned in the last count in the declaration "had no relation whatever to the guaranty of the defendant," it being under the guaranty of a different person.

It was insisted, also, that when Thorn failed, and the dealings between him and the plaintiffs ceased, they were bound to notify the guarantor of the existence of the debts due them by Thorn, and for which Bruen was held liable, in a reasonable time after the dealings ceased; that Thorn failed April 10th, 1837; and the notice was not given until December 31st, 1838; the debts sued for in the three first counts of the declaration being then due; therefore the notice was too late, and the defendant discharged.

The record shows that this ground of defense was not brought to the consideration of the Circuit Court; we do not therefore feel ourselves at liberty to express any opinion upon the question.

*Again it is insisted: The original ar- [*188 rangement made between the plaintiffs and Thorn, in March, 1831; was subsequently, in the spring of 1834, abandoned and deserted; and in the autumn following, a new and inconsistent one, enlarging the credits to be given, and diminishing the security, was made, rendering notice to the defendant necessary, but to which no notice could have given legal effect to charge the defendant for subsequent credits.

To this, and all other questions raised here, on which the court below was not called to express any opinion, we can only give the same answer, given to the next preceding, supposed ground of defense.

It is ordered that the judgment of the Circuit

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Court be reversed, and the cause remanded for another trial thereof.

ORDER.

This cause came on to be heard on the transcript of the record from the Circuit Court of the United States for the Southern District of New York, and was argued by counsel; on consideration whereof, it is now here ordered and adjudged by this court, that the judgment of the said Circuit Court in this cause be, and the same is hereby reversed, with costs; and that this cause be, and the same is hereby remanded to the said Circuit Court, with directions to award a *venire facias de novo*.

Cited—2 How., 450; 6 How., 421; 19 How., 392; 7 Otto, 583; 3 Wood & M., 341; 1 Brown, 175; 1 Biss, 339.

ELIZABETH R. CARTWRIGHT, *Plaintiff in Error*,

v.

ALEXANDER T. HOWE, GEORGE F. RICHARDS, AND WILLIAM RICHARDS, *Defendants*.

THIS cause came on to be heard on the transcript of the record from the Circuit Court of the United States for the District of Columbia, holden in and for the County of Washington, and it having been stated by Mr. Bradley, of counsel for the defendant in error, that the matters in controversy had been agreed and settled between the parties, to which Mr. R. J. Brent, of counsel for the plaintiff in error, assented; it is thereupon now here ordered and adjudged by this court that this cause be, and the same is hereby dismissed, with costs.

189*] *ISAAC S. BOWMAN AND GEORGE W. S. BOWMAN, —— BRINKER AND MARY, His Wife, formerly MARY BOWMAN, AND REBECCA BOWMAM, BY SAID ISAAC S. AND GEORGE W. S. BOWMAN, their next friend, the said MARY AND REBECCA being infants under twenty-one years of age, AND ALBERT T. BURNLEY, *Appellants*,

v.

ATHANASIUS WATHEN, AND THE MAYOR AND COMMON COUNCIL OF THE CITY OF JEFFERSONVILLE.

Court of Equity will refuse to interfere after great lapse of time—fraud no exception—adverse possession—reasonable diligence required.

The doctrine laid down by Lord Camden, in the case of Smith v. Clay (3 Brown's Ch. Rep., in *note*), examined and confirmed, viz., "That a court of equity, which never is active in relief against conscience or public convenience, has always refused its aid to stale demands, where the party has slept upon his rights for a great length of time. Nothing can call forth this court into activity but conscience, good faith, and reasonable diligence. Where these are wanting, the court is passive and does nothing; laches and neglect are always discountenanced; and therefore, from the beginning of this jurisdiction, there was always a limitation of suit in this court."

Also the doctrine laid down by Lord Redesdale in Hovenden v. Lord Annesley, 2 Sch. & Lef., 636, "that every new right of action, in equity, that accrues to a party, whatever it may be, must be acted upon at the utmost within twenty years."

And though the claimant may have been embarrassed by the frauds of others, or distressed, it is not sufficient to take the case out of the rule.

The doctrine has also been ruled by this court, and should now be regarded as the settled law.

In this case, the complainants have so long slept upon their rights that this court must remain passive, and can do nothing: and this is equally true, whether they knew of an adverse possession, or through negligence and a failure to look after their interests, permitted the title of another to grow into full maturity.

THIS was an appeal from the Circuit Court of the United States for the District of Indiana, sitting as a court of equity.

The facts are fully stated in the opinion of the court, and also the authorities referred to in the argument. It is unneccessary to repeat either.

Messrs. Crittenden and *Test* for the appellants.

Messrs. Berrien and *Legaré*, Attorney-General, for the appellees.

Mr. Justice DANIEL delivered the opinion of the court:

This is an appeal from a decree of the Circuit Court of the United States for the Seventh Circuit and District of Indiana. The complainants in the Circuit Court, the appellants here, filed their *bill in the year [*190 1840. It is alleged and shown, that with the exception of Albert T. Burnley, who is a citizen of Kentucky, the complainants are citizens of Virginia, and heirs and devisees of Isaac Bowman, deceased, who was an officer in the Virginia Regiment, known as the Illinois Regiment. That in the division and allotment of the lands appropriated by the State of Virginia for compensating the officers and soldiers of this regiment, a tract of land of five hundred acres on the Ohio River, within the County of Clarke, in the then territory and now State of Indiana, was, in 1786, alloted and conveyed to said Isaac Bowman, for his services in the regiment above mentioned. That Bowman, being seized in fee of this land, afterwards, in March, 1802, by a power of attorney under his hand and seal, constituted one John Gwathney his attorney in fact, with full authority to lay off a town on the same, beginning at the lower part thereof on the river, and to contain one hundred and fifty acres of land. That by this instrument Gwathney was authorized to lay off the town in any manner he might prefer; to convey the title to the land forming the site thereof to proper trustees; to sell the lots on whatever credit he might think proper, and to do every other act which might be necessary for carrying into effect the powers with which the said agent was vested. That Gwathney proceeded to lay off the one hundred and fifty acres of land, to divide them into lots and streets for a town to be called Jeffersonville; reserving two acres for a public

Note—*As to when equity will refuse to interfere from lapse of time*, see note to Prevost v. Gratz, 6 Wheat., 481; and note to Thomas v. Harvie, 10 Wheat., 146; and note to Pratt v. Carroll, 8 Cranch, 471.

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square, and certain lots for the benefit of his principal; designating also a portion of land on the margin of the river as a common. That he likewise caused a map or plan of the town to be made and recorded. This plan is made an exhibit in the cause. That, having laid off the town, Gwathney, on the 23d of June, 1802, by indenture, and for the consideration of five shillings therein expressed, conveyed to Marston G. Clarke and others, as trustees of Jeffersonville, the one hundred and fifty acres of land in conformity with the plan adopted; reserving to himself, as attorney for Bowman, the exclusive right of applying the money to arise from sales of the lots; the right also to have and use for and on behalf of Bowman, "whatever right he may now hold as proprietor, to the establishment of one or more ferries." It does not appear that Bowman was ever on the land after its allotment to him; he contin-

191* ued to reside in Virginia, *where he died in the year 1826, having previously made and published his last will, whereby he devised, among other property, the ferry-right mentioned in the deed from Gwathney to the trustees of the town of Jeffersonville. That the devisees of Bowman, to whom were assigned his lands in Indiana and Kentucky, on the 11th of May, 1839, by deed, and for the consideration therein expressed of $20,000, conveyed these lands, together with the ferry-rights above mentioned to the complainant, Burnley, and have united with him in the institution of this suit.

As early as the 12th of October, 1802, little more than three months after the conveyance from Gwathney to the trustees of Jeffersonville, a license was granted by the territorial government of Indiana to Marston G. Clarke, one of the persons named as trustees of the town, to keep a ferry across the Ohio River from the town above mentioned. On the 2d day of July, 1807, a similar license was granted by the same government to one Joseph Bowman. In the month of December, 1822, one George White, having previously purchased the interest of Clarke, and of others claiming under Clarke, the Legislature of the State of Indiana passed an act confirming to him the right to keep a ferry from Jeffersonville to the opposite shore of the Ohio.

These acts of the territorial and State governments were public and notorious; were parts of the recorded history of the country; the rights they purported to convey were such as could not be secretly enjoyed, and they appear to have been uninterruptedly exercised by the grantees. The three several ferries granted have been united, and have been transferred by purchase to the defendant, Wathen, conjointly with others, who are non-residents of the State of Indiana; and these purchasers, deriving title from the original grantees, have, from the commencement of their interest, exercised an ownership separately from, and independently of either Bowman or the complainants, and exempt from any assertion of title by any of them, until the institution of this suit; showing an use and enjoyment of this ferry, for the space of thirty-eight years from the date of the grant to Clarke, and of twenty years from the confirmation by the Legislature of the license to White.

The complainants, alleging that the mayor and common council of Jeffersonville, as successors of the original trustees of the town of *Jeffersonville, hold the equitable estate [***192** in the ferry for the benefit of the heirs and devisees of Bowman, made the corporation joint defendants with Wathen to their bill; and prayed that the latter might be enjoined from using the ferry; that he might render an account of the profits thereof, and that general relief might be decreed them.

The answer of the defendant, Wathen, repels the claim of the complainants to the ferry, as having any foundation on the alleged reservation in the deed from Gwathney, or on any exception out of the estate passed to the grantees by that deed; relies upon the validity of the grants made by the territorial and State governments; upon the long and uninterrupted use and enjoyment of the ferry under those grants, and upon the position of the defendants as a purchaser without notice.

The corporation of Jeffersonville deny that they were created a corporation by the deed from Gwathney, or that they are the successors of the trustees appointed by that deed: and they claim their corporate character and powers from the authority of the Legislature alone; they deny any riparian or ferry privileges as belonging to the complainants in virtue of the deed from Gwathney, and disclaim any part in the controversy between the complainants and Wathen.

Upon the hearing, the Circuit Court dismissed the bill with costs.

In the examination of this cause by the Circuit Court, and in its discussion here, an extensive range of inquiry has been opened, embracing questions upon the operation of that clause in the deed from Gwathney to the trustees of Jeffersonville, which relates to the ferry-rights claimed, as forming either a reservation or an exception according to the principles of the common law, and as affected, therefore, by the presence of absence of words of perpetuity; also upon the connection of these rights with, and their dependence upon, riparian ownership, and upon the necessity for their separation from the sovereign or eminent domain, to permit of their exercise by private persons. These are topics, however, which this court regard as beside the real merits of the present controversy, or as superseded by the true principles upon which it ought to be settled. The real question involved touches neither the definition of ferry privileges nor the modes of their enjoyment; *but relates [***193** exclusively to the propriety of interfering, at the instance of the complainants below, with those rights as they now are and have been enjoyed by the defendants, and of transferring such rights and enjoyment to the complainants themselves. The complainants are invoking the aid of a court of equity: if they have perfect rights, proper for the cognizance of a different forum, they can have no standing here; if, on the contrary, they require the interposition of this court, they must stand or fall upon the settled principles which govern its action. The frequency and explicitness with which those principles have been announced by this and other tribunals, would seem to dispense with any necessity for their

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repetition, and to impart somewhat the appearance of triteness to their recapitulation. They have been imbodied by Lord Camden, with a succinctness, and at the same time with a comprehensiveness, compressing within a few sentences almost a system of equity jurisprudence, when he declared, in *Smith* v. *Clay* (3 Brown's Chancery Reports, in *note*), "that a court of equity, which never is active in relief against conscience or public convenience, has always refused its aid to stale demands, where the party has slept upon his rights for a great length of time. Nothing can call forth this court into activity but conscience, good faith, and reasonable diligence. Where these are wanting, the court is passive and does nothing; laches and neglect are always discountenanced, and, therefore, from the beginning of this jurisdiction, there was always a limitation of suit in this court." In a case very often referred to (*Hovenden* v. *Lord Annesley*, 2 Sch. & Lef.), Lord Redesdale (page 636) lays it down as what he calls the common law of courts of equity, "that every new right of action in equity that accrues to a party, whatever it may be, must be acted upon, at the utmost, within twenty years." *Hercy* v. *Dinwoody* (4 Bro. Ch. Rep., 257) was a case wherein the statute of limitations could not directly apply, for there had been a decree for an account that had not been proceeded in with effect; it was a case, therefore, in which the court proceeded according to its discretion, and not by any analogy with the statute of limitations; Lord Alvanley, in deciding this case, puts it upon the ground of public policy, and would not permit the account to be carried on, because the party who would otherwise have been entitled to it, had 194*] been guilty of such laches *as to render it impossible to settle the account accurately. In the case already mentioned of *Hovenden* v. *Lord Annesley*, Lord Redesdale strikingly illustrates the force and inflexibility of the principle on which he had been insisting, when he adverts to and disallows the circumstances adduced and relied on to modify the operation of that principle. After declaring that lapse of time, independently of the statute, would conclude the party in default, he proceeds to remark, that "it never can be a sound discretion in the court to give relief to a person who has slept upon his rights for such a lapse of time; for though it is said, and truly, that the plaintiffs in this suit and those under whom they claim were persons embarrassed by the frauds of others, yet the court cannot act upon such circumstances. If it did, there would be an end of all limitation of actions in the cases of distressed persons; for if relief might be given after twenty years on the ground of distress, so might it after thirty, forty, or fifty; there would be no limitation whatever, and property would be thrown into confusion." So Sir William Grant, in the case of *Beckford et al.* v. *Wade* (17 Ves., 87), declares that "courts of equity by their own rules, independently of any statutes of limitation, give great effect to length of time, and they refer frequently to the statutes of limitation, for no other purpose than as furnishing a convenient measure for the length of time that ought to operate as a bar in equity of any particular demand."

This doctrine of an equitable bar by lapse of time, so distinctly announced by the Chancellors of England and Ireland, has been ruled with equal force by this tribunal in the cases of *Prevost* v. *Gratz* (6 Wheat., 481), of *Hughes* v. *Edwards* (9 Wheat., 489), of *Miller's Heirs* v. *McIntyre* (6 Peters, 61), and of *Piatt* v. *Vattier et al.* (9 Peters, 405). It should now be regarded as settled law in this court.

Can the pretensions of these complainants bear examination by the standard which this rule ordains? The town of Jeffersonville was established, by the agent of the original proprietor of the site on which it stands, in June, 1802. The first ferry was granted by the territorial government in October, 1802; a period almost coeval with the creation of the town itself. This grant (like every other for a similar purpose mentioned in the record) was made in no union or connection of interests with the original *proprietor of [*195 the lands, but in a wholly separate and distinct interest. It is proved that the agent of the original proprietor resided in the immediate neighborhood. He may be presumed, from his agency in laying off and selling the lots, to have been familiar with the localities of the place and with the interests and pursuits of the occupants. He is shown to have had knowledge of the existence of a ferry at the place, and to have availed himself of its accomodation like other passengers. The use of this separate and independent ferry-right has existed from the first grant to the institution of this suit, for a period of thirty-eight years, without an intimation, during this interval, of a right in the complainants or in those from whom they deduce title. Throughout all this time, the holders of this ferry, with a feeling of security which circumstances were well calculated to inspire, have bestowed their care and their means upon an enterprise to which they were prompted, no doubt, by considerations of profit, but one not the less useful or laudable, nor less entitled to protection for that reason: an undertaking highly promotive of public advantage. Can these defendants, under circumstances such as are here enumerated, and consistently with the principles of this court, be now arrested in this enterprise? and this at the instance of persons who may in some sense be regarded as having prompted them to it, if not by express invitation or by the connivance of their agent, yet by their own long abandonment of whatever interest in the subject they may once have possessed? Such a proceeding would not accord with the maxims of a court "which is never active to give relief against conscience or public convenience," or "to a party who has slept upon his rights;" a court which "nothing can call forth into activity but conscience, good faith, and reasonable diligence." In this instance the complainants have slept, long slept upon their rights; by their want of reasonable diligence, others have been induced to embark in an undertaking against which these complainants had power to warn them; with respect to these parties, therefore, this court must remain passive, and can do nothing.

It was insisted in the argument for the complainants, that Bowman, the ancestor, having remained in Virginia until his death in 1826, never had knowledge of an intrusion upon his

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ferry-rights; and that without such knowledge, **196*]** no presumption on the score *either of neglect or acquiescence could be allowed against him. In the first place, with regard to the fact of ignorance here assumed, this cannot be admitted; because it is proved that Gwathney, the agent, resided in the immediate neighborhood: that from his agency in laying off and selling the lots, he was necessarily connected with the affairs of the town; and it is shown, beyond question, that he had knowledge of the existence of the ferry, and had actually used it at an early period after its establishment, though the precise time when is not ascertained. Let it be conceded, however, that Bowman and his family omitted to inform themselves of the right set up to this ferry by others; it is not perceived how such a concession would strengthen the claim of the complainants, or impair the title of the defendant, as accruing from lapse of time. The defendant, or his grantors, did not enter under Bowman; nor in subordination to any title of his; they have always claimed under grants from a wholly different authority, and adversely to Bowman and to everyone else. If Bowman, by negligence, or by failure to look after and protect his own interests, permit the title of another to grow into full maturity, he thereby recognizes the force of the principle of the bar by lapse of time, which creates a title as complete in equity as would be imparted by an express conveyance. This conclusion follows by regular deduction from all the authorities upon this doctrine of lapse of time, and is established by the express language of this court in the case of *Boon* v. *Chiles* (10 Peters, 223), where, in speaking of one whose acts may make him a trustee by implication, it holds this language: "His possession enables him to have at least the same protection as that of a direct trustee, who, to the plaintiff's knowledge, disavows the trust, and holds adversely; as to whom the time runs from the disavowal; because his possession from thenceforth is adverse. The possession of the land is notice of a claim to it by the possessor (Sugd. Vend., 753), if not held by a contract or purchase; it is fron its inception adverse to all the world, and in twenty years bars the owner in law and in equity." In conformity with this doctrine is the decision in *Buchannon et al.* v. *Upshaw*, made during the present term of this court.

We consider the pretensions of the complainants below, the appellants here, to be, upon every correct view, within the opera- **197*]** tion *of the equitable bar, by lapse of time; we hold, therefore, that the Circuit Court properly dismissed their bill, and we accordingly affirm the decree of that court.

ORDER.

This cause came on to be heard on the transcript of the record from the Circuit Court of the United States for the District of Indiana, and was argued by counsel; on consideration whereof, it is now here ordered and decreed by this court, that the decree of the said Circuit Court in this cause be, and the same is hereby affirmed, with costs.

Aff'g 2 McLean, 376.
Cited—7 How., 259; 8 How., 222; 1 Wood., &. M., 112 148; 2 Cliff, 155.

THOMAS E. ELLIS, JONATHAN M. HILL, DANIEL ROPER, AND T. B. BETHEA, *Plaintiffs in Error*,

v.

THOMAS JONES, Administrator of MONTRAVILLE D. TAYLOR, Deceased.

Alabama law—governing collection of secured debts—court equally divided.

The law of the State of Alabama, passed in 1821, ch. 26, sec. 5, which authorizes securities to require of the creditor forwith to put the bond, &c., in suit against the principal, and absolves the security unless the creditor commences suit and uses due diligence to collect the debt from the principal, does not include a case where the parties (principal and security) unite in a joint and several sealed bill.

THIS case was brought up by writ of error from the Circuit Court of the United States for the Southern District of Alabama.

On the 16th of January, 1837, the plaintiffs in error executed the following bill:

$5,000 WILCOX C. H., ALA., January 16, 1837.

Twelve months after date, we or either of us promise to pay Montraville D. Taylor, or bearer, the sum of five thousand dollars, value received of him, as witness our hands and seals.

THOMAS E. ELLIS, [L. S.]
JONATHAN M. HILL, [L. S.]
D. ROPER, [L. S.]
T. B. BETHEA. [L. S.]

At some time after the date and delivery of the above bill, Taylor, the obligee, died intestate, and Thomas Jones, a citizen of the State of North Carolina, became his administrator.

*In November, 1839, Jones brought [***198** suit against all the obligors in the Circuit Court of the United States for the Southern District of Alabama. The defendants were returned "not found;" but the suit being renewed to March Term, 1840, they were all served with process except Hill, who was never reached.

Bethea and Roper severed in their pleas from Ellis. The latter pleaded usury, and that he had only received $4,000 for the bill. Bethea and Roper pleaded that they were only sureties, but their plea not being sustained, a jury was impaneled, who found a verdict against the whole three, for $4,000. As far as Ellis was concerned, there was no appeal, and the only question before this court was upon the validity of the pleas of Bethea and Roper.

In order to understand these pleas, it is necessary to refer to the laws of Alabama.

The Act of 1821 (ch. 26, sec. 5, found in Aikin's Digest 2d ed. title "Securities," sec. 6, p. 385), is as follows:

"When any person or persons shall become bound as security or securities, by bond, bill, or note, for the payment of money or any other article, and shall apprehend that his or their principal or principals is or are likely to become insolvent, or to migrate from this State without previously discharging any such bond, bill, or note, it shall be lawful for such security or securities in every such case (provided an action shall have accrued on such bond, bill, or note), to require, by notice in writing, of his or their creditor or creditors, forthwith to put the bond, bill, or note, by which he or they may be bound as security or securities, as aforesaid, in suit;

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and unless the creditor or creditors so required to put such bond, bill, or note in suit, shall in a reasonable time commence an action on such bond, bill, or note, and proceed with due diligence in the ordinary course of law, to recover judgment for, and by execution to make, the amount due by such bond, bill, or note; the creditor or creditors, so failing to comply with the requisition of such security or securities, shall thereby forfeit the right which he or they otherwise would have had, to demand and receive of such security or securities, the amount which may be due by such bond, bill, or note."

Bethea and Roper filed two pleas; the first of which alleged that they were sureties; that Ellis alone received the consideration for the bill; that the intestate knew this; that until the 199*] —*day of ———, 1839, Ellis was solvent, in good credit, and had property sufficient to pay the debt; that on the —— day of July, 1838, in the lifetime of the intestate, they gave notice that he was required to institute suit against Ellis; that by reasonable diligence, he could have collected the debt from the principal; that the intestate did not and would not prosecute his demand within a reasonable time thereafter, but did not sue until the commencement of this suit; and that Ellis had become insolvent.

The second plea stated the same, in substance, with the addition that the notice, given to the intestate requiring him to sue, was in writing.

To these pleas a replication was put in, averring, that in the single bill sealed with the seals of the defendants, Bethea and Roper did, jointly and severally with the said Ellis, promise to pay; and thereby admitted themselves as principals in the said note; and that they ought not to be permitted to aver that they are sureties and not principals, nor that they had no interest in the consideration thereof, because of the admission and promise in the bill aforesaid.

To this replication there was a demurrer, and a joinder in demurrer.

The judgment of the court was that the replication was sufficient in law, and that the demurrer should be overruled; from which judgment Bethea and Roper brought the case up, by writ of error.

Mr. R. Johnson for the plaintiffs in error.

Mr. Jones for the appellee.

Mr. Johnson's point was, that the law of Alabama authorizes such a defense as was made by the plea, without regard to the form which the obligation sued upon may assume, when, in fact, the relation of principal and security exists; or, at least, so allows it, if such fact is known to the creditor.

It is averred in the pleadings, that the intestate knew that they were sureties, and that they gave notice to the administrator to proceed against the principal, which notice was given in writing. In 1 Stewart, 11, the plea was the same as in this case; replication that the notice was not in writing; on demurrer, decided in favor of the defendant. 4 Porter, 232, sup- 200*] posed *to overrule the above, but it is shown not to do so by 9 Porter, 334.

The statute is a cumulative remedy, and it is therefore only necessary to aver the facts, neglect and insolvency. The law is the same in New York. (See 13 Johns., 174.)

As to the second plea. The statute (Aiken's Dig. of Laws of Alabama) requires three things.

1. There shall be a note, &c., for the payment of money.
2. That notice shall be given to the holder.
3. That there must be a neglect on his part.

It is admitted here that the pleas contain all these averments, but the replication says that the obligatton being joint and several all were principals; and the question is, whether, the instrument being under seal, the fact of suretyship can be inquired into. Is the statute applicable to cases where the fact of suretyship does not appear on the face of the instrument?

General rule is, that parol evidence is not admissible to vary written contract; but there are exceptions, one of which is, where two parties are bound, but one is only surety. (2 Stark., ed. of 1834, p. 773, title "Surety.") This being the law, the act did not intend to shut it out, for it meant to benefit the surety, and not the creditor. The first, second, and third sections all show this. By the Act of 1811 (ch. 1, sec. 2, same Digest, 164), parol evidence must be admitted, or the sheriff could not comply with the Act. (See, also, Act of 1827, ch. 27.) The cases sustain this. (1 Stewart; 13 Johns., above cited; 5 Porter, 443; and 3 Stewart, 9, 160.)

Mr. Jones, for appellee, maintained that the replication, though but a re-averment of what sufficiently appears in the declaration and on the face of the cause of action itself, was a good answer to the plea, and was properly sustained on demurrer: that the plea itself was bad on general demurrer, and he was, for that reason, entitled to judgment on the demurrer.

Case in 13 Johnson stands on special ground; the holder of the note had promised to sue the principal. *King* v. *Baldwin* (2 Johns., Ch. Rep., 552–554), lays down the rule with great clearness, that if the creditor gives time to principal by a positive act, it discharges the surety. But it must be by a positive act. (See 10 *Peters, 257; 3 Wheat., 520; 7 Peters, [*201 126.) Plea defective, because does not say for how long a time the creditor neglected to sue principal; what is reasonable time is a question of law, and the time must be stated.

Law says where a person is bound as surety: but this case is not so; he is bound as principal. Starkie refers to the case of co-obligors, and not that of obligee against obligor. The case in 9 Porter is where one was bound expressly as surety. Statute is a penal one.

Mr. Johnson, in reply:

13 Johnson only re-affirms 7 Johnson, which carried out the English doctrine. (13 Johnson cited with approbation in *Sprigg* v. *Bank of Mount Pleasant*, 10 Peters, 266.) Statute not penal, but remedial. In 1811 began to protect surety, but did not carry it far enough. They substituted a legal presumption of mischief for actual proof, by making notice conclusive. Nothing in the act to require suretyship to be apparent on the face of the instrument. It is admitted that after surety has paid the debt, he may enter up judgment against the principal; did Legislature, then, intend surety to be sued before he should have any relief? In Alabama all contracts are several as well as joint, and therefore all would be shut out.

Not an open question (3 Stewart, 9, 160); in 1830 where a bill of surety was dismissed,

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because he had a defense at law by giving notice to the creditor and did not avail himself of it. 9 Porter says statute is a cumulative remedy.

Mr. Jones refers the court to *United States* v. *Bradley* (5 Peters, 264).

The court being equally divided, the judgment of the court below was affirmed.

ORDER.

This cause came on to be heard on the transcript of the record from the Circuit Court of the United States for the Southern District of Alabama, and was argued by counsel; on consideration whereof, it is now here ordered and adjudged by this court, that the judgment of the said Circuit Court in this cause be, and the same is hereby affirmed, with costs and damages at the rate of six per centum per annum.

202*] *WILLIAM T. McCLURG, JOHN C. PARRY, AND ENOCH J. HIGBY, Partners doing business under the firm of McCLURG, PARRY & HIGBY, Assignees of JAMES HARLEY, *Plaintiffs in Error*,

v.

LAWRENCE KINGSLAND, ISAAC LIGHTNER, AND JAMES CUDDY, Partners, doing business under the firm of KINGSLAND, LIGHTNER & CUDDY, *Defendants*.

Invention, what facts justify presumption of license to use—assignees of patent-right, rules governing—trial of action for violation of—Acts of 1839, ch. 88, and 1836, ch. 357.

If a person employed in the manufactory of another, while receiving wages, makes experiments at the expense and in the manufactory of his employer; has his wages increased in consequence of the useful result of the experiments; makes the article invented and permits his employer to use it, no compensation for its use being paid or demanded, and then obtains a patent, these facts will justify the presumption of a license to use the invention.

Such an unmolested and notorious use of the invention prior to the application for a patent, will bring the case within the provisions of the 7th section of the Act of 1839, ch. 88.

The assignees of a patent-right take it subject to the legal consequences of the previous acts of the patentee.

The 14th and 15th sections of the Act of 1836, ch. 357, prescribe the rules which must govern on the trial of actions for the violation of patent-rights; and these sections are operative, so far as they are applicable, notwithstanding the patent may have been granted before the passage of the Act of 1836.

The words, "any newly invented machine, manufacture, or composition of matter," in the 7th section of the Act of 1839, have the same meaning as "invention," or "thing patented."

THIS case was brought up by writ of error from the Circuit Court of the United States for the Western District of Pennsylvania.

The facts are sufficiently stated in the opinion of the court.

The bill of exceptions which was taken on the trial below was as follows:

And the plaintiff thereupon excepted to certain parts of the instructions so given by the court to the jury, which instructions so excepted to are hereinafter set forth, to wit:

"It has, however, been urged by the plaintiff's counsel that the right to the continued use is restricted to the 'specific machine, manufacture, or composition of matter so made or purchased,' so that a defendant is protected no farther than in the case of the invention (for which this patent was granted) prior to the application, and is liable to damages if he makes any rolls by Harley's plan afterwards.

*"We, therefore, feel bound to take [*203 the words, 'newly invented macine,' in the Act of 1839, manufacture, or composition of matter and such invention, to mean the invention patented, and the words 'specific machine,' to refer to the thing originally invented, whereof the exclusive right is procured by patent, but not to any newly discovered improvement to an existing patent.

"The use of the patent must be of the same specific improvement originally invented, as was before the application used by any person who had purchased or constructed the machinery on which he operated to produce the effect described in the specification; but when such person confines the future case to the specific mode, method, manner, and process of producing the described effect, it is by the words and true meaning of the law, without liability to the inventor or other person interested in the invention, so construed, and by thus protecting the person who has engaged the use of an invention before the application for a patent, the great object of the patent laws, as declared in the 4th section of the Act of 1887, will be consummated; that is, to protect the rights of the public and 'of patentees in patented inventions and improvements.' (4 Story, 2547.) A different construction would make it necessary to carry into all the former laws the same literal exposition of the various terms used to express the same thing, and thereby changing the law according to every change of phraseology, make it a labyrinth of inextricable confusion.

"Our opinion, therefore, is, that the defendants have a right to the continued use of the improvement patented to Harley; the facts of the case, which are not controverted, have equal effect with a license, and the evidence brings the defendant under the protection of the Act of 1839, by the unmolested notorious use of the invention before the application for a patent. Nothing has been shown on the part of the plaintiffs to counteract the effect of this prior use; as assignees of Harley, they stand in his place as to right of responsibility; they took the patent, subject to the legal consequences of his previous acts, and connecting these with the want of an assertion of a right, to the use by the defendants of the invention patented, till this suit was brought in September, 1835, protects them from liability.

*"In our opinion, your verdict ought [*204 to be for the defendants. Verdict accordingly, and judgment for defendants."

Mr. Dunlap, on behalf of the plaintiffs in error, contended that the court below had erred in charging the jury—

1. That the facts justified the presumption of a license or grant to use the invention, and that defendants were protected thereby, independent of any act of Congress.

2. That the words "specific machine" in

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the 4th section of the Act of 1839, referred to the invention itself, and that the authority to use it before the patent carried the right to continue to make and use it after the patent had issued.

Mr. Justice BALDWIN delivered the opinion of the court:

This case comes here on a writ of error to the Circuit Court for the Western District of Pennsylvania, in an action brought by the plaintiffs, assignees of James Harley, against the defendants, for the infringement of a patent granted to Harley for an improvement in the mode of casting chilled rollers and other metallic cylinders and cones, in which judgment was rendered for the defendants. On the trial it appeared in evidence that it had long been a *desideratum* to find out some mode by which iron rollers or cylinders could be so cast that when the metal was introduced into the mould it should cause a swyrl or rotary motion, by which the flog or dross would be thrown into the centre instead of the surface of the cylinder. By the old mode, the metal was conveyed from the furnace to the mould through a gate, or pipe, placed in a horizontal or perpendicular direction. The mode alleged to have been invented by Harley is thus described in the specification annexed to the patent: "The tube or tubes, or passages called gates, through which the metal to be conveyed into the moulds shall not enter the mould perpendicularly at the bottom, but slanting, or in a direction approaching to a tangent of the cylinder, or if the gates enter the moulds horizontally, or nearly so, shall not enter in the direction of the axis of the cylinder, but in a tangent form, or inclining towards a tangent of the cylinder."

This was the thing patented, consisting solely in changing the direction of the tube, which 205*] conveyed the metal to the mould *from a horizontal or perpendicular position to an angular one; it produced the desired effect and was highly useful.

The novelty of the invention was much contested at the trial, but as the case turned on other points, that became an immaterial question; as the case comes before us, on exceptions to the charge of the court, which assumed that Harley was the original and true inventor of the improvement, and put the case to the jury on the following facts, which were in full proof, in nowise contradicted, and admitted to be true:

That Harley was employed by the defendants at their foundry in Pittsburgh, receiving wages from them by the week; while so employed, he claimed to have invented the improvement patented, and after several unsuccessful experiments made a successful one in October, 1834; the experiments were made in the defendants' foundry, and wholly at their expense, while Harley was receiving his wages, which were increased on account of the useful result. Harley continued in their employment on wages until January or February, 1835, during all which time he made rollers for them; he often spoke about procuring a patent, and prepared more than one set of papers for the purpose; made his application the 17th February, 1835, for a patent; it was granted on the 3d of March, assigned to the plaintiffs on the 16th of March, pursuant to an agreement made in January.

While Harley continued in the defendants' employment he proposed that they should take out a patent and purchase his right, which they declined; he made no demand on them for any compensation for using his improvement, nor gave them any notice not to use it, till, on some misunderstanding on another subject, he gave them such notice, about the time of his leaving their foundry, and after making the agreement with the plaintiffs, who owned a foundry in Pittsburgh, for an assignment to them of his right. The defendants continuing to make rollers on Harley's plan, the present action was brought in October, 1835, without any previous notice by them. The court left it to the jury to decide what the facts of the case were; but if they were as testified, charged that they would fully justify the presumption of a license, a special privilege, or grant to the defendants to use the invention; and the facts amounted to "a consent and allowance of such use," and show such a consideration as would support *an express license or grant, or [*206 call for the presumption of one to meet the justice of the case, by exempting them from liability; having equal effect with a license, and giving the defendants a right to the continued use of the invention. The court also charged the jury, that the facts of the case, which were not controverted, brought it within the provisions of the 7th section of the Act of 1839, by the unmolested, notorious use of the invention, before the application for a patent by Harley, and that nothing had been shown by the plaintiffs to counteract the effect of this prior use. That as assignees of Harley, the plaintiffs stand in his place, as to right and responsibility; they took the assignment of the patent, subject to the legal consequences of his previous acts, and connecting these with the absence of an assertion of a right adverse to the defendants' use till this suit was brought, protected the defendants from liability for any damages therefor.

The exceptions to the charge were confined to these two points, which constitute the only subject for our consideration. Whether these exceptions are well taken or not must depend on the law as it stood at the emanation of the patent, together with such changes as have been since made; for though they may be retrospective in their operation, that is not a sound objection to their validity; the powers of Congress to legislate upon the subject of patents is plenary by the terms of the Constitution, and as there are no restraints on its exercise, there can be no limitation of their right to modify them at their pleasure, so that they do not take away the rights of property in existing patents.

When the patent to Harley was granted, and this suit brought, the Acts of 1793 and 1800 were the tests of its validity, but the 21st section of the Act of 1836 repealed all existing laws on the subject of patents, with a proviso, that all suits brought before may be prosecuted in the same manner as if that act had not been passed, "excepting and saving the application to any such action, of the provison of the 14th and 15 sections of this act, so far as they may be applicable thereto." This repeal, however, can have no effect to impair the right of prop-

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erty then existing in a patentee, or his assignee, according to the well established principles of this court in 8 Wheat., 493; the patent must therefore stand as if the Acts of 1793 and 1800 remained in force; in other respects the 14th **207*]** and 15th sections of the Act of *1836 prescribe the rules which must govern on the trial of actions for the violation of patented rights, whether granted before or after its passage.

In *Pennock* v. *Dialogue*, this court held, in 1829, "That if an inventor makes his discovery public, looks on, and permits others freely to use it, without objection or assertion of claim to the invention, of which the public might take notice; he abandons the inchoate right to the exclusive use of the invention, to which a patent would have entitled him, had it been applied for before such use, and that it makes no difference in the principle that the article so publicly used, and afterwards patented, was made by a particular individual who did so by the private permission of the inventor." (2 Peters, 14, 15, S. P.; *Grant* v. *Raymond*, 6 Peters, 248, 249; *Shaw* v. *Cooper*, 7 Peters, 313–323.)

On this construction of the Acts of 1793 and 1800, Harley's patent would have been void, on the evidence in this case. Such seems to have been the sense of Congress, as expressed in the Act of 1832, which authorized the issuing a new patent, when an original one was invalid by accident, inadvertence, or mistake, and without any fraudulent intent, by reason of the terms of the 3d section of the Act of 1793 not having been complied with. "Provided, however, that such new patent so granted shall in all respects be liable to the same matters of objection and defense as any original patent, granted under the said first-mentioned act. That no public use or privilege of the invention so patented, derived from or after the grant of the original patent, either under any special license of the inventor, or without the consent of the patentee that there shall be free public use thereof, shall in any manner prejudice the right of recovery for any use or violation of his invention after the grant of such new patent, as aforesaid." (4 Story, 2301.)

This act is an affirmance of the principles laid down by this court in the three cases before referred to, and as the exception to the proviso is limited to an use of the invention under a special license of the inventor after the grant of the original patent, it leaves the use prior to the application for such patent clearly obnoxious to the principle established in 2 Peters, 14, 15, whereby the patent would become void.

The same conclusion follows from the 15th **208*]** section of the Act *of 1836, which declares, that if the thing patented "had been in public use, or on sale, with the consent and allowance of the patentee, before the application for a patent," judgment shall be rendered for the defendant wtth costs. (4 Story, 2511.) The case before us is one of this description: the defendants use the invention of Harley for four months before his application for a patent; this use was public, and not only with his express consent and allowance, but he himself made the rollers on the plan he invented during those months, from the time when he had ascertained the utility of his invention.

It would, therefore, be no strained, if not the fair construction of this act, if under such and the other circumstances in evidence in the cause, the court had charged the jury, that if they believed the witnesses, the patent subsequently obtained was void. The Circuit Court, however, did not go so far; they held that the defendants might continue to use the invention, without saying that the public might use it, without liability to the plaintiffs, in which we think there was no error in their direction to the jury; that they might presume a license or grant from Harley, or on the legal effect of the uncontroverted evidence as to the right of recovery, by the plaintiffs, or on the construction of the Acts of 1793, 1800, 1832, and 1836.

The remaining exception is to the charge of the court below, on the effect of the 7th section of the Act of 1839, which is in these words: "That every person or corporation who has, or shall have purchased or constructed any newly invented machine, manufacture, or composition of matter, prior to the application by the inventor or discoverer of a patent, shall be held to process the right to use and vend to others to be used, the specific machine, manufacture, or composition of matter, so made or purchased, without liability therefor to the inventor, or any other person interested in such invention; and no patent shall be held invalid by reason of such purchase, sale, or use prior to the application for a patent as aforesaid, except on proof of abandonment of such invention to the public, or that such purchase, sale, or prior use has been for more than two years prior to such application for a patent." (Pamphlet Laws, 1839, 74, 75.)

The object of this provision is evidently twofold; first, to protect the person who has used the thing patented, by having *pur- [***209** chased, constructed, or made the machine, &c., to which the invention is applied, from any liability to the patentee or his assignee. Second, to protect the rights, granted to the patentee, against any infringement by any other persons. This relieved him from the effects of former laws and their constructions by this court, unless in case of an abandonment of the invention, or a continued prior use for more that two years before the application for a patent, while it puts the person who has had such prior use on the same footing as if he had a special license from the inventor to use his invention; which, if given before the application for a patent, would justify the continued use after it issued without liability.

At the trial below, and here, the plaintiff's counsel have contended, that this act cannot apply to the present case, inasmuch as the protection it affords to the person who had the prior use, is confined to the specific machine, &c., and does not extend to such use of the invention, or thing patented, if it does not consist of a machine, &c., as contradistinguished from the new mode or manner in which an old machine or its parts operates, so as to produce the desired effect; but we think that the law does not admit of such construction, whether we look at its words or its manifest objects, when taken in connection with former laws, and the decisions of this court in analogous cases

The words "such invention" must be referred back to the preceding part of the sentence,

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in order to ascertain the subject matter to which it relates, which is none other than the newly invented machine, manufacture, or composition of matter constituting the thing patented; otherwise these words become senseless when the invention is not strictly of a machine, &c. Now, in the present case, we find the invention consists solely in the angular direction given to the tube through which the metal is conducted into the cylinder in which the roller is cast. Every part of the machinery is old, the roller itself is no part of the invention, and cannot be the machine, manufacture, or composition of matter contemplated by Congress, nor can the word "specific" have any practical effect unless it is applied to the thing patented, whatever it may be, without making a distinction between a machine, &c., and the mode of producing a useful result by the mere direction given to one of the parts of an old machine. 210*] Such a construction *is not justified by the language of the law, and would defeat both of its objects. If it does not embrace the case before us, the consequence would be that the use of the invention, under the circumstances in evidence, would, according to the decision in 2 Peters, 14, 15, invalidate the patent; for if the act operates to save the avoidance of the patent, it must, of consequence, protect the person who uses the invention before the application for a patent. Both objects must be effected, or both must fail, as both parts of the act refer to the same thing, and the same state of things, as affecting the person using the newly invented machine, or the thing patented, as well as the inventor. Had the words "invention," or "thing patented," been used instead of "machine," &c., there could have been no room for doubt of the application of the act to the present case; and by referring to the phraseology of the different acts of Congress denoting the invention, it is apparent that, though there is a difference in the words used, there is none as to their meaning or reference to the same thing. Thus we find in the 14th section of the Act of 1836, relating to suits for using "the thing whereof the exclusive right is secured by any patent," in the 15th, "his invention, his discovery, the thing patented," "that which was in fact invented or discovered, "the invention or discovery for which the patent issued," "that of which he was the first inventor." In the 1st section of the Act of 1837, "any patent for any invention, discovery, or improvement," "inventions and discoveries;" in the 3d section, "the invention;" in the 3d, "invention or discovery;" in the 4th, "patented inventions and improvements;" in the 5th, "the thing as originally invented." (4 Story, 2510, 2511, 2546.)

We, therefore, feel bound to take the words "newly invented machine, manufacture, or composition of matter" and "such invention," in the Act of 1839, to mean the "invention patented," and the words "specific machine," to refer to "the thing as originally invented," whereof the right is secured by patent; but not to any newly invented improvement on a thing once patented. The use of the invention before an application for a patent must be the specific improvement then invented and used by the person who had purchased, constructed, or used the machine to which the invention is applied: so construed, the objects of the Act of 1839 are accomplished; a different construction would *make it necessary [*211 to carry into all former laws the same literal exposition of the various terms used to express the same thing, and thereby changing the law according to every change of mere phraseology, make it a labyrinth of inextricable confusion.

We are therefore of opinion that there is no error in the charge of the court below, and that its judgment be affirmed.

ORDER.

This cause came on to be heard on the transcript of the record from the Circuit Court of the United States for the Western District of Pennsylvania, and was argued by counsel; on consideration whereof, it is now here ordered and adjudged by this court, that the judgment of the said Circuit Court in this cause be, and the same is hereby affirmed, with costs.

Cited—4 How., 683, 698; 15 How., 131; 1 Wall., 568; 7 Wall., 607; 4 Otto, 94; 2 Wood. & M., 142; 3 Cliff., 588; 3 Story, 405, 408; 1 Blatchf., 38, 111; 3 Blatchf., 504, 505; Taney, 294; Pat. Off. Gaz., 1878, p. 859; 14 Nott & H., 422.

MARY ANN CONNOR,
v.
HENRY BRADLEY ET AL.

Ejectment—lessor died before date of demise laid —evidence and plea conflicting—amount due, how, when and where demanded—proceedings under statute 4 Geo. II.

In an action of ejectment, if the plaintiff count upon a lease to himself from a person whom the evidence shows to have been dead at the time, it is bad.

It is a settled rule at common law, that where a right of re-entry is claimed on the ground of forfeiture for nonpayment of rent, there must be proof of a demand of the precise sum due at a convenient time before sunset, on the day when the rent is due, upon the land, in the most notorious place of it, even though there be no person on the land to pay.

In proceeding under the statute of 4 Geo. II., it must be alleged and proved, that there was no sufficient distress upon the premises on some day or period between the time at which the rent fell due and the day of the demise; and if the time when, according to the proofs, there was not a sufficient distress upon the premises, be subsequent to the day of the demise, it is bad.

THIS case was brought up by writ of error, to the Circuit Court of the United States for the District of Columbia and County of Washington.

The case was this:

In 1807, William Prout, living in the city of Washington, and being the owner, in fee, of a lot in said city, made a lease of a part of it to Joseph B. Parsons, for the term of ninety-nine years, renewable forever. It was in the usual form and contained the usual covenants (with the exception of the one hereafter *men- [*212 tioned), reserving an annual rent of thirty-five dollars, payable on the 13th day of March, clear of all taxes, charges, rates, or assessments whatsoever. There was a covenant that if the said yearly rent of thirty-five dollars should be unpaid at the expiration of sixty days after it was due, and no sufficient effects could be found

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upon the premises, whereon to levy the same, it should be lawful for Prout, his heirs or assigns, to re-enter and take possession of the leased premises.

The special covenant was to this effect, that if at any time or times thereafter, and before the expiration of the lease, Parsons, or his heirs, executors, &c., should pay to the said Prout, his heirs, executors, administrators or assigns, the sum of $196.87½ over and above all rents for said piece of ground that might then be in arrear, that then the said Prout, his heirs, &c., should make and execute a good and sufficient deed of release in fee-simple to the said Parsons, his heirs, &c., for the said piece or portion of ground.

In 1813 Parsons died, having occupied the leased property from the time that the lease was made.

In 1815, and prior thereto, the widow of Parsons, who continued in possession of the property, paid to Prout $100 on account of the purchase of the fee-simple in the said lot.

In 1823 Prout died; Mary Bradley, one of the lessors of the plaintiff, being one of his surviving children. After Prout's death, the widow of Parsons gave possession of the property in question to Mary Ann Connor, the defendant in the ejectment, who for some time paid the taxes as they accrued, and also paid various sums of money on account of the rent due, and in arrear, and of the accruing rent.

In 1831, a partition of the estate of Prout was made, according to law, among his children, and the leased premises in question were assigned to Mary Bradley. After the partition, Mary Ann Connor made payments on account of the rent to Mary Bradley, and also paid the taxes to the corporation of the city of Washington, up to the year 1831, but omitted to pay the taxes for the years 1831, 1832, 1833, and 1834, amounting in all to $44.33.

In 1835, George Adams, the collector of taxes for the corporation of Washington, after having advertised the property, set up to sale the leasehold interest in the said premises, but **213*]** receiving *no bid for the same, immediately thereafter exposed to public sale the fee-simple interest and estate, which was purchased by one Allison Nailor, for the sum of $49.83, being the amount of taxes due thereon, together with the expense of selling the same. The property had been assessed on the books of the corporation of Washington, from 1813 to 1838, in the name of Joseph B. Parsons' heirs.

On the 2d of June, 1838, the corporation of Washington made a deed of the premises to Allison Nailor, and, in November following, he conveyed them to Mary Ann Connor.

In November, 1838, Henry Bradley and Mary, his wife, brought an ejectment against Mary Anna Connor, counting on two demises; one from William Prout, on the first day of January, 1827, and the other from Henry Bradley and Mary, his wife, on the 1st day of January, 1838.

The judgment of the court below was for the plaintiffs. Two bills of exceptions were taken, the first of which it is only necessary to notice, and which is stated at large in the opinion of the court.

Messrs. Brent and *Brent* for the plaintiff in error, and *Mr. Bradley* for defendant. Only such parts of their agreements will be noted as bear upon the point upon which the court rested their judgment.

Mr. Brent, for plaintiff in error, contended, that, as to the first demise, laid on the 1st January, 1827, it was bad, because the evidence showed that Prout died in 1823. (3 Wend., 153.)

The second demise is laid on the 1st January, 1838, and the lessor must show a right to re enter on that day; and he cannot have such right unless there be insufficient distress upon the premises. (3 Harris & Johns., 19; 5 Harris & Johns., 175; Adams on Ejectment, 189; 1 Johns. Cas., 283; 6 Cowen, 149; 2 Leigh's *N. P.*, 882, 883, 934; 4 Durn. & East, 681; 6 Binn., 454; 3 Bibb, 297; 3 Marshall, 134; 3 Monr., 221.) The evidence shows that there was not sufficient distress on the premises, on the — day of October, 1838, but not how it was in January, 1838. (Evans's Practice, 48; Adams on Ejectment, 150, reciting statute of Geo. II.; 7 Durn. & East, 117, 120; 2 Leigh's *N. P.*, 924; Doug., 485; 15 East, 286; 2 Chitty's Pleading, 880, *note K*; 2 Maule & Selw., 529; 6 Cowen, 149.

**Mr. Bradley* (15 East, 286–288, referred [*214 to in Leigh's *N. P.*) only says that there must be an insufficiency at the time of the notice, or when the declaration was served. But in this case the tenant sets up an adversary title, and does not come within the rule. (Buller *N. P.*, 96; 6 Johns. Rep., 272.)

Connor must be considered as a trustee for the true owner, having obtained the title by fraud. (2 Bos. & Pull., 178; 8 East, 263.) Court will direct the jury to resume a deed from trustee to *cestui que trust*. (4 T. R., 682.)

Mr. Brent, in conclusion, insisted that the demise in the declaration must correspond with the right of entry, which did not accrue until there was an insufficient distress. (8 Peters, 214.) Reason of the rule stated in 3 Harris & Johns., 19; 6 Johns., 273. Question of fraud not raised in the bill of exceptions.

Mr. Justice DANIEL delivered the opinion of the court:

At the trial below, the jury having returned a verdict for the plaintiff, the court thereupon adjudged to him his unexpired term in the premises claimed. To the rulings of the court in the progress of the trial two bills of exceptions were sealed at the instance of the defendant. The second to these bills is adverted to merely as making a part of the history of this cause. The questions thereby presented as growing out of the assessment of taxes on lots in the city of Washington, and the modes of proceeding by the corporate authorities to subject the real property of delinquents to sale for arrears of taxes, under the Acts of Congress applicable to such subjects, are withdrawn from the action of the court by previous and more material considerations claiming its attention under the first bill of exceptions; and which, in the view of the court, must determine the rights of these parties in their present attitude here. This bill of exceptions is in the following words:

Defendant's first exception: On this trial of this cause, the plaintiffs, to maintain the issue on their part joined, gave in evidence a lease

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from William Prout to Joseph B. Parsons, as follows (copied in page 18), and proved that the premises in question are the same as those mentioned in said lease; they further gave evidence to show that Joseph B. Parsons entered into [*215 the *possession of the said premises under the said lease, and continued to occupy them until his death, which happened sometime in the year 1813; that he left a widow and seven children, of whom the defendant is one; that his widow was left in the possession thereof at his death, and remained and continued in said possession until the death of said William Prout, which happened sometime in the year 1823; that previous to the year 1815, she paid to the said William Prout $100 on account of the purchase of the fee-simple of the said lot; that sometime after the death of the said William Prout, the said widow of Joseph B. Parsons abandoned the possession of the said premises to the defendant, and the defendant took possession, thereon claiming to hold the leasehold interest, with the full knowledge and consent of said widow, and of the children of said Joseph P. Parsons; that the defendant thenceforth paid the taxes on the said lot under the said lease, and, from time to time, paid various sums of money on account of the rent due and in arrear under the said lease, and of the accruing rent; that, as appears by the within admission of the defendant filed in this cause, marked A, and as follows (copied in page 14), a partition of the estate of said William Prout was made, in March, 1831, among his children; that by that partition, the said premises, and the reversionary interest in the land described in the said lease, was assigned Mary Bradley, one of the plaintiffs, in fee-simple; that the square in which the said demised premises are situated was divided into lots, on the plan of the city of Washington; that after said partition, the said defendant paid moneys on account of said rent, under said lease, to said Mary Bradley, and also paid the taxes to the corporation of the city of Washington, as provided in said lease, to the year 1831; that she failed to pay the taxes for the years 1831, 1832, 1833, and 1834, amounting in all to the sum of $44.33, and the said leasehold interest was set up for sale, and it not producing enough, the fee-simple of the ground described in said lease was set up for sale for taxes, and was sold; that at the time of the said tax sale, there was personal property on the said ground, liable for said taxes, more than sufficient to pay such taxes, and the said ground was improved property, having a dwelling-house upon it; that after said tax sale, the defendant promised the plaintiffs to redeem said property, and failed to [*216 do so within the two *years next succeeding said sale; that she waited until said two years had elapsed, and then called upon Allison Nailor, the purchaser thereof at said tax sale, and represented to him that she was the owner of the said property, and obtained from him an assignment of his certificate of purchase at said tax sale; that afterwards, the said assignment was cancelled, because the corporation could make no deed to an assignee, and the said Nailor received a conveyance from the corporation of Washington, and then executed a conveyance to the defendant of the premises in question, and the defendant then set up a claim to the premises in fee-simple, and adverse to the plaintiffs; that on the — day of October, 1838, there was rent due and in arrear, under the said lease, amounting to $193; and that there was not more than $30 of personal property on the said premises, liable to distress for rent, on the — day of October, or at the time of bringing this action; and here the plaintiffs rested. And thereupon, the defendant, by her counsel, prayed the court to instruct the jury that, under the evidence aforesaid, the plaintiffs are not entitled to recover in this action; which instruction the court refused to give, and the defendant excepts thereto, and prays the court to sign and seal this bill of exceptions, which is done accordingly.

W. CRANCH, [L. S.]
JAMES S. MORSELL. [L. S.]

By a comparison of the facts set out in this bill, with the first count in the declaration, it will be seen that the plaintiff has counted upon a lease to him from William Prout of the date of January, 1827, when it is manifest by the proofs adduced by the plaintiff, that Prout died in 1823, four years previously to the existence of the lease. This irreconcilable contradiction between the different parts of the plaintiff's title, as dependent upon the first count, it is unnecessary to comment upon, as the counsel was understood, in the argument, to admit its effects as conclusive to prevent a recovery under that count.

Had the plaintiff in ejectment a right to recover under the demise from Bradley and wife, upon the second count? The foundations for the recovery contended for on behalf of the plaintiff are, a forfeiture of tenure by the defendants, and a right of re-entry in the plaintiff, for a breach of the condition in the lease of the premises, by the father of Mary Bradley, one of the lessors *of the plaintiff to Joseph B. [*217 Parsons. It is a settled rule at the common law, that where a right of re-entry is claimed on the ground of forfeiture for nonpayment of rent, there must be proof of a demand of the precise sum due, at a convenient time before sunset on the day when the rent is due, upon the land, in the most notorious place of it, even though there be no person on the land to pay. (1 Saund., 287, *note* 16, in which are cited 1 Leon., 305; Cro. Eliz., 209; Plowd. 172, *b;* 10 Rep., 129; Co. Litt., 201, *b;* 4 Leon, 117; 7 T. R., 117; and numerous other authorities, see, also, upon the same point, *Doe, ex dem. Wheeldon*, v. *Paul*, 3 Car. & Payne, 613, 14 Eng. Com. Law, 483; and *Roe, ex dem. West*, v. *Davis*, 7 East, 363.) In this case no proof is adduced or even pretended of a compliance with any one of the requisites just enumerated.

But this suit is said not to be prosecuted upon rules of practice at the common law, but under the authority of the statute of 4 Geo. II. (ch. 28), which is in force in Washington County. We will inquire how far the decisions upon the interpretation of this statute have been fulfilled in the case before us. In *Doe* v. *Lewis* (1 Burr., 619, 620) the court say that this statute prescribes a method of proceeding in ejectment in two cases, viz.: one in case of judgment against the causual ejector; the other in case of its coming to trial. In the former, an affidavit must be made in the court where the suit is depending, that half a year's rent was due before the

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declaration was served, and that no sufficient distress was to be found on the premises countervailing the arrears then due, and that the lessor had power to re-enter; in the latter (that of a trial), the same things must be proved upon the trial; therefore it is held that this statute does not extend to cases where there is a sufficient distress upon the premises, and consequently in such cases the lessor must procced at common law as before the statute. To the same effect is the decision in *Doe, ex dem. Foster*, v. *Wandless* (7 T. R., 117). It has been expressly ruled that under the statute of 4 Geo. II., there must be proof that on some day or period between the time at which the rent fell due, and the day of the demise, there was not a sufficient distress on the premises (*Doe, ex dem. Smelt*, v. *Fuchau*, 15 East, 286); and further, that evidence must be adduced showing an examination of every part of the premises, and **218*]** that where a party omitted to *enter a cottage, this was deemed an insufficient search. (2 Bro. & Bing., 514, 6 Eng. Com. Law.) Of the two demises laid in the declaration, the first is in January, 1827, the second on the 1st of January, 1838. Turning to the first bill of exceptions, we find it stated as having been proved, that on the — day of October, 1838, there was rent due and in arrear, amounting to $193; next, that there was not more than $30 value of personal property on the premises liable to distress for rent on the — day of October, or at the time of bringing this action. It will thus be perceived that the proofs by the plaintiff in ejectment fall short of the requirements of the statute in the following particulars, viz., in failing to show that any examination had been made to ascertain what amount of personal property was upon the premises at any time, or that there was any one day or period of time between the accrual of the rent for six months, and the date of either demise, at which there was a deficiency of personal property on the premises countervailing (to adopt the language of the courts) the arrears then due, for the last demise is dated January 1, 1838, the deficiency is averred to have been in the month of October following; the declaration was served in November, 1838, a still later period of time.

For these defects in the case made by the plaintiff in ejectment, it is the opinion of this court that the instruction prayed by the defendant, as set forth in the first bill of exceptions, ought to have been given; that in refusing such instruction the Circuit Court has erred.

Its jugment must therefore be reversed.

ORDER.

This cause came on to be heard on the transcript of the record from the Circuit Court of the United States for the District of Columbia, holden in and for the County of Washington, and was argued by counsel; on consideration whereof, it is now here ordered and adjudged by this court, that the judgment of the said Circuit Court in this cause be, and the same is hereby reversed, with costs; and that this cause be, and the asme is hereby remanded to the said Circuit Court, with directions to award a *venire facias de novo*.

Cited—15 Wall., 476; 4 Ben., 51.

*LESSEE OF SARAH I. JEWELL ET [*221 AL., *Plaintiff in Error*,

v.

BENJAMIN JEWELL ET AL., *Defendant*

Evidence—declarations of deceased member family to disprove marriages—newspaper a vertisement prepared by deceased—contract marry per verba de presenti *and* de futuro

The declarations of a deceased member of a fami that the parents of it never were married, are a missible in evidence whether his connection wi that family was by blood or marriage.

The acts and declarations of the parties beir given in evidence on both sides, on the question marriage, an advertisement announcing the separation and appearing in the principal cou mercial newspaper of the place of their residen immediately after their separation, is part of th *res gesta*, and admissible in evidence. Whether not it was inserted by the party, and if it was, wh were his motives, are questions of fact for th jury.

If a written contract between the parties be o fered in evidence, the purport of which is to sho that the parties lived together on another bas than marriage, and the opposite party either deni the authenticity of the paper or alleges that it wa obtained by fraud; the question, whether ther was a marriage or not, is still open to the jury upo the whole of the evidence.

Upon the two questions, 1st. Whether, "if befor any sexual connection between the parties, they in the presence of her family and friends, agree to marry, and did afterwards live together as ma and wife," it was a legal marriage and the tie indi soluble even by mutual consent; and, 2d. Whether "if the contract be made *per verba de presenti* an remains without cohabitation, or if made *per verb de futuro* and be followed by consummation," i amounts to a valid marriage, which the partie (being competent as to age and consent) canno dissolve, and is as equally binding as if made i *facie ecclesiæ*; the court can express no opinion being equally divided.

THIS case was brought up, by writ of error from the Circuit Court for the District of South Carolina.

The facts which were not denied were few nearly all the evidence being of a contradictory character. All this evidence was brought to the notice of this court, in the argument, in consequence of the refusal of the court below to grant the third instruction prayed for by the plaintiffs, which instruction will be stated hereafter.

The admitted facts were these:

About the year 1794 or 1795, Benjamin Jewell became acquainted with Sophie Prevost, a young girl, who, with her family, had shortly before emigrated from the West Indies to Savannah. They lived together and continued to do so for many years. They resided but a short time in Savannah, then removed to Barnwell, in South Carolina, and finally to Charleston. During this time *many children [*222 were born, who were reared in the house where their parents lived, the mother passing by the name of Mrs. Jewell. In the year 1810, they separated by mutual consent, after executing the following paper:

"Articles of agreement between Benjamin

NOTE—*As to pedigree and facts of family history when may be proved by hearsay*, see note to Elliott v. Peirsol, 1 Pet., 328; and note to Chirac v. Reinecker, 2 Pet., 615.

What constitutes a valid marriage, and evidence to prove marriage. A marriage by words of present

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Jewell and Sophie Prevost, and receipt of Sophie Prevost, dated 1810 and 1811.

"Articles of agreement entered into this 4th day of December, 1810; Benjamin Jewell on the one part, and Sophie Prevost on the other.

"Whereas, the said Benjamin Jewell and Sophie Prevost have cohabited for several years past, and have had eight children, but are now willing and desirous to separate and live asunder, on certain terms and conditions hereinafter specified: Now, this instrument of writing witnesseth, that the said B. Jewell and Sophie Prevost do agree henceforward to live separate and asunder.

"The said B. Jewell, on his part, consents and engages that the said Sophie Prevost shall have under her sole and absolute control, and free from all restraint or control by the said B. Jewell, the following children, viz.: Juliana, Daniel, and Washington, each child having its clothing. The said Sophie Prevost, on her part, engages and consents that the said B. Jewell shall have under his sole and absolute control, and free from all restraint or control by the said Sophie Prevost, the following children, viz.: Benjamin, Joseph, Hannah, Betty, and Delia, with their clothing. The said Sophie is to pay all the expenses of clothing, education, and maintenance of the children above allotted to her; and the said Benjamin Jewell is to pay all the expenses of clothing, education, and maintenance of the children allotted to him; and moreover engages to pay for one year's schooling, viz., the sum of $40 for the child Juliana, in order to complete her schooling.

"The said Sophie engages not to disturb the said Benjamin, in respect to the management of the children allotted to him, nor in any manner control or interfere with them. And the said Benjamin engages in like manner in respect to those children assigned to the said Sophie.

"And in consideration of this separation and consent to live asunder, the said Benjamin engages to pay to the said Sophie Prevost the sum of $3,000; and to give her a bill of sale of the fellow Jesse, the girl Harriet, the wench Nancy, with her three *children, Char- [*221
lotte, Mary, and Charles; also, the following articles of furniture (here follows a list of furniture); and in consideration of the above, on the part of said Benjamin Jewell, the said Sophie Prevost doth hereby release and discharge the said Benjamin Jewell from all claims and demands whatsoever. In witness whereof, the parties to these presents have set their hands, this 4th of December, 1810.

"W. L. SMITH. "BENJAMIN JEWELL,
"SOPHIE PREVOST."

(*Note.* The signature of W. L. Smith in the original paper is written with pencil.)

It was admitted that Sophie Prevost gave sundry receipts for the cash and furniture mentioned in the above agreement.

It was further admitted, that in June, 1813, Benjamin Jewell was married in Richmond, Virginia, to Sarah Isaacs, by the regular minister of the Hebrew congregation, according to the rites and ceremonies observed by the Jews, soon after which they removed to the State of Louisiana.

In 1818, Sophie Prevost married a man by the name of Storne, continuing to reside in Charleston.

In 1828, Benjamin Jewell died, intestate, in Louisiana; and his widow and children living there, brought an ejectment against his children in Charleston, to recover a house and lot, of which the latter were in possession.

The whole question turned upon the validity of the first marriage; there being no controversy about the validity of the second, in case Jewell, at the time of contracting the second marriage, had not a wife living.

To support the first marriage, it was given in evidence by Sophie Prevost (who had released her interest in the property in dispute), and by others, that at the time of the marriage she and her family had recently arrived from the West Indies; that she was very young; that they brought with them some negroes, of

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contract, such as would have been good at common law, is valid, notwithstanding statutory directions have been disregarded. Such is the rule in Michigan. Meister v. Moore, 96 U. S., 6 Otto, 76.

Where a man was actually married at the time of his marriage with his second wife, and this last marriage was therefore void; but, upon the death of his actual wife, the man and the second wife mutually consented to be man and wife, and cohabited as such. Held, that there was a valid marriage from the time of this consent. Holabird v. Atlantic Ins. Co., 12 Am. L. Reg., 566.

Persons cannot go beyond the State of their residence, for instance, at sea, purposely to avoid restrictions on marriage, of their own State, and there contract a marriage in a manner contrary to the laws of the State of their residence, and afterwards have such marriage sustained by the courts within it. Holmes v. Holmes, Abb., U. S., 525.

A marriage between a woman and a man who is already lawfully married, is void. The woman may afterwards legally form another marriage without waiting for a judicial sentence declaring the first marriage a nullity. Patterson v. Gaines, 6 How., 550.

Marriage in Pennsylvania is a civil contract, to be completed without regard to form, by any sufficient words used in the present tense. It may be proved by anyone who was present and can identify the parties. *Ibid.*

That marriage may be validly contracted by mutual promises alone, without the presence or benediction of a priest, see Hallett v. Collins, 10 How., 174.

Cohabitation for thirty years as man and wife is sufficient evidence of a marriage. Rex v. Stockland, Burr. S. C., 508; 1 W. Bl., 367.

Strong acknowledgments of marriage for eighteen years together are sufficient to establish it *inter vivos*, though no actual proof can be had. Hervey v. Hervey, 2 W. Bl., 877.

A marriage may be established by preponderating repute and by conduct, even though the repute is divided. Lyle v. Elwood, 19 L. R., Eq., 98; 44 L. J., Chanc., 164; 23 W. R., 157—V. C. H.

General reputation is sufficient evidence of a marriage to entitle a son to inherit property, though the father be still living. Doe, d. Fleming, v. Fleming, 4 Bing., 266; 12 Moore, 500.

A marriage may be presumed. There is a strong legal presumption in favor of marriage, particularly after the lapse of a great length of time, and this presumption must be met by strong, distinct and satisfactory disproof. Wilkinson v. Payne, 4 Term R., 468; Piers v. Piers, 2 H. L. Cas., 331; 13 Jur., 569. Rex v. Twining, 2 B. & A., 386; Harrod v. Harrod, 1 Kuy. & J., 4; 18 Jur., 853; Goodman v. Goodman, 5 Jur., N. S., 902; 28 L. J. Chanc., 745, L. J.; Sichel v. Lambert, 15 C. B.

The validity of a marriage contract is to be determined by the law of the State where it was entered into; if valid there it is to be recognized as such in the courts of this State, unless contrary to the prohibitions of natural law, or the express prohibition of a statute. Van Voorhis v. Brintnall, 86 N. Y., 18.

Where, therefore, by a judgment of the Supreme Court of New York, the marriage between E. and

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whom Jewell received three as her portion; that, in consequence of her being a Catholic and Jewell a Jew, the ceremony of marriage between them was performed by a magistrate named White, in the presence of her family and other persons; that she was entirely ignorant of the English language; that she lived with Jewell as his wife, in his house, and under his name; that they removed to Barnwell district in South Carolina, where also she 222*] *associated with the neighborhood as his wife; that they then removed to Charleston, where Jewell kept a clothing store: that she attended to the concerns of the shop and family as Mrs. Jewell; that the children were circumcised according to the Jewish laws, and that none but legitimate children are so; that she was recognized in society as his wife; that, in 1806, she executed a release of dower in some property which Jewell had mortgaged, and that such release was in the form which the law prescribed for wives; that according to the general opinion among Hebrews, a marriage, in the scriptural sense, between a Christian and a Jewess is not legal; but that the Jewish law considers a connection between a Hebrew man and a Christian woman, as concubinage; that it is the duty of a Jew to obey the laws of the country in which he lives; that, if a divorce be obtained according to their law, by mutual consent, it is not considered unlawful to marry again; that the man writes a paper to the effect that the woman is at liberty to marry again, and the act on the part of the woman is her receiving it and assenting to it.

The evidence offered by the plaintiffs in the suit below, to rebut the idea that a marriage had ever taken place between Jewell and Sophie Prevost was, in the first place, the following paper:

"SAVANNAH, 10th March, 1796.

"Received of Benjamin Jewell the sum of five hundred dollars, in full for the cause of action which I brought against him on a promise of marriage; which sum of five hundred dollars, I acknowledge to be in full compensation, and from which I do release and exonerate the said Benjamin Jewell of all actions, demands, or engagements, whatsoever, from the beginning of the world to the present day. [The remaining part of the paper is characterized by the court as gross and indecent, and the reporter does not think proper to insert it. Its purport was to recognize a continuance of the connection on another basis than marriage.] SOPHIE PREVOST."

"Witness,

"CHARLES HARRIS, GEO. J. HULL."

It was also given in evidence by the plaintiffs that the above paper was recorded in the clerk's office of the Superior Court for Chatham County (the county in which Savannah is situated), in *the month of August after [*223 its date, on the oath of Mr. Harris, one of the subscribing witnesses. The handwriting of Mr. Harris, who was a distinguished counselor at law in Savannah, as well as that of Hull, the other subscribing witness, who was a deputy-marshal of Georgia, was proved by a judge and by one of the members of the Savannah bar. It was also given in evidence that Charles Harris was of the highest standing and character; was a distinguished man in the State, and understood and spoke French fluently. No other part of the paper was in his handwriting except the words "witness, Charles Harris."

It was also given in evidence by the plaintiffs, that upon an examination of the minutes of the courts, where the record of magistrates still remains, the name of White, who was said to have performed the marriage ceremony, did not appear as a justice of the peace, in Savannah, in the year 1796, or at any time previous.

It was also given in evidence by the plaintiffs, that Jewell and Sophie Prevost were not considered to be married, by one Borbot, the clerk of Jewell, or by the persons with whom he associated.

It was further given in evidence on behalf of the plaintiffs, by the Rev. Mr. Poznanski, the officiating minister of the Hebrew congre-

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B. was dissolved on the ground of adultery of the latter, the decree of divorce adjudging it is to be unlawful for him to marry during the life of E., and, thereafter, during her life, he went to Connecticut and there married I., both being residents of said State of New York, having gone out of it for the purpose of evading its laws, returning to it on the day of marriage, and thereafter, residing there, which marriage was valid under the laws of Connecticut, *held*, that such marriage was valid in New York, and the issue of such marriage was legitimate; also that the provision of the Revised Statutes (2 R. S., 139, § 5; *Id.*, 146, § 49), prohibiting the second marriage of a person divorced on the ground of his or her adultery, during the life of the former husband or wife, and declaring such second marriage void, had no application, as they are in the nature of a penalty, and have no effect outside of this State, in the absence of express terms showing a legislative intent to give them that effect. Van Voorhis v. Brintnall, 86 N. Y., 18; S. C., 13 N. Y., Week. Dig., 246; 40 Am. Rep., 505; followed in Moor v. Hegeman, 27 Hun., N. Y., 68; 15 N. Y., Week. Dig., 90.

The consent of the parties is all that is required to the valid celebration of the marriage; and as marriage is said to be a contract *jure gentium*, that consent is all that is required by the natural or public law. 2 Kent's Com., 86, and authorities cited.

If the contract be made *per verba de praesenti*, and remains without cohabitation, or if made *per verba de futuro*, and be followed by consummation, it amounts to a valid marriage in the absence of all civil regulations to the contrary, and which the parties (being competent as to age and consent) cannot dissolve, and it is equally binding as if made *in facie ecclesiæ*. 2 Kent's Com., 87; Bunting v. Lepingwell, 4 Co., 29; S. C., Moore, 169; Jessin v. Collins, 6 Mod., 155; 2 Salk., 437; Dalrymple v. Dalrymple, 2 Hagg. Consist. R., 54, 64; La Tour v. Teesdale, 8 Taunt., 830; Fenton v. Reed, 4 Johns., 52; Londondery v. Chester, 2 N. H., 295; Rose v. Clark, 8 Paige, 574; Stato v. Patterson, 2 Iredell, N. C., 316.

It is very clear that the marriage contract is valid and binding, if made by words *de praesenti*, though it be not followed by cohabitation. McAdam v. Walker, 1 Dow's P. R., 148; Jackson v. Winns, 7 Wend., 47.

And it is equally clear that a promise to marry, given and accepted, with subsequent cohabitation —*subsequent copula*—and without any circumstances to disconnect the mutual promise from the cohabitation, and where there was there was no previous illicit connection, and valid marriage was really intended by the parties, is a valid marriage. Shelford on Marriages and Divorce, p. 29, 969, edit. London 1841, and the authorities there cited.

This is the rule in the Scotch law, though Lord Chancellor Brougham, in a case on appeal to the House of Lords, exceedingly regretted it. Honyman v. Campbell, 2 Dow. & Clark's P. C., 265.

Proof of matrimonial cohabitation, declarations of the parties and reputation that they are man and wife, is sufficient upon which to found a presumption of marriage. Betsinger v. Chapman, 88 N. Y., 487; 14 N. Y. Week. Dig., 308.

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gation in Charleston, that if a Jew has a child by a person who is not a Jewess, the rite of circumcision may be performed, and that it is not necessary (for circumcision) that the child should be legitimate.

To rebut all this evidence, the defendants gave testimony, by Sophie Prevost, or Jewell, that she never signed the paper, purporting to be a release of all damages, &c., or any paper of the kind, and that she never was acquainted with either Harris or Hull; and by R. W. Pooler, the clerk of the court, that aldermen of the common council of Savannah were *ex officio* justices of the peace, for all purposes, within the town and hamlets of Savannah, but that he did not know whether or not White was an alderman in the years 1794, 1795, or 1796.

There were two bills of exceptions taken in the court below; the first of which related to the admissibility of certain evidence which the court rejected; and the second to the instructions prayed to be given to the jury, and refused by the court, as also to the instructions actually given.

224*] *The first bill of exceptions is as follows, viz.:

The plaintiff, to sustain his action, proved the marriage of Benjamin Jewell, on the 30th June, 1813, with Sarah Isaacs, one of the lessors; the seisin of Benjamin Jewell; his death; and that the other lessors of the plaintiff are the issue of that marriage.

The defendants, to defeat the plaintiff's action, and prove themselves the heirs-at-law of Benjamin Jewell, examined Sophie Storne, who testified to a prior marriage between her and Benjamin Jewell; and that he held her out as his lawful wife; and that eight children were born during the time they lived together; and offered in evidence, to sustain their defense, the testimony on the part of the defendants contained in the schedule annexed to this bill of exceptions. To rebut which evidence, the plaintiff offered the deeds and papers annexed to this bill of exceptions, signed by Sophie Storne, by the name of Sophie Prevost, and gave evidence that the said Benjamin and Sophie separated in December, 1810; and then offered in evidence the declarations of one Simons, the deceased husband of one of the defendants, that his wife's mother was not married to her father; which evidence the court overruled, and the plaintiff excepted thereto. And the plaintiff further offered in evidence a file of the Charleston Courier for the year 1811, and showed that the manuscripts or originals, from which the paper of that day was published, are lost or mislaid; and that the Charleston Courier was then the leading commercial paper in Charleston, where the parties lived, and offered to read from the file the following notice, as published on the 23d January, 1811, and for three successive weeks from that time, viz.:

"NOTICE.

"The subscriber forbids all persons from giving credit to Mrs. Sophie Prevost, on his account, as he will pay no debts whatever she may contract.

(Signed) "BENJAMIN JEWELL."

But the court refused to allow the evidence to be read; to which ruling of the court the plaintiff excepted.

Second bill of exceptions: And at the trial of the said cause after the parties had produced the evidence in the schedule hereto *annexed, the plaintiffs desired the said justices to instruct the jury as follows: [*225

1. That if Sophie Prevost and Benjamin Jewell agreed to live in concubinage, and, under that agreement, cohabited together, the connection is not matrimony, although they passed themselves off, to other persons, as man and wife.

2. That if Benjamin Jewell and Sophie Prevost asserted, contrary to the fact, that they were married, when, in reality, they had agreed to cohabit without marriage, such assertion will not change the nature of their connection so as to legitimate the children that were the produce of that union.

3. That if the jury do not believe that Benjamin Jewell and Sophie Prevost were married by a magistrate in Savannah, in the year 1796, or before that time, then there is no evidence of a marriage before them, on which they can find the defendants to be the legitimate heirs of Benjamin Jewell.

4. That if the said Benjamin and Sophie were living in concubinage in 1796, under the agreement produced in evidence, and continued to cohabit together afterwards, such cohabitation will not amount to marriage, notwithstanding their representations to third persons, unless there was a distinct agreement between them to rescind the former agreement, and to stand to each other thenceforward in the relation of husband and wife. And that if such new agreement be relied on, it ought to be established by satisfactory proof, and cannot be inferred from common reputation.

5. That if there was a promise of marriage, followed by sexual intercourse between Benjamin Jewell and Sophie Prevost, and she afterwards sued him for breach of marriage promise, or received a sum of money in satisfaction of the injury done her by refusing to marry her, the promise is thereby released, and the promise and subsequent intercourse do not constitute the parties man and wife.

6. That a promise to marry at a future time, followed by cohabitation, does not constitute marriage, though the promise be accepted at the time when it was made.

And the defendants prayed the justices to instruct the jury:

1. That if they believe that before any sexual connection between Miss Prevost and Benjamin Jewell, Mr. Jewell and Miss *Prevost, [*226 in the presence of her family and his friends, agreed to marry, and did afterwards live together as man and wife, the tie was indissoluble even by mutual consent.

2. That if the jury believe a marriage was celebrated in Savannah by a magistrate, the moment the celebration was over, the contract was perfect and indissoluble.

3. That even if the paper signed in Savannah in March, 1796, was signed by Sophie Prevost, and was so signed when she was unmarried, still it was not an indissoluble contract, but one which the parties were at full liberty to cancel and retract. And that the constant admission by both parties that they were man and wife, their reception in society, his calling her to renounce her dower, are evidence to authorize the jury

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to draw the conclusion that Mr. Jewell and Sophie Prevost had concluded and agreed to become and live together as lawful husband and wife prior to 1810; and if so, the separation does not affect the right of the children of that marriage; they are legitimate.

And the said justices refused the third instruction prayed by the plaintiffs. And as to the sixth instruction prayed by the plaintiffs, the said justices instructed the jury, that "if the contract be made *per verba de presenti*, and remains without cohabitation, or if made *per verba de futuro*, and be followed by consummation, it amounts to a valid marriage, and which the parties (being competent as to age and consent) cannot dissolve; and it is equally binding as if made *in facie ecclesiæ*." (2 Kent's Com., 86, 3d edit.) To which refusal and instruction the plaintiffs except. And the said justices gave the first instruction prayed by the defendants, to which the plaintiffs also except.

Messrs. Cox and *Legaré*, Attorney-General, for the plaintiffs in error.

Mr. Hunt for defendants.

The following were the points relied upon on the part of the plaintiffs in error:

1. That the declarations of Simons ought to have been admitted in evidence.

2. That the exclusion of the notice in the newspaper was error.

3. That Mrs. Storne was clearly incompetent as a witness, if her testimony was true, she having been the wife of Jewell. She **227*]** *was also interested in the event of the cause. (This point, however, was not in the bill of exceptions, and was not discussed.)

4. That the instructions asked for by the plaintiffs, and refused by the court, ought to have been given.

5. That there was error in the instruction given at the request of the defendants.

Mr. Coxe, for plaintiff in error, entered into a particular examination of the testimony, all of which was before the court, in consequence of the refusal of the court below to grant the third instruction prayed by the plaintiffs, which was, "that if the jury did not believe that Benjamin Jewell and Sophie Prevost were married by a magistrate in Savannah in the year 1796, or before that time, then there was no evidence of a marriage before them."

This investigation, as also that of the counsel who argued the case subsequently, is omitted in the report.

As to the admissibility of Simons' declarations, 1 Stark., 59, 2 Eng. Com. Law, 298; 1 Maule & Selw., 636; 1 Stark., 69, 2 Eng. Com. Law, 299; 10 East, 282; 18 Ves., 140; 1 Peters, 328.

As to the admissibility of the publication in the newspaper, 2 Stark., 66, 165, 166, 3 Eng. Com. Law, 247, 296. That gazette is good evidence to prove public notice, 10 Cond. Ch. Rep., 217.

As to what constitutes marriage, *Dalrymple* v. *Dalrymple* (4 Condensed Ecclesiastical Reports, 485, 488, 489); 4 Bac. Abr., title "Marriage;" *Easterly* v. *Easterly* (Dyer, 305); Bac. Abr., pl. 60; Buller's *N. P.*, 101, 102; 3 Dane's Abr., 294, 299; 18 Johns., 349; 7 Wend., 51; 10 Watts, 158, 161, 162.

Mr. Hunt, for defendants:

As to what constitutes marriage, Bracton, bk. 1, p. 4, ch. 5, sec. 7; Swinburne on Espousals, 198, also 5, 6, 7, 223, 224, 226, 227, 234; Taylor on Civil Law, 254, 258, 268, 277, 279; 1 Milton's Paradise Lost, as to the ceremony which took place on the first marriage; 4 McCord, 256; 18 Johns., 347; 4 Johns., 53; 2 Bl. Rep., 877; 1 Dow's Rep., 176, 181; Moore, 170; Manuscript Cases in South Carolina, *Strongfellow* v. *Strongfellow*, also *Billings* v. *Billings*, decided by Chancellor Harper; 1 Price's Rep., 83; 6 Mod., 172; 1 Dow's Rep., 189.

*As to the admissibility of the news- [***228** paper evidence, case of *The Berkeley Peerage* (4 Camp., 401).

As to Simons' declarations, no time or circumstances are mentioned when they were made, and he does not testify to general reputation.

Mr. Legaré, for plaintiffs:

As to Simons. His declarations were against his interest. Old coats-of-arms, tombstones, &c., all now admitted. (1 Peters, 337; 18 Ves., 514; Cowp., 591, 594; 2 Russ. & Mylne, 147, 156; 2 Cond. Ch. Rep., 431; Greenl. on Evidence, 159.)

As to the newspaper, 7 Peters, 100; Pothier, 295, 296; 6 East, 192; 2 Russ. & Mylne, 435.

As to what constitutes marriage, 6 Serg. & Rawle, 333; 10 Johns., 226, analogous cases of partnership; 2 Barn. & Ald., 387; 18 Johns., 348; 4 Johns., 52; 2 Dow, 462; *Cunningham* v. *Cunningham* (2 Dow, 504); *North* v. *Valek*, (Dudley's Ch. Rep.); 6 Binney, 405; 2 Dane's Abr., 302; 2 Cowen's Phillips, 354, collection of cases; *Alderson* v. *Clay* (1 Stark. Rep., 405(; 2 Eng. Com. Law, 445; 2 Stark. on Evidence, 590, 688; *Kelly* v. *Jackson* (6 Peters, 622, 62); Greenl. on Evidence, 39; 4 Hag. Ec. Rep., 519; *Dalrymple* v. *Dalrymple* was a clear case of *verba in presenti*; "*accipio te.*"

As to the proof offered that none but the legitimate children of the Jews are circumcised, Gen. xvii., 9.

On the general subject of marriage, Planke's History of Christian Society, Vol. I; Pothier, 5, 30, 38, 39; Swinb., 27, 231, 227; *Collins* v. *Jethro* (6 Mod., 155); 3 Dane's Abr., title "Marriage," 301, that the canon law was never adopted in this country; *Brown* v. *United States* (8 Cranch, 110); 3 Dall., 281; 2 Bibb's Rep., 343.

Mr. Chief Justice TANEY delivered the opinion of the court:

This is an action of ejectment brought by the plaintiffs in error against the defendants, to recover a house and lot in the city of Charleston, in South Carolina. The plaintiffs claim to be the lawful wife and children of Benjamin Jewell, deceased, who, it is admitted, died intestate and seized of the premises in question. The defendants also claim to be the lawful children of the same Benjamin Jewell, by Sophie Storne, who, before her marriage, was named Sophie Prevost, who is still living and has conveyed all *her [***229** interest to her children, and the rights of the parties depend altogether upon the validity of this marriage.

At the trial in the Circuit Court, the verdict and judgment being in favor of the defendants, the case is brought here by a writ of error, sued out by the plaintiffs.

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The questions before this court appear in the two bills of exception taken by the plaintiffs. The testimony as set forth in the record is voluminous, and in many instances contradictory. But a very brief statement will show the points of law which have been brought here for revision, and it is unnecessary to encumber the case with the mass of testimony which was offered to the jury by the respective parties, in order to prove or disprove the marriage in controversy.

The plaintiffs proved the marriage of Benjamin Jewell, on the 30th of June, 1812, with Sarah Isaacs, one of the lessors; and that the other lessors of the plaintiff are the issue of that marriage.

The defendants, in order to show that they, and not the plaintiffs, were the heirs-at-law of Benjamin Jewell, examined Sophie Storne, who stated that she was married to Benjamin Jewell, at Savannah, in Georgia, in 1794 or 1795, by a magistrate whose name she did not recollect, in the presence of several witnesses; that the said Jewell was a Jew, and the witness a Catholic; that her mother would not consent that she should be married according to the Jewish form, and that Jewell would not consent to be married according to their form, and on that account they were married by a magistrate; that they lived together as man and wife many years, and that the defendants are the issue of that marriage; that they at length separated, and she having heard that Jewell was married again, thought that she also had a right to marry, and accordingly married a certain Joseph Storne, with whom she lived some years, and who is since dead. Various acts and declarations of the parties, and the general reputation in the places where they lived, were also offered in evidence on the part of the defendants, to prove that the said Jewell and Sophie had lived together as man and wife, and had constantly acknowledged and spoken of each other as such.

To rebut this evidence, and to show that the connection of the parties was merely concubinage, and not marriage, several instruments of writing, alleged to have been executed by them [*230 at different *times, were offered in evidence on the part of the plaintiffs, and also various acts of the parties and the general reputation in the places where they lived.

After this evidence on the part of the plaintiffs and defendants had been given to the jury, the plaintiffs offered the declarations of one Simons (the deceased husband of one of the defendants), that his wife's mother was not married to her father. It was objected to by the defendants, and rejected by the court.

The plaintiffs also further gave in evidence that the separation took place in Charleston, in the month of December, 1810, where it was admitted that the parties had been living together for many years, and then produced a file of the Charleston Courier for the year 1811, and proved that the manuscripts or originals from which the paper of that day was published are lost or mislaid; that it was at that time the leading commercial paper in Charleston; and thereupon offered to read from the file the following notice, as published on the 23d of January, 1811, and for three successive weeks from that time, viz.:

"NOTICE.

"The subscriber forbids all persons from giving credit to Mrs. Sophie Prevost on his account, as he will pay no debts whatever she may contract. BENJAMIN JEWELL."

But the court refused to allow the evidence to be read; and these two points of evidence form the subject of the first exception.

The second exception brings up the question as to what constituted a legal marriage in Georgia and South Carolina, in one or the other of which States the parties had always lived from the time of their original connection. Several instructions were asked for on both sides, some of which would appear not to have been controverted; and the points before this court will be better understood by excluding all the prayers on both sides which do not form a part of the exception, and are therefore not now the subjects of review in this court. The exception is confined to the third and sixth instructions asked for by the plaintiffs, and to the first asked for by the defendants. They are as follows:

3. That if the jury do not believe that Benjamin Jewell and Sophie Prevost were married by a magistrate in Savannah, in the year 1796, or before that time, then there is no evidence of a *marriage before them, on which [*231 they can find the defendants to be the legitimate heirs of Benjamin Jewell.

6. That a promise to marry at a future time, followed by cohabitation, does not constitute marriage, though the promise be accepted at the time when it was made.

Defendant's prayer. 1st. That if the jury believe that before any sexual connection between Sophie Prevost and Benjamin Jewell, they, in the presence of her family, and his friends, agreed to marry, and did afterwards live together as man and wife, the tie was indissoluble even by mutual consent.

Whereupon the court gave the instruction requested by the defendant, and refused the third instruction asked for by the plaintiff; and upon the sixth directed the jury that if the contract be made *per verba de presenti*, and remains without cohabitation, or if made *per verba de futuro*, and be followed by consummation, it amounts to a valid marriage, and which the parties (being competent as to age and consent) cannot dissolve; and it is equally binding as if made in *facie ecclesiæ*. To this refusal and instruction the plaintiff excepted.

We proceed to examine the questions presented by these exceptions in the order in which they are stated.

The first point in the first exception is upon the rejection of the declarations of Simons, the deceased husband of one of the defendants. It is true that Simons cannot be presumed to have known of his own personal knowledge the particular fact of which he was speaking; and he must have made the statement upon information derived from others. He does not appear to have named the person from whom he obtained his information, nor to have stated that his knowledge was derived from the general understanding and reputation in his wife's family. But the knowledge of events of this description most generally exists in every family, and hence the declarations of one of its members is admissible, although he does not

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mention the source from which he derived his information; and such declarations are equally admissible whether his connection with the family is by blood or marriage. In the case of *Vowles* v. *Young* (13 Ves., 140), testimony precisely similar to that now offered was received; and we think the declarations of Simons ought to have been admitted, and that the Circuit Court erred in rejecting them.

232*] *The second point in this exception was upon the admissibility of the advertisement in the Charleston Courier; and upon this point also we differ in opinion with the Circuit Court.

It was admitted that the parties had cohabited together for a long time, and that the defendants were the issue of that intercourse: and in order to prove that their mother was married to Jewell, the acts and declarations of the parties during their cohabitation were offered in evidence by the defendants (and were unquestionably admissible), to prove that during that time she was acknowledged and treated by Jewell as his lawful wife. Acts and declarations were also offered on the parts of the plaintiffs to prove the contrary. The separation took place in December, 1810, in Charleston, where the parties had lived together for many years, and this advertisement appeared in the principal commercial paper of the place in the January following. It was offered by the plaintiff, like the acts and declarations above mentioned, on his part to rebut the testimony which had been given by the defendants; and this advertisement would manifestly have been admissible on the same rules of evidence, if it had appeared while the parties were still living together or at the moment of separation. And although they had parted a short time before the publication, yet it followed so immediately afterwards, that it must be regarded as a part of the *res gesta*, and as one of the circumstances connected with the separation and previous cohabitation. Whether it was inserted by Jewell or not; and if it was, what were his motives for so doing, are questions for the consideration of the jury, and not for the court. The plaintiff had a right to show the fact that such an advertisement did appear at the time mentioned, and it was with the jury to determine the degree of weight, if any, to which this fact was entitled, taking into consideration all the circumstances under which it appeared.

As relates to the points contained in the second exception, we think the court were right in refusing the third instruction requested by the plaintiffs. In order to explain the question intended to be raised by this prayer, it is proper to state, that in addition to the testimony of Sophie Storne, herein before mentioned, certain acts and declarations of the parties, which it is not necessary to set forth at large, were given **233*]** in evidence by the defendants, *by other witnesses, to prove that the parties were married at Savannah, about the time mentioned by Sophie Storne, and before they cohabited together. The plaintiff, on the contrary, in order to prove that they were not married, and that she went to live with him as his concubine, offered in evidence a paper purporting to be signed by the parties, and dated March the 10th, 1796, by which there was an open and plain agreement on her part to become the mistress of Jewell. The paper is gross and indecent in its language, and it is unnecessary to state more particularly its contents. The third instruction asked for by the plaintiff is founded upon the assumption that this paper is genuine, and insists that if the marriage did not take place before its date, then the intercourse began under this agreement, and their subsequent cohabitation must be presumed to have been of the same description, unless an actual marriage afterwards was proved. But the answer to the argument is, that the authenticity of the paper is denied by the defendants, who contend that it was fabricated by Jewell, or, if signed by Sophie, that she was entrapped and deceived, and ignorant of its contents. The question, therefore, is open to the jury, upon the whole evidence, to determine upon what terms and in what character the connection originally began; and the evidence offered by the defendants, that they lived together for so many years as man and wife, and treated and spake of each other as such, are certainly admissible to show that a marriage had taken place between them at some time or other, and whether before or after the date of the paper could not be material.

The residue of the instructions contained in this exception all involve the question as to what constituted marriage at the time of this cohabitation, by the laws of Georgia and South Carolina. The question has, of course, no concern with the nature and character of the union of man and wife in a religious point of view. But regarding it (as a court of justice must do) merely as a civil contract, and deciding in what form it ought to have been celebrated in order to give the parties the legal rights of property which belong to the husband or the wife, and to render the issue legitimate, the Circuit Court held, and so instructed the jury, that if they believed that, before any sexual connection between the parties, they, in the presence of her family and friends, *agreed to marry, [**234** and did afterwards live together as man and wife, the tie was indissoluble even by mutual consent. And that if the contract be made *per verba de presenti*, and remains without cohabitation; or if made *per verba de futuro*, and be followed by consummation, it amounts to a valid marriage, and which the parties (being competent as to age and consent) cannot dissolve; and that it is equally binding as if made in *facie ecclesiæ*.

Upon the point thus decided, this court is equally devided; and no opinion can therefore be given. Upon the questions, however, contained in the first exception, the judgment of the Circuit Court must be reversed, and a *venire de novo* awarded.

ORDER.

This cause came on to be heard on the transcript of the record from the Circuit Court of the United States for the District of South Carolina, and was argued by counsel; on consideration whereof, it is now here ordered and adjudged by this court, that the judgment of the said Circuit Court in this cause be, and same is hereby reserved, with costs; and that this cause be, and the same is hereby remanded to the said Circuit Court, with directions to award a *venire facias de novo*.

Cited—1 Sawy., 111; 1 Abb. U. S., 593.

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THE PRESIDENT AND DIRECTORS OF THE BANK OF THE METROPOLIS, *Plaintiffs in Error*,

v.

THE PRESIDENT, DIRECTORS AND COMPANY OF THE NEW ENGLAND BANK, *Defendants*.

Current account between banks—lien for general balance of account upon paper transmitted for collection.

When there have been, for several years, mutual and extensive dealings between two banks, and an account current kept between them, in which they mutually credited each other with the proceeds of all paper remitted for collection, when received, and charged all costs of protests, postage, &c.; accounts regularly transmitted from the one to the other and settled upon these principles; and upon the face of the paper transmitted, it always appeared to be the property of the respective banks, and to be remitted by each of them upon its own account; there is a lien for a general balance of account upon the paper thus transmitted, no matter who may be its real owner.

THIS case was brought up by writ of error from the Circuit Court for the District of Columbia.

235*] *At the trial in the Circuit Court, it appeared upon the evidence that the Bank of the Metropolis, one of the banking institutions of the District of Columbia, had been for a long time in the habit of dealing and corresponding with the Commonwealth Bank of Massachusetts. They mutually remitted for collection such promissory notes or bills of exchange as either might have, which were payable in the vicinity of its correspondent, which, when paid, were credited to the party who sent them, in the account current kept by both banks, and regularly transmitted from the one to the other and settled upon these principles. The costs and expenses, such as protests and postage, were, of course, charged in such account.

The balance was sometimes in favor of one, and sometimes of the other. On the 24th of November, 1837, the Bank of the Metropolis was indebted to the Commonwealth Bank in the sum of $2,200, and in the latter part of the year 1837, the Commonwealth Bank transmitted to the Bank of the Metropolis, for collection in the usual way, sundry drafts, notes, and other commercial paper which would fall due in the ensuing months of February, March, April, May, and June. They were indorsed by E. P. Clarke, cashier, and made payable to C. Hood, cashier, and again indorsed by C. Hood, cashier, to G. Thomas, cashier. Clarke was the cashier of the New England Bank; Hood, of the Commonwealth Bank, and Thomas, of the Bank of the Metropolis.

On the 13th of January, 1838, the Commonwealth Bank failed, and on that day Charles Hood, the cashier, wrote a letter to the Bank of the Metropolis, directing them to hold the paper which had been forwarded, as above stated, "subject to the order of the cashier of the New England Bank, it being the property of that institution." When this letter was received, the account was examined, and it was discovered that on that day the Commonwealth Bank was indebted to the Bank of the Metropolis in the sum of $2,900.

The deposition of Charles Hood, which appeared to have been taken under the act of Congress, was read in evidence by the defendant in error. It stated, among other things, that "the Commonwealth Bank never, at any time, owned any of said notes or obligations, or any part or either of them, and had never any *right, title, interest, claim, or lien thereon, but that the same were at the time of the receipt, and ever afterwards, the property of said New England Bank, and subject to its order and control." [*236

The reading of this deposition was objected to in the court below, and included in the bill of exceptions; but as the objection was not argued in this court, it is presumed to have been abandoned.

The action was brought by the New England Bank against the Bank of the Metropolis, and the judgment in the Circuit Court was in favor of the plaintiff for the whole amount of the proceeds of the notes and bills in question.

At the trial, a bill of exceptions was taken by the defendant (the present plaintiff in error), which, after reciting the evidence, concludes as follows:

Whereupon, the counsel for defendants prayed the court to instruct the jury, that, if they shall believe from the said evidence that the Commonwealth Bank did for a series of years transact business with defendants, and did from time to time transmit notes and other commercial paper to defendants for collection, which were all treated by both parties as if the same were the property of the said Bank of the Commonwealth, who were credited in their account current with the proceeds, and charged with the costs and expenses, which accounts were from time to time adjusted upon these principles; that the notes and paper mentioned in said letter of 13th January, 1838, were indorsed and transmitted in the ordinary course of business, without any notification that any other party or person had any interest in said paper, were thus received by defendants, and held by them; that while thus held by them, the said Commonwealth Bank became insolvent or embarrassed in its circumstances, and after such embarrassment the letters aforesaid of the 13th January, 1838, were written, and at the time of their receipt by defendants, said embarrassed state of said Commonwealth Bank was known to defendants, and there was at that period a large balance on general account due defendants from said Commonwealth Bank, and the said paper was all regularly indorsed by the cashier of said Commonwealth Bank to defendants; the said defendants had a right to receive said paper, and the proceeds when recovered, until such balance was paid: and plaintiffs are not entitled *to recover; [*237 which instruction, as prayed, the court refused to give.

Mr. Coxe for the plaintiff in error.

Mr. Bradley for the defendant.

Mr. Coxe argued, 1. As to the law, supposing the Commonwealth Bank and the Bank of the Metropolis to have been the only parties in the transaction; and 2d. How far that law was changed by the intervention of the New England Bank. On the first point, he cited 17 Wend., 100; 1 Ryan & Moodie, 271; 1 Rose's Cases, 280, 80; 5 T. R., 488, 491, 493; 1 Esp. Cases, 66; 2 Bla. Rep., 1154.

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As to the second point, he argued that it must have been a secret trust between the two eastern banks, which did not follow the specific paper; and cited 1 Rose's Cases, 238, 242, 246, 248; 7 T. R., 355; 7 Mass. Rep., 319, 324; 2 Vesey, 585.

Mr. Bradley, contra. As to the question of lien, 3 Bos. & Pull., 494; 6 T. R., 14; 7 East, 224, that special liens must be sustained by proof; also Burrow, 2221; 6 East, 28; 1 Atk., 236. That the *onus* is on the person who claims a lien, 7 Barn. & Cress., 212, in 14 Com. Law. Rep., 30; 3 Bro. Chan. Cases, 21. No lien for general balance on bills casually left. (7 Taunt., 278; see, also, 3 Mason's Rep., 222; 1 Maule & Selw., 140; 2 Dall., 60; 1 East, 335; 8 Barn. & Cress., 622, or 15 Com. Law. Rep., 319; 7 Bingh., 284; 20 Com. Law. Rep., 130; Doug., 303; 3 T. R., 321; 1 P. W., 318; 3 P. W., 185; 1 Salk., 160; 1 Atk., 234; 2 Barn. & Ald., 327; 3 Barn. & Cress., 376; 1 Peters, 28, 30, 35.)

Mr. Coxe, in conclusion, examined cases cited on the other side to show that they did not apply, and argued that there was a special usage made out between these two banks. In 1 Livermore on Agency, 261, cases examined, and same distinction drawn as exists here.

Mr. Chief Justice TANEY delivered the opinion of the court:

If this were a question between the two Boston banks, and the case depended upon their respective rights, the plaintiff in the court below would, undoubtedly, have been entitled to **238*]** *recover, for it is admitted, that although the notes and bills were endorsed to the Commonwealth Bank by the cashier of the New England Bank, yet no consideration was given for them; nor any advances of money made upon them; and they were placed in the hands of the first mentioned bank as the agent of the other, merely for the purpose of collection. The question, however, is a different one between the parties to this suit; and its solution must depend, not upon the nature of the transactions between these two banks, but upon the dealings between the Commonwealth Bank and the Bank of the Metropolis.

It appears from the evidence offered by the plaintiff in error, that for several years prior to the insolvency of the Commonwealth Bank (which happened in January, 1838), there had been mutual and extensive dealings between the two last mentioned banks, and an account current between them, in which they mutually credited each other with the proceeds of all paper remitted for collection when received, and charged all costs of protest, postage, &c. Accounts were regularly transmitted from the one to the other, and settled upon these principles; and upon the face of the paper transmitted, it always appeared to be the property of the respective banks, and to be remitted by each of them on its own account.

The balances in the account current fluctuated according to the amount of paper they respectively transmitted, and these balances it would seem were generally suffered to remain until they were reduced by the proceeds of the notes and bills deposited with each other in the usual course of their business. Thus, in November, 1837, the Bank of the Metropolis was debtor upon the account in the sum of $2,200; but in January, 1838, when the notice of the failure of the Commonwealth Bank was received, that balance had been extinguished, and the last mentioned bank was debtor in the sum of $2,900. It is not suggested that any information of the interest of the New England Bank, in the paper in question, was ever communicated to the Bank of the Metropolis, until after the insolvency of the Commonwealth Bank. And the queston is, whether the plaintiff in error has a right to retain the proceeds of the notes then in its hands to cover the balance of account due upon these transactions.

If the notes remitted had been the property of the Commonwealth *Bank, there [***239** would be no doubt of the right to retain; because it has been long settled, that wherever a banker has advanced money to another, he has a lien on all the paper securities which are in his hands for the amount of his general balance, unless such securities were delivered to him under a particular agreement.

The paper in question was, however, the property of the New England Bank, and was indorsed and delivered to the Commonwealth Bank for collection, without any consideration, and as its agent in the ordinary course of business; it being usual, and indeed necessary, so to indorse it, in order to enable the agent to receive the money. Yet the possession of the paper was *prima facie* evidence that it was the property of the last-mentioned bank; and without notice to the contrary, the plaintiff in error had a right so to treat it, and was under no obligation to inquire whether it was held as agent or as owner; and if an advance of money had been made upon this paper to the Commonwealth Bank, the right to retain for that amount would hardly be disputed.

We do not perceive any difference in principle between an advance of money and a balance suffered to remain upon the faith of these mutual dealings. In the one case as well as the other, credit is given upon the paper deposited or expected to be transmitted in the usual course of the transactions between the parties.

There does not, indeed, appear to have been any express agreement that those balances should not be immediately drawn for; but it may be implied from the manner in which the business was conducted; and if the accounts show that it was their practice and understanding to allow them to stand and await the collection of the paper remitted, the rights of the parties are the same as if there had been a positive and express agreement; and such mutual indulgence on these balances would be a valid consideration; and, like the actual advance of money, give the plaintiff in error a right to retain the amount due on closing the account.

It is evident that a loss must be sustained either by the plaintiff or defendant in error by the failure of the Commonwealth Bank. We see no ground for maintaining that there is any superior equity on the side of the New England Bank. It contributed to give to the corporation which has proved insolvent *credit [***240** with the plaintiff in error, by the notes and bills which it placed in its hands to be sent to Washington for collection, indorsed in such a form as to make them *prima facie* the property of the Commonwealth Bank, and enabled it to

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deal with them as if it were the real owner. The Bank of the Metropolis, on the contrary, is in no degree responsible for the confidence which the defendant in error reposed in its agent. And when this misplaced confidence has occasioned the loss in question, it would be unjust to throw it upon the bank which has been guilty of no fault or want of caution, and which was induced to give the credit by the manner in which the defendant in error placed its property in the hands of an agent unworthy of the trust.

If, therefore, the jury find that the course of dealing between the Commonwealth Bank and the Bank of the Metropolis was such as is stated in the testimony; that they always appeared to be, and treated each other as the true owners of the paper mutually remitted, and had no notice to the contrary; and that balances were from time to time suffered to remain in the hands of each other to be met by the proceeds of negotiable paper deposited or expected to be transmitted in the usual course of the dealing between them, then the plaintiff in error is entitled to retain for the amount due on the settlement of the account.

The question, whether the balances were usually suffered to lie for a time on account of negotiable paper actually deposited or expected to be received, and which formed the consideration on which the defense rested, is not, perhaps, as distinctly stated as it might have been in the hypothetical instruction requested by the plaintiff in error. But we think it is fairly to be inferred from the language used in the prayer, by which the defense is put upon the ground that the paper transmitted was treated by the parties as the property of each other; and as the prayer was rejected without any explanation or qualification, we have no reason for supposing that a different construction was put upon it in the Circuit Court.

The judgment must therefore be reversed.

ORDER.

This cause came on to be heard on the transcript of the record from the Circuit Court of the United States for the District of Columbia, 241*] *holden in and for the County of Washington, and was argued by counsel; on consideration whereof, it is now here ordered and adjudged by this court, that the judgment of the said Circuit Court in this cause be, and the same is hereby reversed, with costs; and that this cause be, and the same is hereby remanded to the said Circuit Court, with directions to award a *venire facias de novo*.

S. C., 6 How., 212.
Cited—3 How., 769, 770; 1 Otto, 314; 6 Bank. Reg., 375; 12 Bank. Reg., 459.

BERNARD McKENNA, *Plaintiff in Error,*

v.

CHARLES B. FISK, *Defendant.*

Effect of plea of not guilty in trespass—actions of trespass "de bonis" transitory—venue—common law, application of, in District of Columbia.

After pleading the general issue, it is too late to take advantage of a defect in the writ, or a variance between the writ and declaration.

Actions of trespass, except those for injury to real property, are transitory in their character.

Where the writ mentions a trespass with force and arms upon the storehouse of the plaintiff, and a seizure and destruction of goods, it covers a transitory as well as a local action.

In transitory actions, a venue is laid to show where the trial is to take place. It is a legal fiction, devised for the furtherance of justice, and cannot be traversed.

In such actions, such a venue is good without stating where the trespass was in fact committed, with a *scilicet* of the county in which the action is brought.

In the absence of statutory provisions, the courts in the District of Columbia must apply the principles of the common law to such actions, the pleadings, and the proofs.

THIS case was brought up by writ of error from the Circuit Court of the United States for the District of Columbia and County of Washington.

In the trial of the cause in the court below, the whole of the evidence offered by the plaintiff was shut out by a decision of the court, and the question was solely upon the correctness of this opinion.

The writ was as follows:

The United States of America, to the Marshal of the District of Columbia, greeting:

We command you, that you take Charles B. Fisk, late of Washington County, if he shall be found within the County of Washington, *in your said district, and him safely [*242 keep, so that you have his body before the Circuit Court of the District of Columbia, to be held for the county aforesaid, at the city of Washington, on the fourth Monday of November next, to answer unto Bernard McKenna, in a plea, wherefore, with force and arms, &c., at the County of Allegany, in the State of Maryland, to wit, at the County of Washington, he broke into the storehouse of the said Bernard, and seized, took, detained, and destroyed the goods and chattels, and articles of household of the said Bernard, then and there found, and being of a large value, and other wrongs to the said Bernard then and there did, against the peace, dignity, and government of the United States, &c. Hereof fail not at your peril, and have you then and there this writ.

Witness, Wm. Cranch, Esq., Chief Judge of our said court at the city of Washington, the 1st day of May, *Anno Domini*, one thousand eight hundred and forty.

WM. BRENT, Cl'k.

Issued the 27th day of May, 1840.

The declaration was as follows:

NARR.

Washington County, District of Columbia, to wit:

Charles B. Fisk, late of the County of Washington aforesaid, yeoman, was attached to answer unto Bernard McKenna, in a plea wherefore, with force and arms, &c., at the County of Washington aforesaid, he broke into the storehouse of the said Bernard, and seized, took, detained, and destroyed the goods, chattels, and articles of household of the said Bernard, then and there found, and being of a large value, and other wrongs to the said Bernard then and there did, against the peace, dignity, and government of the United States, and to the great damage of the said Bernard.

And thereupon, the said Bernard, by Brent and Brent, his attorneys, complains, that the

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said Charles, heretofore, to wit, on the — day of September, in the year of our Lord, eighteen hundred and thirty-nine, at the County of Washington, in the District of Columbia, with force and arms, &c., seized, took, detained, and destroyed the goods and chattels, to wit, one thousand gallons of spirituous liquors of different kinds; a large quantity of coffee and of tea; various clothing ready made for sale; two hundred bushels of Indian corn; all the prom-
243*] issory notes and accounts of *sundry persons due to the said Bernard, to the amount of at least $400; all the furniture, bedding, and other articles in said storehouse; and also the shantee, or storehouse, in which said goods and chattels then and there were found; the said shantee or storehouse being a temporary building erected by said Bernard, and to be removed by him, and not being part of, or attached to, the freehold or real; all of said goods and chattels, bills, bonds, and accounts belonging to the said Bernard, then and there found, and being of a large value, to wit, of the value of $2,000, and carried away and destroyed the same, and converted the same to his own use, and other wrongs to the said Bernard then and there did, against the peace, government, and dignity of the United States, &c. And also, for that the said Charles, to wit, on or about the — day of September, 1839, with force and arms, &c., at the County of Washington, in the District of Columbia, broke and entered a certain other shantee or temporary storehouse of the said Bernard, situate and being in said County of Washington, and then and there made a great noise and disturbance therein, for a long space of time, and then and there forced and broke open, broke to pieces, damaged, and destroyed divers, to wit, bottles, barrels, hogsheads, jugs, and demijohns, containing one thousand gallons of spirituous liquor of different kinds, of, and belonging to, the said Bernard, and broke to pieces, destroyed, damaged, and spoiled divers, to wit, one thousand pounds of coffee; two hundred pounds of tea; one hundred suits of ready-made clothing; two hundred bushels of Indian corn; sundry promissory notes, bonds, bills, and accounts due to said Bernard from sundry persons; and also, sundry planks, timbers, shingles, and other materials in the construction of a certain shantee, also belonging to the said Bernard, then and there found, and of great value, to wit, of the value of $2,000, and other wrongs to the said Bernard then and there did, against the peace, government, and dignity of the United States, &c.

And also, during the time aforesaid, to wit, on the day and year aforesaid, at the county aforesaid, seized and took divers other goods and chattels, to wit, one thousand gallons of spirituous liquors of different kinds; a large quantity of coffee and tea; two hundred bushels of Indian corn; $400 in amount of promissory notes, bonds, bills, and accounts due to
244*] said Bernard by *different persons; sundry ready-made clothing; and also a certain shantee, all of the goods and chattels, promissory notes, bonds, bills, and accounts of the said Bernard, then and there found, and being of great value, to wit, of the value of $2,000, and damaged, spoiled, and destroyed the same, and other wrongs to the said Bernard then and there did, against the peace, government and dignity of the United States. By means of which said several premises, he, the said Bernard, saith, he is worse, and hath damage of $4,000, and therefore he brings suit, &c.

BRENT AND BRENT, for plaintiff.

JOHN DOE AND RICHARD ROE, Pledges, &c.

And the bill of exceptions was as follows:

PLAINTIFF'S BILL OF EXCEPTIONS.

Bernard McKenna
v.
Charles B. Fisk.

At the trial of this cause, the plaintiff, to support the issue on his part joined, offered to give evidence by a competent witness, tending to prove that in the summer of the year 1839, the defendant, with a large force of armed men, came to the shantee, or storehouse, of the plaintiff, in Allegany County, in the State of Maryland, a place not within the jurisdiction of this court, and entered into the same, and then and there seized, took, and carried away the goods and chattels stated in the declaration, and at the same time offered to prove that the said shantee or storehouse was erected by the plaintiff for the purpose of carrying on his trade in merchandise on the line of the Chesapeake and Ohio canal, in said county, at, or near a place called Fifteen Mile Creek; and that, by the usage and practice on the said line of said canal, said shantees were considered temporary buildings, and could be removed or sold at the will and pleasure of the person erecting them; and that the said shantee of the plaintiff was a frame house and had posts in the ground.

And further offered to give evidence, at the same time, to show the value of said goods and chattels and shantee, at the time of such taking and carrying away and destruction thereof by the defendant and others, to be more than $1,000; but the court would not allow the plaintiff to give such offered evidence, or any part thereof, to the jury, but refused to permit the same to be *given; to which decision [*245 and refusal of the court, the plaintiff excepts, and this his bill of exceptions is signed, sealed, and enrolled, this 28th day of December, 1841.

W. CRANCH, [L. S.]
JAS. S. MORSELL. [L. S.]

Test: W. BRENT, Clerk.

Messrs. Brent and *Brent* for the plaintiff in error.

Messrs. Bradley and *Coxe* for the defendant.

Mr. Brent, for plaintiff. If there be a variance between the writ and declaration, advantage can only be taken of it by plea in abatement. (2 Wheat., 55.) First and third counts relate to personal property; second count charges an entry, but also injury to the personalty. (Precedents in 2 Chitty's Pleading, 864, and 1 Evans's Harris, 524: cited, also, Comberback, 324.) There is no misjoinder (1 Chitty on Pleading, 394, edition of 1819; cited, also, 1 Durn. & East, 479; 1 Cowp., 171); case in Cowper since overruled, but not as to the question of pleading. Distinction between transitory and local actions, 1 Cowp., 177, 179; 1 Strange, 646. In 4 Durn. & East, 503, there was a count for asportation of goods, but plaintiff nonsuited, because there was no proof. (1 Brock. Rep., 208; 1 Carth., 131; 2 Williams's Saund. Rep., 72, *note;* 2 Peters, 145.) Where a

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building erected for purposes of trade is said not to be real estate. 1 Saunders's Plead., 415; 2 Saund. Rep., 74 *a;* Rep. Temp. Hard., 121.

Mr. Bradley, for defendant, cited 3 B. C., 393; 1 Chitty's Pl., 438; 2 Wilson, 394. After party has appeared, the writ is dead. (1 Bos. & Pull., 647.) Suppose declaration good; can it be sustained by proof of an injury committed in Maryland? (1 Taunt., 379.) This is essentially an action of trespass *quare clausum fregit.* (2 Saund. Pl. & Ev., 858, marginal page; 1 Chitty's Pl., 271.)

Mr. Coxe, on same side, insisted that this was essentially an action of trespass *quare clausum fregit*, and that the injuries laid were merely aggravation. Case in 2 Peters only decided the interest between landlord and tenant, and not that the latter was unable to bring trespass for an injury to his possession.

Mr. Brent, Sen., in conclusion. Only the second count refers to the storehouse; the first and third are for injuries to the personalty. The second is copied exactly from Evans's Harris.

246*] *Mr. *Justice* WAYNE delivered the opinion of the court:

The declaration in this case contains three counts. It is alleged in the first and third, that the defendant, with force and arms, in the County of Washington, seized, took, detained, and destroyed the goods and chattels belonging to the plaintiff, and also the shantee or storehouse in which the goods were found, of the value of $2,000. The only difference in the counts is in the specification of the goods destroyed. In the second count, the defendant is charged with having, with force and arms, in the County of Washington, broke and entered a certain other shantee or temporary storehouse of the plaintiff, situate and being in the County of Washington.

The defendant pleaded not guilty, and issue was joined on that plea.

The plaintiff, on the trial, in support of his case, offered evidence to prove that the defendant, with a large force of armed men came to the storehouse or shantee of the plaintiff, in Allegany County, Maryland, entered into the same, and took and carried away the goods and chattels stated in the declaration, &c., and other evidence was offered to show the value of the goods. The court refused to permit the evidence to be given to the jury. Upon an exception to this ruling, the case is now before this court.

It was first urged in argument, that as the original writ in the case declared that the defendant, with force and arms, &c., broke into the storehouse of the plaintiff, &c., it was such a declaration of the nature of the complaint, which the defendant was required to answer, that it must be considered as the gist of each count, and that there was such a variance between the counts and the writ that it would abate the writ. Admit that this fault exists, and that the nature of the plaintiff's demand must be mentioned in the writ, that the defendant may know before he appears in court the kind of complaint he is required to answer, and that the declaration afterwards filed, or the writ, or both, shall be deficient in some legal requisite, or shall contain irregularity, informality, or mistake, which would abate the writ, the defendant is not here in a situation to avail himself of the fault. He has pleaded not guilty. This plea refers to the counts, and not to the writ. It puts the plaintiff to prove the material allegations in his declaration, and the defendant assumes by it to contest them. To *allow, then, a defendant, after the gen- [*247 eral issue has been pleaded, to avail himself of any defect or mistake in the writ, or variance or repugnancy between the count and the writ, would be, not to try the cause at issue, but would have the effect to take it from the jury and to place it before the court, upon a point of pleading which has not been pleaded, and which is unconnected with the merits of the cause. Such mistakes, either in the writ or in a variance between the count and the writ, must be taken advantage of by a plea in abatement. And if the mistake or fault is apparent on the face of the declaration, such as a misstatement of the cause of action, it will be a good cause of demurrer. (3 Black. Com., 301; Com. Dig. Abatement, G, I., 8; Willes, 410; 1 Show., 91; 1 Salk., 212; Duvall & Craig, 2 Wheat., 45, 55.) The case, then, is not in a condition to enable the defendant to avail himself of the objection. But is there any such variance in this case. We think not. The writ mentions a trespass with force and arms upon the storehouse of the plaintiff, and the seizure and destruction of goods. This puts the defendant in possession of the complaint against him, or what he will be required to answer before he appears in court. It is but the commencement of the suit, and is sufficient, if it advises the defendant of the cause of action, without those particulars which must be set out in the declaration, which, when filed, gives the defendant an opportunity to use any of those defenses or pleas to which he may be entitled by the rules of pleading.

It was also urged that the venue laid in each of the counts was so imperfect that the evidence offered could not be received to support either of them. That it could not be received under the second count, for that was *quare clausum fregit* in the County of Washington, and the evidence proved a local trespass, within another jurisdiction or sovereignty; and that it could not be received under the first and third counts; because, though they might be counts, for transitory causes of action, it was necessary to lay a venue where the trespass was committed with a *scilicet*, to let in the evidence at any other place of trial. The evidence offered as to the local count was certainly not competent; but that is because the venue is local, and cannot be changed into any other county than where the trespass to the realty was done and never can be carried out of the sovereignty in which the *land is. But it is an established [*248 rule, that in transitory actions a venue is only necessary to be laid to give a place for trial. Such a venue is indispensable, for without it would not appear in what county the trial was to take place, nor could a jury be summoned to try the issue. (Com. Dig. Pleader, C., 20; 1 Cowp., 176, 177; 5 Term Rep., 620; 2 Lev., 227; Bacon's Ab., Venue, C; 3 Term Rep., 387.) The venue for trial is a legal fiction, devised for the furtherance of justice, and cannot

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be traversed. So that, if A becomes indebted to B. or commits a tort upon his person or upon his personal property in Paris, an action in either case may be maintained against A in England, if he is there found, upon a declaration alleging a cause of action to have occurred in an English county, in which the action is laid, without taking notice of the foreign place. (1 Cowp., 177-179.) Lord Mansfield said: But as to transitory actions, there is not a color of doubt but that any action which is transitory may be laid in any county in England, though the matter arises beyond the seas. (*Mostyn* v. *Fabrigas*, 1 Cowp., 161.) In *Doulson* v. *Matthews et al.* (4 D. & East, 503), a case in all its particulars like this, which was an action for entering the plaintiff's house in Canada and expelling him, and in which there was a count for taking away his goods, Lord Kenyon nonsuited the plaintiff because the first count was local, and because he had not supported his second count by proof. Buller, *Justice*, also said: It is now too late for us to inquire whether it was wise and politic to make a distinction between transitory and local actions; it is sufficient for the courts, that the law has settled the distinction, and that an action *quare clausum fregit* is local. We may try actions here, which are in their nature transitory, arising out of a transaction abroad; but not such as are in their nature local. In *Rafael* v. *Verelst* (2 W. Black., 1055), which was a trespass committed in the dominions of a foreign prince, De Grey, *Chief Justice*, said: Crimes are, in their nature, local, and the jurisdiction of crimes is local. And so as to the rights of real property, the subject being fixed and immovable. But personal injuries are of a transitory nature, and *sequuntur forum rei*. And though in all declarations of trespass it is laid *contra pacem regis*, yet that is only matter of form, and not traversable. The same doctrine in respect to local and transitory actions has been repeatedly **249*]** affirmed in the courts *of the States of this Union. (1 Stra., 646; 2 W. Black., 1070; 1 Cowp., 176; 4 Term Rep., 503-507; Cowp., 587; 6 East, 598, 599; Com. Dig. Action, 177; 1 Cowp., 161, 177, 178, 184, 344; 2 H. Black., 145, 161; Co. Litt., *a*, *n.* 1; 3 Term Rep., 616; 7 Term Rep., 243; 1 Saund., *n.* 2; *Glen* v. *Hodges*, 9 Johns., 67; *Gardner* v. *Thomas*, 14 Johns., 134.) It then appears from our books, that the courts in England have been open in cases of trespass other than trespass upon real property, to foreigners as well as to subjects, and to foreigners against foreigners when found in England, for trespasses committed within the realm and out of the realm, or within or without the king's foreign dominions. And it also appears from the authorities which have been cited, that in a transitory action of trespass, it is only necessary to lay a venue for a place of trial, and that such venue is good without stating where the trespass was in fact committed, with a *scilicet* of the county in which the action is brought.

The courts in the District of Columbia have a like jurisdiction in trespass upon personal property with the courts in England and in the States of this Union, and in the absence of statutory provisions, in the trial of them must apply the same common law principles which regulate the mode of bringing such actions, the pleadings, and the proof. It is our opinion that the exception taken by the plaintiff to the ruling of the court, in respect to the evidence excluded, must be sustained, and we direct the cause to be remanded for further proceedings.

ORDER.

This cause came on to be heard on the transcript of the record from the Circuit Court of the United States for the District of Columbia, holden in and for the County of Washington, and was argued by counsel: on consideration whereof, it is now here ordered and adjudged by this court, that the judgment of the said Circuit Court in this cause be, and the same is hereby reversed, with costs; and that this cause be, and the same is hereby remanded to the said Circuit Court, with directions to award a *venire facias de novo*.

Cited—13 How., 137.

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*SAMUEL PECK, *Plaintiff in Error*, [*250
v.
MARY YOUNG.

IN error to the Court for the trial of Impeachments and Correction of Error, of the State of New York.

The counsel for the plaintiff in error, having filed a statement in writing, setting forth that the matters in controversy in this case had been agreed and settled between the parties; it is thereupon now here considered and adjudged by this court that this writ of error be, and the same is hereby dismissed, at the cost of the plaintiff in error.

THE UNITED STATES
v.
GABRIEL F. IRVING, JAMES E. DEKAY, FRANCIS R. TILLON, AND CHARLES P. CLINCH, Surviving Executors of the Last Will and Testament of HENRY ECKFORD, Deceased.

Collector continued in office—new bond required for each term—extent of liability of sureties—evidence in suit against—transcript of accounts not conclusive—may be reformed—sureties' rights cannot be affected by acts of treasury officers.

When a collector is continued in office for more than one term, but gives different sureties, the liability of the sureties is to be estimated just as if a new person had been appointed to fill the second term.

When the accounts of a collector are returned to the treasury quarterly, and the date of the commencement and expiration of his term of office is on some intermediate day between the beginning and end of the quarter, a restatement and treasury transcript of his account up to the end of his term is legal evidence in a suit against the sureties.

Such a restatement does not falsify the general accounts, but arranges the items of debits and credits so as to exhibit the transactions of the col-

NOTE.—*As to official bonds, and liabilities of sureties thereon*, see note to United States v. Giles, 9 Cranch, 212; and note to Postmaster-General v. Early, 12 Wheat., 136.

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lector during the four years for which the sureties were responsible.

The amount charged to the collector at the commencement of his second term is only *prima facie* evidence against the sureties.

But payments into the treasury of moneys accruing and received in the second term, should not be applied to the extinguishment of a balance apparently due at the end of the first term. Payments made in the subsequent term, of moneys received on duty bonds, or otherwise, which remained charged to the collector as of the preceding official term, should be so applied.

The settlement of quarterly accounts at the treasury, running on in a continued series, is not conclusive. The officers of the treasury cannot, by any exercise of their discretion, enlarge or restrict the obligation of the collector's bond. Much less can they, by the mere fact of keeping an account current in which debits and credits are entered as they occur, and without any express appropriation of payments, affect the rights of sureties.

251*] *THIS case came up from the Circuit Court for the Southern District of New York, under a certificate of division in opinion between the judges of that court upon the two following points:

1. Whether the transcript from the books and proceedings of the treasury, given in evidence on the part of the United States to show the indebtedness of Swartwout on the 28th day of March, 1834, on which day the second term of office of said Swartwout expired, was, in this case, competent and legal evidence for that purpose.

2. Whether the payments made by said Samuel Swartwout subsequently to the said 28th day of March, 1834, should be applied to the discharge of his indebtedness existing on said 28th day of March, 1834, or accruing during his second term of office, or whether such payments should be applied to the discharge of his indebtedness accruing after that time.

The facts in the case were as follows:

Swartwout was appointed collector at the port of New York on the 1st day of May, 1829; but his proceedings during this, his first term, have nothing to do with the present case.

On the 29th of March, 1830, his second term commenced, and he was appointed for four years.

On the 22d of June, 1830, he gave a bond for the faithful performance of his duties, in the mode prescribed by law, with several sureties, one of whom was Henry Eckford, whose executors are parties to this suit. The penalty of the bond was $150,000, and the condition ran thus: "Now, therefore, if the said Samuel Swartwout hath truly and faithfully executed and discharged, and shall continue truly and faithfully to execute and discharge all the duties of the said office, according to law, then the above obligation to be void and of none effect; otherwise it shall abide and remain in full force and virtue."

Quarterly accounts were rendered to the Treasury Department, according to law; but they continued to be made out, as they had been during his temporary appointment, running from the 1st of January to the 31st of March, from the 1st of April to the 30th of June, and so on. In these quarterly accounts were stated the various sums received by him on account of the government, and also the payments which he had made on behalf of the United States, although it often happened that 252*] the covering warrants *from the treasury, the final vouchers for such payments, were not received in time to be returned with said quarterly accounts, in which case they were thrown into the next quarter, when the proper credits were given.

Swartwout's third term of office commenced on the 29th of March, 1834; and the bond which he gave contained a condition similar to the one which has been recited, but Henry Eckford was not one of his sureties. The time, therefore, covered by Eckford was from the 28th of March, 1830, to the 28th of March, 1834, inclusive of the latter day.

In his accounts for 1834, Swartwout continued to make them up for the quarters of the year, as he had done, and his account for the first quarter was brought up to, and ends on, the 31st March. No account was filed by him ending on the 28th of March. The one ending on the 31st shows a large balance of "cash on hand."

In adjusting this account, the auditor began with charging Swartwout with the balance as it stood against him in the preceding account, then charged him with all the moneys which he had received in that quarter. Having given him credit for various sums paid into the Treasury, and paid to individuals under proper authority, he strikes a balance in favor of the United States, which is stated to consist of bonds uncollected, not due, bonds in suit, general bonds for spirits, wines, &c., and cash on hand.

In adjusting the account for the ensuing quarter, ending on the 30th of June, 1834, the auditor brought forward the entire balance standing against Swartwout in the last account, and then proceeded to charge and credit him as before.

In April, 1839, these accounts were restated by order of the first comptroller, so as to make the first account end on the 28th of March, 1834, instead of the 31st. The restatement begins on the 28th of March, 1830, and runs through the whole four years of Eckford's suretyship ending on the 28th of March, 1834, and shows a balance of cash due to the United States of $486,455.24. A certified copy of this paper is the transcript mentioned in the certificate of division of opinion in the court below.

Mr. Legaré, Attorney-General, on behalf of the United States.

Messrs. Lord and *Silas Wright* for the defendants.

*The points presented by the counsel, [*253 were—for the plaintiffs:

1. That this transcript is competent and legal evidence to show that Swartwout was, on the 28th March, 1834, indebted to the United States.

2. That the payments made by Swartwout subsequent to the 28th March, 1834, should not be applied to discharge his debt incurred before, but to discharge that incurred after, that date.

On the part of the defendants the points were as follows:

I. Preliminary references:

1. The form of the collector's bonds is prescribed by law, and expressly assumes the past as well as prospective accountability of the collector. (Act 1799, 3 U. S. Laws, 237.)

2. The law obliged the collector, once in every three months, and oftener, if required, to transmit his accounts, for settlement, to the

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officers of the treasury. (Act 1799, sec. 21, 3 U. S. Laws, 157; Act 1820, May 15, sec. 2, 6 U. S. Laws, 521.)

The law also bound him, as a disbursing officer, to the same duty. (Act 1823, Jan. 31, sec. 2, 7 U. S. Laws, 113.)

3. The law required the officers of the Treasury Department to examine the accounts submitted, and to state and certify the balance thereof (Act 1817, March 3, sec. 4, 8, and 9, 6 U. S. Laws, 199); and also the references under the preceding proposition.

4. The accounts rendered quarterly to the treasury, there examined, corrected, and returned to the collector, are binding upon both parties as to all the items embraced in the accounts and included in the adjustment at the treasury.

II. The balances in the quarterly accounts are to be taken as cash funds, or cash on hand; if so, every consideration, equitable as well as legal, requires them to be treated as the primary fund for subsequent payments, and these payments to be applied accordingly.

III. If the quarterly balances are presumed to be arrears, or defaulting balances, nevertheless the mutual rendering of accounts between the collector and the Treasury Department, to each other, was an appropriation of the payments to the charges, in the order of time in which they stand in those accounts.

IV. The sureties in posterior bonds of collectors of the customs have no equity to be taken into view, even in respect to an appropriation of payments, by mere implication of law.

254*] *V. If the surties on such posterior bonds should be deemed to have an equity against an application of payments, made after the date of their bonds, and during the period covered by it, to an antecedent balance, such application might have the effect to discharge such sureties; the United States cannot, for such a cause, without the consent of the anterior sureties, recall such application, made by accounts rendered, adjusted, and settled, according to law and long usage, and binding as between the United States and the collector.

VI. The restatement of the account from 1830 to 1834, made at the treasury in 1839, after the rendering and the settling, at the time of the quarterly accounts, was without authority of law, if it was to affect any previous appropriation of payments; if it was not, it was immaterial and irrelevant. It was in every view without authority of law.

Mr. Legaré, for plaintiffs:

1. Whether the transcript is evidence.

2. As to the application of payments.

3. The Act of the 3d March, 1797 (1 Story, 464), declares that a transcript of the account shall be evidence. It is objected that this is not such, because the account is restated. But if an account has been once stated, why not state it again? Accounting officers are not judges; need not restate, unless some error. Time does not discharge sureties. (*United States* v. *Kirkpatrick*, 9 Wheat.) Government is not estopped if new evidence be discovered. (1 Domat, Public Law, title 6.) An error may be corrected in a patent. (*Grant* v. *Raymond*, 6 Peters, 241.) Where a contract requires to be severed, court will sever it, as with rent. (Co. Litt., 742, 215, A; Litt., sec. 244; 1 Rolle's Abr. Apportionment, D.) So in partnership cases. (3 Bro. Ch. Cases, 4, 44.)

As to the second point.

If the opposite doctrine be correct, neither set of securities is responsible, because there is no default in the second term, and the first is paid. (1 Mer., 529, 572.) If the debtor does not apply the payment himself, the court will apply it where the security is most precarious. (6 Cranch, 27.) Civil law stated in 1 Poth. on Obligations, 338, ed. of 1826. The creditor may make the application. (4 Cranch, 317.) A leading case is in 7 Cranch, 572, but* *Justice* [***255** Story dissents from it in 5 Mason's Rep., 82. Secureties only liable for what was actually received during the term. (12 Wheat., 509.) The responsibility must be severed. (1 Gilpin, 125.)

Mr. Lord, for defendants:

Custom has been to apply payments as to time, unless something peculiar in the case. Bond of second sureties retrospective, law required it to be so. Sureties must have looked to this, backward as well as forward. Quarterly settlements are required by law. (Act of 1799, ch. 128, sec. 21; May, 1820, ch. 625, sec. 2; Jan. 1823, ch. 138.)

Collecter is obliged to retain money for various purposes; for example, to pay debentures, &c. The quarterly accounts are settlements, and bind the parties. Act of March 3, 1817, makes it the duty of the government to settle them. *Onus* is on the government. (1 McLean's Rep., 493; 9 Cranch, 230, 237.) Presumption is that the accounting officers knew what the collector ought to keep on hand, and allowed him to retain it, aided by his re-appointment. Suppose that it was a debt from Swartwout: has it been paid? Rule is, that oldest debt is paid first, unless there be some equity. First, the debtor directs; if he does not, the creditor does; if neither does, the court makes the application. (6 Cranch, 9; 9 Wheat., 720; 4 Mason, 333.) In December, 1834, this application was made. Oldest debt most likely to be lost, and policy of government is to throw balances on last securities. Debtor may make the application. (7 Cranch, 575; 9 Wheat., 720; 1 Mer., 604; 3 Sumn., 109; Gilpin, 125; 1 McLean, 493.) The collector owed no debt until the government called for its money. Even if money had been borrowed from second surety and paid to government, the payment would have been good. The transcript is not a paper according to law, because the law meant a copy of what was done, not to make out something new.

Mr. Wright, on same side:

Debtor has a right to make the application. (2 Vern., 606.) If he does not, the creditor may, but he must say before any controversy. (5 Taunt., 596.) Either party having declared their intention is bound by it, and cannot change it without the consent of the other. (4 Cranch, 315.) If neither party make the application, courts will consult the interests of creditor as well as debtor, *because they [***256** will apply it to a debt not bearing interest or not secured, rather than to one bearing interest or secured. In a running account the oldest credits are applied to the oldest debts, and so on, in order of time. (9 Wheat., 720; 2 Strange,

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1194; 9 Mod., 427; 4 Mason, 33; 2 Marsh., 319; 1 Mer., 572–611; 2 Barn. & Ald., 39; 3 Bingh., 71; 1 Wash., 128; 2 Brod. & Bingh., 7; 1 Stark., 122; 12 Wheat., 505; 1 Mason, 323; Stiles, 239; Ambl., 55; 5 Mason, 82; 3 East., 484; 1 Bingh., 452; 2 Barn. & Cress., 265; 2 Maule & Selw., 18; 9 Cranch, 212; 1 Gilpin, 125, 106; Theobald, 221; 1 Law Library, 131.) The power of the creditor and debtor over payments is the same where there are sureties as where there are none. (4 Mason, 333; 3 Bingh., 71; 9 Cranch, 212.) The case in 1 Gilpin, 125, is not justified by either the case in Cranch or the case in Mason. In 1 McLean, 493, the officer was not a disbursing officer, and the bond was not retrospective. Case in 5 Peters, 373, not applicable.

Payments in this case were in fact and in law applied to extiguishment of former balances. Law required accounts to be settled quarterly. Every quarter Swartwout made the application, and it must bind him. So the government officers, also, by bringing down fresh balances. 3 East, 484; 9 Peters, 12; 1 Mason, 323; 14 East, 239; 8 Wend., 403.)

Suppose a new person had been appointed who had debited himself with the balance, and the government had assented to it; would not this have discharged principal and surety? and how is it changed if the same man be re-appointed?

Mr. Legaré, for plaintiffs, in reply:

The question is not now, whether a balance can be shown, but merely whether the evidence is legal; a cash balance is *prima facie* evidence of a debt. Every term of office is a separate responsibility, as to principal and sureties. No matter how the accounts are kept; the law of 1820 cuts through and severs them. Act of 1840, commonly called the Sub-Treasury Act, declares the appropriation of public money a felony; and such an appropriation to pay an old debt is the basis of this defense. In 9 Wheat. the bond was given during an executive appointment. The sureties must see that their principals settle every four years. Swartwout was a bailiff or agent, not a debtor. (15 Peters, 257*] 432; *see 1 Jac. & Walk., 247.) An agent who keeps the money in bank is presumed to be using it for his own benefit. (11 Peters, 61.) A debtor paying a debt out of his own money has a right to apply it, but not paying it out of another man's money. He held the money of the government as a mere bailiff, and had no right to do anything with it but hand it over.

Mr. Justice McLEAN delivered the opinion of the court:

This action was commenced in the Circuit Court for the Southern District of New York, against the sureties of Swartwout, late collector of the customs at that city.

Swartwout was appointed collector by the President, the 1st of May, 1829; and continued to serve under such appointment until the 28th of March ensuing. On the 29th March, 1830, his nomination was sanctioned by the Senate, and he continued to serve in the office of collector four years. On the 29th March, 1834, he was again appointed by the President and Senate, for the term of four years.

Under each of the above appointments he gave bond and security, which, after reciting his appointment of collector, &c., provided: "Now, therefore, if the said Samuel Swartwout hath truly and faithfully executed and discharged, and shall continue truly and faithfully to discharge, all the duties of the said office according to law, then," &c.

The bond on which this suit was brought is dated the 22d June, 1830.

A transcript of the accounts of Swartwout from the commencement to the termination of his service as collector, was given in evidence, and also a transcript which purports to state the responsibilities arising under the second term of his service.

At the commencement of his second term, a large balance was charged against him, arising under the previous term; and at the commencement of the third term, a balance was charged, as arising under the second term.

In the course of the trial the two following points were raised, on which the judges were opposed in opinion, and the questions were certified to this court:

"1. Whether the said transcript from the books and proceedings of the treasury, given in evidence, on the part of the United States, *to show the indebtment of said Swart- [*258 wout, on the 28th of March, 1834, on which day the second term of office of said Swartwout expired, was in this case competent and legal evidence for that purpose."

"2. Whether the payments made by said Samuel Swartwout, subsequently to the said 28th day of March, 1834, should be applied to the discharge of his indebtment existing on the said 28th day of March, 1834, or accruing during his said second term of office, or whether such payment should be applied to the discharge of his indebtment accruing after that time."

By the Act of the 2d of March, 1799, collectors of the customs are required, "once in every three months, or oftener, if directed, to transmit their accounts for settlement, to the officer of officers whose duty it shall be to make such settlement."

From the transcripts in this case, and the deposition of the late comptroller, it appears that until after 1838, the accounts of collectors of the customs were kept at the treasury in one continued series of debits and credits, without regard to the terms of the appointments or the different sureties involved.

By the Act of May 15th, 1820, the term of appointment of collectors of the customs and other officers named, was limited to four years. Prior to that act, such appointments were made without any limitation as to time, except the pleasure of the President.

The 2d section of the Act of 3d March, 1797, provides, that "in every case of delinquency, where suit has been, or shall be, instituted, a transcript from the books and proceedings of the treasury, certified by the register, and authenticated under the seal of the department, shall be admitted as evidence," &c. By the 11th section of the Act of the 3d March, 1817, the auditors of the War and Navy Departments were authorized to certify accounts the same as the register.

Before the points certified are examined, we will consider the principles involved in the case.

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Under the Act of 1820, collectors can only be appointed for four years. At the end of this term the office becomes vacant, and must be filled by a new appointment. And each collector is required to give bond and security on entering upon the duties of his appointment, in such sum as shall be designated.

259*] *That the collector is responsible for all moneys received by him and not accounted for, without reference to the official terms he may have served, or to any bonds he may have executed, is undoubted. But this is not the case with his sureties. They are responsible only for the faithful performance of his duties, for the term of his appointment. The condition of the bond is, that he hath performed his duties faithfully, and that he shall continue to perform them. But this does not extend to his delinquencies under any other appointment.

The bond in question is dated the 22d of June, 1830, and relates to the 29th of March, preceding, at which time the term of the collector commenced; and its obligation extends to the 29th of March, 1834. That the sureties are not bound beyond this period, is too clear for controversy. As regards their liability, it is the same as if Swartwout had served only the term covered by their bond. For the faithful performance of his duties under the executive appointment, which preceded the above term, Swartwout gave bond and security; and, also, under the new appointment for four years, which he served from the 29th March, 1834. So far as the sureties are concerned, these terms are as separate and distinct as if a different individual had filed each one of them.

The extent of the obligation of the sureties being stated, we are brought to the inquiry, "whether the transcript, given in evidence on the part of the United States, to show the indebtment of Swartwout, on the 28th of March, 1834, was legal evidence."

The transcript is certified in the form required by the act of Congress. In the argument no objection was stated, as to the mode of its authentication. But the restatement of the account by the treasury officers, showing the liabilities incurred by the collector during the term for which the defendants are bound, as sureties, is objected to.

The collector is also a disbursing officer. He is charged with the bonds taken for duties, and is credited for sums paid into the treasury, and also for drawbacks and other disbursements incident to his office, or which have been made under the order of the Treasury Department. But from the continuous mode of keeping his accounts, without regard to the terms he may have served, the defalcation within any one term does not appear.

260*] *At the commencement of each term an amount is charged against the collector, but it may be composed of bonds in suit, not due, and deposited specially, as is found by the items first charged in the general transcript, amounting to more than eleven millions of dollars. The balance charged, therefore, at the commencement of any quarter or term, does not show that the collector is in default. He may, indeed, stand charged with money actually paid into the treasury by him, but for which he has received no credit, as what is called a covering warrant has not been issued. Until this shall be done the credit cannot, by the usage of the department, be given.

To meet the necessary disbursements, a sufficient sum of money should always be under the control of the collector. And it is understood to be the usage of the collector, under the sanction of the department, to retain such sum.

From this it appears that the general transcript affords no sufficient *data* on which to charge the sureties for any term of office, where, as in the present case, the same person has served as collector several terms.

It is contended that the duties of the treasury officers charged with the settlement of these accounts are in their nature judicial; and that when an account is once settled it is conclusive on the government, and can only be opened for correction by a suit in court. That in the present case, as credits were given in the account current, which more than paid the moneys received within the four years under examination, the sureties must stand discharged of all liability. And, that although these payments were in part made from moneys received, after the expiration of the above term, the credit must stand as entered.

It this be a sound argument, by the mode of keeping these accounts in the Treasury Department, all sureties of collectors, except those for the last term, are discharged. And it is supposed that this construction would impose no hardship or injustice on the last securities; that, as the bond binds them for the past, as well as the future conduct of the collector, they must inquire what amount is charged against him at the commencement of the term for which they are bound.

Now, the retrospective obligation of the bond is as much limited by the term of the new appointment as the prospective. And in *this view it would be as logical and just [***261** to hold that the sureties are liable for defalcations after the expiration of the term as for those which occurred before its commencement. There is no such condition in the instrument. It recites the new appointment, and, by consequence, limits the obligation to the term of office fixed by law.

The rule as to the appropriation of payments by debtor or creditor in the ordinary transactions of business, is earnestly relied on as applicable to the present case. And all the leading authorities on this subject are referred to. In the case of *Devaynes* v. *Noble*, &c. (1 Mer., 606), the doctrine which governs the application of payments was elaborately considered. But the applicability of this doctrine is not admitted. We think the rule established by this court in the case of *The United States* v. *January and Patterson* (7 Cranch, 572), is the true one. In that case the court say: "The debtor has the option, if he think fit to exercise it, and may direct the application of any particular payment at the time of making it. If he neglects to make the application, the creditor may make it; if he also neglects to apply the payment, the law will make the application." But the court add, "A majority of the court is of opinion that the rule adopted in ordinary cases is not applicable to a case

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where different sureties under distinct obligations are interested."

The treasury officers are the agents of the law. It regulates their duties, as it does the duties and rights of the collector and his sureties. The officers of the treasury cannot, by any exercise of their discretion, enlarge or restrict the obligation of the collector's bond. Much less can they, by the mere fact of keeping an account current, in which debits and credits are entered, as they occur, and without any express appropriation of payments, affect the rights of sureties. The collector is a mere agent or trustee of the government. He holds the money he receives in trust, and is bound to pay it over to the government as the law requires. And in the faithful performance of this trust the sureties have a direct interest, and their rights cannot be disregarded. It is true, as argued, if the collector shall misapply the public funds, his sureties are responsible. But that is not the question under consideration. The collector does not misapply the funds in his hands, but pays them over to the **262*]** government, without any special *direction as to their application. Can the treasury officers say, under such circumstances, that the funds currently received and paid over shall be appropriated in discharge of a defalcation which occurred long before the sureties were bound for the collector, and by such appropriation hold the sureties liable for the amount? The statement of the case is the best refutation of the argument. It is so unjust to the sureties, and so directly in conflict with the law and its policy, that it requires but little consideration.

If the collector be in default for a preceding term, it is the duty of the Treasury Department to require payment from him and his sureties for that term. To pay such defalcation out of accruing receipts during a subsequent term, even with the assent of the collector, would be a fraud upon the sureties for such term. The money in the hands of the collector is not his money. Without a violation of his duty, he cannot appropriate it as such. He pays it over in the performance of his duty—the duty which the sureties have undertaken that he shall faithfully perform. And shall the sureties not be exonerated? The collector has done all that they stipulated he should do. How, then, can they be made responsible? It is contended that their responsibility arises, not from the default of the collector, but from the appropriation of his payments by the treasury. This, at least, is the fair result of the doctrine advanced. For, if such appropriation is properly made by the treasury, in payment of a defalcation of the collector before the commencement of the current term, it must follow that the sureties for such term are responsible for the amount thus paid.

The government must show the amount of the defalcation of the collecter during the term for which the defendants were sureties, to charge them: and this is not done on the face of the general transcript. It is necessary, therefore, to have a restatement of the account for this purpose. This restatement does not falsify the general account, but arranges the items of debits and credits so as to exhibit the transactions of the collector during the four years in question. Whether this be done by depositions, or in the form of a transcript, may not be material.

We think that the transcript or restatement of the account, as explained by the depositions, was competent evidence to the jury. This *statement, as appears from the deposi- [**263** tion of Tarbutt, is defective in not giving all the credits to which the collector was entitled; but as it relates to the matter in controversy, it is evidence. The jury will determine what effect it shall have.

The amount charged to the collector, at the commencement of the term, is only *prima facie* evidence against the sureties. If they can show by circumstances or otherwise that the balance charged in whole or in part had been misapplied by the collector prior to the new appointment, they are not liable for the sum so misapplied. If the sum charged consists of duty bonds, the defendants may show that the bonds were never paid. These remarks apply to the sureties under every new appointment of the collector, and to the balance charged against him.

On the 29th of March, 1834 a new official term of Swartwout commenced, and new securities were given. On that day a large apparent balance was due to the government by him. Now, the inquiry should be, of what did that balance consist? Did it arise from a misapplication of the public money during the preceding term? If so, the sureties of the preceding term are liable for the amount thus misapplied. But if there was no misapplication of the public money by the collector, and he paid over to the government, or to its order, all the moneys he received during the official term for which the defendants were his sureties, however such payments may have been appropriated by the treasury, the sureties are discharged.

In answer to the question, "whether the payments made by the collector subsequently to the 28th of March, 1834, should be appropriated in discharge of his indebtment on that day," we say, that so far as such payments were made of moneys accruing and received in the subsequent term, they should not be so applied. But so far as payments were made in the subsequent term of moneys received on duty bonds or otherwise, which remained charged to the collector, as of the preceding official term, such payments should be appropriated in discharge of the indebtment of the collector for that term. The sureties are only responsible for a misapplication of the public money during the four years preceding the 29th of March, 1834. And of course the extent of this responsibility must be shown by the government. As before remarked, the court consider the official terms as distinct and *separate in regard to the [**264** sureties as if different persons had served in the three terms specified; that the legal responsibilities of the sureties are not and cannot be affected by any action of the Treasury Department. If liable, the sureties are made so by their contract; and the government, being a party to that contract, cannot, without the consent of the defendants, change its legal or equitable effect.

ORDER.

This cause came on to be heard on the tran-

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script of the record from the Circuit Court of the United States for the Southern District of New York, and on the points and questions on which the judges of the said Circuit Court were opposed in opinion, and which were certified to this court for its opinion, agreeably to the act of Congress in such case made and provided, and was argued by counsel; on consideration whereof, it is the opinion of this court:

1st. That the transcript from the books and proceedings of the treasury, given in evidence on the part of the United States, to show the indebtedness of Samuel Swartwout on the 28th day of March, 1834, on which day the second term of office of said Swartwout expired, was, in this case, competent and legal evidence.

2d. That the payments made by said Samuel Swartwout subsequently to the said 28th day of March, 1834, should be appropriated in discharge of his indebtedness on that day, so far as said payments were made, in the subsequent term, of moneys received on duty bonds or otherwise, which remained charged to the collector as of the preceding official term; but not where such payments were made of moneys accruing and received in the subsequent term.

Whereupon it is now here ordered and adjudged by this court that it be so certified to the said Circuit Court.

Cited—7 How., 689, 691; 10 How., 133; 13 How., 485; 19 Wall., 213; 10 Otto, 11; 1 Wood. & M., 167, 168.

265*] *WILLIAM NELSON, A Petitioner in Bankruptcy.

v.

DANIEL CARLAND, an Opposing Creditor.

Bankruptcy Act—district judge not to sit as member of circuit court on question certified to that court from district court—appeal or writ of error from circuit court in such case.

Upon questions adjourned from the District to the Circuit Court under the "Act to establish a uniform system of bankruptcy throughout the United States," the District Judge cannot sit as a member of the Circuit Court, and, consequently, the points adjourned cannot be brought before this court by a certificate of division.

Nor will an appeal or writ of error lie from the decision of the Circuit Court; and it is conclusive upon the district judge.

THE case came up on a certificate of division in opinion between the judges of the Circuit Court of the United States for the District of Kentucky. The facts are set forth in the opinion of the court.

Mr. Chief Justice TANEY delivered the opinion of the court:

In the case of William Nelson, petitioner in bankruptcy in the Kentucky District, against Daniel Carland, an opposing creditor, several points were adjourned by the District to the Circuit Court. Upon the hearing in the last-mentioned court, the District Judge as well as the Justice of the Supreme Court, sat in the case; and being opposed in opinion upon the questions adjourned, they were certified to this court upon the motion of the counsel for the petitioner.

The first question that presents itself upon this certificate is, whether the Supreme Court have jurisdiction in the matter in this form of proceeding. And after examining the printed argument filed by the counsel for the petitioner, and carefully considering the subject, the court are of opinion that the District Judge cannot sit as a member of the Circuit Court, upon questions adjourned to that court, under the "Act to establish a uniform system of bankruptcy throughout the United States;" and that, consequently, the points adjourned cannot be brought before this court by a certificate of division. Nor will an appeal or writ of error lie from the decision of the Circuit Court; and it is conclusive upon the District Judge.

In delivering the opinion of the court, it is, however, proper for me to say, that I dissent from that part of it which excludes *the [*266 District Judge from sitting as a member of the Circuit Court in a case of this description. Yet I concur in the judgment dismissing these proceedings; being of opinion that the Act of Congress of 1802, authorizing the certificate of division where the judges of the Circuit Court are opposed in opinion, does not apply to the peculiar and summary jurisdiction directed to be exercised in cases of bankruptcy.

The proceedings must therefore be dismissed for want of jurisdiction.

Mr. Justice CATRON dissented.

On a petition for a discharge, the District Judge adjourned into the Circuit Court the question: Whether the Act of 1841, establishing a uniform system of bankruptcy, was constitutional, or otherwise. The judges were divided in opinion on the question, and a certificate of division was made to the Supreme Court; calling upon this court to decide the question, and return it so decided, to be entered as the judgment of the Circuit Court.

The District Judge may adjourn into the Circuit Court any question, whether he has, or has not, doubts regarding its decision. Its importance is a sufficient reason. That he properly adjourned the question, whether the bankrupt law was or was not constitutional, is free from doubt. Of this question, the Circuit Court had full and proper jurisdiction; and the decision of it would have been conclusive of the case before us.

Was it a "question" on which the judges could divide in opinion?

The Act of April 29, 1802, provides: "That whenever any question shall occur before a Circuit Court, upon which the opinion of the judges shall be opposed, the point upon which the disagreement shall happen, shall during the same term, upon the request of either party, or their counsel, be stated under the direction of the judges, and certified under the seal of the court, to the Supreme Court, at their next session to be held thereafter; and shall, by the said court, be finally decided. And the decision of the Supreme Court, and their order in the premises, shall be remitted to the Circuit Court, and be there entered of record, and shall have effect according to the nature of the said judgment and order: Provided, That nothing herein contained *shall prevent the [*267 cause from proceeding, if, in the opinion of the court, further proceedings can be had without prejudice to the merits."

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The act declares, when any "question shall occur before the Circuit Court," &c., then, on a division, a certificte shall be made at the request of either party. No matter in what form of proceeding it occurs, be it at law or in equity; divisions are nearly as frequent in causes in equity as at law. Under the Bankrupt Law, the proceedings are in the form prescribed to courts of equity.

Now, "did a question occur" in the Circuit Court? It must be admitted that one of the gravest occurred that could be presented to a court of justice: there it was to be decided, and the case concluded by its decision. The judges were opposed, and it could not be decided: then it was their duty, at the request of either party, to send it to this court, to decide for the Circuit Court; where the decision of the Supreme Court is to be entered as the judgment of the Circuit Court.

So far the case presented seems to be sufficiently clear: but it is met by another consideration: and that is, whether the Circuit Court, in a question adjourned under the 6th section of the bankrupt law, consists of the two judges, or of the circuit judge only. In all other cases, in the circuit courts of the United States, except in writs of error and appeals from the District Court to the Circuit Court (an exception made by positive legislation), the two judges have equal powers—they constitute the Circuit Court usually; and must do so when a division takes place: does the Bankrupt Law cut off these powers of the district judges? The law does not so provide; and can it be justly inferred? If the District Judge cannot be a member of the court on the hearing of the adjourned question, then no division of course can take place. To come at the inference of his exclusion, the intention of Congress must be ascertained from the whole scope of the act.

Great questions were involved in its construction. It was to be administered by more than thirty judges, acting separately; no appeal to the Circuit Court was allowed, save in a single case: that of a refusal to finally discharge the bankrupt from his debts (sec. 4); and then the Circuit Court is commanded, if the bankrupt shall be found entitled to the benefits of [*268] the act, "to make a *decree of discharge, and grant a certificate, as provided in this act." No appeal is allowed to this court from the decree of the Circuit Court: the creditor is not allowed an appeal, either from the District Court to the Circuit Court, or to the Supreme Court in any case. Nor is the debtor allowed an appeal from the decree of the Circuit Court, refusing his discharge. Such is the unanimous opinion of my brethren now present; and with which opinion I concur. If the discharge is objected to by the creditors, and the District Court refuses it, the debtor may then demand a trial by jury, and try the matter over again: if the jury decides against him also, he may then appeal to the Circuit Court, and there elect to submit the matter a third time, either to the court, or to another jury; and this finding is conclusive, whether by the court or a jury. It is not possible, therefore, to reach this court by appeal, in a bankrupt case. This is clear; and my brethren think it equally clear, that no adjourned question can be brought here by a division of opinion: it follows, this court has no revising power over the numerous and conflicting constructions of the bankrupt law. In some circuits it is held, that one indebted "in consequence of a defalcation as a public officer; or as executor, or administrator, guardian, or trustee; or while acting in any other fidicuary capacity," can be discharged from all his other debts; and that the less favored creditors may take all his property, unless the government, ward, &c., see proper to come in for distribution, when the fiduciary claim will also be extinguished. In other circuits, those indebted to any amount in a fidicuary capacity are all excluded as a class: the fact appearing on the face of the petition, it is dismissed of course. Such is the construction of the act in the eighth circuit; it has excluded from applying great numbers in the eighth and other circuits, who would have been admitted had they applied in circuits where the law is construed otherwise. This question also has been brought here by a division of opinion from the district of Kentucky, at the instance of the district and circuit judges, acting together as the Circuit Court; the question having been adjourned into that court by the District Judge.

In the case of *William Nelson*, the question occurred in the same court, whether the bankrupt law was unconstitutional and void, or otherwise. It was adjourned, as already stated, into the *Circuit Court by the [*269] District Judge; and there the judges were opposed in opinion, and certified the question to this court for its decision. This was done at the instance of the bar of St. Louis; the District Judge of Missouri having pronounced the Bankrupt Act a mere insolvent law; such as was never contemplated by the framers of the Constitution, and therefore void. The following are some of his reasons for entertaining this opinion:

"Is this act of Congress, under which the petitioner claims a discharge from his debts, authorized by the Constitution? In order to determine this, it will be necessary to notice several of its provisions.

"It provides, in substance, that any person, whether a trader or not, who is indebted, except in a few enumerated cases, may file his petition in the District Court of the United States, for the benefit of the act, at any time he may please, without the consent or action of any of his creditors, and obtain by a decree of the court, a discharge from all his debts. This decree is to be had without the consent of any of his creditors being required, even if they do not participate in the proceedings or receive a dividend from the property. The decree is to be deemed a full and complete discharge from all his debts, contracts and engagements, provable under the act, whether contracted before or after the passage of the act. If he has property, he surrenders it; if he has none, it is the same thing as it regards his discharge.

"In examining this question, we should ascertain, if possible, what was the object the convention had in view by inserting the provision. The phraseology adopted would indicate a part of the object: 'To establish uniform laws on the subject of bankruptcies throughout the United States.' It was appre-

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hended, at least, that they would not be uniform, unless Congress had the power to make them so. In addition to this, we are told by Mr. Madison (Fed., No. 42) that 'the power of establishing uniform laws of bankruptcy, is so intimately connected with the regulation of commerce, and will prevent so many frauds where the parties or their property may lie or be removed into different States, that the expediency of it seems not likely to be drawn into question.' To have a system that would be uniform and would prevent frauds, &c., seems to have been the object. The proposition was **270*]** *referred to the committee of detail, of which Mr. Rutledge was chairman, and reported as it now stands in the Constitution. In ascertaining what were the mischiefs to be remedied or the objects to be effected, the convention, doubtless, looked to the condition of things, and of course to the institutions and laws of the various States. But for a definition of that or any other legal term, or to ascertain the nature and extent of the powers they were about to grant, by particular words or phrases, they would hardly look to the laws of the States.

"There was far less intercourse in those days than at present. There were no steamboats, railroads, or Macadamized roads.

"The laws of the several States could not have been generally known to the members of the convention from the different States, even the best lawyers could not have been acquainted with the laws of the States in which they did not practice. They are not so, even at this day. If they had been acquainted with the laws of all the States, to which would they have referred in preference to all the rest, for definitions, or the meaning and extent of legal terms? The convention well knew it was making a Coustitution for the whole Union; that the terms they might use should be known and understood, and must be interpreted and explained in every State. They were, therfore, exceedingly exact in the use of words and phrases: every word of legal import, every phrase was weighed and considered; and a phrase of only a few words was frequently referred to a committee, as was done in this case, and examined and reported on. They were frequently obliged to use legal terms; they were making a law; this was a legal term—bankrupt laws; what was to be done to prevent confusion and uncertainty? And above all, to mark exactly and with legal precision the extent of the powers they were about to grant, that neither more nor less power might be granted than was desired?

"Our ancestors had removed from England; the United States had then lately been English colonies and part of the British empire. The English laws and system of jurisprudence had been substantially adopted in every State in the Union. Every person at all conversant with legal subjects, and every lawyer, of course, was acquainted with the English laws. This **271*]** knowledge *was equally extensive in every State. It is so to this day. Here, then, was a law with which all were acquainted, and to which all could refer. There could be no mistake, if reference was made to it for the meaning of terms. And to it they did accordingly refer. We do so to this day. Ask a lawyer the meaning of a legal term, and where does he look for an answer? To the statutes of Massachusetts or Georgia—New York, Pennsylvania, or Virginia? Certainly not. In most instances he would look in vain.

"The proposition in regard to bankruptcies was made by Mr. Charles Pinkney, of South Carolina; in the words we now find in the Constitution. It was referred to the committee of detail, consisting of Mr. Rutledge, of South Carolina; Mr. Randolph, of Virginia; Mr. Gorham of Massachusetts; Mr. Ellsworth, of Connecticut; and Mr. Wilson, of Pennsylvania; and they reported it in the words in which it was referred. Now, several of these States never had anything like a bankrupt law. To which then did they refer, or could they refer, to ascertain the meaning and extent of the terms they were employing? The lawyer, if he is not familiar with the term, will refer to Blackstone's Commentaries, or to an English Law Dictionary, where he will readily find it. If he referred to the statutes of the different States, he might get as may definitions as there were States, supposing they had any law on the subject.

"The first Continental Congress, in 1774, declared, among other things, 'that the respective colonies were entitled to the benefit of such of the English statutes as existed at the time of their colonization, and which they had, by experience, found to be applicable to their several local and other circumstances.' (1 Journal of Congress, 28. Phila. ed. of 1800.)

"Many of the States had adopted, in a body, the English statutes, only excepting such as were local to that kingdom, or not applicable to their situation.

"The Supreme Court of the United States, in *Patterson* v. *Winn* (5 Peters, 233), say that 'the English statutes passed before the emigration of our ancestors, and applicable to our situation, and in amendment of the law, constituted a part of the common law of the country.'

"We know, as matter of history, that the members of the convention *who took **[*272** part in debate, were intimately acquainted with the English laws. The committee above mentioned possessed several of the most eminent lawyers in America, and who have held the highest legal stations. Reference was often made by them to the English laws for the meaning of terms or phrases they were using. Thus, when it was proposed to define and limit treason against the United States, Mr. Randolph and Mr. Ellsworth (two of the committee), Mr. Madison, Mr. Mason, and Mr. Gouverneur Morris, all referred to the Act of Parliament of 25th Edward III.; and the convention, at last, adopted the precise phraseology of that act. (Madison Papers, 1770.) Again, when the phrase *ex post facto* was under consideration, Mr. Dickerson stated that, on examining Blackstone's Commentaries, he fond the term related to criminal cases only. (Mad. Pap., 1450.) And the Supreme Court has since confirmed the signification of the terms to the definition given by Blackstone. Mr. Hamilton, who was a member of the convention, in speaking of the *habeas corpus* provision in the Constitution, refers to, and quotes, Blackstone's Commentaries. (Fed., No. 84.)

This general principle being established, we may go a step farther, and show that, in point of fact, the convention had the English statutes

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in view, in determining the nature and extent of the power they were granting to Congress, when the bankrupt clause was under consideration.

"Mr. Sherman observed 'that bankruptcies were, in some cases, punishable with death by the laws of England, and he did not choose to grant a power, by which that might be done here.' (3 Mad. Pap., 1481.) It thus appears, that the laws of England were the laws referred to in regard to the definition and nature of the powers they were conferring.

"It may also be remarked, that Blackstone's Commentaries were in the hands of the members, and frequently referred to. This book contained a definition of a bankrupt, and a summary of the English laws on the subject. What, then, was the English law to which the convention referred when they adopted the clause in regard to bankrupts? The English system, when the convention sat, had been in operation for several generations; and provided, in substance, a proceeding by a creditor against a debtor, who was a trader; distribution of 273*] bankrupt's effects *equally among his creditors; a discharge to be obtained by the debtor from his debts, upon obtaining the consent of a given majority of his creditors.

"It was a proceeding for the benefit of creditors, as are all laws for the collection of debts, of which this was one; but with liberality towards the debtor, who, by misfortunes so frequently attending trade, became unable to pay his debts, in allowing him a discharge from those debts, upon obtaining the consent thereto of a given majority of his creditors. Even this provision for a discharge, we are told by Blackstone, was intended for the benefit of creditors, as it influenced debtors to act with economy, industry, and honesty, and make a full surrender of their property, without which they could not hope to obtain the consent of their creditors.

"The whole system was founded on the principle, that a trader, who owed debts in various parts of the country, and was fraudulently making way with his property, instead of paying his debts with it, should have that property taken away and placed in the hands of trustees or other officers, with which his debts should be paid, and each of his creditors, whether absent or present, have his fair dividend.

"We are told by Mr. Madison, who has, not inaptly, been called the Father of the Constitution, that a uniform system of bankruptcy would prevent so many frauds, when the parties, or their property, may lie or be removed into different States, that the expediency of it seems not likely to be drawn in question.' (Fed., No. 42.) This reason for the adoption of the clause in regard to bankrupts was published by Mr. Madison after the Constitution was proposed by the convention, but before it was adopted by the States; was intended to explain the grant of power to Congress, and to induce the States to accept the Constitution; and no doubt had its effect. The frauds of whom—the removal of whose property, are here spoken of? Certainly the frauds of the debtor—the property of the debtor.

"We have another almost contemporaneous exposition of this grant of power to Congress. It is the Act of Congress of 1800, 'To establish a uniform system of bankruptcy throughout the United States.' It is altogether, in its principle and material features, like the English system; a proceeding by creditors against debtors who are traders; distribution of bankrupt's effects *equally among creditors; a dis- [*274 charge of the bankrupt from his debts, on the consent obtained of a given majority of his creditors.

"I have now, I think, shown that the bankrupt system intended by the framers of the Constitution, and to establish which, power was given to Congress, was a system for the benefit of creditors, to enable them to collect their just debts, and to prevent the frauds of debtors who might remove their property and themselves into different States.

"I will now show that the act we are considering is solely and entirely for the benefit of debtors, and to enable them to avoid their debts; and therefore opposed to the whole intent, spirit, and object of a bankrupt law. For this purpose I will here further notice some of its provisions

"1. The debtor selects his own time to commence proceedings—when he may have entitely squandered his property, and when nothing can be found. It is not even necessary that he should have been sued, or threatened with a suit, or ever asked for the debt.

"2. He is allowed to select the State and county where he will commence proceedings. For this purpose he can change his residence or business to any place he may think most favorable. He can thus go where nobody is likely to detect his frauds.

"3. He may have spent all his property in idleness, riotous living, debauchery, or gambling in stocks, or wild speculations: it will not affect him; and he is entitled to his discharge, equally with the most prudent, industrious, and economical person.

"4. If he does not surrender to his creditors one cent's worth of property, he may have property reserved to him, to the amount of $300, for his own use; and also his wearing apparel, and that of his family, which has been held, by some, to include jewelry.

"5. If a majority of his creditors should object to his discharge, it will only give him an additional privilege—that of demanding a jury, and taking the cause away from the court. Or he may appeal, even before the cause is tried, and is allowed ten days to appeal in. No such privileges are given to creditors.

"6. After the court disposes of the matter, or decides the cause against him, and refuses the discharge, he can then have it referred to a jury, although already tried and decided by the court, *which, heretofore, has never [*275 been allowed in any case, either in law or equity. The creditor is allowed no such privilege.

"7. In such cases, no provision is made by the act to allow the creditors a trial by jury.

"8. An appeal is given to the debtor—none is allowed by the act to a creditor.

"9. When the cause is removed into the appellate court, the debtor can demand either a trial by jury or a trial by the court. The creditor has no such privilege.

"10. The debtor may take the chance of a

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decision in his favor by the court; if in his favor, it will be conclusive. If the court decides against him, then he may demand a jury, and have another chance. If the court decides against him, he can have another chance by appeal. In the appellate court, if he thinks the court is likely, from previous decision, to be against him, he can take the chance of a jury. If he thinks the jury is likely to be against him, he can take his chance with the court. If some of these chances do not hit, there is no 'uncertainty in the law.' The creditor has no choice; any decision against him is to be final, and scarcely any in his favor is allowed to be final or conclusive.

"11. The English bankrupt law and the Act of 1800 gave the appointment of the assignee to the creditors, because they alone were interested. No such privilege is given by this act.

"12. The commissioner is to be appointed in the county where the bankrupt lives.

"13. There is no punishment for frauds.

"14. To conclude, the debtor is to get a discharge from all his debts, without the consent of any creditor. It applies to debts contracted before the passage of the act, and of which creditors could have had no idea at the time they gave the credit.

"May I not here inquire, whether it is fair to construe this grant of power, intended for the benefit of creditors, and to enable them to collect their just debts, so as to authorize the passage of a law solely for the benefit of debtors, and to enable them to avoid and discharge their debts?

"Again: a clause had been introduced into the Constitution prohibiting the States from passing any law impairing the obligation of contracts, because, as was said by the members 276*] of the *convention, it was immoral, contrary to the first principles of justice, and a power that ought not to be exercised by any legislative body. Would the States have ratified the Constitution, and submitted to such a prohibition on themselves, for such reasons, if they had understood that Congress could, at its pleasure, under color of bankrupt laws, authorize the abrogation of all contracts?"

Pursuant to the opinion, decrees were entered, dismissing the first cases presented for final discharges in the District of Missouri; and some twelve hundred more, depending in that court, will be dismissed, unless the decrees are reversed which have been entered. It was thought, by the Circuit Judge, due to the county at large, and to the parties concerned, that this important question should meet with the speedy decision of this court; and therefore it was brought here.

No law that Congress ever passed, has in it to a greater degree the elements of various construction and confusion, than the bankrupt law of 1841, when administered by more than thirty judges, acting separately; if all are exempt from the revising power of this tribunal, created for the purpose (amongst others) of producing uniformity of decision and construction in all cases over which its jurisdiction extends.

I think Congress intended, by the 6th section of the bankrupt law, to give the District Judge the power to adjourn questions into the Circuit Court, 1. For the purpose of obtaining the aid and assistance of the Circuit Judge: and, 2. To make up a division of opinion on great questions, so that the decision of the Supreme Court might be had. This was contemplated by Congress; or it was intended that in no bankrupt case should this court have a revising power, although in every district in the United States the law might be differently construed: and the wildest prediction could hardly have exceeded the reality. So far from being "a uniform system of bankruptcy," in its administration, it has become, by the various and conflicting constructions put upon it, little more uniform than the different and conflicting State insolvent laws. This result could not have escaped those who passed the law; it was too prominently manifest to be overlooked; I cannot, therefore, bring my mind to the belief that the revising power of this court was intended to be cut off. And, as the most expeditious and convenient mode of revision was by *a division of [*277 opinion, I think Congress intended that should be the mode. Notwithstanding the question was sent to this court, the case might progress below at the election of the District Court; so the recited Act of 1802 provides; and then the creditor and debtor would have equal opportunities to redress a perverted construction. But, as the matter now stands, the remedy is with Congress, either to give this court jurisdiction, or to withhold it.

ORDER.

This cause came on to be heard on the transcript of the record from the Circuit Court of the United States for the District of Kentucky, and on the points and questions on which the judges of the said Circuit Court were opposed in opinion, and which were certified to this court for its opinion, and was argued by counsel; on consideration whereof, it is now here ordered and adjudged by this court, that this cause be, and the same is hereby dismissed, for the want of jurisdiction; and that this cause be, and the same is hereby remanded to the said Circuit Court, for such proceedings to be had therein as to law and justice may appertain.

Cited—3 How., 323; 13 How., 11; 5 Bank. Reg., 102; 9 Bank. Reg., 54; 11 Bank. Reg., 195.

While this volume was in press, we received the following opinion delivered by Judge Catron in his judicial district, which we insert as being of general interest.

IN THE MATTER OF EDWARD KLEIN.

This is an appeal from the District Court of Missouri, in a case of bankruptcy, on the voluntary petition of the appellant, to be discharged from his debts, on the surrender of his property, according to the Act of Congress of 1841. The proceeding being in all respects regular, the petitioner moved for his discharge. The District Court refused to grant such motion, "because it considered the act of Congress under which said Klein asked to be discharged from all his debts, as being against the Constitution of the United States, and therefore the court had no power to grant such discharge."

The ground of this judgment the Circuit Court is called upon to revise. I am relieved from setting forth at any length the opinion of the District Judge, because this has been already done, in an opinion delivered by me in the Supreme Court of the United States at its last term, when an attempt was made to bring the present question before that court to have it decided for the purposes of this case.

By the Constitution, Congress is vested with power "to establish uniform laws on the subject of bankruptcies throughout the United States." The District Judge was of opinion that the extent

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of the power is limited to the principle on which the English bankrupt system was founded; and to [279] that system *the convention referred, when it adopted the clause above recited, for its definition. That system provided, a proceeding by a creditor against a debtor who was a trader; a distribution of a bankrupt's effects equally among his creditors; and a discharge of the debtor from his contracts upon obtaining the consent of a given majority of his creditors. That it was a proceeding for the benefit of creditors; the whole system being founded on the principle that a trader who owed debts in various parts of the country, and was fraudulently making away with his property, instead of paying his debts with it, should have the property taken away and placed in the hands of trustees or other officers, with which his debts should be paid; and each of his creditors, whether present or absent, have his fair dividend; and that the bankrupt law of 1800 is a fair exposition of the constitutional provision.

Briefly: That a bankrupt law was one by which honest creditors could force fraudulent debtors, who were traders, to surrender all their property, to pay ratably all their just debts; but that a law made solely and entirely for the benefit of debtors, and which enabled them at their own election to avoid their debts, was opposed to the whole intent, spirit, and object of a bankrupt law.

I state thus much of the grounds on which my brother judge's decree was founded from his printed opinion, because this case has not been argued on part of the creditors; for whom no counsel appeared in this court, nor did there in the court below, as I am informed. The accuracy, industry, and unquestioned ability of the District Judge, have, I do not doubt, brought forward the best reasons that exist, in support of the judgment he gave. The tenor, and true spirit, of the English bankrupt laws, such as they were when our Federal Constitution was adopted, he has given; and I agree with him, that the Act of 1841, in so far as it permitted the debtor, at his own sole election, to come into court and coerce an extinction of his debts, and abrogation of his contracts, contrary to the will of his creditors, was in violation of the leading principles on which the English laws were founded. Our law contemplated a proceeding by a debtor against his creditors; provided the debtor was insolvent; by the English law, the creditor alone could originate the proceeding; and it mattered not whether the defendant was insolvent or otherwise; if he did the fraudulent act, it made him a bankrupt—a fraudulent trader. Then by the English laws, "a fraudulent trader" could only be a bankrupt; with him as debtor; and with his creditors, could courts deal; and this at the election of the creditors—the debtor having no election to ask for distribution or for a discharge from his debts. If the power conferred on Congress carries with it these restrictions, then the District Court properly refused to discharge the applicant Klein, because the act of Congress was unconstitutional in his case. But other and controlling considerations enter into the construction of the power; it is general and unlimited, it gives the unrestricted authority to Congress over the entire subject, as the Parliament of Great Britain had it; and as the sovereign States of this Union had it before the time when the Constitution was adopted. To go no farther: what was the power of the States on the subject of bankruptcies? They could, and constantly did, permit the debtor to come involuntarily and surrender his property, and ask a discharge from his debts; the property was distributed generally among the creditors, and the debts of the [279] petitioner annulled. *Nor does the Constitution prohibit the States from passing such laws; New York, Pennsylvania, Louisiana, and others, now have them in full operation. The insolvent laws of Pennsylvania are in substance, and to a great extent in detail, similar to the Act of Congress of 1841, and no doubt furnished some of the ideas that were incorporated into the act. That Pennsylvania had power to pass these laws, no one ever doubted, so far as she was not restricted by the Constitution of the United States. The Supreme Court held, in the case of Ogden v. Saunders [12 Wheat., 313], that the States retained the power and could exercise it by law, and that the law would operate to discharge the contract between debtor and creditor; they being inhabitants of the particular State at the date of the proceeding, if the contract had been made there after passing the law. In such case the parties contracted subject to the law, and it entered into the contract. The case of Boyle v. Zacharie and Turner (6 Peters, 638) settled the contested question of power; and that it remained with the States to this limited extent. But the restrictions depend on general principles of international law, and other parts of the Constitution; especially that which prohibits the States from passing any law impairing the obligations of contracts; as will be seen by reference to the leading case on the subject, of Sturges v. Crowninshield (4 Wheat., 122). What the States might do before the adoption of the Constitution, may well be ascertained from what they now do in virtue of their respective powers. They may frame a bankrupt law in any form they see proper; this has never been questioned so far as my knowledge extends. The controversies in the Supreme Court turned on the question, whether the Constitution inhibited the States (there being no acts of Congress opposed to it) from legislating on the subject of bankruptcies; or, whether the power was exclusive in Congress. In the State tribunals the debtor comes involuntarily, and forces the creditor to prove his debt or be barred. One not a trader may apply: neither is the consent of the creditors (or any portion of them) necessary to authorize a discharge from the contracts of the debtor. So he may have no property to divide, and many debts to annul, from which he seeks a discharge, and from which he is discharged. These powers clearly belonged to the State governments, before Congress was invested with them; and this was done without limitation.

The District Court relied confidently on the ground that Congress can pass no law violating contracts; and that the clause of the Constitution conferred no such authority, because the English bankrupt laws, by which the power is supposed to be restricted, only permitted the contract to be annulled at the election of four parts in five of the creditors in number and value; and therefore they annulled it by a new contract. This argument proceeds on the assumption, that a proceeding in bankruptcy can only be had, at the election of, and for the benefit of creditors; and that every material step is their joint act; to which the debtor is compelled to submit. For the present it will only be necessary to say, that one prominent reason why the power is given to Congress, was to secure to the people of the United States, as one people, a uniform law, by which a debtor might be discharged from the obligation of his contracts, and his future acquisitions exempted from his previous engagements; that the rights of debtor and creditor, equally entered into the mind of the framers of the *Constitution. The great [*280 object was to deprive the States of the dangerous power to abolish debts. Few provisions in the Constitution have had more beneficial consequences than this; and the kindred inhibition on the States that they should pass no law impairing the obligation of contracts.

The inhabitants of States producing largely must be creditors; the inhabitants of those that are consumers will be debtors; bankrupt laws of the latter States might ruin the produces and creditors, they having no interest or power in the government of the consuming States, and it being the interest of the latter to annul the debts of non-residents, no remedy would exist for the grossest oppression. No laws of relief would be more effectual in times of pressure by foreign creditors; nor more likely to be adopted. If one State adopted such a measure, it would furnish a fair occasion for others to do the same, on the plausible pretext of self-defense; others would be forced into a similar bad policy, until discredit and ruin would overspread the entire land, by an extinction of all debts; and a consequent prostration of morals, public and private, on the subject of contracts. This evil had to a certain extent occurred, and was fresh in the minds of the framers of the Constitution, and no doubt it would again occur in some of the States, but for the provisions under consideration standing in the way of abrogating the private contracts of non-residents.

But if Congress passed the law, it must be uniform throughout the United States; then the entire people are equally represented, and have the power to protect themselves against hasty and mistaken legislation by its repeal, if found oppressive in practice.

Legislation by Congress on the subject of bankruptcies is of much less consequence than its prohibition on part of the States. They can pass no law affecting a non-resident, because no jurisdiction exists of his person; they can impair no con-

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tract made out of the State, because it was not made subject to the State Insolvent Law.' The power, as it stands restricted by the decision in Ogden v. Saunders, is almost harmless: those whom the State bankrupt law can most affect, have the popular vote in the State Legislature, and may repeal the law; the foreigner has little interest in its existence, as he cannot be affected by it, further than that the debtor may be deprived of his property. Another reason why Congress was vested with the power, was to prevent dangerous conflicts of jurisdiction among the States. A discharge in one sovereignty from contracts is by the laws of nations not recognized as a discharge in another sovereignty, save on the grounds of comity: an assignee under the British bankrupt laws is not recognized in this country as owner of the debts of the bankrupt; and an attaching creditor, or the government may disregard a title set up by the foreign assignee. (Harrison v. Sterry, 5 Cranch, 298.) The States in this respect are foreign to each other, and would be little likely to extend comity to the discharge of each others; from which great confusion might follow, and much ill will.

In considering the question before me, I have not pretended to give a definition; but purposely avoided any attempt to define the mere word "bankruptcy." It is employed in the Constitution in the plural, and as part of an expression; "the subject of bankruptcies." The ideas attached to the word in this connection, are numerous and complicated; they form a subject of extensive and [*281] complicated legislation; of this subject, Congress has general jurisdiction; and the true inquiry is: To what limits is that jurisdiction restricted?

I hold, it extends to all cases where the law causes to be distributed the property of the debtor among his creditors; this is its least limit. Its greatest, is a discharge of the debtor from his contracts. And all intermediate legislation, affecting substance and form, but tending to further the great end of the subject—distribution and discharge—are in the competency and discretion of Congress.

With the policy of a law, letting in all classes, others as well as traders; and permitting the bankrupt to come in voluntarily, and be discharged without the consent of his creditors, the courts have no concern; it belongs to the law-makers.

I have spoken of State bankrupt laws. I deem every State law a bankrupt law, in substance and fact, that causes to be distributed by a tribunal the property of a debtor among his creditors; and it is especially such if it causes the debtor to be discharged from his contracts within the limits prescribed by the case of Ogden v. Saunders. Such a law may be denominated an insolvent law; still it deals directly with the subject of bankruptcies, and is a bankrupt law, in the sense of the Constitution; and if Congress should pass a similar law, it would suspend the State law, while the act of Congress continued in force.

This court deeming the Act of 1841 constitutional, it is ordered, that the decree of the District Court dismissing the proceeding be reversed, and the petitioner (Klein) be discharged from his debts, and receive his certificate. The same order is directed in the case of Christopher Rhodes; dismissed also on constitutional grounds by the District Court.

In Re

CHARLES W. CASTLEMAN, a Petitioner in Bankruptcy.

[This case is similar to that of Nelson.]

ORDER.

THIS cause came on to be heard on the transcript of the record from the Circuit Court of the United States for the District of Kentucky, and on the points and questions on which the judges of the said Circuit Court were opposed in opinion, and which were certified to this court for its opinion, and was argued by counsel; on consideration whereof, it is now here ordered and adjudged by this court, that this cause be, and the same is hereby remanded to the said Circuit Court, for such proceedings to be had therein as to law and justice may appertain.

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*JOEL COLLINS, a Petitioner in Bankruptcy, [*282

v.

JAMES BLYTH, an Opposing Creditor.

[This case is similar to that of Nelson.]

ORDER.

THIS cause came on to be heard on the transcript of the record from the Circuit Court of the United States for the District of Kentucky, and on the points and questions on which the judges of the said Circuit Court were opposed in opinion, and was argued by counsel; on consideration whereof, it is now here ordered and adjudged by this court, that this cause be, and the same is hereby dismissed for the want of jurisdiction; and that this cause be, and the same is hereby remanded to the said Circuit Court, for such proceedings to be had therein as to law and justice may appertain.

WILLIAM TAYLOR ET AL., *Appellants*,

v.

GEORGE M. SAVAGE, Executor of SAMUEL SAVAGE, Deceased, *Defendant*.

Removal of executors and appointment of administrator on same day—decree obtained in U. S. Circuit Court—parties to appeal—execution not issuable in case open to appeal, nor pending appeal.

Where a decree is passed by the court below against an executor, being the defendant in a chancery suit, and before an appeal is prayed the executor is removed by a court of competent jurisdiction, and an administrator *de bonis non* with the will annexed, is appointed, all further proceedings, either by execution or appeal, are irregular, until the administrator be made a party to the suit.

If an execution be issued before the proper parties are thus made, it is unauthorized and void; and no right of property will pass by a sale under it.

The administrator cannot obtain redress by application to this court, but must first be made a party in the court below. This may be done at the instance of either side.

After he is thus made a party, he may stay proceedings by giving bond, or the complainants may enforce the decree, if the bond be not filed in time.

It is not clear that a complainant who has appealed from a decree in his favor, in the hope of obtaining a larger sum, can, pending the appeal, issue execution upon the decree of the court below.

MR. MOREHEAD, of counsel for the appellee, moved the court for leave to give an appeal bond in this case, which shall operate as a *supersedeas*, and for leave to docket the cross-appeal, and for such relief as may meet the case.

*He stated that Taylor had obtained [*283 a decree against Savage, executor of Savage, in the court below, for $5.000 and upwards; that the decree was actually rendered on the 29th day of November, 1842, but was entered as of the day before; that the complainant had appealed from this decree, and sent the record up to this court, where the case is now pending;

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that an appeal was also prayed and allowed on the part of the defendants; that this last-mentioned appeal was not carried out, because, on the 28th day of November, the date of the decree, the Orphans' Court of Lauderdale County, in Alabama, removed Savage from his executorship, and appointed Vincent M. Benham administrator *de bonis non* with the will annexed; that, of course, Savage could not give bond to prosecute the appeal which had been allowed him, and Benham lived at a distance from the court when the decree was rendered, and was ignorant of the said decree, and of the change made in the representative of the estate; that the complainants, notwithstanding their appeal, had taken out execution, which had been levied upon the property of the deceased, and a sale was about to take place; that among the subjects of said levy were some family negroes, who had been for several generations in the family, whom it would be especially painful to part with; that the complainants resided in Scotland and other foreign countries, so that there would be no chance to recover back the money, if the decree of the court below should be reversed.

Under these circumstances he moved for leave to docket the cross-appeal, upon giving security, and for an order to quash the execution irregularly issued; and filed affidavits setting forth the facts stated above. He stated that he had not been able to find a precedent bearing upon the case, but argued to show that the petitioner was entitled to relief.

Mr. Crittenden, contra.

If no precedent can be found, it is a strong argument against the motion. Distance of the residence of the complainants is no reason for relief, because one of the parties in every suit must be the inhabitant of another State. The execution is not here; nothing but an affidavit. The petitioner has other means of relief than by coming to this court. As to the hardship of [*284] the case, twenty days were given below to file the bond. Why did not the party come in? It is said he lived at a distance. How far? When was he told of the decree? The papers are studiously ambiguous. The complainants are not all foreigners; one of them is a citizen of Pennsylvania, and now in court. There is no irregularity in the execution.

Mr. Sergeant, in reply, and for the petitioner:

If the papers are ambiguous, the other side could have had them cleared up, because they have been filed for some days.

This court has possession of the case by virtue of the appeal brought up on the other side. The United States Court and Orphans' Court sat in different places, and neither knew what the other did. After appeal, the case was not in the court below, because it was removed here, and the whole case brought up. The wrong has been done to the court itself; the party has been brought here to defend the appeal, and then execution is issued against him. The only case like this is in 7 Cranch, 278. The execution is not noticed on the record at all, and must have issued after the record was made out.

Mr. Chief Justice TANEY delivered the opinion of the court:

This case is brought before the court by the petition of Vincent M. Benham, administrator *de bonis non*, with the will annexed, of Samuel Savage.

It appears that a bill was filed by William Taylor and others, in the District Court of the United States for the Northern District of Alabama, against George M. Savage, executor of Samuel Savage, deceased, to which the defendant appeared and answered. Testimony was taken on both sides, and at the final hearing on the 28th of November, 1842, the court decreed that the complainants recover of the respondent, as executor of Samuel Savage, $5,212.92 and costs, to be levied of the goods and chattels, lands and tenements of the said Samuel Savage. On the same day the Orphans' Court of Lauderdale County, in the State of Alabama, having competent jurisdiction for that purpose, removed the said George M. Savage from his executorship, and appointed Vincent M. Benham, the petitioner above mentioned, administrator as aforesaid.

Huntsville, where the District Court of the United States held its session, and Florence, where the Orphans' Court of Lauderdale County was in session, were distant from each [*285] other between seventy and eighty miles; and the new administrator, Vincent M. Benham, does not appear to have known of the decree until some days after it was passed. At the time of the decree Harvey Dillahunty was attending to the suit in chancery as the attorney in fact of George M. Savage, the respondent, and two days afterwards, that is to say, on the 30th of November, 1842, in the name of the respondent, prayed an appeal; and the District Court, with the consent of the complainants, passed an order giving the said George M. Savage liberty to file an appeal bond at any time within twenty days from the adjournment of the court. On the 2d of December, the complainants also appealed, and on the same day gave the usual bond to cover costs, which was duly approved; and the transcript of the record and proceedings had in the cause in the District Court have been transmitted to and docketed in this court in the names of the said William Taylor and others, complainants and appellants, against the said George M. Savage, executor of Samuel Savage, respondent and appellee.

The executor having been removed as aforesaid, no bond was executed by him nor by Vincent M. Benham, the administrator, within the time limited by the court; and therefore an execution was issued by the clerk of the District Court against the property of Samuel Savage, by virtue of which the marshal has seized the property of the said deceased, and is about to sell the same in order to satisfy the decree.

In this state of the proceedings, Benham, the administrator, has filed his petition at the present term, setting forth the facts as above mentioned, and offering to file a transcript of the proceeding on his part and to give security on his appeal, and praying that his bond may be approved by this court, and the execution issued by the complainants superseded until the appeal can be heard and decided in this court. Affidavits have been filed on both sides, but there is no conflict between them in any circumstance deemed material by the court; nor do they vary in any important particular from the statement contained in the petition.

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We are by no means prepared to say that a complainant, after having appealed from a decree in his favor, can be permitted, pending the appeal, to carry into execution the decree which he is seeking to reverse in the appellate **286*]** court, in order to obtain a *decree for a larger sum. But the relief asked for the petition cannot be granted, because there is no case legally in this court upon appeal of either party, upon which process can be issued. The decree in the Circuit Court is against George M. Savage, executor of the last will and testament of Samuel Savage, deceased. There was no other party respondent in the District Court, and the decree was passed against him in his representative character. Before the appeal was prayed on either side, he had ceased to be the representative of the estate of Samuel Savage, and had no control over it, nor any right to interfere with it by prosecuting or appearing to an appeal, or in any other manner. By his removal from the office of executor, he was as completely separated from the business of the estate as if he had been dead, and had no right to appear in or be a party in this or any other court, to a suit which the law confided to the representative of the deceased. No further proceedings, therefore, could be had on the decree in the District Court, until Benham, the administrator *de bonis non*, was made a party.

In this view of the subject it follows, 1. That the appeal of the complainants is not regularly before this court, and the irregularity cannot be cured here unless the administrator voluntarily appears to it. The case may, however, upon the application of the appellants, be remanded to the District Court with leave to make the proper parties.

2. The execution issued on the decree was unauthorized and void, and no right of property will pass by a sale under it, if one should be made by the marshal.

3. The appeal of Benham, the administrator *de bonis non*, is also irregular; and the case cannot be brought here by him unless he is first made a party in the District Court.

But he may be made a party there, either upon his own application or that of the complainants, according to the rules and practice in chancery proceedings. And when this has been done, the administrator may take an appeal; and upon giving bond within the time prescribed by law, all proceedings upon the decree will be stayed in the District Court, until the decision of this court shall be had in the premises. And if he fail to give the bond within the limited period, the complainants will then be entitled to process from the District Court, in order to enforce it. As the case **287*]** *now stands, there is no suit here upon which this court can found any process to set aside the execution improperly issued, and the petition of Benham, the administrator, must be dismissed.

ORDER

On consideration of the petition of Vincent M. Benham, filed in this case, and of the arguments of counsel thereupon had, it is now here ordered by this court that the said petition be, and the same is hereby dismissed.

S. C. Aff'd—2 How., 395.
Cited—5 How., 261; 3 Wood. & M., 517.

WILLIAM J. MINOR ET AL., *Plaintiffs in Error*,

v.

SHUBAL TILLOTSON.

Practice—questions to be decided upon final hearing of cause, not to be considered on argument of special motion.

Whether or not a record contains a bill of exceptions or statement of facts by the court, according to the practice of Louisiana, by which any question of law is brought up for revision in such a form as to enable this court to decide upon it; and whether or not there is a mass of various and conflicting testimony in relation to facts, upon which no jurisdiction can be exercised upon a writ of error; are questions to be decided only upon the final hearing of the cause.

The court will not go into this inquiry upon a motion to dismiss the writ of error, before the cause is taken up for argument.

MR. WEBSTER, of counsel for the defendant, moved to dismiss the writ of error in this case, for the following reasons:

1. Because this court has no jurisdiction on writs of error of any question apparent in this record.

2. Because the record does not show any question of law to have been decided in the court below, which this court can revise.

3. Because there is no question of law stated on the record by bill of exception; nor any special verdict, or agreed state of facts, or any unquestioned evidence of facts, on which any question of law can arise.

4. Because it does not appear whether any, or, if any, what matter of law was in dispute between the parties.

The action was brought to recover certain tracts of land. Two trials had been had, the verdict rendered on the first had been set aside by the court, and the judgment rendered on the second verdict reversed by this court.

*Another jury was impaneled to try [***288** the cause, June 11, 1839; and after the trial had proceeded for some time, the parties agreed that the whole case should be submitted to the court, on the facts and the law, and that the judge should state the facts as he should find them; that such statement might be regarded as a special verdict.

On the 10th April, 1840, the court rendered a general judgment for the defendant, without making any statement of facts whatever. And thereupon, the next day, April 11, 1840, the parties agreed that all documents, plans, depositions, evidence, and exhibits, read in the cause, should be taken for a statement of facts in the case. The whole mass, therefore, of various and conflicting evidence, mixed up with questions of law, if there be such questions, is submitted to the decision of the judges of this court. This is a form of exercising its appellate jurisdiction on writs of error which it is not supposed to be competent to this court to adopt. (2 Wheat., 363; 3 Peters, 410; 16 Peters, 169.)

Mr. Walker opposed the motion, and contended that there were three questions of law in the case, and that the statement of the judge was adopted, by agreement, as a special verdict.

Mr. Chief Justice TANEY delivered the opinion of the court:

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This is a writ of error from the Circuit Court of the United States for the Eastern District of Louisiana.

A motion has been made to dismiss the writ, upon the ground that the record contains no bill of exception, nor statement of facts by the court, according to the practice in Louisiana, by which any question of law is brought up for revision in such a form as to enable this court to decide upon it; and that there is a mass of various and conflicting testimony in relation to facts, upon which no jurisdiction can be exercised upon a writ of error.

Assuming this statement to be correct, it does not follow that advantage can be taken of it upon a motion to dismiss. The record shows that a judgment was rendered in the Circuit Court, over which this court undoubtedly have jurisdiction upon a writ of error. The plaintiffs allege that there is error in law in this judgment, and have brought it here for the revision of this court. And upon the argument of the [289* case it will be incumbent upon *them to show that the record presents, in some form or other, a statement of facts upon which a question of law arose in the Circuit Court, and which was there erroneously decided. And if he fails to do this, the judgment must be affirmed. But he is entitled to be heard, in order that he may show, if he can, that the error of which he complains appears in the record; and whether it does so appear or not, is a matter which cannot be inquired into in the form in which the case is now brought before us.

The motion must therefore be dismissed.

ORDER.

On consideration of the motion made in this cause on a prior day of the present term of this court, to wit, on Saturday, the 18th ult., by *Mr. Webster*, to dismiss this writ of error for the want of jurisdiction, and of the arguments of counsel thereupon had, as well in support of as against the said motion, it is thereupon now here considered and ordered by this court, that the said motion be, and the same is hereby dismissed.

S. C., 2 How., 322.
Cited—20 How., 441; 2 Black., 484; 3 Wall., 105; 10 Wall., 260; 11 Wall., 677; 12 Wall., 141; 1 Otto, 131; 7 Otto, 364.

JAMES TODD, *Appellant*,

v.

OTIS DANIELL, *Defendant*.

AN agreement in writing between the counsel, as well for the appellant as for the appellee, that the decree of the Circuit Court in this case shall be affirmed with legal damages and costs for the said Daniel, having been filed; it is thereupon considered and decreed by this court, that the decree of the said Circuit Court in this cause be, and the same is hereby affirmed, with costs and damages, at the rate of 6 per centum per annum; and also that the said appellee recover of the said appellant, the further sum of $125 for the costs of the transcript of the record in the Circuit Court according to the said agreement.

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*JAMES WILLIAMS, *Plaintiff in Error*, [*290

v

THE UNITED STATES, *Defendants in Error*.

Ministerial duties of President—directions for advance of public moneys not required to be personal—evidence of authorization—dockets and records of court evidence in suit against marshal's sureties.

The Act of Congress passed January 31st, 1823, prohibiting the advance of public money in any case whatsoever to the disbursing officers of government, except under the special direction of the President, does not require the personal and ministerial performance of this duty, to be exercised in every instance by the President under his own hand.

Such a practice, if it were possible, would absorb the duties of the various departments of the government in the personal action of the one chief executive officer, and be fraught with mischief to the public service.

The President's duty, in general, requires his superintendence of the administration, yet he cannot be required to become the administrative officer of every department and bureau, or to perform in person the numerous details incident to services which, nevertheless, he is, in a correct sense, by the Constitution and laws required and expected to perform.

It is legal evidence that the President specially authorized and directed, in writing, the Secretary of the Treasury to make such advances, and that such paper was destroyed, when the treasury building was burned. It is sufficient if the witness states his belief that it was so destroyed. The case in 9 Wheat., 486, examined and confirmed.

The dockets and records of a court, showing that money had been received by the marshal or his deputies, under executions, are good evidence in a suit against his securities. The acts of the court must, in the first instance, be presumed to be regular, and in conformity with settled usage; and are conclusive until reversed by a competent authority.

THIS case came up by writ of error from the Circuit Court of the United States for the District of Columbia, holden in and for the County of Washington.

The facts were these:

On the 4th of February, 1831, Henry Ashton was appointed marshal of the District of Columbia, and on the 7th executed a bond for the faithful performance of the duties, by himself and his deputies. There were several securities, among whom was James Williams, the plaintiff in error. He remained in office until the 28th of February, 1834.

In June, 1835, the United States brought suit upon the bond, to which there was a plea of performance. The replication assigned five breaches. 1. That he had neglected to return executions issued for fines and costs. 2. That he had discharged persons committed to his custody under execution. 3. That he had not accounted for fines paid. 4. That he had not accounted *for money advanced to him [*291 by the Secretary of the Treasury under the special direction of the President of the United States; and, 5. That he had discharged persons from prison without authority of law. To this replication there were a rejoinder and issues, and in 1839 the case was tried. The verdict of the jury was for the United States. The two bills of exception taken at the trial are set forth in the opinion of the court, and need not be repeated.

Mr. Bradley for the plaintiff in error.

Mr. Legaré, Attorney-General, for the United States.

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Mr Bradley made the following points:

1. The President of the United States holds a relation toward the Secretary of the Treasury different from that which he holds toward the head of any other department.

2. No money can be drawn from the treasury but in the manner and upon the vouchers designated by law.

3. Where a special discretion is given by positive law to the President to direct money appropriated by law to be paid out of the treasury, must be exercised by him alone, and cannot be delegated.

4. Where money is by law to be drawn from the treasury by a special authority, different from the usual manner, that special authority must be deposited in the Treasury Department, and form part in the settlement of the treasury account.

5. And: The treasury transcript is not evidence, *per se*, to charge a surety with money so paid to his principal; but must be accompanied by a copy of the voucher on which such payment was made.

To support them, he argued that the United States were bound to show the exercise of the special power vested in the President. The treasury transcript is not conclusive evidence that the money was drawn from the treasury legally. (5 Peters, 292; 8 Peters, 375.) Evidence of the contents of the order said to have been given by the President could not be received, as there was no proof of its loss. (2 Stark. Ev., 350.) Court say, in 1 Peters, 596, that proof must be given of its loss, and that it was searched for. If the money was not placed with the marshal according to law, the United States cannot recover.

292*] *As to the second exception:

The declarations of the marshal do not bind the sureties; not evidence unless in the regular course of his business, and he had nothing to do with the docket. If an indorsement be made on the writ, it is his official act, but not otherwise. (3 Bro. & Bing., 132.)

The Act of Maryland, February, 1777 (ch. 13, sec. 2), provides for the recovery of common law fines by *fieri facias* or *ca. sa.*, but the Act of 1797 (ch. 74), directs *capias ad satisfaciendum* to be issued for all fines. Here were *fi. fa.* for common law fines, which proceeding was contrary to law. The Act of 1794 (ch. 54), provides remedies against the sheriff, and, of course, the marshal; judgment should have been entered up against him. No action on the bond until a judicial sentence of default. (18 Johns., 391.)

Mr. Legarè, for the United States:

If the President could not delegate this power, he could do little else but look at marshal's accounts. But this court have recognized the authority to delegate. (*Wilcox* v. *Jackson*, 13 Peters; 10 Peters, 291: 1 Peters, 296.)

As to the evidence. The court has allowed reasonable evidence to be given. (7 Peters, 99; 12 Peters, 3.)

As to the Maryland practice.

The general rule is, that an admission of a deputy does not bind surety; but see 10 Barn. & Cress., 17, 317. In this case the party is dead, and it is his declaration against his own interest. But the acts of parties, part of the *res gesta*, are binding. (8 Wheat., 326; 3 Wash. C. C. R., 369.) The confession of an under sheriff evidence against the sheriff. (1 Lord Raym., 190.) At common law, *fi. fa.* could issue for fines. (3 Coke, 12 *b*; 2 Just., 19.) The act of Maryland was merely directory. Inventory of sheriff evidence between other parties. (Buller's *N. P.*, 249; 2 Campb., 379.)

Mr. Bradley, in conclusion:

The Act of 1809 (ch. 199) gives the President power to transfer appropriations; but no one supposes he can delegate this power to the secretary. In *Kendall's* case (12 Peters), the court draw a *distinction between general [*293 and special powers. General rule is, that discretionary powers cannot be delegated.

Mr. Justice DANIEL delivered the opinion of the court:

This cause comes up on a writ of error to the Circuit Court of the United States for the District of Columbia.

The defendants in error instituted an action of debt in the Circuit Court against the plaintiff in error, as surety for Henry Ashton, deceased, late marshal of the District of Columbia, in a bond executed by Ashton, conditioned for the faithful performance of the duties of his office. On oyer of the bond, the defendant pleaded generally conditions performed by the marshal and his deputies; after this plea various breaches of the condition of the bond were specially assigned, charging the late marshal with failing to account for moneys advanced to him by the Secretary of the Treasury, under special direction of the President of the United States; with not having accounted for and paid over moneys received by him and his deputies on executions, and with having failed to collect under executions which came to his hands, moneys that he ought to have collected from persons who were solvent. Issues were taken to the country upon the several breaches thus assigned, and the jury impaneled to try those issues, returned as their verdict, in substance, that the said Henry Ashton, by himself and his deputies, did not well and faithfully perform and fulfil all the duties of his office of marshal of the district, in pursuance of the acts of Congress in such cases made and provided; and they found the sum of $8,279.25, with interest thereon from the 24th day of November, 1836, to be really and justly due to the United States on the marshal's bond. Upon this verdict the court gave a judgment for $20,000, the penalty of the bond, but to be discharged by the amount assessed by the jury, together with the costs of suit.

At the trial, and before the jurors withdrew from the bar, the defendant below tendered two bills of exceptions to the ruling of the court in the cause, which bills of exceptions are as follow:

Defendant's first bill of exceptions: On the trial of this case, the plaintiff's, to support the issues joined, on their part, offered to give in evidence the accounts settled between the United States *and Henry Ashton, late [*294 marshal of the District of Columbia, upon whose official bond this action is brought against the defendant, as one of the sureties therein named. By these accounts it appears that a balance appears due from the said Ashton to the United States of $6,455.16. That

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in making up the said balance, various sums of money were, from time to time, during his continuance in office, advanced and paid to him, as marshal as aforesaid, out of the Treasury of the United States, by order of the Secretary of the Treasury, before the said Ashton, as marshal, had rendered accounts or vouchers, showing that he had himself advanced and paid the same, or any part thereof, to those entitled by law to receive the same; and while balances for moneys previously advanced to him existed on the books of the department, and before it had been shown that the same had been properly applied and expended, and when the said sum of $6,455.16 was not in fact due from the United States for any services rendered or money expended.

And the plaintiffs offered in evidence the statements of Asbury Dickins, formerly a clerk in the Treasury Department, and of McClintock Young, now chief clerk of said department; which, reserving all objections to the competency of such testimony, it was agreed should be received as if said parties had been sworn in the case, and had testified in accordance with said statements. To the admissibility of all which testimony the defendant objects, but the court overruled the objection, and the defendant, by his counsel, excepts; and the said evidence being thus admitted to go to the jury, the counsel for the plaintiffs prayed the court to instruct the jury, that upon this evidence the plaintiff was entitled to recover the said sum of $6,445.16 against the defendant; and the court overruling the objection of the defendant thereto, gave said instruction, to which the defendant excepts; and the court, in pursuance of the statute, sign and seal this bill of exceptions to all the matters so ruled, as aforesaid, this 11th day of January, 1840.

W. CRANCH. [L. S.]
B. THRUSTON, [L. S.]
JAMES S. MORSELL. [L. S.]

Second bill of exceptions: In the further trial of this cause, the plaintiffs produced the dockets and records of this court, showing that in a number of cases where judgment had 295*] been entered *against defendants for common law fines, forfeitures and costs, adjudged against the said defendants, and the said defendants had paid the said amounts, so respectively adjudged against them, to the marshal, and entries were thereupon made by the said marshal or his deputy, on the dockets of said courts, "money made and ready," "money paid," and that the amounts so received by said marshal amounted to the sum of ———.

And the plaintiffs further proved by the dockets, records, &c., as aforesaid, that certain sums of money were adjudged by the court aforesaid, against certain defendants, for common law fines, forfeitures, and costs, upon which writs of *ca. sa.* were issued, which writs were returned by the marshal, "satisfied marshal," and showed that the said sums so received by said Ashton amounted to ———.

And the defendant objected to the said several amounts as being recoverable in this action against the said defendant, and prayed the court to instruct the jury that he was not liable therefor; but the court refused so to instruct the jury, and instructed them that the defendant was liable for the amounts so received by said Ashton.

To which refusal the defendant, by his counsel, excepts, and prays the court to sign and seal this bill of exceptions, which is done accordingly, this 11th day of January, 1840.

W. CRANCH, [L. S.]
JAMES S. MORSELL. [L. S.]

The statements of Asbury Dickins and McClintock Young, referred to in the first bill of exceptions, are in the following words:

WASHINGTON, January 11, 1840.

DEAR SIR: In compliance with your request, I now state, as I mentioned to you verbally, some time ago, that it is within my recollection that soon after the passing of the "Act of the 31st of January, 1823, concerning the disbursement of public money," the Secretary of the Treasury was specially authorized and directed in writing, by the President of the United States, to make such advances of money, from time to time, to various classes of the disbursing officers of the government, and among others to the marshals of the United States, as should be found necessary, to the faithful and prompt discharge of their respective duties, and to the *fulfillment of the public engagements. [*296 The papers containing these directions of the President were, as I believe, destroyed in the late burning of the treasury building.

I am, dear sir, sincerely yours,
ASBURY DICKINS.

To Francis S. Key, Esq., &c., &c., &c.

DEAR SIR: In reply to your inquiry, I have to state, that all advances to marshals U. S. are made by the Secretary of the Treasury, and not by direction of the accounting officers.

Yours resp'y,
11th January, 1840. McC. YOUNG.
F. S. Key, Esq.

The questions presented for consideration here upon the aforegoing bills of exceptions, and the proofs to which they refer are these:

1. Whether the sums of money placed in the hands of the late marshal by the Secretary of the Treasury, and forming a part of the aggregate found by the verdict of the jury, were so advanced in conformity with the law, as to create a liability on the part of the sureties of the marshal for their proper application by that officer; and,

2. Whether the several sums admitted to have been paid to the marshal upon executions for fines, forfeitures, and costs adjudged against various defendants, and as to a part of which sums the marshal or his deputy had made upon "the dockets of the court," the following entries, "money made and ready" and "money paid;" and as to other portions of which levied on executions for fines and forfeitures, the marshal had made on the executions themselves this entry, "satisfied marshal," were so proved to have been received by the marshal in virtue of his office, as to render his sureties responsible for these latter sums.

Under the first of these inquiries, it is contended for the plaintiff in error, that the Act of Congress of January 31, 1823, expressly prohibits the advancing of public money in any case whatsoever, except under the special direction of the President, to the disbursing

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officers of the government, for the faithful and prompt discharge of their public duties, and to the fulfillment of the public faith: and it is insisted upon as the correct interpretation of this statute, that the power thereby vested to **297*]** make advances for the *public service, is not one appertaining to the office of President, but is an authority strictly personal and ministerial, to be exercised in every instance only by the individual himself, by his own hand, and never in any respect to be delegated. Such an interpretation of the law this court can by no means admit. While it has been doubtless the object of Congress to secure economy and regularity in public disbursements, and for that end to limit, as far as was proper, the discretion of subordinate agents over the public money, it never can be reasonable to ascribe to them a conduct which must defeat every beneficial end they could have in view, and render the government an absolutely impracticable machine. The President's duty in general requires his superintendence of the administration; yet this duty cannot require of him to become the administrative officer of every department and bureau, or to perform in person the numerous details incident to services which, nevertheless, he is, in a correct sense, by the Constitution and laws required and expected to perform. This cannot be, 1st. Because, if it were practicable, it would be to absorb the duties and responsibilities of the various departments of the government in the personal action of the one chief executive officer. It cannot be, for the stronger reason, that it is impracticable—nay, impossible. The position here assumed may be illustrated in the single example of a marshal. This officer has various duties to perform, which, though well understood, yet all of them, as to duration and extent, contingent, and varying, of course, as to the *quantum* of expense attending their performance. He is to summon and pay grand and petit juries and witnesses; to provide stationery and fuel for the court; guards for the transportation and safe keeping of prisoners; to pay the per diem allowed to clerks and attorneys, and other incidental charges. If the argument for the plaintiff in error be correct, it would be indispensable either that the President should ascertain (and that, too, before their performance, or, in other words, their existence) these indefinable services, and, when so ascertained, that he, under his own hand, and none other, should give special written instructions for the payment of each one of them; or that the marshal should, upon credit, or from his own private resources, obtain the performance of these services, and await his re-imbursement upon accounts to be subsequently **298*]** allowed and certified *by the court. Such consequences, so fraught with mischief to the public service, utterly forbid the construction of the law contended for by the plaintiff in error. If it be asked, How, then, shall the provisions and the purposes of the statute be fulfilled? the answer is obvious, and satisfies at once the meaning of the law and the public exigencies. Average estimates may be formed of the expenses incident to the courts, and instructions may be given by the President to the Secretary of the Treasury to make advances from time to time, either upon the basis of those estimates, or upon statements or requisitions made by the marshals themselves, showing the necessity of advances to meet the public service. And this plain and only feasible mode of complying with the law appears to have been adopted and to have become the settled usage of the government, as is shown by the testimony of Asbury Dickins, admitted by the parties to be received as if taken upon oath. It is insisted, however, that if this interpretation of the statute be the true one, still a compliance with its requirements has not been shown; that neither is an order from the President to the Secretary of the Treasury nor the copy of such an order produced; nor is the absence of both or either of these so accounted for as to authorize the admission of inferior evidence to supply their place. How stands this objection? Dickins, formerly a clerk in the Treasury Department, states it to be a fact "within his recollection, that soon after the passing of the Act of January 31, 1823, concerning the disbursement of the public money, the Secretary of the Treasury was specially authorized and directed in writing, by the President of the United States, to make such advances of money, from time to time, to various classes of disbursing officers of the government, and among others to the marshals, as should be found necessary to the faithful and prompt discharge of their respective duties, and to the fulfillment of the public engagements. The papers containing these directions of the President were, as he believes, destroyed in the late burning of the treasury building." The general principle as to the admissibility of secondary evidence is familiar to all, and will receive no comment from the court; but we will simply inquire whether the facts here shown do not present a case falling within the operation of that principle. What does Dickins prove? 1st. The existence of the special written instruction *from the [***299** President, made expressly to carry into effect the law of 1823, and forming the established rule and usage of the department; 2d. The conflagration of the Treasury Department, the legal and proper depository for this instruction; and, 3d. The belief of the witness, then a clerk in the department, and, by consequence, to a great extent cognizant of its arrangement and condition, that the document was destroyed in that conflagration. Authorities need not be multiplied to show that the case before us is completely within the rule respecting secondary evidence; a single decision of this court will be cited, as placing that matter wholly beyond controversy. In *Riggs* v. *Tayloe* (9 Wheat., 486), the court, after laying down the general rule, proceeds thus: "It is contended that the affidavit is defective; not being sufficiently certain and positive as to the loss of the particular writing. The affiant only states his impression that he tore it up; and if he did not tear it up, it has become lost or mislaid; that this is in the alternative, and not certain and positive. We do not concur in this reasoning. An impression is an image fixed in the mind; it is belief; and believing the paper in question was destroyed has been deemed sufficient to let in the secondary evidence." The testimony of Dickins appears to this court much more direct upon the point

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than that admitted in the case of *Riggs* v. *Taylor*; we consider it as fully justifying oral proof of the contents of the instrument to which it related, and as establishing the character and import of that instrument, as well as the usage founded thereupon; and upon this fact of the usage, Dickins is corroborated by the testimony of Young, the chief clerk in the Treasury Department at the time of the trial.

In considering the second exception made by the defendant, it may be remarked that the grounds of the exception are not stated with that distinctness and precision necessary to clear it entirely of obscurity; still the statement is thought to contain enough to guide the court to a correct solution of the question involved. The second bill of exceptions sets forth that the plaintiffs produced the dockets and records of the court, showing that in a number of cases where judgments had been entered against defendants for common law fines, forfeitures, and costs, and the said defendants had paid the amounts so respectively adjudged against them to the marshal, and entries were made by the 300*] said *marshal or his deputy, on the said dockets, "money made and ready," 'money paid;" and that the amounts so received amounted, &c. And again: The plaintiffs further proved by the dockets, records, &c., that certain sums of money were adjudged by the court against certain defendants for fines, forfeitures, &c., upon which judgments, writs *of ca. sa.* were issued, which writs were returned by the marshal, "satisfied marshal," and showed that the said sums amounted, &c. In the evidence set forth upon the face of these exceptions, nothing particular is disclosed relative to the modes of proceeding on executions, or of the means in practice by the court for recording and preserving the evidence of such proceedings, or of the acts and returns of the officers who may be charged with the management of final process; of course nothing is adduced to impeach the regularity of the reception by the court, of the returns and entries made by the marshal, or of the manner of placing them permanently upon the archives of the court. But it is admitted in the exception, that all these things are apparent on the records, viz.: The judgments and executions; the receipt of the money by the marshal, and his admissions of the receipt thereof, both by himself and his deputies. These facts are conceded to be parts of the records of the court to which the officer properly belonged, and before which his conduct was regularly cognizable: a tribunal in all respects competent to pass upon his acts; competent to fashion its records, and to preserve the evidences of its own proceedings and of the acts of its officers. The acts of this court, then, must, in the first instance, be presumed to be regular, and in conformity with settled usage; and they are conclusive until they shall be reversed by a competent power, and upon a case properly made. Upon both the instructions given and excepted to, in this cause, we approve the opinion of the Circuit Court, and therefore affirm the same.

ORDER.

This cause came on to be heard on the transcript of the record from the Circuit Court of the United States for the District of Columbia, holden in and for the County of Washington, and was argued by counsel; on consideration whereof, it is now here ordered and adjudged by this court, that the judgment of the said Circuit Court in this cause be, and the same is hereby affirmed.

Aff'g 5 Cranch C. C., 619.
Cited—2 Curt., 622.

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*ANDREW DUNCAN, *Plaintiff in Error*, [*301

v.

ISAAC DARST, HENRY DARST, AND JACOB DARST, *Defendants.*

One in custody under United States writ cannot be discharged under State law.

A person in custody under a *capias ad satisfaciendum* issued under the authority of the Circuit Court of the United States, cannot legally be discharged from imprisonment by a State officer, acting under a State insolvent law.

THIS case came up by writ of error from the Circuit Court of the United States for the Eastern District of Pennsylvania.

The facts in the case were not disputed, and were as follows:

Isaac Darst, Henry Darst, and Jacob Darst, citizens of the State of Ohio, recovered a judgment in the Circuit Court of Pennsylvania, against one Jacob Roth, who was arrested on a *capias ad satisfaciendum*, and handed over for safe keeping to Andrew Duncan, sheriff of the County of York. This was on the 6th of December, 1832. On the next day, Roth applied to George Barnitz, an associate judge of the Court of Common Pleas for the County of York, for the benefit of an Act of the Legislature of Pennsylvania, passed on the 28th of March, 1820, entitled, "A supplement to the act entitle A supplement to the act entitled An Act for the relief of insolvent debtors, passed the twenty-ninth of January, one thousand eight hundred and twenty."

The first section of the act referred to is as follows:

"That if any debtor shall hereafter be arrested or held in execution, on a bailpiece, in a civil suit, and who shall have resided six months in this Commonwealth previously thereto, he may apply, when arrested on execution, to the president or any associate judge of the Court of Common Pleas of the county in which he is so arrested, or when held on a bailpiece, may apply to the president or associate judge of the said court, in the county in which the suit was instituted, and give bond to the plaintiff or plaintiffs, at whose suit he is so arrested and held, with such security as shall be required and approved of by the said judge: the condition of which bond shall be, that the said debtor shall be and appear at the next Court of Common Pleas for said county, and there take the benefit of the insolvent laws of this Commonwealth, and to surrender himself to the jail of the said county, if he fail to comply with all things required by law to *entitle him [*302 to be discharged, and generally to abide all orders of the said court: whereupon the said judge shall give an order to the sheriff, consta-

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ble, or other person, having such debtor in custody, to forthwith discharge him upon his paying the jail fees, if any be due."

It was admitted that this act was in force on the 7th of December, 1832, and for a long time afterwards; that Roth had resided in the Commonwealth of Pennsylvania for six months previously to his application, and that he complied, in all respects, with the provisions of the above section. The judge gave an order to the sheriff having Roth in custody, to forthwith discharge him upon his paying the jail fees, and he was thereupon discharged.

Darst brought an action against Duncan for an escape, who pleaded specially the above matters in his defense. The plaintiff demurred to the plea, and the demurrer was sustained in the Circuit Court; and, upon the validity of this demurrer, the case was brought up to this court.

The statute of Pennsylvania, above recited, required the party who desired to be discharged from imprisonment, to give bond that he would appear at the next Court of Common Pleas, and there take the benefit of the insolvent laws of the Commonwealth. Upon a reference to the acts then existing, it will be found that the privileges conferred upon the debtor and the duties required of him, by the insolvent laws, are the following: He was to be declared free from imprisonment, not only upon that suit, but from subsequent arrests, on his giving a warrant to appear in court; and although the property which he might subsequently acquire was subject to execution, yet the court was at liberty to exempt it, provided two thirds of his creditors assented. The duties required of the debtor were, that he should hand in a list of his property, creditors, debts, and losses; that he should not be guilty of collusion or false swearing; that he should not conceal or convey away his property, under penalty of imprisonment; and that he should be liable to punishment at hard labor, if found to be a fraudulent debtor. The property of and debts due to the debtor were vested in trustees, who were to convert them into cash and divide it among the creditors; the surplus, if any, belonging to the debtor.

303*] *This is the process through which it was necessary to pass, according to the bond of anyone who might be discharged from imprisonment, as Roth was.

Mr. Read for the plaintiff in error.

Mr. Penrose for defendant.

Mr. Read, for plaintiff, took the following positions:

1. The 3d section of the Process Act of the 19th May, 1828, expressly adopted the Act of Assembly of Pennsylvania of the 28th March, 1820, and particularly the first section thereof, as a part of the proceedings on writs of execution, issued out of the courts of the United States, sitting within the State of Pennsylvania, and the discharge therefor of the said Jacob Roth, in pursuance thereof, was a lawful one, and obligatory both upon the said sheriff of York and the plaintiff in the execution.

2. That the said defendant, a State officer, in thus obeying the legal order of a State judge under a State law, adopted by the express words of an act of Congress, was not guilty of an escape.

3. That under the circumstances appearing on the record, no action of debt for an escape would lie against the plaintiff in error.

To sustain these positions, he referred to *Wayman* v. *Southard* (10 Wheat., 1), *United States Bank* v. *Halstead* (10 Wheat., 51), *Beers* v. *Haughton* (9 Peters, 329), *Ross* v. *Duval* (13 Peters, 45), *Amis* v. *Smith* (16 Peters, 303); *Bronson* v. *Kinzie*, decided at the present term.

In 9 Peters, 362, all the laws regulating State officers were adopted, and the reason is found in 12 Wheat., 283.

In 1789, the United States applied to the States for the use of their jails (1 Story, 70, 207); and Pennsylvania complied. (2 Smith's Laws of Pa., 513.) [*Mr. Read* referred to and commented upon the several acts of Congress respecting writs and processes, and traced the history of laws relaxing imprisonment for debt.]

Mr. Penrose, for defendants, entered into a critical examination of the powers of the federal government and States, and contended, that whether the Act of Congress of 1828 adopted State insolvent laws or not, it did not intend that they should be enforced by State officers, to the exclusion of the jurisdiction of the United States courts. He then reviewed the cases cited on the other side, and maintained that they did not authorize the positions assumed.

304*] *Mr. Read*, in reply:

The argument made on the other side takes the same ground as the dissenting opinion of *Mr. Justice* Thompson, in the case of *Ogden* v. *Saunders*. But the court did not so think. In 1819, Pennsylvania passed a law exempting females from imprisonment for debt, which was not enacted by Congress until 1838. In the mean time, they would have been subject to this process from the federal court, if the argument on the other side be correct. In 1828, it was declared that the United States courts should have the same rules as State courts. Suppose a man imprisoned under process from both courts; could he come out, under the Insolvent Law, from one and not the other? If so, how have they both the same rules?

Mr. Justice CATRON delivered the opinion of the court:

It appears from the record that in 1824 Darst and others recovered, in the Circuit Court of the United States for the Eastern District of Pennsylvania, a judgment against Jacob Roth, for the sum of $5,465.

In November, 1832, a *capias ad satisfaciendum* was sued out against him, returnable to the April Term, 1833, of the court. On the 6th of December, 1832, the marshal arrested Roth, and delivered him to Duncan, the sheriff and jailer of York County, for safe keeping in the jail of that county, until discharged by due course of law. On the 7th of December, Duncan discharged him from custody, and the present suit was brought for an escape.

He pleaded in justification, that Roth applied to G. B., an associate judge of the Court of Common Pleas of York County, gave bond and security to appear at the next Court of Common Pleas, then and there to take the benefit of the insolvent laws of Pennsylvania; and to surrender himself to the jail of the county, if he failed to comply with all things required by

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law, to entitle him to be discharged, &c. To this plea there was a demurrer, and judgment for the plaintiffs.

To the regularity of the writ of *capias ad satisfaciendum*, to its execution on the body of Roth; or to his delivery to Duncan as the proper jailer to receive him, there is no objection made: the case turns exclusively on the question, 305*] whether by giving *bond and security to appear in the Insolvent Court, the sheriff was authorized to release Roth from imprisonment.

It is admitted that had Roth been arrested by a sheriff on a *ca. sa.*, issued from a State court of Pennsylvania, a discharge would have been proper on his giving the bond: and it is contended the same consequence followed in this case, because the acts of Congress had adopted the modes of proceeding on final process governing the State courts and officers.

This brings up the question, to what extent Congress had adopted the various causes of discharge (in 1832), provided by the State laws, for the release of debtors, imprisoned by virtue of writs of *ca. sa.* issued by courts of the United States: beyond the State laws adopted, it is settled the federal courts are not bound to conform to State regulations. What State laws apply, and regulate the modes of proceeding in the courts of the United States, depends on a proper understanding of the acts of Congress, on the subject.

The first in order, is that of 1789 (ch. 21, sec. 2); which declares, the forms of writs and executions, and the modes of process in suits at common law, shall be the same in each State respectively as are now used, or allowed in the supreme courts of the same. This act was temporary, but is referred to, and in part sanctioned, by that of 1792 (ch. 36, sec. 2). This declares: That the forms and modes of proceeding, in suits at common law, shall be the same as are now used in the courts of the United States respectively, in pursuance of the Act of 1789 (ch. 21).

By the first section of the Act of 1828 (ch. 68), the then processes and modes of proceeding of the highest State court of original jurisdiction are prescribed as applicable to the courts of the United States in the States respectively that came into the Union after 1789.

But the third section applies to the old and new States equally, except Louisiana; and declares: "That writs of execution, and other final process, issued on judgments and decrees, and the proceedings thereupon, shall be the same in each State respectively, as are now used in the courts of such State." Giving the courts power to alter final process by rules so far only as to conform to any State law subsequently passed, on the subject. No rules have been adopted in Pennsylvania, and the acts of Congress referred to therefore govern this case.

306*] *The terms, "modes of process," in the Act of 1789; and, "proceedings upon executions, and other final process." In the Act of 1828, have the same meaning, and include all the regulations and steps incident to that process, from its commencement to its termination as prescribed by the State laws; so far as they can be made to apply to the federal courts: as this court held in *Wayman* v. *Southard* (10 Wheat., 27, 28), and, also, in *Beers* v. *Houghton* (9 Peters), *United States* v. *Knight* (14 Peters), *Amis* v. *Smith* (16 Peters, 312).

Congress, however, did not intend to defeat the execution of judgments rendered in the courts of the United States; but meant they should have full effect by force of the State laws adopted: and therefore all State laws regulating proceedings, affecting insolvent persons; or that are addressed to State courts, or magistrates in other respects, which confer peculiar powers on such courts and magistrates, do not bind the federal courts, because they have no power to execute such laws. The case of *Palmer* v. *Allen* (7 Cranch, 563) is to this effect: Palmer as deputy-marshal arrested Allen on a *capias ad respondendum*, in the District of Connecticut and imprisoned him. By the laws of that State, this could not be done, without a *mittimus* from a magistrate. This court held the process acts did not adopt the law of Connecticut, which required the *mittimus*: "That it was a peculiar municipal regulation, not having any immediate relation to the progress of the suit, and only imposing a restraint on the State officers; but altogether inoperative upon those of the United States." Had it been necessary to ask the aid of the magistrate, to execute the process, then he would have had the discretion to refuse, and thereby to defeat it.

As State courts, or magistrates, cannot be compelled to aid a federal court in the exercise of its jurisdiction; so neither can they be permitted to restrain its process by injunction, or otherwise, as was held in *McKim* v. *Voorhies* (7 Cranch). It follows, that a State law, regulating the practice of State courts, and addressed to its judges and magistrates; but which can only be executed by them, or with their aid, is a peculiar municipal regulation; not adopted by the acts of Congress, nor applicable to the courts of the United States.

The case of *Duncan* must be tested by these rules. Roth applied *to a judge of the [*307 Common Pleas, and gave a bond, to appear at that court, at its next term, and take the benefit of the insolvent laws. On this single step being taken, the jailer discharged him. The proceeding had no reference to the process by which Roth was imprisoned; but to a new proceeding, proposed to be instituted, by which all his property should be equally distributed among all his creditors; and his person be exempted in future from arrest for his existing debts when discharged.

As all the creditors of Roth had the right to become parties to the proceeding in the Insolvent Court, no matter where they resided, it is manifest the Circuit Court of the United States could take no jurisdiction of the parties, nor execute the Insolvent Law, had an application been made to that court for such purpose. It is therefore a peculiar law, as respects the court of the United States: is strictly municipal in its character; and as it could only be executed by the State courts, no action under it, by these courts, could affect the process by which Roth was imprisoned.

This opinion is in conformity to the decision of the Supreme Court of Pennsylvania, in the case of *Duncan* v. *Klinefetter* (5 Watts' Rep., 141). That was an action on the case, by the present plaintiff in error, Duncan, against the jailer his deputy, for discharging Roth; where-

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by, Duncan alleged he had sustained damage.

It is insisted the foregoing conclusion is in conflict with the decision of this court in the case of *Beers* v. *Haughton* (9 Peters); and which decision is confidently relied on as governing this case. In that case, Beers sued Harris in the Circuit Court of Ohio; Haughton became bail for Harris. Judgment was recovered in December, 1830; a *ca. sa.* was run against Harris, and returned not found.

In February, 1832, Harris took the benefit of the Insolvent Law of Ohio: by this proceeding his person was exempted from arrest in all cases, for debts previously contracted.

In December, 1832, Beers sued Haughton on the bail-bond; who pleaded and relied on the discharge of Harris.

By the laws of Ohio, the bail has the right to surrender the principal at any time before he is thus sued, and served with the process.

Haughton undertook that Harris should surrender his person, if he failed to pay the debt. To enforce this condition, the *ca. sa.* issued. The bail had the right to arrest the principal, **308***] and deliver *him to the marshal, who could imprison the debtor as if arrested by the *ca. sa.* Not being subject to imprisonment after the discharge under the insolvent law, the marshal could not receive the prisoner; nor could he have lawfully arrested him. It followed, the bail was equally inhibited; and of course discharged from performance, by the act of the law; just as certainly as he would have been discharged by the act of God, had Harris died, at the time he was released under the Insolvent Act. This is the doctrine settled in *Beers* v. *Haughton.*

Had Roth been discharged in the Insolvent Court, by its judgment, from future imprisonment, before the *ca. sa.* was executed by the marshal; then a case would have arisen, to which the principle declared in that of *Beers* v. *Haughton* would apply; as the State of Pennsylvania had the undoubted right to exempt persons thus discharged from imprisonment for debt; so she might exempt all persons whatever. But it does not follow that one not excepted from the operation of the general law, who had been properly arrested, and imprisoned by the process of a federal court, could be discharged by a State judge. The general rule is (10 Co., 76, *b*, same cases cited in *note*, 5 Watts' R., 144; and nothing is better settled) that an officer is not justified in obeying the order of a judge, or court, having no jurisdiction in the matter; and this rule applies in an especial manner, as between the State and federal courts; where it never has been supposed that the judges of the one could control the process of the other. If it was otherwise, and writs of injunction, of *supersedeas*, and orders to discharge defendants from imprisonment, could be granted by State courts, or judges, to render ineffectual process issued from the courts of the United States, the jurisdiction of the latter might be, and probably would be, overthrown in parts of the Union; as it would be the exercise of the power of prohibition; and might be extended to defeat the fruits of all judgments rendered by federal courts, at the discretion of State courts and judges. A conflict of jurisdiction, fraught with more dangerous consequences, could not well be supposed; and to concede the validity of the discharge of Roth, would involve such a consequence, however innocently meant by the State judge; of whose integrity of intention, we have no doubt.

If, during Roth's confinement in prison, he had been declared *insolvent by the [***309** Court of Common Pleas of York County; then it might have been a question properly made before the Circuit Court of the United States, whether he should be discharged from imprisonment. But as such a motion would have called into exercise the legal discretion of the court upon a mixed question of law and fact, it can be affirmed with something like safety that the merely giving a bond to appear before the Insolvent Court, would not have been sufficient to authorize his release from imprisonment. Be this as it may, that court alone had jurisdiction to act in the matter.

It is insisted for the defendant in error, that the Act of Congress of 1800 (ch. 4), for the relief of persons imprisoned for debt, is the only law by which a discharge can be had, from a *ca. sa.*, awarded by a court of the United States. We do not think so. By that law, the district judges are authorized by themselves, or through commissioners appointed for the purpose, to discharge the debtor; he must show, and swear, that he is not worth thirty dollars, and give notice to the execution creditor before a discharge can be ordered. The debtor may have, and usually has, outstanding claims to choses in action, and interests in property of various kinds; perhaps contingent, and remote; probably of little value, or it might turn out they are of much value; and as he has to swear that he has no estate, real or personal, in possession, reversion, or remainder, to the amount or value of thirty dollars, it will often happen the oath cannot be taken by the most honest and conscientious debtor. The consequence is, he must remain in prison until the humanity of the creditor interposes; and as he usually resides at a distance, cases of the greatest hardship and distress may occur, if the State laws afford no additional remedy. Whereas, by the laws of some of the States, he may give bond and security, when the process issues from a State court to the sheriff, to appear at the return term of the writ, and give in a schedule of his property; the title and possession of which are conferred on the sheriff for the benefit of the execution creditor; and the proceeds are applied to the satisfaction of the judgment; and then the debtor is permitted to take the insolvent oath, and be discharged.

As the marshals and courts of the United States are necessarily governed by the same rules that the sheriffs and courts of the respective *States are, in this respect, they [***310** must proceed in the same manner.

So there are other modes of discharge prescribed by the State laws, that can be executed just as conveniently and properly, by the federal courts and judges, as they can be by the State courts or judges, in cases where the execution issues from the latter courts. State laws of this description have been adopted by the acts of Congress, as incident to the remedy; they are cumulative, and in addition to the Act of Congress of 1800, both being in force.

As we have adopted in effect the same construction, where property had been levied on,

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in *Amis* v. *Smith* (16 Peters, 312), it would be harsh to hold otherwise, in restraint of personal liberty.

In that case, a forthcoming bond, for property levied on, had been taken by the marshal, and the property been released according to the laws of Mississippi; the statute of that State, authorizing such a bond and the release of the property. This mode of proceeding was held to be incident to the process of execution, because it had been adopted by the Act of Congress of 1828; previously, no delivery bond could have been taken, nor the property released by the marshal.

If bond and security could be taken for the delivery of property seized, the same could not be refused, for the appearance at court of the defendant, conditioned that he give in a schedule of his property, and take the benefit of the insolvent laws; when the statutes of the State where the proceeding was had, expressly commanded it to be done in like cases, under process issued from the State courts, directed to their officers.

We think the judgment of the Circuit Court upon the demurrer was correct, and order it to be affirmed.

ORDER.

This cause came on to be heard on the transcript of the record from the Circuit Court of the United States for the Eastern District of Pennsylvania, and was argued by counsel; on consideration whereof, it is now here ordered and adjudged by this court, that the judgment of the said Circuit Court in this cause be, and the same is hereby affirmed, with costs and damages at the rate of 6 per centum per annum.

Cited—2 How., 13, 17, 18; 6 Wall., 195, 517; 2 Curt., 6, 191, 494, 569; 7 Bank. Reg., 426; 3 Blatchf., 242.

311*] *ARTHUR BRONSON, *Complainant.*

v.

JOHN H. KINZIE AND JULIETTE A., HIS WIFE, EDMUND K. BUSSING AND JOHN S. BUSSING, THE PRESIDENT, DIRECTORS AND COMPANY OF THE STATE BANK OF ILLINOIS, JAY HATHWAY, MARY ANN WOLCOTT, DANIEL S. GRISWOLD, CAROLINE DUNHAM, AND ALONZO HUNTINGTON, *Defendants.*

Constitutionality of State laws.

A State law, passed subsequently to the execution of a mortgage, which declares that the equitable estate of the mortgageor shall not be extinguished for twelve months after a sale under a decree in chancery, and which prevents any sale unless two thirds of the amount at which the property has been valued by appraisers shall be bid therefor, is within the clause of the tenth section of the first article of the Constitution of the United States, which prohibits a State from passing a law impairing the obligation of contracts.

MR. CHIEF JUSTICE TANEY delivered the opinion of the court:

This case comes before the court upon a division of opinion in the Circuit Court of the United States for the District of Illinois, upon certain questions which arose in the case, and which have been certified to this court according to the act of Congress.

It appears from the record, that, on the 13th of July, 1838, John H. Kinzie executed a bond to Arthur Bronson, conditioned for the payment of $4,000, on the 1st of July, 1842, with interest thereon, to be paid semi-annually; and, in order to secure the payment of the said sum of money and interest, Kinzie and wife, on the same day, conveyed to the said Bronson, in fee-simply, by way of mortgage, one undivided half part of certain houses and lots in the town of Chicago, with the usual proviso that the deed should be null and void if the said principal and interest were duly paid; and Kinzie, among other things, covenanted that, if default should be made in the payment of the principal or interest, or any part thereof, it should be lawful for Bronson or his representatives to enter upon and sell the mortgaged premises at public auction, and, as attorney of Kinzie and wife, to convey the same to the purchaser; and out of the moneys arising from such sale, to retain the amount that might then be due him on the aforesaid bond, with the costs and charges of sale, rendering the overplus, if any, to Kinzie.

The interest not having been paid, Bronson, on the 27th of *March, 1841, filed his [*312 bill to foreclose the mortgage. In the mean time, after the mortgage was made, and before the bill was filed, the Legislature of Illinois, on the 19th of February, 1841, passed a law, the 8th section of which provided that mortgageors and judgment creditors should have the same right to reedeem mortgaged premises sold by the decree of a court of chancery, that had been given to the debtors and judgment creditors by a previous law passed in 1825, in cases where lands were sold under execution. The law of 1825 authorized the party whose lands should be sold by execution, after that law took effect, to redeem them within twelve months from the day of sale, by repaying the purchase money with interest at the rate of 10 per cent.; and if the debtor did not redeem it within the time limited, any judgment creditor was authorized to do so upon the like terms, within fifteen months from the sale. This act, which took effect on the 1st of May, 1825, was held, it seems, not to extend to sales of mortgaged premises under a decree of foreclosure; and the Act of February 19, 1841, above mentioned, was passed to embrace them.

By another act of the Legislature of Illinois, approved the 27th of February, 1841, it was directed that, "when any execution should be issued out of any of the courts of the State, and be levied on any property, real or personal, or both, it should be the duty of the officer levying such execution to summon three householders of the proper county, one of whom should be chosen by such officer, one by the

NOTE—*As to constitutionality of ex post facto laws*, see note to Calder v. Bull, 3 Dall., 386.

As to ex post facto laws as affecting vested rights, and therefore unconstitutional as impairing obligation of contracts, see note to Fletcher v. Peck, 6 Cranch, 87, and note to Sturges v. Crowninshield, 4 Wheat., 122.

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plaintiff, and one by the defendant in the execution; or, in default of the parties making such choice, the officer should choose for them; which householders, after being duly sworn by such officer so to do, should fairly and impartially value the property upon which such execution was levied, having reference to its cash value: and that they should indorse the valuation thereof upon the execution, or upon a piece of paper thereunto attached, signed by them: and when such property should be offered for sale, it should not be struck off, unless two thirds of the amount of such valuation should be bid therefor." It further provided, among other things, that all sales of mortgaged property should be made according to the provisions of that act, whether the foreclosure of said mortgage was by judgment at law or decree in chancery. It also directed that the pro-
313*] visions *of this law should extend to all judgments rendered prior to the 1st of May, 1841, and to all judgments that might be rendered on any contract or cause of action accruing prior to that day, and not to any other judgments than as before specified. These are, in substance, the provisions of these acts, as far as they are material to the present controversy.

On the 19th of June, 1841, after the laws above mentioned had been passed, the Circuit Court of the United States for the District of Illinois adopted the following rules:

"Ordered, that when the marshal shall levy an execution upon real estate, he shall have it appraised and sold under the provisions of the law of this State, entitled 'An Act regulating the sale of property,' approved February 27, 1841, if the case come within the provisions of that law; and any two or three householders selected under the law, agreeing, may make the valuation of the premises required.

"Before the sale of any real estate on execution, the marshal shall give notice thirty days in a newspaper published in the county where the land lies; and if there be no paper published in the county, then the notice shall be given thirty days before the sale, by notice, as the statute requires. The court adopt the 8th section of the Act of this State, to amend the act concerning judgments, &c., passed 19th of February, 1841, which regulates the sale of mortgaged premises, &c., except where special direction shall be given in the decree of sale."

After these rules were adopted—that is to say, at December Term, 1841—the bill filed by Bronson, as herein before mentioned, came on for final hearing in the Circuit Court; and thereupon the complainant moved the court for a final decree of strict foreclosure of said mortgage, or that the mortgaged premises should be sold to the highest bidder, without being subject to said rule and the act referred to. This motion was resisted on part of defendants, who moved that the decree should direct the sale according to said rule and act.

And the judges being opposed in opinion on the following points, to wit:

1. Whether the decree in this case should be so entered as to direct the sale of the said mortgaged premises according to the said statute of the State of Illinois above mentioned; or
314*] whether *the same premises should be sold at public auction, to the highest bidder, without regard to the said law.

2. Whether the decree in this case shall or shall not direct the sale of the mortgaged premises, without being first valued by three householders, and without requiring two thirds of the amount of the said valuation to be bid, according to the said act of the State of Illinois.

3. Whether the terms of the mortgage in this case, do or do not require it to be excepted from the operation of the rule above recited.

On motion of the complainant, it was ordered and directed that this cause, with said points, be certified to the Supreme Court, in pursuance of the act of Congress. And it is upon these questions, thus certified, that the case is now before us; and the 8th section of the Act of February 19th, and the entire act of February 27, are set forth at large in the record, as the laws referred to in the above-mentioned rules of the Circuit Court. The case has been submitted to the court, for decision, by a written agreement between the counsel on both sides. On the part of the complainant, a printed argument has been filed, but none has been offered on behalf of the defendant. As the case involves a constitutional question of great importance, we should have preferred a full argument at the bar. But the parties are entitled, by the rules of the court, to bring it before us in the manner they have adopted; and it being our duty to decide the questions certified to us by the Circuit Court, we have bestowed upon the subject the careful and deliberate consideration which its importance demands.

Upon the points certified, the question is, whether the laws of Illinois, of the 19th and the 27th of February, 1841, come within that clause of the 10th section of the 1st article of the Consiitution of the United States which prohibits a State from passing a law impairing the obligation of contracts.

The laws of a State, regulating the process of its courts, and prescribing the manner in which it shall be executed, of course do no bind the courts of the United States, whose proceedings must be governed by the acts of Congress. The Act of 1792, however, adopted the process used in the State courts, as it stood in 1789; and, since then, the Act of 1828, on the same subject, *has been passed: and the 3d sec-[*315
tion of this law directs that final process issued on judgments and decrees in any of the courts of the United States, and the proceedings thereupon, shall be the same, except their style, in each State, respectively, as were then used in the courts of such State, and authorizes the courts of the United States, if they see fit, in their discretion, by rules of court, so far to alter final process as to conform the same to any change which might afterwards be adopted, by the Legislatures of the respective States, for the State courts. Any acts of a State Legislature, therefore, in relation to final process, passed since 1828, are of no force in the courts of the United States, unless adopted by rules of court, according to the provisions of this act of Congress. And, although such State laws may have been so adopted, yet they are inoperative and of no force, if in conflict with the Constitution or an act of Congress.

As concerns the obligations of the contract upon which this controversy has arisen, they depend upon the laws of Illinois as they stood at the time the mortgage deed was executed.

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The money due was indeed to be paid in New York. But the mortgage given to secure the debt was made in Illinois for real property situated in that State, and the rights which the mortgagee acquired in the premises depended upon the laws of that State. In other words, the existing laws of Illinois, created and defined the legal and equitable obligations of the mortgage contract.

If the laws of the State passed afterwards had done nothing more than change the remedy upon contracts of this description, they would be liable to no constitutional objection. For, undoubtedly, a State may regulate at pleasure the modes of proceeding in its courts in relation to past contracts as well as future. It may, for example, shorten the period of time within which claims shall be barred by the statute of limitations. It may, if it thinks proper, direct that the necessary implements of agriculture, or the tools of the mechanic, or articles of necessity in household furniture, shall, like wearing apparel, not be liable to execution on judgments. Regulations of this description have always been considered, in every civilized community, as properly belonging to the remedy, to be exercised or not by every sovereignty, according to its own views of policy and humanity. It must reside in every State to enable it to secure its citizens from unjust and 316*] *harassing litigation, and to protect them in those pursuits which are necessary to the existence and well-being of every community. And, although a new remedy may be deemed less convenient than the old one, and may in some degree render the recovery of debts more tardy and difficult, yet it will not follow that the law is unconstitutional. Whatever belongs merely to the remedy may be altered according to the will of the State, provided the alteration does not impair the obligation of the contract. But if that effect is produced, it is immaterial whether it is done by acting on the remedy or directly on the contract itself. In either case it is prohibited by the Constitution.

This subject came before the Supreme Court in the case of *Green* v. *Biddle*, decided in 1823, and reported in 8 Wheat., 1. It appears to have been twice elaborately argued by counsel on both sides, and deliberately considered by the court. On the part of the demandant in that case, it was insisted that the laws of Kentucky passed in 1797 and 1812, concerning occupying claimants of land, impaired the obligation of the compact made with Virginia in 1789. On the other hand, it was contended that these laws only regulated the remedy, and did not operate on the right to the lands. In deciding the point the court say, "It is no answer that the acts of Kentucky now in question are regulations of the remedy, and not of the right to the lands. If these acts so change the nature and extent of existing remedies as materially to impair the rights and interests of the owner, they are just as much a violation of the compact as if they directly overturned his rights and interests." And in the opinion delivered by the court after the second argument, the same rule is reiterated in language equally strong. (See pages 75,[1] 76, and 84.) This *judgment of the court is entitled to [*317 the more weight, because the opinion is stated in the report of the case to have been unanimous; and Judge Washington, who was the only member of the court absent at the first argument, delivered the opinion of the second.

We concur entirely in the correctness of the rule above stated. It is difficult, perhaps, to draw a line that would be applicable in all cases between legitimate alterations of the remedy and provisions which, in the form of remedy, impair the right. But it is manifest that the obligation of the contract, and the rights of a party under it, may, in effect, be destroyed by denying a remedy altogether; or may be seriously impaired by burdening the proceedings with new conditions and restrictions, so as to make the remedy hardly worth pursuing. And no one, we presume, would say that there is any substantial difference between a retrospective law declaring a particular contract or class of contracts to be abrogated and void, and one which took away all remedy to enforce them, or encumbered it with conditions that rendered it useless or impracticable to pursue it. Blackstone, in his Commentaries on the Laws of England (1 vol.,55), after having treated of the declaratory and directory parts of the law, defines the remedial in the following words:

"The remedial part of the law is so necessary a consequence of the former two, that laws must be very vague and imperfect without it. For, in vain would rights be declared, in vain directed to be observed, if there were no method of recovering and asserting those rights when wrongfully withheld or invaded. This is what we mean properly when we speak of the protection of the law. When, for instance, the declaratory part of the law has said 'that the field or inheritance which belonged to Titius's father is vested by his death in Titius; and the directory part has forbidden anyone to enter on another's property without the leave of the owner; if Gaius, after this, will presume to take possession of the land, the remedial part of the law will then interpose its office, will make Gaius restore the possession to Titius, and also pay him damages for the invasion."

We have quoted the entire paragraph, because it shows, in a few plain words, and illustrates by a familiar example, the connection of the remedy with the right. It is the part of the municipal law *which protects the [*318 right, and the obligation by which it enforces and maintains it. It is this protection which the clause in the Constitution now in question mainly intended to secure. And it would be unjust to the memory of the distinguished men who framed it, to suppose that it was designed to protect a mere barren and abstract right, without any practical operation upon the business of life. It was undoubtedly adopted as a part of the Constitution for a great and useful purpose. It was to maintain the integrity of contracts, and to secure their faithful execution throughout this Union, by placing them under the protection of the Constitution of the United States. And it would but ill become this court, under any circumstances, to depart from the plain meaning of the words used, and to sanc-

1.—"Nothing, in short, can be more clear, upon principles of law and reason, than that a law which divests to the owner of land a remedy to recover the possession of it when withheld by any person, however innocently he may have obtained it; or to recover the profits received from it by the occu-

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tion a distinction between the right and the remedy, which would render this provision illusive and nugatory; mere words of form, affording no protection, and producing no practical result.

We proceed to apply these principles to the case before us. According to the long-settled rules of law and equity in all of the States whose jurisprudence has been modeled upon the principles of the common law, the legal title to the premises in question vested in the complainant, upon the failure of the mortgageor to comply with the conditions contained in the proviso; and at law, he had a right to sue for and recover the land itself. But, in equity, this legal title is regarded as a trust estate, to secure the payment of the money; and, therefore, when the debt is discharged, there is a resulting trust for the mortgageor. (*Conard* v. *The Atlantic Insurance Company*, 1 Peters, 441.) It is upon this construction of the contract that courts of equity lend their aid either to the mortgageor or mortgagee, in order to enforce their respective rights. The court will, upon the application of the mortgageor, direct the re-coveyance of the property to him, upon the payment of the money; and, upon the application of the mortgagee, it will order a sale of the property to discharge the debt. But as courts of equity follow the law, they acknowledge the legal title of the mortgagee, and never deprive him of his right at law until his debt is paid; and he is entitled to the aid of the court to extinguish the equitable title of the mortgageor, in order that he may obtain the benefit of his security. For this purpose, it is his absolute and undoubted right, under an ordinary mort-
319*] gage deed, *if the money is not paid at the appointed day, to go into the Court of Chancery, and obtain its order for the sale of the whole mortgaged property (if the whole is necessary), free and discharged from the equitable interest of the mortgageor. This is his right, by the law of the contract; and it is the duty of the court to maintain and enforce it, without any unreasonable delay.

When this contract was made, no statute had been passed by the State changing the rules of law or equity in relation to a contract of this kind. None such, at least, has been brought to the notice of the court; and it must, therefore, be governed, and the rights of the parties under it measured by the rules above stated. They were the laws of Illinois at the time; and, therefore, entered into the contract, and formed a part of it, without any express stipulation of that effect in the deed. Thus, for example, there is no covenant in the instrument giving the mortgageor the right to redeem, by paying the money after the day limited in the deed, and before he was foreclosed by the decree of the court of Chancery. Yet no one doubts his right or his remedy; for, by the laws of the State then in force, this right and this remedy were a part of the law of the contract, without any express agreement by the parties. So, also, the rights of the mortgagee, as known to the laws, required no express stipulation to define or secure them. They were annexed to the contract at the time it was made, and formed a part of it; and any subsequent law, impairing the rights thus acquired, impairs the obligations which the contract imposed.

This brings us to examine the statutes of Illinois which have given rise to this controversy. As concerns the law of February 19, 1841, it appears to the court not to act merely on the remedy, but directly upon the contract itself, and to engraft upon it new conditions injurious and unjust to the mortgagee. It declares that, although the mortgaged premises should be sold under the decree of the Court of Chancery, yet that the equitable estate of the mortgageor shall not be extinguished, but shall continue for twelve months after the sale; and it moreover gives a new and like estate, which before had no existence, to the judgment creditor, to continue for fifteen months. If such rights may be added to the original contract by subsequent legislation, it would be difficult to say at what point they must stop. An equitable *interest in the premises may, in like [*320 manner, be conferred upon others; and the right to redeem may be so prolonged, as to deprive the mortgagee of the benefit of his security, by rendering the property unsalable for anything like its value. This law gives to the mortgageor, and to the judgment creditor, an equitable estate in the premises, which neither of them would have been entitled to under the original contract; and these new interests are directly and materially in conflict with those which the mortgagee acquired when the mortgage was made. Any such modification of a contract by subsequent legislation, against the consent of one of the parties, unquestionably impairs its obligations, and is prohibited by the Constitution.

The second point certified arises under the law of February 27, 1841. The observations already made in relation to the other act apply with equal force to this. It is true that this law apparently acts upon the remedy, and not directly upon the contract. Yet its effect is to deprive the party of his pre-existing right to foreclose the mortgage by a sale of the premises, and to impose upon him conditions which would frequently render any sale altogether impossible. And this law is still more objectionable, because it is not a general one, and prescribing the mode of selling mortgaged premises in all cases, but is confined to judgments rendered, and contracts made, prior to the 1st of May, 1841. The act was passed on the 27th of February in that year; and it operates mainly on past contracts, and not on future. If the contracts intended to be affected by it had been specifically enumerated in the law, and these conditions applied to them, while other contracts of the same description were to be enforced in the ordinary course of legal proceedings, no one would doubt that such a law was unconstitutianal. Here a particular class of contracts is selected, and encumbered

pant; or which clogs his recovery of such possession and profits, by conditions and restrictions tending to diminish the value and amount of the thing recovered, impairs his right to, and interest in, the property. If there be no remedy to recover the possession, the law necessarily presumes a want of right to it. If the remedy afforded be qualified and restrained by conditions of any kind, the right of the owner may indeed subsist, and be acknowledged, but it is impaired, and rendered insecure, according to the nature and extent of such restrictions." 8 Wheat., 75.

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with these new conditions; and it can make no difference, in principle, whether they are described by the names of the parties, or by the time at which they were made.

In the case before us, the conflict of these laws with the obligations of the contract is made the more evident by an express covenant contained in the instrument itself, whereby the mortgagee, in default of payment, was authorized to enter on the premises, and sell them at 321*] public auction; and to retain out *of the money thus raised, the amount due, and to pay the overplus, if any, to the mortgageor. It is impossible to read this covenant, and compare it with the laws now under consideration, without seeing that both of these acts materially interfere with the express agreement of the parties contained in this covenant. Yet, the right here secured to the mortgagee is substantially nothing more than the right to sell, free and discharged from the equitable interest of Kinzie and wife, in order to obtain his money. Now, at the time this deed was executed, the right to sell, free and discharged from the equitable estate of the mortgageor, was a part of every ordinary contract of mortgage in the State, without the aid of this express covenant; and the only difference between the right annexed by law and that given by the covenant consists in this: that in the former case, the right of sale must be exercised under the direction of the Court of Chancery, upon such terms as it shall prescribe, and the sale made by an agent of the court; in the latter, the sale is to be made by the party himself. But, even under this covenant, the sale made by the party is so far subject to the supervision of the court, that it will be set aside, and a new one ordered, if reasonable notice is not given, or the proceedings be regarded, in any respect, as contrary to equity and justice. There is, therefore, in truth but little material difference between the rights of the mortgagee with or without this covenant. The distinction consists rather in the form of the remedy, than in the substantial right; and as it is evident that the laws in question invade the right secured by this covenant, there can be no sound reason for a different conclusion, where similar rights are incorporated by law into the contract, and form a part of it at the time it is made.

Mortgages made since the passage of these laws must undoubtedly be governed by them; for every State has the power to describe the legal and equitable obligations of a contract to be made and executed within its jurisdiction. It may exempt any property it thinks proper from sale, for the payment of a debt; and may impose such conditions and restrictions upon the creditor as its judgment and policy may dictate. And all future contracts would be subject to such provisions; and they would be obligatory upon the parties in the courts of the United States, as well as in those of the State. 322*] We speak, of course, of contracts *made and to be executed in the State. It is a case of that description that is now before us; and we do not think it proper to go beyond it.

Upon the questions presented by the Circuit Court, we therefore answer:

1. That the decree should direct the premises to be sold at public auction to the highest bidder, without regard to the law of February 19, 1841, which gives the right of redemption to the mortgageor for twelve months, and to the judgment creditor for fifteen.

2. That the decree should direct the sale of the mortgaged premises, without being first valued by three householders, and without requiring two thirds of the amount of the said valuation to be bid according to the law of February 27, 1841.

The decision of these two questions disposes of the third. And we shall direct these answers to be certified to the Circuit Court.[1]

Mr. Justice McLEAN dissented:

The Act of Illinois of the 27th February, 1841, does not apply to the case under consideration. The rule of the Circuit Court adopting that act, limits it to executions on judgments at law. It can have no application, therefore, to any proceeding in chancery. The only rule adopted in relation to a chancery proceeding, is that which gives the mortgageor a year within which to redeem the premises sold, on the payment of the purchase money and 10 per cent. interest, agreeably to the 8th section of the Act of 19th February, 1841. And that rule was to operate only in decrees of foreclosure and sale, where a different order was not made. So that, in fact, no positive rule was adopted in Illinois by the Circuit Court, in relation to sales of mortgaged premises under a decree.

By the rules regulating chancery proceedings adopted by this court at its last term, it is supposed the above rule and all others regulating the practice in chancery was rescinded. But this is not material. The points certified would be answered by saying, that the acts of the Legislature referred to can have no operation *in the case; as no State law can govern [*323 the proceedings of a chancery court of the United States.

Under such circumstances, I cannot but regret that the court have deemed it necessary or proper to consider the constitutionality of the above acts, and to hold that they are unconstitutional. The decision of the matters before the court does not require this judgment. And it is the more to be regretted, as there was no argument, written or oral, to sustain these laws. Heretofore this court have not deemed it proper to act on so grave a subject as the constitutionality of a State law unless the question were essentially involved in the decision of the case before them.

The act of the 27th of February, 1841, is held to be unconstitutional as regards all contracts or mortgages entered into prior to its enactment, because it requires real property levied on by execution to be appraised and to sell for two thirds of its value.

As preliminary to an examination of this question, I will take a cursory review of the policy and laws of the federal government in respect to State process. By the Act of the 29th September, 1789, it is provided, "that the forms of writs and executions, except their style, in the Circuit and District Courts, in suits at common law, shall be the same in each State respectively as are now used, or allowed, in the Supreme Court of the same."

1.—Present, Mr. Chief Justice Taney, and Justices Thompson, McLean, Baldwin, Wayne, Catron, and Daniel.

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Again: By the Act of the 8th of May, 1792, the above provision is re-enacted, "subject to such alterations and additions as the courts respectively shall, in their discretion, deem expedient; or to such regulations as the Supreme Court of the United States shall think proper, from time to time, by rule to prescribe to any circuit or district court concerning the same."

In the 8th section of the Act of the 2d March, 1793, it is provided, "that where it is now required by the laws of any State, that goods taken in execution, on a writ of *fieri facias*, shall be appraised previous to the sale thereof, it shall be lawful for the appraisers appointed under the authority of the State to appraise goods taken in execution on a *fieri facias* issued out of any court of the United States, in the same manner as if such writ had issued out of a State court." And it is made the duty of the marshal to summon the appraisers, &c.

Under the foregoing process acts, a question was made in the State of Kentucky, whether the executions from the Circuit Court of the [*324] *United States should be governed by the laws of that State. In the case of *Wayman* v. *Southard* (10 Wheat., 2), among several points certified from the Circuit Court, for the decision of this court, were the two following:

"That, if the statutes of Kentucky, in relation to executions, are binding on this court, viz.: the statute which requires the plaintiff to indorse on the execution, that bank notes of the Bank of Kentucky, or notes of the Bank of the Commonwealth of Kentucky, will be received in payment, or that the defendant may replevy the debt for two years, are in violation of the Constitution of the United States."

"That all the statutes of Kentucky, which authorize a defendant to give a replevin bond, in satisfaction of a judgment or execution are unconstitutional and void."

This court held that the Process Acts of 1789, and of 1792, did not apply to States subsequently admitted into the Union; and that as the act regulating executions had not been adopted by the Circuit Court of the United States for Kentucky, it could not regulate final process in that court. But the court did not deemed it necessary or proper to decide on the constitutionality of the laws referred to.

In the case of *The Bank of the United States* v. *Halstead* (10 Wheat., 51), a point was certified from the Circuit Court of Kentucky, involving the question, whether "the Act of Assembly of Kentucky, of the 21st December, 1821, which prohibits the sale of property taken under executions for less than three fourths of its appraised value, was repugnant to the Constitution of the United States." And this court held, Judge Thompson giving the opinion, as in the case of *Wayman* v. *Southard*, that the law of the State did not apply to the courts of the United States, it never having been adopted. And they remark: "This renders it unnecessary to inquire into the constitutionality of the law of Kentucky."

These cases in principle are analogous to the one under consideration. The only rule of court affecting a proceeding in chancery having been repealed or rescinded by the general rules adopted by this court at its last term, and if not repealed does not apply; the laws of the State of Illinois, as regards the proceeding under consideration, are as inapplicable as were the laws of Kentucky *in the above [*325 cases. And it is a subject of regret that the precedent of the above cases has not been followed in the present decision.

Out of the present decisions grew the Process Act of the 19th May, 1828. That act declares, "that writs of execution and other final process, issued on judgments and decrees rendered in any of the courts of the United States, and the proceedings thereupon, shall be the same as are now used in the courts of the State." And power was given to "the courts, if they shall see fit in their discretion, by rules of courts, so far to alter final process in said courts as to conform the same to any change which may be adopted by the Legislatures of of the respective States for the State courts."

The above enactments show that the settled policy of the federal government is, to adopt the State laws regulating final process. And so far as the acts of Congress have operated, State laws have governed executions in the federal courts.

In Virginia, real estate is not liable to be sold on execution. In Connecticut, and, I believe, in Massachusetts, lands are taken in satisfaction of judgments on a valuation. In Ohio, and in many of the other States, real estate must be sold for one half or two thirds of its valuation. In Indiana, and in some of the other States, the defendant has a right within twelve months to redeem his land sold on execution, on paying some 10 or 12 per cent. interest. In Virginia, Mississippi, and some of the other States, fortcoming bonds are given, which suspend further proceedings on executions, and in some degree changes the security under the judgment.

Now, these laws prevail in some of the States, and there is no reason why, under the Constitution, they may not be adopted in all of them. If Virginia may withdraw her lands from execution, and Ohio admit them to be sold under a valuation, why may not Illinois do the same?

But I understand the objection to the Illinois statute is, its limited operation and its applicability to prior contracts.

The 2d section of the Act provides, that it "shall extend to all judgments rendered prior to the 1st of May, 1841, and to all judgments that may be rendered on any contract or cause of action, accruing prior to the 1st May, 1841."

*This provision may seem to be some- [*326 what capricious and of doubtful policy; but the inquiry must be, does it violate the Constitution of the United States? On the 27th February, 1841, this law was enacted, and although it is limited in its effects, yet it is general in its provisions. And I know of no power in the Constitution to limit the legislative discretion of the States as to the duration of their enactments. The only question under this act as to its constitutionality must be, whether it impairs the obligations of contracts entered into before it was passed. And in this view, the question arises, whether the remedy, in the sense of the Constitution, can be considered as a part of the contract.

That the law objected to is remedial, no one can controvert. It does not purport to act upon contracts, but modifies the remedy for the enforcement of contracts. But my brethren

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suppose that, as this remedy may be retarded by the limitation on the sale of land under judgments, the obligation of the contract is thereby impaired. This conclusion can only be sustained on the ground that the remedy is a part of the contract. On this hypothesis every contract embraces the existing remedy, and that remedy cannot be protracted by the Legislature. This is a question of constitutional power, and cannot be affected by any notions of expediency. If the remedy be so modified as to protract the recovery of a debt a week, or a month, in the view now taken by the court, it impairs the obligation of the contract as clearly as any longer period of time. The question cannot, in any degree, depend upon time. What could be more preposterous than to say the Legislature of a State may prolong the remedy a week, a month, or three months, but cannot prolong it beyond that period? Where shall this judicial discretion find a limit? There must be some limit. If the Legislature may not modify the remedy at their discretion, in regard to existing contracts, they must be prohibited from making any change. Any departure from this rule of construction must depend upon the arbitrary decision of the courts. And each court, in this respect, may exercise its own discretion, until the question shall be settled by this tribunal.

But the question may be asked, suppose the Legislature shall repeal all remedy; is the contract not thereby impaired? This question may be asked with no more propriety and ef- [*327] fect than *many others. May not a State fail to appoint judges, clerks, and other officers essential to the administration of justice?

I am aware that, in the case of *Green* v. *Biddle* (8 Wheat., 17), this court say: "It is no answer, that the acts of Kentucky now in question are regulations of the remedy, and not of the right to lands. If these acts so change the nature and extent of existing remedies as materially to impair the rights and interests of the owner, they are just as much a violation of the compact as if they directly overturned his rights and interests."

The above question arose under the compact between Virginia and Kentucky, which declared, "that all private rights and interests of lands, within Kentucky, derived from the laws of Virginia prior to such separation, shall remain valid and secure under the laws of the proposed State, and shall be determined by the laws then existing in the State of Virginia."

The above article, say the court in their opinion, "declares in the most explicit terms that all private rights and interests of lands, derived from the laws of Virginia, shall remain valid and secure under the laws of Kentucky, and shall be determined by the laws then existing in Virginia. It plainly imports, therefore, that these rights and interests, as to their nature and extent, shall be exclusively determined by the laws of Virginia, and that their security and validity shall not be in any way impaired by the laws of Kentucky. Whatever law, therefore, of Kentucky does narrow these rights and diminish these interests, is a violation of the compact, and is consequently unconstitutional."

And again the court observe: "The only question, therefore, is, whether the Acts of 1797 and 1812 have this effect. It is undeniable that no acts of a similar character were in existence in Virginia at the time when the compact was made; and, therefore, no aid can be derived from the actual legislation of Virginia to support them." These acts were held to abridge the rights of the holder under the Virginia title, and, whether remedial or otherwise, were consequently repugnant to the compact. By the compact, the rights and interests of the Virginia claimant, both as to their nature and extent, say the court, were to be exclusively determined by the laws of Virginia. In other words, where rights are to be determined by one law, another and a repugnant law can have no influence upon them. And this was the point *adjudged in the case of *Green* [*328] v. *Biddle*. The question did not arise under the Constitution of the United States, but under the compact.

In the case of *Sturges* v. *Crowninshield* (4 Wheat., 200), the late Chief Justice says: "The distinction between the obligation of a contract and the remedy given by the Legislature to enforce that obligation, has been taken at the bar, and exists in the nature of things. Without impairing the obligation of the contract, the remedy may certainly be modified as the wisdom of the nation shall direct." This is the true principle laid down in explicit terms.

The doctrine that the remedy constitutes a part of the contract is a mere abstraction, which cannot be carried into practical operation. If the doctrine be sound, it secures the means for the enforcement of the contract at its date.

Now, does anyone doubt that a State Legislature may abolish imprisonment for debt, as well on past as future contracts? Here is a modification of the remedy, which takes away a means, and often a principal means, of enforcing the payment of the debt. And yet this is admitted by all to be a constitutional law. Nor does anyone doubt the constitutionality of a statute of limitations. This operates upon contracts entered into before its enactment, and bars the right of action.

Now, if the remedy existing at the time of the contract is a part of the contract, the State Legislature cannot modify the remedy, much less, as by the above statute, take it away. It is no answer to this argument to say, that the statutory bar is only interposed where the obligee has been grossly negligent. There was no such condition of vigilance at the date of the contract, and if the above argument be sound, no subsequent action of the Legislature can impair its obligation by materially retarding its enforcement, much less by barring the remedy.

The argument in favor of the statute is, that it does not act upon the contract, but withdraws the remedy. Now, if this be a constitutional exercise of power by a State Legislature, surely the exercise of the lesser power, by modifying the remedy at discretion, must also be constitutional. Does not the greater power include the lesser? The power, whether exercised in passing a statute of limitations, or in modifying the laws in relation to *judg- [*329] ments and executions, acts upon the remedy. In both instances the enactments constitute the

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laws of the forum. And in my judgment they depend upon the same power over the remedy.

But if the remedy be a part of the contract, how must it be applied? Instead of looking to the laws regulating judicial proceedings at the time the action is brought, the court must look to the date of the contract and the laws then in force. The contract, in this view, gives vitality to laws annulled by the Legislature, and the law of the remedy becomes as diversified as the contracts to which it is applied. Can such a rule of construction be enforced?

How is a contract made in one State to be enforced in another? If the remedy in the State where the contract is made enter into it, does it carry this remedy into another jurisdiction? This will not be contended; and why not? If the contract within the State include the law of the remedy, why does it not carry into a foreign jurisdiction the same conditions? Every contract does this, which is governed by the local law. A contract for the payment of money, made and to be performed in the State of New York, bears 7 per cent. interest. And this rate of interest is recovered on the contract in a State where 7 per cent. would be usurious. And so of every other contract made under a local law, however repugnant may be its conditions to the laws and policy of the jurisdiction where the remedy is sought. This is emphatically the law of the contract. And if the remedy be also the law of the contract, it must follow the contract wherever it shall be prosecuted. If this be not the case, the argument falls; the remedy exists independently of the contract, and does not constitute a part of it.

A contract void by the local law on the ground of usury, or because it is against the policy of the law, can be enforced nowhere. There is no exception to the principle that where a contract is entered into under the sanctions of a State law, that law governs the contract in whatever jurisdiction suit may be brought on it. And so where a contract is made in one State to be performed in another, the place of performance gives the law of the contract. But in no case does the remedy attach itself to the contract, so as to constitute a part of it. Such an idea is too abstract for practical operations. At most, it could only affect contracts sued on in the State where they were made. Such a principle could **330*]** *not be carried out. It would diversify the remedy to an impracticable extent.

Every contract is entered into with a supposed knowledge by the parties, that the law-making power may modify the remedy. And this it may do, at its discretion, so far as it acts only on the remedy. It may regulate the mode in which process shall be issued and served: how the pleadings shall be filed, and at what term judgment shall or may be entered. And it may also regulate final process. It may require that the personal property of the defendant shall be levied on and sold, before land shall be taken in execution. It may say what notice shall be given on the sale of real estate on execution; and also require that it shall sell for one half or two thirds of its value. A valuation law in those States where it has been adopted has been found salutary in guarding the rights of debtor and creditor. A debtor, under this law, cannot defeat the claim of his creditor, by purchasing the real estate levied on, through the agency of a friend, at a nominal price; and this protects the rights of the creditors of the defendant generally. There may be some cases of hardship to creditors under such a law, but they must be few and unimportant in comparison with the benefits secured by the law both to creditors and debtors. Some restriction on the sale of land on execution is required by a sound policy, especially in new and rising States, where real property can scarcely be said to have a final value.

But this law is supposed to be unconstitutional from its retrospective effect. I had supposed that such a supposition could not be raised, under the decision of this court.

In the case of *Satterlee* v. *Matthewson* (2 Peters, 407), "The plaintiff, at the trial, set up a title under a warrant dated the 10th January, 1812, founded upon an improvement in the year 1785, which it was admitted was under a Connecticut title, and a patent dated 19th February, 1813.

"The defendant claimed title under a patent issued to John Wharton in the year 1781, and a conveyance by him to Satterlee in 1812." Sometime in the year 1790, the defendant had come into possession as tenant to the plaintiff, and it was insisted that the defendant was estopped from setting up his title. The Court of Common Pleas decided in favor of the plaintiff; but on a writ of error, the Supreme Court of Pennsylvania held, that "by the settled *law of that State, the relation of land- [***331**
lord and tenant could not subsist under a Connecticut title." Upon which ground the judgment was reversed, and a *venire facias de novo* was awarded.

On the 8th day of April, 1826, and before the second trial of the cause took place, the Legislature of that State passed a law, declaring "that the relation of landlord and tenant shall exist, and be held as fully and effectually between Connecticut settlers and Pennsylvania claimants, as between other citizens of this Commonwealth, on the trial of any cause now pending or hereafter to be brought within this Commonwealth, any law or usage to the contrary notwithstanding." Under the instruction of the court in accordance with that statute, the jury found a verdict for the plaintiff, on which judgment was entered. This judgment, on being removed by writ of error to the Supreme Court of Pennsylvania, was affirmed. On the ground that the above statute impaired the obligation of the contract between Satterlee and Matthewson, the cause was removed to this court from the Supreme Court of Pennsylvania, by a writ of error.

In their opinion this court say: "If the effect of the statute in question be not to impair the obligation of the contract, is there any other part of the Constitution of the United States to which it is repugnant? It is said to be retrospective. Be it so; but retrospective laws which do not impair the obligation of contracts, or partake of the character of *ex post facto* laws, are not condemned or forbidden by any part of that instrument."

And again, "The objection is urged that the effect of this act was to devest rights which were vested by law in Satterlee. There is cer-

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tainly no part of the Constitution of the United States which applies to a State law of this description; nor are we aware of any decision of this, or of any Circuit Court, which condemned such a law upon this ground."

Here was a direct legislation not only on existing rights growing out of contracts, but such an effect was given to the law as to devest vested rights. And yet this act was held not to be in violation of the Constitution of the United States.

What vested right is there or can there be, in the nature of things, in the holder of a contract to the particular remedy for its enforcement which existed at its date? But if there were such a vested right as to the remedy, 332*] which there is not, it may, under *the above authority, be devested by law. If the decision do not mean this, it means nothing.

A State Legislature cannot impair the contract by changing the time or manner of its performance. By the contract, the parties have fixed their rights and obligations; and these are guarded by the Constitution. But the remedy for the enforcement of the contract being established by the law-making power, may be modified at its discretion. This is admitted as regards subsequent contracts, but the same rule applies to prior ones. So far as the mere remedy is concerned, in my judgment, no sound and practical distinction can be drawn between prior and future contracts.

I think, in the case under consideration, that the laws of Illinois referred to do not apply, and, therefore, I agree to the answers given by the court to the points certified.

HOWARD 1.

ORDER.

This cause came on to be heard on the transcript of the record from the Circuit Court of the United States for the District of Illinois, and on the points and questions on which the judges of the said Circuit Court were opposed in opinion, and which were certified to this court for its opinion, agreeably to the act of Congress in such case made and provided, and was argued by counsel; on consideration whereof, it is the opinion of this court, 1st. That the decree should direct the premises to be sold at public auction to the highest bidder, without regard to the law of February 19th, 1841, which gives the right of redemption to the mortgageor for twelve months, and to the judgment creditor for fifteen. 2d. That the decree should direct the sale of the mortgaged premises without being first valued by three householders, and without requiring two thirds of the amount of the said valuation to be bid according to the law of February 27th, 1841; and that the decision of these two questions disposes of the third. It is thereupon now here ordered and adjudged by this court, that it be so certified to the said Circuit Court.

Cited—2 How., 613, 614; 3 How., 328-330, 717; 5 How., 315; 6 How., 327, 328, 330, 332, 540; 9 How., 447; 15 How., 310, 319; 24 How., 465; 2 Wall., 23; 4 Wall., 550, 551, 554; 5 Wall., 300; 8 Wall., 322, 583; 4 Otto, 143; 6 Otto., 74, 603; 12 Otto., 419; 1 Bank. Reg., 409; 10 Bank. Reg.,409; 12 Bank. Reg., 519, 520; 1 Wood. & M., 132,134; 2 Wood. & M., 413; 1 Woods, 524; 3 Wall., Jun., 214; 1 Dill., 528; Hemp., 314, 534; 1 Biss., 186; 12 Blatchf., 193; McAll., 519; 2 Bond., 163; 2 Abb. U. S., 60; 1 Sawy., 712; 5 McLean, 272; Newb., 288, 300, 308; 3 Woods, 212, 214.

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REPORTS

OF

CASES

ARGUED AND ADJUDGED IN

THE

Supreme Court of The United States,

IN JANUARY TERM, 1844.

BY BENJAMIN C. HOWARD,

Counselor at Law, and Reporter of the Decisions of the Supreme Court of the United States.

VOLUME II.

CONTAINING, IN AN APPENDIX, THE OPINION OF THE HON. CHIEF JUSTICE TANEY, IN THE CASE OF THE BANK OF THE UNITED STATES V. THE UNITED STATES.

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JUDGES

OF THE

SUPREME COURT OF THE UNITED STATES

DURING THE TIME OF THESE REPORTS.

The Hon. ROGER B. TANEY,* *Chief Justice.*
The Hon. JOSEPH STORY, *Associate Justice.*
The Hon. JOHN M'LEAN, *Associate Justice.*
The Hon. HENRY BALDWIN, *Associate Justice.*
The Hon. JAMES M. WAYNE, *Associate Justice.*
The Hon. JOHN CATRON, *Associate Justice.*
The Hon. JOHN M'KINLEY, *Associate Justice.*
The Hon. PETER V. DANIEL, *Associate Justice.*

JOHN NELSON, Esq., *Attorney-General.*
WILLIAM THOMAS CARROLL, Esq., *Clerk.*
BENJAMIN C. HOWARD, Esq., *Reporter.*
ALEXANDER HUNTER, Esq., *Marshal.*

* The Chief Justice was attacked, very early in the session, by a severe indisposition, which rendered him unable to take his seat upon the bench during the remainder of the term.

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THE DECISIONS

OF THE

Supreme Court of the United States,

AT

JANUARY TERM, 1844.

9*] *ALEXANDER G. McNUTT, Governor of Mississippi, who sues for the use of LEGGETT, SMITH, and LAWRENCE,

v.

RICHARD J. BLAND AND BENJAMIN G. HUMPHREYS.

Mississippi statute—citizen of another state may sue in circuit court of U. S. on sheriff's bond—sheriff no right to discharge prisoner in custody under process of circuit court unless discharge is sanctioned by act of Congress or rule of that court.

By a law of the State of Mississippi, sheriffs are required to give bond to the governor for the faithful performance of their duty.

A citizen of another State has a right to sue upon this bond; the fact that the governor and party sued are citizens of the same State, will not oust the jurisdiction of the Circuit Court of the United States, provided the party, for whose use the suit is brought, is a citizen of another State.

Under the resolution passed by Congress in 1789, relating to the use of State jails, and the law of Mississippi passed in 1822, a sheriff has no right to discharge a prisoner in custody by process from the Circuit Court, unless such discharge is sanctioned by an act of Congress, or the mode of it adopted as a rule by the Circuit Court of the United States.

THIS case was brought up by writ of error from the Circuit Court of the United States for the Southern District of Mississippi.

It was a suit upon a sheriff's bond, given by Bland, sheriff of Claiborne County, dated 10th November, 1837, and in the penalty of $15,000.

At the May Term, 1837, of the Circuit Court of the United States for the Southern District of Mississippi, Leggett, Smith, and Lawrence, citizens of New York, instituted a suit against George W. McNider, a citizen of Mississippi, and in November following obtained a judgment for $3,910.78.

On the 30th December, 1837, Leggett, Smith, and Lawrence sued out a writ of *capias ad satisfaciendum*, against the body of the said
10*] *George McNider, which was directed to the marshal of the State of Mississippi. The writ was executed, and McNider taken into custody. The marshal handed him over for safe keeping to Bland, the sheriff of Claiborne county.

Whilst thus in custody, McNider applied to McDougall, a judge of probate, duly commissioned in and for the County of Claiborne, for the benefit of the Insolvent Law, of the State of Mississippi, passed in June, 1822. The forms of that law being complied with, the judge directed McNider to be discharged from imprisonment, and the sheriff accordingly discharged him.

At May Term, 1839, Leggett, Smith, and Lawrence brought suit against the sheriff and his securities, of whom Humphreys was one, using for this purpose the name of the Governor of Mississippi, to whom the bond had been given. The breach assigned was that the said Bland, in violation of his duty as sheriff, did discharge, release, and set at liberty his said prisoner, not by force or operation of law, or in pursuance of any power or process emanating therefrom, but in violation thereof, and without the license or consent of said plaintiffs, or of their lawful agent or attorneys, and against their will, they the said plaintiffs being wholly unsatisfied and unpaid, and said judgment aforesaid being then and there in full force and effect, and not in any respect reversed or annulled, paid off, or discharged.

The defendants pleaded two pleas:

1. That the Act of June, 1822, passed by the Legislature of Mississippi, provided, amongst other things, that where an insolvent person should not be able to satisfy or pay his ordinary prison fees, if the creditor, upon notice given to him or her, his or her attorney or agent, should refuse to give security to the jailer or sheriff for the payment of such prison fees, or should fail to pay the same when demanded, the sheriff or jailer should discharge such debtor out of prison; and it was further provided that whereas it was unreasonable that sheriffs should be obliged to go out of their counties to give notice to creditors at whose

NOTE.—*As to jurisdiction of federal courts depending on parties and residence*, see note to Emory v. Greenough, 3 Dall., 369; and note to Strawbridge v. Curtis, 3 Cranch, 267.

As to citizenship of a corporation, and its stockholders, and jurisdiction depending upon it, see note to Hope Ins. Co. v. Boardman, 5 Cranch, 57.

As to residence of assignor, and co-taxable conveyance to enable suit to be brought, affecting jurisdiction, see note to McDonald v. Smalley, 1 Pet., 620.

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suit any person might be in custody of such sheriff, where any execution should be delivered to the sheriff of any other county than that where any creditor resided, such creditor should name some person in the county where the execution was to be levied, to be his, her, or their agent for the particular purpose of giving to and receiving from the sheriff any notices which might be necessary relating thereto; 11*] and if any creditors should fail *to appoint such agent, the sheriff should not be obliged to give notice previous to the discharge of such prisoner for want of security for his prison fees, but such prisoner should be discharged without any notice to be given to the creditor so failing.

The defendants then averred that Leggett, Smith, and Lawrence, at the time of the commitment, were not residents of Claiborne County, nor were they ever so afterwards, and that they failed to appoint any agent or attorney to receive a notice from the sheriff; that McNider was unable to pay his prison fees, and that the plaintiffs wholly failed to give security to the sheriff for the payment of the said prison fees.

2. That McNider was regularly, and according to the provisions of the acts of the Legislature of Mississippi for the relief of insolvent debtors, brought before McDougall, a judge of probate, and then and there, by the order and warrant of the said judge, discharged from the custody of the said sheriff.

The replication of the plaintiffs to the first plea was, that at the time of the discharge of McNider, they had an agent residing within the State of Mississippi, to wit, in the County of Warren, and that no application whatever was made to the plaintiffs or their agent, for the payment of jail fees, or to give security for the same; nor was any notice whatever given to the plaintiffs or their agent or attorney of an intention to discharge the prisoner, or of his application to be discharged, either for that cause or any other.

The replication to the second plea was, that the prisoner was, by virtue of process legally issuing from the Circuit Court of the United States, taken into custody by the marshal of the district, and by him was delivered to the defendant, Bland, for safe keeping, who was then sheriff of the county in which the prisoner was taken. That the prisoner was not discharged from custody aforesaid by virtue of any process emanating from any court of the United States or judge thereof, nor by virtue of any law of the United States, but that he was discharged contrary to the provisions of the several acts of Congress made and provided, prescribing the mode and manner of discharging prisoners confined under process from the courts of the United States.

To both these replications the defendant demurred. There was a joinder in demurrer as to the first; what was done with the second, the record did not show.

The court below sustained both demurrers.

12*] *Mr. Jones* for the plaintiffs in error.

Mr. Walker for the defendants.

Mr. Jones contended:

1. That the laws of the United States and of Mississippi, and the bond of the sheriff, bound the defendant to receive and hold McNider as a prisoner, under the laws and jurisdiction of the United States, not of the State of Mississippi.

2. That the pleas of the defendant were insufficient, and whether the replications were good or not, the court would look to the first error in the pleadings, the insufficiency of the pleas.

3. That the United States and Mississippi have each separate systems for insolvent debtors; that they cannot be reconciled with each other.

4. That the courts of the United States and of the States can each look only to their respective systems and act upon them.

5. That the State courts cannot discharge a debtor in confinement under execution from a court of the United States, either under the laws of insolvency, or by any other State authority.

He considered this case as coming fully within the principle established by this court in *Duncan* v. *Darst* (1 Howard, 301). No State can change the laws of the United States. The insolvent law of Mississippi is confined to cases where persons are under execution by process issued by any court of record within the State. (1 Howard & Hutchinson, 687.) It provides, also, that no creditor shall receive anything unless he shall have obtained a judgment. The discharge by the sheriff in consequence of not being indemnified is also a branch of the State system. The marshal could not have discharged the prisoner, and the sheriff was *pro hac vice* the marshal. The latter was responsible to the former for the fees.

Mr. Walker contended that the equity of the case was with the defendants, inasmuch as the discharge had been ordered by a court of competent jurisdiction, which would have enforced its order by an attachment. The first replication averred that the plaintiffs had an agent in an adjoining county, which was tendering an immaterial issue. The demurrer to this was therefore properly sustained. There was no question raised below as to the power of the State. But the court below had no jurisdiction in the case, as it was between citizens of the same State. Although this court has decided that where the real party is out of the State, he may use the name of a nominal *plaintiff within it, yet it has also decided [*13 that where the assignment is by operation of law, such a plaintiff cannot sue. The law of Mississippi gives no right of action on a sheriff's bond, but provides other remedies. (Howard & Hutchinson, 625 *et seq.*) They are by motion against the sheriff and his securities.

Mr. Jones, in reply:

The replication must be overlooked, if the plea itself is bad, which is the case here. It is settled that the real party to a suit is the party for whose use it is brought. The governor's name is only used *pro forma*. If the argument on the other side be sound, there is no remedy on the bond at all; for an escape could not be tried upon motion. The object of requiring a bond was to secure the interest of all the citizens of the State, and yet the bond would become of no use in cases of escape. The law of Mississippi accepting the Resolutions of 1789, gives a remedy to all parties concerned. (Howard & Hutchinson, 49.)

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Mr. Justice BALDWIN delivered the opinion of the court:

As the judgment below was rendered on a general demurrer, it is necessary to ascertain in what part of the pleadings the first demurrable defect occurred, which the defendant here alleges was in the declaration, inasmuch as it appears that the plaintiffs and defendants were citizens of Mississippi, and consequently the court below had not jurisdiction of the case.

By the law of that State (How. & Hut., 290, 291), all sheriffs must give a bond to the governor of the State for the time being, and his successors, conditioned for the faithful performance of the duties of his office; which bond may be put in suit and prosecuted from time to time at the costs and charges of any party injured, until the whole amount of the penalty thereof be recovered. This suit was accordingly brought in the name of the governor, for the use of Legget, Smith, and Lawrence, citizens of New York.

The parties in interest, therefore, had a right to sue the defendants in the Circuit Court in their own names, by a bill in equity in an appropriate use, or by an action of debt, or for an escape against the sheriff himself, as in *Darst v. Duncan* (1 How., 301), if he made out a cause of action in either form, and we can perceive no sound reason for denying the right of prosecuting the same cause of action against the sheriff and his sureties in the bond, by and in the name of the governor, who is a purely 14*] naked trustee for any party injured. *He is a mere conduit through whom the law affords a remedy to the person injured by the acts or omissions of the sheriff; the governor cannot prevent the institution or prosecution of the suit, nor has he any control over it. The real and only plaintiffs are the plaintiffs in the execution, who have a legal right to make the bond available for their indemnity, which right could not be contested in a suit in a State court of Mississippi, nor in a circuit court of the United States, in any other mode of proceeding than on the sheriff's bond.

It would be a glaring defect in the jurisprudence of the United States, if aliens or citizens of other States should be deprived of the right of suit on sheriffs' bonds in the federal courts sitting in Mississippi, merely because they were taken in the name of the governor for the use of the plaintiffs in mesne or final process, who are in law and equity the beneficiary obligees; we think this defect does not exist. The Constitution extends the judicial power to controversies between citizens of different States; the 11th section of the Judiciary Act gives jurisdiction to the circuit courts, of suits between a citizen of the State where the suit is brought, and a citizen of another State. In this case there is a controversy and suit between citizens of New York and Mississippi; there is neither between the governor and the defendants; as the instrument of the State law to afford a remedy against the sheriff and his sureties, his name is in the bond and to the suit upon it, but in no just view of the Constitution or law can he be considered as a litigant party; both look to things, not names—to the actors in controversies and suits, not to the mere forms or inactive instruments used in conducting them, in virtue of some positive law.

This court must have acted on these principles in *Browne et al.* v. *Strode* (5 Cranch, 303), which was a suit on an administration bond of an executor, for the faithful execution of the testator's will, in conformity with a law of Virginia (5 Hen. St., 461), which requires all such bonds to be payable to the justices of the County Court, where administration is granted, but may be put in suit and prosecuted by, and at the costs of the party injured. The object of that suit was to recover a debt due by the testator to a British subject; the defendant was a citizen of Virginia; the persons named in the declaration as plaintiffs were the justices of the county, who were also citizens of Virginia, yet it was held that the Circuit Court of that State had jurisdiction. We are aware of no subsequent decision of this court, which in the least impairs the authority of that case, or contravenes the principle *on which it was decided; [*15 that where the real and only controversy is between citizens of different States, or an alien and a citizen, and the plaintiff is by some positive law compelled to use the name of a public officer who has not, or ever had any interest in, or control over it, the courts of the United States will not consider any others as parties to the suit, than the persons between whom the litigation before them exists.

Executors and administrators are not in this position, they are the actors in suits brought by them; the personal property of the decedent is vested in them; the persons to whom they are accountable, for whose benefit they act, can bring no suit to assert their rights against third persons, be the cause of action what it may; nor can they interfere with the conducting of the suit to assert their rights to the property of the decedent, which do not vest in them. The personal representative is, therefore, the real party in interest before the court (12 Pet., 171), and succeeds to all the rights of those they represent, by operation of law; and no other persons are capable, as representatives of the personalty, of suing or being sued. They are contradistinguished, therefore, from assignees who claim by the act of the parties, and may sue in the federal courts in cases where the decedent could not. (8 Wheat., 668; 4 Cranch, 308, S. P.) By the 11th section of the Judiciary Act, assignees cannot sue where the assignor could not, nor can they sue in their own names if the assignor could, unless the assignees were aliens or citizens of another State than that of the defendant, and the instrument sued on was so assigned as to vest the right of action in the assignees, in which latter case, the suit must be by the party originally entitled to sue. Thus where the payee of a promissory note, which was neither negotiable nor assignable, so as to sustain an action by the assignees, sued for the use of a corporation incapable of suing in the federal courts, this court held that the Circuit Court had jurisdiction, on the ground that the suit was on a contract between the plaintiff and defendant. The legal right of acting being in the plaintiff, it mattered not for whose use the suit was brought, the parties being citizens of different States. (*Irvine* v. *Lowry*, 14 Pet., 298.) In that case the decision in 5 Cranch was reviewed and affirmed; and as it is in all respects analogous to, it must govern this and similar cases, where the cause of action

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is not founded on a contract between the parties or their legal representatives.

The objection to the jurisdiction cannot, therefore, be sustained.

16*] *The next question arises on the defendants' first plea in bar, which sets up a discharge of the prisoner by the sheriff, in default of the plaintiff in the execution paying the prison fees due, pursuant to the Act of 22d June, 1822 (secs. 35, 47; Hut. & How., 640–644).

This law, by its own force, cannot apply to persons committed on executions from the courts of the United States, it must first be adopted by act of Congress, or some rule of court under the authority conferred on the courts of the United States by law. It is a peculiar municipal regulation, applicable and intended to apply only to persons committed under State process, as clearly appears by the 62d section of the same law, in the revised code, as to process of the United States. (How. & Hut., 649, 650.) 'After reciting in full the Resolution of Congress relating to jails, passed in 1789 (1 Story, 70), it proceeds, "And whereas it is just and reasonable to aid the United States therein, on the terms aforesaid, until other provisions shall be made in the premises, it is enacted, That all sheriffs, &c., within this State, to whom any person or persons shall be sent or committed by virtue of legal process, issued by or under the authority of the United States, shall be, and are hereby required to receive such prisoners into custody, and to keep the same safely until they shall be discharged by due course of law, and be liable to the same pains and penalties, and the parties aggrieved be entitled to the same remedies, as if such prisoners had been committed under the authority of the State. The sheriff may require of the marshal the fulfillment of the proposals of the general government, with regard to rent and sustenance, at least quarter yearly; and on the discharge of the prisoner shall make a statement of charges, &c., to enable him to make his return to the proper department of the general government."

Taking this section of the law in connection with the Resolution of 1789, there appears an evident intention in the Legislature, that the law should cover the whole resolution, so as to carry it into effect in all its parts and provisions. Hence the terms in each must be made to harmonize; whereby the phrase in the 62d section, "and to keep the same safely until they shall be discharged by due course of law," will be referred to the corresponding phrase in the resolution, "until they shall be discharged by due course of the law thereof" (the United States), so as to authorize no discharge by virtue of any State law, incompatible with the resolution. If any doubt could arise on these words in the resolution, "all prisoners committed under the authority of the United States," whether they 17*] applied to cases *between individuals, it is removed by the explicit language of the law, "any person or persons who shall be sent or committed by virtue of legal process, issued by, or under the authority of the United States," &c., "and the parties aggrieved shall be entitled to the same remedies," &c., which necessarily embrace all cases, civil or criminal.

As it would be wholly inconsistent with this view of the resolution and law, for the Legislature to authorize the sheriff to discharge any person from custody, otherwise than by the due course of the laws of the United States, we cannot attribute such an intention to them, unless the words of their act clearly indicate it; but there is nothing in the act to that effect, or any words which admit of such construction. On the contrary, as the resolution of Congress positively requires it, as the preamble to the State law declares it to be "just and reasonable to aid the United States therein," the enacting part must be taken accordingly; otherwise the law would conflict with the resolution.

The Act of Congress passed in 1800 provides for the mode of discharging insolvent debtors, committed under process from the courts of the United States, and the cases in which it may be done; it is obligatory on the sheriffs in every county of the States who have acceded to the Resolution of 1789, and no discharge under any State law not adopted by Congress, or a rule of court, can exonerate the officer. (*Vide* 1 Story, 715; 3 Story, 1932, 1939; *Suydam* v. *Broadnax*, 14 Pet., 75; 10 Wheat., 36, 37.) From the time of *Palmer and Allen* (7 Cranch, 550) to *Darst* v. *Duncan*, the language and decisions of this court have been uniform for more than forty years, that a State law, which is "a peculiar municipal regulation, not having any immediate relation to the progress of a suit, but imposing a restraint on State officers in the execution of the process of their courts, is altogether inoperative upon the officers of the United States in the execution of the mandates which issue to them. By the Process Acts of 1789, 1792, and 1828, Congress have adopted such State laws as prescribe the modes of process and proceedings in suits at common law, as are not in conflict with the laws of the United States, which can be executed by the courts of the United States; which impose no restraint on, or obstruction of their process from its inception till ultimate satisfaction from the defendant, or the marshal, sheriff, or other officer, intrusted with its execution." (3 Pet., 525; 10 Wheat., 40, 56, &c.) "Congress, however, did not intend *to defeat the execu- [*18 tion of judgments rendered in the courts of the United States, but meant they should have full effect by force of the State laws adopted, and therefore all State laws regulating proceedings affecting insolvent persons," or that are addressed to State courts or magistrates in other respects, which confer peculiar powers on such courts and magistrates, do not bind the federal courts, because they have no power to execute such laws. (1 How., 306; 14 Pet., 74, S. P.) For these reasons we are of opinion that the defendants' first plea is defective, in not setting forth a case which justifies the discharge of the person committed on the execution.

The second plea sets up a discharge of the prisoner pursuant to the laws of Mississippi, as an insolvent debtor, by order of a judge of probate; which presents a case covered by the decision of this court in *Darst* v. *Duncan*, that such a discharge by a sheriff was no defense to an action of debt for an escape. (1 How., 304.)

The judgment of the court below must therefore be reversed, and judgment rendered for the plaintiff.

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Mr. Justice DANIEL dissented:

From the opinion just pronounced on the part of the court in this cause, I am constrained to differ. Although it ever must be with unaffected diffidence that I shall find myself opposed to a majority of my brethren, still a feeling like that just adverted to, should not, and properly cannot, induce in me a relinquishment of conclusions formed from examinations carefully made, and upon decisions which appear to be distinctly, as they have been repeatedly announced. My opinion is, that the judgment of the Circuit Court against the plaintiff below ought to be affirmed, for the reason that the court could not properly take cognizance of his cause. Under systems of polity compounded as are the federal and State governments of this Union, instances of conflicting power and jurisdiction, real or apparent, will frequently arise, and will sometimes run into niceties calculated to perplex the most astute and practiced expositors. For myself, I must believe that the surest preventive of such instances, their safest and most effectual remedy when they shall occur, will be found in an adherence to limits which language in its generally received acceptation prescribes, and in shunning not merely that which such acceptation may palpably forbid, but as far as possible, whatever is ambiguous or artificial. In adopting or commending the rule thus indicated, I undertake to 19*] propound no new principle of *construction to this court, to essay no innovation upon its doctrines. I plant myself, on the contrary, upon its oft-repeated decisions, and invoke their protection for the interpretation now insisted upon.

The action in the Circuit Court was instituted in the name of Alexander McNutt, Governor of the State of Mississippi (who was the successor of Charles Lynch), who sues for the use of Thomas Leggett and other, citizens of the State of New York, against Bland, Humphreys, and Geissen, citizens of the State of Mississippi. It was founded on a bond executed by Bland, as sheriff of the County of Claiborne in the State above mentioned. The pleadings, so far as they relate to the conduct of the sheriff in fulfilment of his duties, or in dereliction thereof, are irrelevant to the question here raised, and need not therefore be examined. The proper question for consideration here is this—whether, upon the case as presented upon the declaration, the Circuit Court of Mississippi could take jurisdiction. McNutt is the party plaintiff upon the record, in whom is the legal right of action. Leggett and others, who are said to be the beneficiaries in the suit, and in whom is the equitable interest, are not the legal parties to the suit at law, and could not maintain an action upon the bond to which they were not parties.

Is McNutt to be considered as suing in his private individual character, and the addition "governor of the State of Mississippi" to be regarded as merely a phrase of description? Or is it to be viewed as the representative of the State of Mississippi, or rather as identified with the sovereignty of that State, and having vested in him the exercise of her executive authority? Let both branches of this inquiry be carefully pursued. If McNutt is to be regarded as a private party to the action, whether in his own interest, or as the private agent of the State for certain purposes, it would indeed seem to be too late, and entirely supererogatory, to construct an argument to prove, that to warrant either the commencement or prosecution of a suit in his name in a Circuit Court of the United States, his citizenship must be averred and shown upon the record. Decisions to this effect may be said to have been piled upon the question, for they may be traced from a period coeval almost with the passage of the judicial act, down to a comparatively recent day; ranging through at least ten volumes of the decisions of this court: and ruling, it is believed without an exception, that wherever jurisdiction is to be claimed from the citizenship or alienage of parties, such citizenship or alineage must be expressly set forth; ruling, moreover, that wherever jurisdiction is *claimed from the character of parties, [*20 it must be understood as meaning the parties to the record.

The first case in support of these positions, is that of *Bingham* v. *Cabot et al.* (from 3 Dall., 382), instituted in 1797, in which the plaintiffs were styled in *narr.* as John Cabot (with the coplaintiffs), described as being "all of our said district of Massachusetts," and as complaining that "said William, of Boston, being indebted, &c." Lee, Attorney General, insisted "that there was not a sufficient allegation in the record of the citizenship of the parties to maintain the jurisdiction of the Circuit Court, which is of limited jurisdiction." Dexter, on the other hand, urged "that stating in the declaration the party to be of a particular place, designates his home, and of course his citizenship." The court were clearly of opinion "that it was necessary to set forth the citizenship (or alienage where a foreigner was concerned) of the respective parties, in order to bring the case within the jurisdiction of the Circuit Court." In the year 1797, were decided in the Supreme Court the cases of *Turner* v. *Eurille*, and of *Turner, Admin., &c.*, v. *The Bank of North America*, reported in 4 Dall., the former at pp. 7 and 8, the latter on pp. 8, 9, 10 and 11. The declaration in the former case set out a demand by the Marguis de Casa Eurille, of ——, in the island of ——, against Stanley and the intestate of Turner and Greene, merchants and partners at Newbern in the said district. Upon objection to the jurisdiction for want of a proper description of parties—BY THE COURT: "The decision in the case of *Bingham* v. *Cabot et al.* must govern the present case; let the judgment be reversed with costs." *Turner, Admin. of Stanley*, v. *The Bank of North America* was an action upon a promissory note drawn at Philadelphia by Stanley, indorsed by Biddle & Company to the Bank of North America. The *narr.* stated that the president and directors were citizens of the State of Pennsylvania, that Turner, the administrator, and Stanley, the intestate, were citizens of the State of North Carolina; but of Biddle & Company, the payers and indorsers, there was no other description than "that they used trade and merchandise at Philadelphia or North Carolina." Ellsworth, *Chief Justice*, in delivering the opinion of the court, after remarking that the Bank of North America, as well as the drawer of the note, was properly described, proceeds thus: "The error assigned is, that it does not appear from the

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record that Biddle & Company, the promisees, or any of them, are citizens of a State other than that of North Carolina. The Circuit 21*] Court, though an inferior *court in the language of the Constitution, is not so in the language of the common law. A circuit court, however, is of limited jurisdiction, and has cognizance not of cases generally, but only of a few specially circumstanced; and a fair presumption is, not (as with regard to a court of general jurisdiction) that a cause is within its jurisdiction unless the contrary appears, but rather that a cause is without its jurisdiction till the contrary appears. This renders it necessary to set forth, upon the record of a circuit court, the facts and circumstances which give jurisdiction, either expressly or in such manner as to render them certain by legal intendment. Among those circumstances, it is necessary, where the defendant is a citizen of one State, to show that the plaintiff is a citizen of some other State, or an alien. Here the description of the promisee only is, that he used trade at Philadelphia or North Carolina, which contains no averment that he was a citizen of a State other than North Carolina, or an alien. We must therefore say there was error." In *Mossman* v. *Higginson* (4 Dall., 12), the same doctrine is affirmed, and the court conclude their opinion with the following explicit language: "Neither the Constitution, nor the act of Congress, regards, on this point, the subject of the suit, but the parties. A description of the parties is therefore indispensable to the exercise of jurisdiction. There is here no such description." The case of *Course et al.* v. *Stead et ux.* (4 Dall., p. 22) is marked by one trait which peculiarly illustrates and enforces the principle ruled in the cases previously cited. In this last case, a supplemental bill was filed making a new party to a suit previously pending, but in the supplemental bill no description of the citizenship of this new defendant was given: the absence of such description having been assigned for error, it was contended that such a description was not necessary in the supplemental suit, which is merely an incident of the original bill brought in the same court; but the Supreme Court sustained the objection, and reversed the decree of the Circuit Court on the ground of jurisdiction. Next in the order of time is the case of *Wood* v. *Wagnon* (2 Cranch, 9). Where the statement in the pleadings was that Wagnon, a citizen of Pennsylvania, showeth, that James Wood, of Georgia, &c. The judgment was reversed for the defect that the plaintiff and defendant were not shown by the pleadings to be citizens of different States.

In *Hepburn and Dundas* v. *Ellzey* (2 Cranch, 445), the decision turned upon a defect in the description of a party necessary to give 22*] *jurisdiction. (*Winchester* v. *Jackson*, 3 Cranch, 514.) The writ of error was dismissed for want of jurisdiction, the parties not appearing upon the record to be citizens of different States. In *Kemp's Lessee* v. *Kennedy*, this court declare, that "the courts of the United States are all of limited jurisdiction, and their proceedings are erroneous if the jurisdiction be not shown upon them." (5 Cranch, 185.) The same in effect, the same indeed in terms, is the decision of this court in *Montalet* v. *Murray* (4 Cranch, 46.) Again, the principle that the character which authorizes access to the Circuit Court must be apparent upon the record, is strikingly exemplified in *Chappedelaine et al.* v. *Dechenaux* (4 Cranch, 306). In this case, the plaintiffs were trustees, not suing in their own interest; yet as they were aliens and as such entitled to sue in the circuit courts of the United States, this court, in virtue of that character, and their title flowing therefrom apparent on the record, sustained the jurisdiction of the Circuit Court. Passing, with a mere mention of them, the cases of *The Hope Insurance Company* v. *Boardman et al.* (5 Cranch, 57), *Hodgson and Thompson* v. *Bowerbank et al.* (5 Cranch, 303), *Skillern's Ex'rs* v. *May's Ex'rs* (6 Cranch, 267), *The Corporation of New Orleans* v. *Winter* (1 Wheaton, 91), all full to the point; I will quote an emphatic and more comprehensive affirmation of Judge Washington in reference to the powers of the circuit courts, expressed in the opinion of that judge in *McCormick and Sullivant* (10 Wheat., 199): "They are all (says he) of limited jurisdiction. If the jurisdiction be not alleged in the proceedings, their judgments and decrees are erroneous, and may upon a writ of error or appeal be reversed for that cause." But the fullest and clearest exposition and vindication of the doctrine contended for in this opinion, will be found in the reasoning of *Chief Justice* Marshall, in delivering the decision in the case of *Osborn* v. *The Bank of the United States*. The portion of the reasoning particularly referred to commences on the 856th page of the 9th volume of Wheaton: "The judicial power of the Union," says the Chief Justice, "is also extended to controversies between citizens of different States; and it has been decided that the character of the parties must be shown on the record. Does this provision depend on the character of those whose interest is litigated or of those who are parties on the record? In a suit, for example, brought by or against an executor, the creditors or legatees of his testator are the persons really concerned in interest; but it has never been suspected that, if the executor be a resident of another State, the jurisdiction of the *federal courts could [*23 be ousted by the fact that the creditors or legatees were citizens of the same State with the opposite party. The universally received construction in this case is, that the jurisdiction is neither given nor ousted by the relative situation of the parties concerned in interest, but by the relative situation of the parties named on the record. Why is this construction universal? No case can be imagined in which the existence of an interest out of the party on the record is more unequivocal than in that which has been stated. Why, then, is it universally admitted that this interest in no manner affects the jurisdiction of the court? The plain and obvious answer is, because the jurisdiction of the court depends not upon this interest, but upon the actual party on the record." Again he remarks (p. 857), "It may, we think, be laid down, as a rule which admits of no exception, that in all cases where jurisdiction depends on the party, it is the party named in the record. Consequently, the 11th amendment, which restrains the jurisdiction granted

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by the Constitution over suits against States, is of necessity limited to those suits in which a State is a party on the record."

This reasoning of the late Chief Justice seems to meet the present case in every aspect of which it is susceptible, and to dispel every shade of doubt that could possibly be cast upon it. The doctrine this reasoning so well sustains, is re-affirmed by the same judge, in the still later case of *The State of Georgia* v. *Juan Madrazo* (1 Peters, 122); and amongst other authorities there cited, the principles ruled as above mentioned in *Osborn* v. *The Bank of the United States* are referred to and approved. (*Vide*, also, *Keary et al.* v. *The Farmers' and Mechanics' Bank of Memphis*, 16 Pet., 90.)

Alexander McNutt, in the case under examination, must be regarded as a private person acting in a private capacity; at most as a mere agent under a law of Mississippi, in whom the interests of other individuals may to a particular extent have been vested, and through whom they were authorized to sue. He represented or was identified with no political or fiscal rights or interests of the State of Mississippi. That State had no interest involved in the conducting of that suit by McNutt, and much less was she a party to the record in that suit. Standing, then, in the relation of a mere agent in the transaction, and there being no law of the United States investing the federal courts with jurisdiction, as incident to such agency, he could have access to those courts, and the courts themselves could have jurisdiction, solely in virtue of his character of citizen of a 24*] State different from that in *which the defendants resided, and that character it was indispensable should appear upon the record. These are positions which it has seemed to me impossible successfully to assail; positions encompassed with a chain of authorities comprehending the entire existence and duration of the government itself. This, however, is said to have been broken by the act of this court, and by that act an opening made for farther power and jurisdiction in the circuit courts. The mean by which such important consequences are supposed to have been effected, is the decision of the case of *Browne et al.* v. *Strode*, to be found in 5 Cranch, 303. In this case, which was submitted without argument, and in which the certificate directed to the Circuit Court is comprised in two lines, no reason whatever is assigned for the conclusion at which the court appeared to have arrived. The facts of the case, as presented in the short abstract of it, are thus stated: "It was an action upon an executor's bond given in conformity with the laws of Virginia. The object of the suit was to recover a debt due from the testator in his lifetime to a British subject. The defendant was a citizen of Virginia. The persons named in the declaration as plaintiffs were the justices of the peace for the County of Stafford, and were all citizens of Virginia. The court ordered it to be certified as their opinion "that the court below has jurisdiction in the case." This is the whole case, and it is confidently believed to stand entirely solitary; without support, and without a likeness in the whole history of our jurisprudence: and, in commenting upon this case, it may be safely asserted, that if the court in their certificate have intended to affirm, that the holders of equitable interests, *cestuis que trust*, who are not the holders of the legal interests, or rights of action at law, are in actions at law the regular and proper parties to the record, then, indeed, they have not merely overturned the series of decisions in this court, from the case of *Bingham* v. *Cabbot*, in 3 Dall., decided in 1798, down to the case of *The Governor of Georgia* v. *Madrazo* (1 Peters, 110); they have reversed, moreover, what is believed has been regarded as a canon of the law, wherever the principles of the common law have been adopted; and this they have accomplished by one short sentence, and without a single word to explain this mighty revolution. But can it be reasonably presumed that this court have in so cursory a mode intended to reverse its own well-considered, well-reasoned, and oft-repeated decisions; and this, too, without professing to review them—nay, without one word of reference to them of any kind? A *presumption like this seems scarcely compatible with that cautious reluctance with which innovation on settled principles is always admitted by the courts. Is it not far more probable that the short and isolated abstract in question exhibits an imperfect picture of the action and purposes of the court as applicable to some particular state of case which may not be fully and accurately given, for the record of the case in the court below is not set out *in extenso*. But let it be supposed that the objects and the language of the court, in the case of *Browne* v. *Strode*, are accurately given; still the inquiry recurs, does that case establish the law of this cause at the present day? *Browne* v. *Strode* was decided in 1809. Turning, for the moment, from the decisions of this court prior to 1809, supposed (strong, and explicit, and numerous as they are) to have been silently demolished by *Browne* v. *Strode*, what must be understood with respect to the decisions of *Skillern's Ex'rs* v. *May's Ex'rs* (6 Cranch, 267); of *Osborn* v. *The Bank of the United States* (9 Wheat., 33); of *McCormick et al.* v. *Sullivant et al.* (10 Wheat., 199), and of *The Governor of Georgia* v. *Madrazo* (1 Peters, 110)—all posterior in date to 1809? If these cases are to be received upon the import solely of their own terms, uninfluenced by any reference to prior decisions, still as they are posterior in time to *Browne* v. *Strode*, and are wholly irreconcilable therewith, they should be understood as controlling and reversing that decision. How much stronger, then, nay how irresistible appears this conclusion, when it is ascertained that the several decisions subsequent to 1809 refer expressly to those of previous date, rely upon them as forming their own foundation, and re-affirm them as the law of the federal courts.

The only decision in this court which would appear, upon a superficial view of it, to give color to the decision of *Browne et al.* v. *Strode*, is the case of *Irvine* v. *Lowry*, reported in 14 Peters, 293. An attentive examination of the latter case, however, will show that, so far from resembling *Browne* v. *Strode*, the facts of the two cases differ essentially; and that the former does not sustain, but, in effect, contradicts the latter. In *Irvine* v. *Lowry* the action was in the name of Irvine, the payee of the no-

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for the benefit of the Lumberman's Bank. On behalf of Lowry, the defendant, exception was taken to the jurisdiction upon the ground that the Lumberman's Bank, the beneficiaries in the suit, consisted, in part, of persons who were citizens of the same State to which the defendant belonged. The case of *Browne et al.* v. *Strode* was relied on to show that these benefi-
26*] ciaries *and not the nominal parties or those who held the legal interest, should be considered the true parties on the record. This exception was overruled, and the jurisdiction sustained in the name of the party holding the legal right, in conformity with the current of authorities before cited. 'Tis true that, in the opinion delivered in this case, the decision in *Browne et al.* v. *Strode* is mentioned, and accounted for upon an hypothesis which by no means devests it of its anomalous character, any more than it rests the case of *Irvine* v. *Lowry* upon any real similitude with it. The argument is this, that although in *Browne et al.* v. *Strode* the plaintiffs and defendant were citizens of the same State, yet the statute of Virginia, which requires the executor's bond for the protection of creditors and legatees, passes the legal right to those whose interests the bond is designed to protect. To this reasoning several answers at once present themselves, either of which appears to be sufficient. 1. If this could be so understood, it would leave the objection precisely where it stood before. The parties to the action would still be all citizens to the same State, whereas the Judicial Act declares they shall be (that is, the plaintiffs and defendants) of different States. 2. The Virginia statute professes to affect no such transmutation of legal rights. 3. It confers no right of action on the beneficiaries under the bond. 4. It orders the prosecution of the suit in the names of the justices the obligees, and by consequence, forbids such proceeding in the names of any other persons. 5. In point of fact, in the case commented on (as doubtless would be found to be the fact in every suit ever instituted under the statute), the action was brought in the names of the justices, so that those whose interests were designed to be protected by the bond, were never parties to the suit at all, much less the real or only parties representing the right of action under the bond.

My mind, then, is impelled, by considerations like these, to the deductions, that *Browne* v. *Strode* does not furnish the rule for the decision of this cause; and that, if it ever was a rule for the federal courts, it has been clearly and emphatically annulled. As a corollary from the above reasoning and the cases adduced in support thereof, it follows, that Alexander McNutt, without appearing as the party plaintiff upon the record to be a citizen of some State other than that to which the defendants belong, could have no standing in the Circuit Court; and that failing so to appear, the Circuit Court could have no jurisdiction over the cause.

27*] *It cannot be requisite here to meet any argument, should any be attempted, designed to maintain the right of McNutt to sue in virtue of his character of Governor of Mississippi, and as such representing the sovereign or supreme executive power of that State. In that aspect, the suit would be virtually by the State herself, and not be the suit of Alexander McNutt; such a suit, too, could take place only where some direct right or interest of the States should be involved. Of such a controversy, the Circuit Court could unquestionably have no jurisdiction; this having been settled as one of those instances, the cognizance whereof belongs exclusively to the Supreme Court. (*Vide, The State of Georgia* v. *Brailsford*, 2 Dall., 402, and *The Governor of Georgia* v. *Madraza*, 1 Peters, 110; *Fowler et al.* v. *Lindsay et al., &c.* 3 Dall., 411.)

To any argument, *ab inconvenienti*, which may be urged in support of the jurisdiction in this case, I would simply oppose the observations of two distinguished members of this bench, in reply to a similar argument addressed to them in the case of *Turner, Admin., &c.*, v. *The Bank of North America* (4 Dall., 10), in which *Chief Justice* Ellsworth inquired: "How far is it intended to carry this argument? Will it be affirmed that, in every case to which the judicial power of the United States extends, the federal courts may exercise jurisdiction without the intervention of the Legislature to distribute and regulate the power?" And Chase, *Justice*, remarked: "If Congress has given the power to this court, we possess it, not otherwise; and, if Congress has not given the power to this or any other court, it still remains at the legislative disposal." *Est boni judicis ampliare jurisdictionem* was once quoted as a wise judicial maxim; how far this may accord with systems differently constituted from ours, and having their foundations in a large and almost undefinable discretion, it is, perhaps, unnecessary here to inquire; it seems, however, scarcely compatible with institutions under which the political and civil state is referred, almost exclusively, to legislative or express regulation.

Upon the views above given, I conclude that the judgment of the Circuit Court should be affirmed.

ORDER.

This cause came on to be heard on the transcript of the record from the Circuit Court of the United States for the Southern District of Mississippi, and was argued by counsel; on consideration whereof, it is now here ordered and adjudged by this court, that the judgment *of the said Circuit Court in this cause [**28** be, and the same is hereby reversed, with costs; and that this cause be, and the same is hereby remanded to the said Circuit Court, with directions to that court to enter judgment in this case for the plaintiff in that court.

Mr. Justice STORY:

The decree of the Circuit Court in this case was reversed on the 30th of January, 1844, and the cause remanded, with directions to enter judgment for the plaintiff. On the 31st of January, *Mr. Jones*, for the plaintiff in error, suggested the death of Bland, and moved that the writ of error stand against the survivor, Humphreys, and that judgment be entered against him alone.

Mr. Justice STORY, in delivering the opinion of the court, said, that if Bland died since the commencement of the term, the judgment might be entered against both defendants, on a day prior to the death of Bland, *nunc pro tunc*. If he died before the commencement of the term, then upon the suggestion of his death

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before the term being entered of record, the cause of action surviving, the judgment might be entered against the surviving defendant, Humphreys. There certainly is no objection in this case, under all the circumstances, to granting the application as asked for by the plaintiff's counsel; that is, to enter the suggestion of Bland's death upon the record, and then entering judgment against Humphreys alone as the survivor; and it is accordingly so ordered by the court.

Alexander McNutt, Gov., &c., plaintiff in error,
v.
Richard J. Bland, et al.

Mr. Jones, of counsel for the plaintiff in error, having suggested the death of Richard J. Bland, one of the co-defendants, since the last continuance of this cause, now here moved the court that his writ of error stand as against the surviving defendant. Whereupon this court not being now here sufficiently advised of and concerning what order to render in the premises, took time to consider.

January 31, 1844.

Alexander McNutt, Gov., &c., plaintiff in error,
v.
Richard J. Bland et al.

On consideration of the motion made in this case on a prior day of the present term of this court, to wit: on Wednesday, the 31st day of January, it is now here ordered by this court that the suggestion of Bland's death be entered 29*] on the record, and that then judgment *be entered against Humphreys alone as the survivor, and that the mandate of this court direct the Circuit Court to enter judgment for the plaintiff against Benjamin G. Humphreys alone as the survivor.

March 12th, 1844.

Cited—14 How., 587; 17 How., 499; 21 How., 74; 11 Wall., 178, 177; 13 Wall., 67; 20 Wall., 123, 124; 11 Otto., 569; 2 Curt., 494; 1 Biss., 435; 3 Wood. & M., 22; Hemp., 545, 546; 2 Bond, 162; 7 Bank. Reg., 62.

WILLIAM M. GWIN
v.
JAMES W. BREEDLOVE.

Mississippi statute regulating duties of sheriffs collecting moneys, and suits against them—proceedings against marshal and sureties—on motion residence not averred to give jurisdiction—Process Act of Congress—adoption of laws of a State—marshal must account in gold and silver—legal tender.

A statute of the State of Mississippi, passed on the 15th of February, 1828, provided that if a sheriff should fail to pay over to a plaintiff money collected by execution, the amount collected, with 25 per cent. damages, and 8 per cent. interest, might be recovered against such sheriff and his sureties, by motion before the court to which such execution was returnable.

A marshal and his sureties cannot be proceeded against, jointly, in this summary way, but they must be sued as directed by the act of Congress.

But the marshal himself was always liable to an attachment, under which he could be compelled to bring the money into court; and by the Process Act of Congress, of May, 1828, was also liable, in Mississippi, to have a judgment entered against himself by motion.

This motion is not a new suit, but an incident of the prior one; and hence, residence of the parties in different States need not be averred in order to give jurisdiction to the court.

Such parts only of the laws of a State as are applicable to the courts of the United States are adopted by the Process Act of Congress; a penalty is not adopted, and the 25 per cent. damages cannot be enforced.

A marshal who receives bank notes in satisfaction of an execution, when the return has not been set aside at the instance of the plaintiff, or amended by the marshal himself, must account to the plaintiff in gold or silver; the Constitution of the United States recognizing only gold and silver as a legal tender.

THIS case was brought up by writ of error from the Circuit Court of the United States for the Southern District of Mississippi, and arose upon the following statement of facts:

At some period prior to the 13th day of February, 1839, James W. Breedlove, the defendant in error, had recovered a judgment in the Circuit Court of the United States for the Southern District of Mississippi, against certain persons there, for the sum of $12,976, with interest at the rate of 8 per cent. per annum, from the 24th of May, 1838, until paid; and on the said 13th of February, an execution was issued upon the judgment, and placed in the hands of Gwin, the marshal. The sum of $5,000 was collected in unexceptionable money, *and paid over to the plaintiff; the balance [*30 was received in notes of the Commercial Bank of Vicksburg, and Planters' Bank of Mississippi, which the plaintiff refused to receive.

At the November Term, 1839, of the Circuit Court of the United States, Breedlove moved for a judgment against Gwin, the marshal, for the sum of $7,976, being the balance due to the plaintiff on the execution. This motion was made under a statute passed by the Legislature of Mississippi on the 15th day of February, 1828, which had been adopted in the practice of the Circuit Court by a rule of that court. The statute provided (Howard & Hutchinson, 296) that if the sheriff should fail to pay, on demand by the plaintiff, money collected by execution, such sheriff and his sureties should be liable to pay to the plaintiff the whole amount of money so collected, together with 25 per cent. damages thereon, with interest at the rate of 8 per cent. per annum, to be recovered by motion before the court to which such execution is made returnable. The statute further provided for a jury, if the sheriff should deny that the money was collected by him. In case the sheriff failed to return an execution on the return day thereof (Howard & Hutchinson, 298), the plaintiff was allowed to recover judgment against the sheriff and his sureties, with 5 per cent. damages, by motion before the court. It was also declared to be a misdemeanor for the sheriff to refuse to pay over money which he had collected, and punishable on conviction, by removal from office. (Howard & Hutchinson, 299.)

The reasons filed in support of the motion were, that the marshal had made the money and failed, or refused, to pay it over to the plaintiff.

Gwin demurred to the motion; but the demurrer being overruled, he filed four pleas. In the first two, he denied having received money. In the last two, he alleged that he had collected

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and received notes of the Planters' Bank of the State of Mississippi, and of the Commercial and Railroad Bank of Vicksburg, due and payable on demand, when said banks were paying gold and silver on all their notes payable on demand; which notes, so collected and received, were collected and received without any instructions from the plaintiff or his attorney that gold or silver would be required, and at a time when the bank notes received were the current circulating medium; and the same were tendered to the attorney of the plaintiff, before the suspension of specie payments by any or either of said banks—all of which said bank notes said defend-
31*] ant had always been ready and *willing, and was then ready and willing, to pay over to the plaintiff or his attorney.

The plaintiff joined issue upon the first two pleas, and replied specially to the last two, that the defendant was, previous to the reception of the notes, instructed, that gold or silver would be required of him. Issue was joined upon the last two replications.

Evidence was offered at the trial, that the attorney of the plaintiff, Breedlove, told the marshal frequently, before the money was collected, that specie would be required; that he had demanded the money of the marshal, who refused to pay him; that the marshal never tendered him any bank notes, and that the notes of those banks, before their suspension, were received in the community everywhere as specie, and by the sheriffs and officers in collection of executions.

The execution was issued on the 13th of February, and the banks suspended specie payments on the 15th or 22d of March, 1839.

The counsel for the defendant prayed the court to instruct the jury as follows:

1. That if the jury believe from the evidence that bills of exchange and bank notes were received by the marshal, and not gold or silver, then the jury will find the issues on the first and second pleas in favor of the defendant.

2. If the jury believe that the instructions given to the marshal were intended to authorize the marshal to collect gold or silver, or its equivalent, and he collected bank notes which were equivalent to gold or silver, then they should find the issue for the defendant.

3. And that if they find that the marshal received bank notes or bills of exchange and not money in specie, which the plaintiff refused to receive as money, then they must find the issues for the defendant, as the issue is, whether he received and collected money or not.

The first and third of which charges, the court refused to give, but gave the second charges, to the jury: to which refusal to give the first and third charges, the defendant excepted.

The jury found for the plaintiff.

Mr. Walker for Gwin, the plaintiff in error.

Mr. C. Cox for the defendant.

Mr. Walker made the following points:

1. That the statute of Mississippi had not been strictly pursued.

2. That it did not apply to marshals of the United States.

32*] *3. That there is a want of jurisdiction, inasmuch as the record does not show, in any part of it, that Breedlove was not a citizen of Mississippi.

1. The statute is highly penal in its character; and, therefore, like all other penal statutes, must be construed strictly. It provides (Howard & Hutchinson, 296) two remedies against sheriffs: one for not paying over the money which they may have collected, and the other for neglecting to levy the execution. The motion below was under the first head, which was an erroneous proceeding, because bank notes are not money. The return states the collection to have been in bank notes; but, if they had been notes, of a mercantile firm, it would clearly not have been money. The one is no more money than the other. The statute is so highly penal that a refusal on the part of the sheriff to pay, is declared to be a misdemeanor (page 299), and punished by removal from office.

The agreement of the sheriff, to receive anything but money, does not bind the plaintiff. (5 Howard, 246.) Where the sheriff returned that he had received bank bills, it was not considered a legal return or binding on the plaintiff, and a new execution was awarded. (5 Howard, 621.) A sheriff cannot take a negotiable note and return the execution satisfied. (1 Cowen, 46.) The payment must be in cash. (9 Johnson, 263.) There being no money received, the remedy pursued ought to have been for omitting to collect the money. (Howard & Hutchinson, page 642, sec. 42.)

2. The statute does not apply to marshals. It was passed on 16th February, 1828. The Process Act of Congress was passed on 19th May, 1828; but no rule of court has ever adopted the State law. How came marshals, then, to be under the State law? Their duties are pointed out by acts of Congress (Gordon's Digest Laws of the United States, articles 610, 611), and a party injured may sue on their bond and recover damages legally assessed. But the sheriffs, under the State law, are subject also to a penalty of 25 per cent. in addition. Can the marshals be legislated by a State into this responsibility? The sheriffs are also to be removed from office. Can a State law require the President of the United States to remove a marshal? If not, where can the line be drawn?

The words in the Act of Congress of 1828 are borrowed from the Act of 1792, and direct that the process at common law used in State courts should be adopted in the courts of the United States. But the process of the original suit below had been exhausted. The *motion [*33 against the marshal was a new proceeding, and not a part of the process of the other case.

(10 Wheat., 1, 32; 6 Peters, 658; 7 Cranch, 654; 1 Howard, 300; 2 Dallas, 396; 5 Mason, 26; 12 Peters, 300; that attachment laws of States are not included in the Process Act.)

The courts of the United States do not adopt State, criminal, or penal laws. (17 Johnson, 1, 4.)

3. Breedlove is not shown in the record to have been a citizen of another State. This court has decided that, as the courts of the United States are of limited jurisdiction, it must appear on the face of the record. (10 Wheat., 192; 2 Cranch, 9; 2 Bald. C. C. R., 275; 13 Peters, 45; 4 Wash. C. C. R., 32.)

Mr. C. Cox, for defendant, argued:

1. That it was no ground of exception to defendant's motion; that it does not show him to be a citizen of a State other than Mississippi; in all other respects it is formal.

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2. The plaintiff was accountable on his return, and on the facts established by the verdict, for the amount of $7,000 in money.

3. The statute of Mississippi is applicable to the present case.

1. The question of jurisdiction was settled by the original judgment; and a ministerial officer of the court cannot be permitted to raise the objection. After an appearance, the objection cannot be made. (3 Peters, 459; 5 Howard, 432; 9 Peters, 156.)

2. Issue was joined below upon the question whether the marshal received notice that coin would be required, and decided against him. The plaintiff below was, therefore, entitled to consider the marshal's return as of money. A tender of bank notes is good, unless objected to. (10 Wheat., 333.)

3. The Act of Congress of 1828 was subsequent to the statute of Mississippi. Process means the proceedings until the end of the suit, the possession of the fruits of the judgment. (10 Wheat., 1*51.)

The statute of Mississippi was adopted by rule of court.

The bond of the marshal is a cumulative remedy. All courts have authority over their officers, and the remedy for injury is by motion. There is nothing unusual in the proceeding. All amercements are penal. In 9 Peters, 156, a judgment was entered on motion and refused to be re-opened.

34*] *Mr. Walker*, in reply:

If the return of the marshal was that the execution was satisfied, was it not an end of that suit?

No matter who makes the question of jurisdiction, the court will always notice it. The original judgment does not settle it, because the proceedings there do not make the necessary averment.

The case in 9 Peters does not apply: there is no case where the penal laws of a State have been applied to marshals.

Mr. Justice CATRON delivered the opinion of the court:

The writ of error in this case is prosecuted by the former marshal to reverse a judgment recovered against him by motion in the Circuit Court of the United States for the District of Mississippi. The proceeding in this form, is founded on a law of that State governing sheriffs; as will be seen by the statement of the reporter.

The first objection raised on behalf of the plaintiff in error is, that it does not appear on the record that Breedlove was a citizen of a different State from the defendant; and therefore it is insisted the court below had no jurisdiction as between the parties. As this does not appear, in an ordinary case jurisdiction would be wanting. On the other hand, it is contended that the motion against the ministerial officer of the court for not performing his duty, was an incident, and part of, the proceeding in the suit of *Breedlove* v. *Marsh et al.*, in which the execution issued; and that no question of jurisdiction can be raised.

The motion for a judgment being a proceeding according to the statute of Mississippi, it is also objected that Congress by the Act of 1828 (ch. 31), had provided a complete and exclusive remedy on marshal's bonds by suit; but if it was otherwise, still, the additional remedy furnished by the State law, when substituted, must be treated as an independent suit, in like manner as an action on the marshal's bond, and the residence of the parties be such as to give the federal court jurisdiction.

These propositions are so intimately blended that it is most convenient to consider them together.

We think it true beyond doubt, that if the bond had been proceeded on against the marshal and his sureties, it could not have been done by motion, according to the State practice prescribed by the statute of Mississippi; but the proceeding must have been according *to the act of Congress. Yet before the [*35 Act of 1806 was passed, and ever since, the common law remedy by attachment has been the most usual to coerce the marshal to perform his various duties; and among others, to bring into court moneys collected on executions. So in the State courts, nothing is more common than to proceed by attachment against the sheriff, instead of resorting to a summary motion, for judgment against him by force of a statute, where he withholds moneys collected. The marshal's bond is for twenty thousand dollars; the sureties are bound to this amount only; and if no other remedy existed save on the bond, after the penalty was exhausted, he might set the court at defiance: the marshal could also be sued in *assumpsit*, by the plaintiff in the execution. It has therefore never been true, that a suit on his bond, governed by the acts of Congress, furnished the exclusive remedy as against the marshal himself; and we think that Congress intended by the new Process Act of 1828, to add the cumulative remedies, then existing by statute, in the new States, where they could be made to apply, because they were more familiar to the courts and country, and better adapted to the certain and speedy administration of justice. In our opinion, the act of Mississippi authorizing a judgment by motion, against a sheriff for failing to pay over moneys collected on execution, to the party on demand, or into the court at the return day, was adopted by the Act of 1828, and does apply in a case like the present, as a mode of proceeding in the courts of the United States, held in the District of Mississippi; and could be enforced against the marshal in like manner it could be against a sheriff in a State court.

The same facts that justified the judgment against the goods, &c., of the marshal, would have authorized an attachment against his person; operating even more hastily than a *capias ad satisfaciendum*, founded on a judgment; and therefore no objection to this means of coercion can be perceived, that did not apply with still more force to the old mode by attachment. The latter remedy was never deemed an independent suit, but a means to compel the ministerial officer of the court to perform his duty, so that the plaintiff should have the fruits of his judgment; and the same end is attained by the new remedy under the State law; each is an incident of the suit between the plaintiff and defendant to the execution; of which the proceeding against the officer is part; and to that suit the question of jurisdiction must be

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referred. It follows the officer had no right to raise the question.

36*] *The next inquiry is, to what extent does the statute of Mississippi apply to the courts of the United States held there?

It is contended for the defendant in error, that the Act of Congress of 1828 did intend, and could only have intended to adopt the State law entire; that when the process and modes of proceeding were adopted, the provision carried with it the penalties prescribed to enforce their performance; to recognize part as governing the practice of the federal courts, and reject other parts, as not applicable to them, would break up the whole system. That so doing is a delicate, and difficult duty, experience has taught us; it is impossible, however, to do otherwise in many cases. That of *Amis* v. *Smith* (16 Peters, 303), was an instance. It also came up from Mississippi. By the laws of that State, the sheriff is commanded to take a forthcoming bond for the delivery of property on the day of sale, levied on by virtue of an execution; if the bond is forfeited for not delivering the property, it operates as a new judgment against the defendant to the execution, and also against the sureties to the bond: and no writ of error is afterwards allowed to reverse the original judgment. Pursuant to the laws of Mississippi a delivery bond had been taken by the marshal; it was forfeited, and then the defendant prosecuted a writ of error to this court to reverse the judgment on which the execution issued. It was held here, that that part of the State law authorizing the delivery bond to be given, was adopted by the Act of 1828, and that a new execution might issue on it; but the part cutting off the writ of error must be rejected. Another instance will be given, which is presented by the statute of Mississippi, on which the present motion against the marshal was founded. The 27th and 28th sections enacts, that if the sheriff shall make a false return on an execution or other process, to him directed, for every such offense he shall pay a fine of $500, one half to the plaintiff, and the other half to the use of the literary fund, recoverable by motion. If the fact that the return is false does not appear of record, the court shall immediately impannel a jury to try such fact, and on its being found, proceed to assess the fine.

The recovery of the penalty could with quite as much propriety have been on conviction by indictment as on a summary motion; and in neither mode can it be plausibly contended that the courts of the United States could inflict the penalty on its marshal; the motion and assessment of the fine, being distinct from the process and mode of proceeding in the cause of 37*] which the execution was *part on which the false return was made. This being an offense against the State law, the courts of the State alone could punish its commission; the courts of the United States having no power to execute the penal laws of the individual States.

A judgment below for 25 per cent. damages was given against the marshal for failing to pay over the debt collected; the penalty amounted to $1,750. The motion for judgment was founded on the 25th section of the act; it declares judgment on motion shall be rendered against the marshal, for the money collected, with legal interest: and also for 25 per cent. damages on the amount.

This is just as much the infliction of a penalty, as if a fine had been imposed under the 27th and 28th sections for a false return; and for the same reasons was beyond the competency of the Circuit Court; and for so much the judgment cannot stand.

We next come to the question whether the marshal is rendered liable by his return, and the proofs, and pleadings.

By the State statute he was allowed to contest the fact by pleading to the motion, that he had not received the money. He first demurred to the written grounds of the motion; being in the nature of a declaration. The demurrer was overruled and the defendant had leave given to plead over. He pleaded, 1st. That he did not receive or collect on said execution the moneys specified in the motion. The 2d plea is to the same effect, but for the larger sum, including a bill of exchange, about which there is no controversy.

3d. That he received and collected the notes of the Commercial and Railroad Bank of Vicksburg, and the Planters' Bank of Mississippi, due and payable at said banks; and which were paying specie on their notes on demand; that is, on the 12th day of March, 1839; which notes were collected and received without any instructions from the plaintiff or his attorney that gold or silver would be required; and at a time when the bank notes were the current circulating medium; and that the same on the day aforesaid were tendered to the attorney of the plaintiff before the suspension of specie payments by the banks—all of which bank notes he has always been ready, and is yet ready and willing to pay over to the plaintiff. The 4th plea is the same in substance.

On the first two pleas issues were joined to the country. To the other two, the plaintiff replied: That previous to the reception of the bank notes, the defendant was instructed that gold and silver would be required upon the execution; and issues were tendered to *the [*38 country; which were joined on the single point, whether the marshal had been instructed that gold or silver would be required.

Two instructions were asked on behalf of the marshal and refused. First,

"If the jury believe from the evidence that bills of exchange and bank notes were received by the marshal, and not gold and silver, then the jury will find the issues on the first and second pleas in favor of the defendant."

3d. "And that if they find that the marshal received bank notes or bills of exchange, and not money in specie, which the plaintiff refused to receive as money, then they must find the issues for the defendant; as the issue is, whether he received and collected money or not."

The 2d instruction asked was given, and need not be noticed.

The return of the marshal was, that he had received on the execution bank notes due on demand and payable in specie—on the two banks named in the return, amounting to $7,000—the subject of the present motion.

No question is, or can be raised, on the two last issues; they were found against the defendant on the proof that he had been instructed that nothing but gold or silver would be re-

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ceived in satisfaction. The merits of the case therefore turn on the two instructions refused; they are referable to the facts giving rise to the instructions; the facts briefly are, that the marshal was instructed to collect specie on the execution; he failed to do so, and took bank notes from the debtor to the amount of $7,000 in lieu of specie. A few days after the notes were received, one of the banks at which a part of them were payable suspended specie payments, and its notes thereby became depreciated in value. The instructions raise the question, who shall bear the loss? If the officer's return is treated as a nullity, then it will fall on Marsh and others, defendants to the execution; if the marshal's offer to deliver the notes to Breedlove's attorney, and his plea of tender had been good, then the execution creditor must have sustained the loss—but failing in these grounds of defense the officer must bear it himself.

By the Constitution of the United States (section ten) gold or silver coin made current by law can only be tendered in payment of debts: Nevertheless, if the debtor pays bank notes, which are received by the creditor in discharge of the contract, the payment is just as valid as if gold or silver had been paid. Had Marsh 39*] paid *his creditor Breedlove in the manner he did the marshal, then there can be no doubt Breedlove could not have treated the payment as a nullity, and on this assumption have issued an execution on his judgment, and enforced payment again in specie.

By the writ of execution the marshal was commanded to collect so many dollars; this meant gold or silver of course. And the Court of Errors and Appeals of Mississippi, in the case of *Nutt* v. *Fulgham* (5 How. R., 621), ordered the return of a sheriff, like the one before us, to be struck out, on motion of the plaintiff in the suit. That court says: "The return of the sheriff, that he took the Union Bank notes, is not a legal return; and the plaintiff is not bound by it, unless the plaintiff had agreed to receive that kind of money or notes in payment; and no such agreement appears."

In the case before us no motion was made to strike out the return on part of the plaintiff Breedlove; nor did the marshal ask leave to alter his return, stating he had not made the money; the three parties interested treated the payment as a valid discharge of the judgment against Marsh: and we think, for the purposes of this motion, at least, it must be so deemed. Gwin, the marshal, did receive bank notes in payment, and intended they should be taken in discharge of the execution; the record throughout shows he did so receive them, and that they were received as money; still, he could only pay into court gold or silver, if required by the execution creditor to do so, and therefore he ran the risk of converting the notes into specie when he took them; having incurred the risk, the marshal must bear the loss of depreciation. We apprehend this view of an officer's responsibility who collects bank notes, is in conformity to the general practice of the courts, and collecting officers throughout the country.

This court therefore reverses so much of the judgment of the Circuit Court as adjudged the plaintiff in error, Gwin, to pay the twenty-five per cent. damages, on the amount recovered against him, and affirms the residue of said judgment.

Mr. Justice DANIEL dissented:

I am unable to concur with the majority of the court in their opinion just announced. 'Tis my opinion, that the judgment of the Circuit Court should have been wholly reversed.

Congress, by express enactment, have defined the duties and responsibilities of the marshals, and prescribed the modes in which *they [*40 shall be enforced. These express regulations, designed for the government of the peculiar officers of the federal courts, cannot, I think, be varied or controlled by rules established by the States for the conduct of their respective ministerial agents; but must be of paramount authority.

The laws of Mississippi, therefore, denouncing penalties against the misconduct of sheriffs, and directing the manner of enforcing them, cannot govern this case. Should it be conceded, however, that the laws of Mississippi concerning sheriffs could have effect in this motion against the marshal, it seems obvious, to my mind, that the appropriate remedy under the State law for an act like that complained of, has not, in this case, been adopted. The alleged delinquency in the marshal, made the foundation of this motion, a delinquency identically the same for which a like proceeding is authorized against a sheriff, is the refusal to pay over money actually made and in his hands, and collected in satisfaction of an execution. For such a refusal, a peculiar penalty, the very same sought and adjudged by the court in this instance, is provided. By the return of the marshal, relied on in proof by the plaintiff, it is conclusively shown that the money which the officer was commanded to make had never been received; but that he had received, in part, that which was not money, and which had never been converted into money, and which the plaintiff, in the execution, would never have received in lieu of money. Nay, the oral evidence introduced by the plaintiff was brought in to prove that the marshal, in opposition to the plaintiff's positive instructions, had received that which was not money, excluding, upon this proof, as well as upon the return, every inference that money had been actually received in satisfaction of the process in his hands. A refusal or an omission to levy or to return an execution, the statutes of Mississippi designate as different and distinct offenses, and the conduct of the marshal as shown in the proofs, approaches more nearly to either of these than it does to the misfeasance alleged in the notice, and, for which, the court has awarded a penalty against him, although the fact charged is positively disproved by all the testimony, as it is also by the plaintiff's replications to the defendant's 3d and 4th pleas. But whether or not the conduct of the marshal can in literal strictness be denominated a failure or refusal to levy or to return an execution, it is surely not a failure or refusal to pay over money actually levied, and, therefore, the proceeding, under color of the statute of Mississippi, is not *the [*41 proceeding appropriate to the act of the officer, however that act may be characterized. This is, too, a statutory proceeding, and should strictly conform to the power which authorizes

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it. It cannot be extended either to modes or objects not clearly embraced within the terms of that authority. It cannot, therefore, in any event, warrant the judgment now proposed, as that is clearly for a penalty wholly different from the one imposed by the law of Mississippi, for an offense such as is assumed by the court to have been committed in this instance. Surely the law of Mississippi either should or should not govern this case.

Again, I do not think that the jurisdiction of the Circuit Court is made out as between the parties to the judgment. The motion on which it is founded is neither process nor a mode of proceeding in the suit between Breedlove and Marsh & Company, nor can it be deemed an execution or process or proceeding upon or regularly incident to the judgment between those parties. It is a distinct and substantive and original proceeding against a third person no party to the controversy. A right of action is claimed against this third person for his own acts or delinquencies, independently of the contract or controversy between the parties to the judgment. In his character of officer of the court, he would, doubtless, be amenable to the authority it possesses to supervise the conduct of its own officer, and to secure the enforcement of its own judgments; an attachment would, therefore, lie against him, to effect these ends of justice. He would, also, be liable upon his official bond as marshal; because the judicial act confers a right of action thereon, without restriction as to citizenship, on all persons who may be injured by a breach of the condition of that bond. But if a farther or different recourse is sought against the marshal, one which may be supposed to arise neither from the inherent power of the court over its peculiar officer, or its judgments; then it is presumed that those who seek such recourse, must show their right as arising out of their character to sue in the federal courts; they must show themselves by regular averment to be citizens of a State other than that of him whom they seek to implead. The present case closely resembles that of *Course et al.* v. *Stead et ux.* (4 Dall., 22), in which it was ruled that the want of a proper description of parties in a supplemental suit was not cured by a reference to the original suit.

The judgment should, I think, be reversed.

42*] *ORDER.

This cause came on to be heard on the transcript of the record from the Circuit Court of the United States for the Southern District of Mississippi, and was argued by counsel; on consideration whereof, it is now here ordered and adjudged by this court, that so much of the judgment of the said Circuit Court in this cause as adjudges William M. Gwinn, the plaintiff in error, to pay 25 per cent. damages thereon, be, and the same is hereby reversed and annulled; and that the residue of the judgment of the said Circuit Court in this cause, be in all respects, and the same is hereby affirmed.

Cited—6 How., 10; 12 Wall., 586, 618, 619, 657; 16 Wall., 195; 2 Curt., 44, 307, 497; 1 Biss., 240; 18 Blatchf., 159.

*DAVID SHRIVER, JUNIOR'S, LESSEE, [*43

v.

MARY LYNN, WILLIAM LYNN, GEORGE LYNN, JOHN G. LYNN, JAMES C. LYNN, ELLEN JANE LYNN, MARY MAGRUDER, JONATHAN W. MAGRUDER, ANNA B. TILGHMAN, FREDERICK AUGUSTUS SCHLEY (who married with FRANCINA C. LYNN, Deceased. Daughter of DAVID LYNN), FREDERICK AUGUSTUS SCHLEY, WILLIAM HENRY SCHLEY, AND ELIZA M. SCHLEY (Children of FREDERICK A. SCHLEY and FRANCINA, his Wife), Devisees of DAVID LYNN.

Construction of will devising lands—Maryland statutes enlarging powers of chancery—record of decree of sale on application of part of heirs, conclusive—sale by court without jurisdiction is a nullity—cannot be ratified.

The following words in a will, viz.: "I give and bequeath unto my brother E. M., during his natural life, 100 acres of land. In case the said E. M. should have heirs lawfully begotten of him in wedlock, I then give and bequeath the 100 acres of land aforesaid to him, the said E. M., his heirs and assignees forever; but should he, the said E. M., die without an heir so begotten, I give, bequeath, devise, and desire that the 100 acres of land aforesaid be sold to the highest bidder, and the money arising from the sale thereof to be equally divided amongst my six children," give to E. M. only an estate for life, and not a fee-simple conditional.

Under the statute of Maryland, passed in 1785 (1 Maxcy's Laws, chap. 72), the Chancellor can decree a sale of land upon the application of only a part of the heirs interested; and as he had jurisdiction, the record must be received as conclusive of the rights adjudicated.

The decree of the Chancellor must be construed to conform to the sale prayed for in the petition, and authorized by the will; and a sale beyond that is not rendered valid by a final ratification.

A sale ordered by a court, in a case where it had not jurisdiction, must be considered as inadvertently done, or as an unauthorized proceeding; and, in either branch of the alternative, as a nullity.

THIS case was brought up by writ of error from the Circuit Court of the United States for the District of Maryland, and was an ejectment for 100 acres of land, lying in Alleghany County, in that State.

The plaintiff, who was also plaintiff in the court below, claimed title under a sheriff's sale; but the opinion of the court, upon a case stated, being against him, he brought it up to this court.

The facts were as follows:

In 1789, Zachariah Magruder was in possession of a tract of land called George's Adventure, containing 456 acres. His title was admitted, upon all sides, to be good.

In that year he made his will, which contained the following bequest *to his wife: [*44

I also give to my said beloved wife the full use of my dwelling plantation, containing in the whole, cleared and uncleared, after the legacy thereafter given is taken out, about 356 acres, called George's Adventure, to be by her peaceably and quietly possessed and enjoyed without molestation during her natural life.

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After sundry other bequests, he goes on to say:

"Item. I give and bequeath unto my brother, Elias Magruder, during his natural life, 100 acres of land, being a part of a tract of land called George's Adventure, lying and being in Washington County, and State aforesaid; to be laid off at the upper end of the tract aforesaid, so as to include the plantation whereon he now lives. In case the said Elias Magruder should have heirs lawfully begotten of him in wedlock, I then give and bequeath the 100 acres of land aforesaid to him, the said Elias Magruder, his heirs and assigns, forever; but should he, the said Elias Magruder, die without an heir so begotten, I give, bequeath, devise, and desire that the 100 acres of land aforesaid be sold to the highest bidder, and the money arising from the sale thereof to be equally divided among my six following children, to wit: Samuel Beall Magruder, William B. Magruder, Richard Magruder, Josiah Magruder, Norman Bruce Magruder, and Nathaniel Beall Magruder.

"Item. I devise, give, bequeath, and desire that the remaining part of my land, called George's Adventure, being about 356 acres, lying and being in Washington County, and State aforesaid, to be sold to the highest bidder, by and at the discretion of my executrix and executor hereafter named; and the money arising from such sale to be divided equally amongst my six sons, to wit: Samuel Beall Magruder, William Beall Magruder, Richard Magruder, Josiah Magruder, Norman Bruce Magruder, and Nathaniel B. Magruder."

After some further provisions, the testator appointed his wife and son executrix and executor.

In 1796 Zachariah Magruder died, and his brother Elias took possession of the 100 acres, which were laid off agreeably to the directions of the will. The title of the defendants is derived wholly from Elias Magruder, who conveyed the 100 acres to David Lynn, their ancestor, in fee-simple in 1806.

In 1805, four of the six children mentioned in the will, filed a petition in the High Court of Chancery of Maryland, stating that the executrix was dead; that the letters testamentary which had been granted to the executor had been revoked; that no sale of the real estate 45*] *had been made; that the testator devised that the remaining part of his land called George's Adventure, being about 356 acres, should be sold to the highest bidder, and the money equally divided amongst his six children, including the petitioners. The petition prayed the court to grant them relief, by appointing a trustee to sell all the property devised to be sold, and apply the proceeds to the purposes directed by the will.

The Chancellor granted the prayer, and decreed that the real estate directed to be sold, in the will, should be sold, and appointed a trustee in the usual way.

The decree ran thus: "That Roger Perry be, and he is hereby appointed trustee for making the said sale, and that the course and manner of his proceedings shall be as follows: He shall first file with the register of this court a bond executed by himself and a surety or sureties approved by the Chancellor," &c., &c.

The decree was passed at December session, 1805.

On the 10th of March, 1806, Elias Magruder conveyed to David Lynn, as has been already stated, the 100 acres of land upon which he (Elias) lived.

On the 22d of March, 1806, the trustee proceeded to sell the 356 acres mentioned in the will, stating in his report that he excepted the 100 acres devised to Elias Magruder, saying, "The 100 acres, part of said tract devised to be sold in case Elias Magruder should die without heirs, as expressed in the will, still remains unsold."

The report passed through the regular process, and was finally ratified in June, 1807; the net proceeds of sale being divided equally amongst the six children of Zachariah Magruder.

At some period prior to the 1st of January, 1812, Elias died unmarried, not having at the time of his decease, nor ever having had, any heir or issue begotten by him in wedlock.

On the 15th of February, 1812, the trustee proceeded to sell, as he said in his report, "all the remaining part of the real estate of Zachariah Magruder, deceased, consisting of 100 acres of land, part of a tract of land called George's Adventure, it being that part devised to Elias Magruder," when Walter Slicer became the highest bidder and purchaser.

This report was finally ratified in February, 1813; and, in August, 1813, the trustee executed a deed to Slicer, describing the 100 acres by the same metes and bounds by which they had been originally located when Elias Magruder took possession under the will.

*In October, 1817, one Arnold, for the [*46 use of David Shriver, Junior, the lessor of the plaintiff in this cause, and one Lamar, for himself, brought suits against Slicer in the County Court of Alleghany County; and in February, 1818, one Evans, also for the use of Shriver, brought suit against Slicer in the same court.

The defendant in the present case relying, as a ground of defense, upon an outstanding title existing in Lamar or his heirs under these proceedings, and the plaintiff resting his title wholly upon them, their progress is exhibited in a tabular form, showing the history of each one, up to the consummation by a sale of the 100 acres now in dispute.

ARNOLD	EVANS	LAMAR
1817. Sues Slicer.		Sues Slicer
1818. Gets judgment against Slicer. Judgment superseded.	Sues Slicer.	
1819. June—Sues out *fi. fa.* October—*fi. fa.* countermanded.	April 20. Gets judgment. June—Issues *fi. fa.* October—*fi. fa.* countermanded.	April 28. Gets judgment. October—Issues *fi. fa.*
1820.	February 2d. *fi. fa.* "to lie."	February—Injunction on the judgment.
1821.		

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ARNOLD	EVANS	LAMAR
1822.		April—Answer filed. October—Injunction dissolved.
1823. December 31, *sci. fa.* issued.	December 31. *sci. fa.* issued.	2d. *Fi. fa.* 100 acres sold to Lamar. In September sheriff makes deed.
1824. Fiat. *Fi. fa.* issued. 100 acres sold to Shriver by sheriff.	Fiat. *Fi. fa.* issued. 2d. *fi. fa.* 100 acres sold to Shriver by sheriff.	
1825. Sheriff makes deed to Shriver.	Sheriff makes deed to Shriver.	

47*] *In 1827, Shriver, the purchaser under the two elder judgments, brought suit in the Circuit Court of the United States, he being at that time a citizen of Virginia, against David Lynn, the assignee of Elias Magruder, as already stated.

In 1836, the death of David Lynn was suggested and his devisees became defendants.

In 1839 a verdict was found for the plaintiff, subject to the opinion of the court upon a case to be stated; upon which case, when stated, the opinion of the court below was in favor of the defendants and judgment rendered accordingly. To review this opinion, the writ of error was sued out.

It was agreed at the trial of the cause, "that the court might, in deciding this case, presume from the aforesaid proceedings in chancery, any fact which they would direct a jury to presume from said proceedings"

Mr. R. Johnson for the plaintiff.

Mr. Schley for the defendants.

The points made respectively were, for the plaintiff:

1. That by the will of Z. Magruder, of 26th March, 1789, Elias Magruder took a life estate only in the land sued for, and, under the facts in the case, had no other estate to his death; and that, at his death, the land was to be sold for the benefit of the six children of the testator mentioned in the devise.

2. That this being the case, the Court of Chancery of Maryland had authority, upon the petition of four of such children, to decree a sale of the land.

3. That the court did so decree, and

4. That the sale made under the decree to Walter Slicer, under whom the lessor of the plaintiff claims, passed to Slicer the fee, which is now in the plaintiff's lessor.

For the defendants:

1. That under the devise to Elias Magruder (in the 8th clause of the will of Zachariah Magruder), said Elias Magruder virtually took, under the laws of Maryland, an estate in fee-simple.

2. That even if Elias Magruder, under the facts stated, took only an estate for life, yet the proceedings in chancery were not effectual to vest in Walter Slicer (through whom the plaintiff claims) a legal title to the parcel of land sought to be recovered in this suit.

3. That even if, upon the facts stated, said Walter Slicer acquired *a legal title to [*48 said land, yet the lessor of the plaintiff, upon the whole facts, does not show that such title had become vested in him at the time of the demise.

4. That even if the lessor of the plaintiff had, at the time of the demise, a legal title to undivided parts of the tract, he could not recover at all, the demise being for an entirety.

Mr. Johnson, for the plaintiff:

The first question is, what estate did Elias Magruder take under the will? We say, only an estate for life: the other side say that it was either an estate in fee, by virtue of the rule in *Shelly's* case, or a fee-tail, or a fee-simple conditional at common law. It is perfectly clear that if the will had stopped at the first paragraph, the estate devised would have been only for life; the doubt is as to the second paragraph. If the contingency happened, the estate was to become a fee to the devisee; if he died without children, then it was to go to the children of the testator.

Is it enlarged by the rule in *Shelly's* case?

1 Rep., 93, contains the rule. It was recognized as an old one, and is, that where an estate is given for life with limitation over to heirs, it is an estate in fee, and taken by virtue of the rule. But if the contingency had happened here, the devisee would have taken under the will an estate in fee; and the distinction is in his taking under the will or under the rule. (Fearne, Cont. Rem., 28, *note;* 1 Hargrave's Law Tracts, 490; 1 Preston on Estates, 363 to 419; 4 Kent, 214.)

Is it a conditional fee-simple?

The defendant is understood to place it in this class. But a conditional fee-simple at common law in an estate limited over to some particular heirs, in exclusion of heirs general. Before statute of Westminster, courts held that where the contingency happened, the estate became absolute and could be aliened; but in no other case than where heirs special are preferred to heirs general. A qualified or base fee is where a deed is made to A and his heirs, tenants of the manor of Dale; where they hold only as long as they are tenants. The error of the other side is in not distinguishing between a fee-simple conditional at common law and an estate to arise upon condition. The difference between estates upon condition precedent and condition subsequent is, that in the former there is no estate in the party until the contingency happens, whilst in the latter there is. *Here, the [*49 estate in fee was to arise upon the happening of a future contingency, in case Elias married and had children; otherwise he was a mere tenant for life. (2 Bl. Com., 109.)

2. Was the chancery proceeding regular?

1. Did the Maryland statute give jurisdiction?

2. Was it a case of ordinary chancery jurisdiction?

The Court of Chancery is created by the constitution of the State, and invested with all chancery powers, unless restrained by law. In case of doubt, we look at the statute to see whether it takes away any of the ordinary

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chancery powers. The Act of 1785 (chap. 72) is intended to enlarge jurisdiction; its title being, "An Act to enlarge the jurisdiction of the High Court of Chancery." The 4th section is applicable to this case. The executrix was dead, and the authority of the executor was revoked. No regular bill was necessary; a petition was sufficient. All that the Chancellor had to be satisfied of, were two things: 1st. That the sale ought to be made, and 2d. That there was no person to make it.

2. It was a case also of ordinary chancery jurisdiction. A trust was to be executed and there was no trustee. The petition prayed for a sale, and the decree was that all directed by the will to be sold should be sold. The trustee, therefore, sold the whole.

Our title is good, if Slicer's was. He claims under the proceedings of a court of competent jurisdiction, whose decision must be presumed to be right. Elias must be presumed to have been dead, if it is necessary to sustain the authority of the court. It is objected also that it does not appear that the trustee ever gave a bond; but this court must presume that everything was properly done. (10 Peters, 449.)

It is also objected that the power to sell was in the surviving executor. This court and the Court of Appeals in Maryland have differed upon this point. (10 Peters, 533, that it survives; 4 Gill & Johnson, 323, that it does not.) But the ground of the decision in Peters was, that the sale was to be made to pay debts. In this case there were no debts. The devisees cannot deny the validity of the chancery proceedings.

Mr. Schley, for defendant:

By the laws of Maryland (1789, chap. 45) estates of fee-tail general or fee-simple conditional are in fact fee-simple estates, because they are descendible as such (1 Harris & Gill, 111), 50*] and are liable *for the debts of the deceased. Elias took a fee-simple conditional. (2 Preston on Estates, 289, 295, 298, 303, 304.) Elias had something more than an estate for life. (1 Brockenborough, 131; 2 Virginia Rep., 11; 7 Harris & Johnson, 244, Fleta, lib. 3, chap. 9, page 186; Bracton, 17; 1 Reeves' History of English Law, 293; 2 Preston, 296; Plowden, 343, 350; 2 Lord Raymond, 779; Co. Litt., 18.)

If Elias had issue, they would have taken by descent after his death; he must therefore have had a fee in himself. (1 Preston on Estates, 264; 2 Powel on Devises, 602; Willes, 3; 3 Gill & Johns., 458.)

Suppose Elias had only an estate for life; how did Slicer get the residue? In 1805, Elias Magruder was alive, because in 1806 he sold land. The Chancellor ordered the land sold free of all claims of heirs or devisees; but Elias was a devisee and living on the land. Was his land sold over his head? He had not joined in the petition, or forfeited his estate. The petition, therefore, does not include the 100 acres, but states that the 356 acres had not been sold. True, the decree covers all; but it must be limited by the petition.

The Act of 1785 does not include this case, because it is confined to cases where the party neglects or refuses to act; but Elias being alive, there was no neglect to sell the 100 acres, because the time to sell had not yet come. Elias might even then be married and have children.

The power of the trustee was only that which the executor had, the proceeding being *ex-parte*. Elias did not die until 1812, and the Chancellor could not devest him of his rights upon a petition filed by other persons.

The bond of the trustee is a condition precedent, and he had no right to act without complying with it. The law required a bond. The case in 2 Gill & Johnson, 114, is not applicable, because no final ratification appeared there, and there was much evidence on the subject.

Suppose that Slicer had a good title, did the plaintiff obtain it? The two elder judgments were dormant for three years prior to Lamar's sale. If there is an outstanding title in Lamar, the plaintiff must fail in his ejectment; on this subject some analogous cases may be found in 12 Wheaton, 179; 4 Cond. Rep., 457, *note*.

In Maryland, there is no law limiting the lien of a judgment, but the judgment itself is good for twelve years. The Chancellor, however, decided (2 Bland. Ch. Rep., 323) that a judgment cannot lie dormant *forever. Some [*51 illustrative cases are 2 Harris & Johnson, 66; 8 Gill & Johnson, 38; 7 Gill & Johnson, 360.

It is settled in Maryland that there must be a *scire facias* where a new party is to be charged; such party must have a day in court. (2 Harris & Johnson, 72; 10 Gill & Johnson, 373.)

4. The demise is for an entirety.

Two children did not join in the petition, and the record does not show that they ever received a distributive share of the proceeds of the second sale of 100 acres. Their title is not extinguished; and whatever may be the condition of the other four children, the plaintiff, not having acquired the title of these two, cannot succeed under the present demise.

Mr. Johnson, in reply:

It does not appear that any of the children ever objected to the proceedings of the trustee.

As to the 356 acres, it must be admitted that there was no other mode of making a sale than under the Act of 1785; and there was the same necessity as to the 100 acres. The executor had not power to sell them; here was a case, then, where property ought to be sold, and there was nobody to sell it. If the Chancellor appoints a trustee, he has decided that a trust exists. This court has said that the decision of a court of competent jurisdiction must stand; and must assume that the necessary facts were proved.

The Court of Appeals in Maryland have decided (M. S. Denison & Dublin) that a proceeding under the fourth section of the Act of 1785 is like a suit. One person is enough to petition; others can go in and be heard. If one were not enough to petition, the act would be of little use. The trustee was directed to "sell and convey the property," not merely the interest of the petitioners. The act was designed, for a practical purpose, to reach the estate.

Was the trustee appointed for the 100 acres also? True, the petition speaks only of 356 acres, but it refers to the will, and states it. The same children who were to receive the proceeds of the 356 acres, were, by the will, also to receive the proceeds of the 100 acres. The right to the 100 acres was prospective and contingent; but the trustee was vested with power to sell all, for the sake of convenience.

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It is objected that Elias was still alive; but the court may as well presume him to be dead, as that there was error in the decree. The admission in the record is, that the court may pre-
52*] sume any fact which *they would instruct a jury to presume. If, therefore, they would instruct a jury to presume the death of Elias, it can presume it too. The trustee first reported that he had not sold the 100 acres, and afterwards reported specially that he had. The court, by ratifying this last report, have made it conclusive that they considered the trustee to have been authorized.

This party cannot object to these proceedings; if any persons could, it would be the children who did not join, but the court would not now tolerate an ejectment, if brought by them.

The bond is not necessary to give the Chancellor jurisdiction, but to secure the parties; its omission is a mere irregularity, and not to be brought into view upon a collateral matter. Besides, it must be presumed to have been given. In 2 Gill & Johnson, 114, a ratification was presumed (page 130).

It is said that we do not show a title to the whole. But the two children who did not petition received their share of the proceeds, and by that act made themselves parties. They are estopped. The decree gave authority to sell the whole land, and the whole title was conveyed to us.

The Court of Appeals did say once that a plaintiff could not recover an undivided part, claiming title to the whole. The Act of 1832 corrected this. This act has been repealed in part, but not in this.

As to the outstanding title in Lamar:

Until the Chancellor said otherwise, the profession had no doubt of the propriety of the lien of an elder judgment. Before the Act of 1823, execution had to be issued within a year and a day. Now three years are allowed. All judicial liens must be noticed by all. A purchaser under a junior judgment must be presumed to have notice of the first. The Chancellor says that the object of requiring a prompt issue is to protect purchasers; but they are already protected by the records.

What estate did Elias take?

It is true that an estate tail general or fee-simple conditional is, by the laws of Maryland, synonymous with a fee-simple. But a fee-simple conditional is where the limitation is to heirs special, to the exclusion of heirs general. (2 Bl. Com., 110.) There is no such special limitation in this will. No estate of inheritance passed on the death of the testator. 2 Bl. Com., 151, 154, defines an estate upon condition.

If a fee passed upon the death of the testator,
53*] it was not by virtue *of the will. Rules giving a different direction to an estate from that pointed out in the will are not applied except from necessity. The devise to the children is a good executionary devise, to take effect unless a contingency happened. The object of the testator was to benefit his children: but the argument on the other side would defeat that intention.

Mr. Justice M'LEAN delivered the opinon of the court:

This case comes up on a writ of error to the Circuit Court for the District of Maryland. An action of ejectment was commenced by the lessor of the plaintiff, to recover the possession of 100 acres of land, part of a tract called George's Adventure, situated near the town of Cumberland. In the Circuit Court a verdict was found for the plaintiff, subject to the opinion of the court upon a case stated. A judgment was entered for the defendant; and the cause is now before us, on the facts agreed.

By his last will and testament, Zachariah Magruder, a citizen of Maryland, among other things, devised to his wife Sarah, "the full use of his dwelling plantation, containing in the whole, after a certain legacy was deducted, about 356 acres, called George's Adventure, in Washington County; to be by her peaceably and quietly possessed and enjoyed without molestation, during her natural life."

The will also contained the following: "I give and bequeath unto my brother, Elias Magruder, during his natural life, 100 acres of land, being part of tract of land called George's Adventure, lying and being in Washington County, and State aforesaid; to be laid off at the upper end of the tract aforesaid, so as to include the plantation on which he now lives. In case the said Elias Magruder should have heirs lawfully begotten of him in wedlock, I then give and bequeath the 100 acres of land aforesaid to him, the said Elias Magruder, his heirs and assigns, forever; but should he, the said Elias Magruder, die without an heir so begotten, I give, bequeath, devise, and desire that the 100 acres of land aforesaid be sold to the highest bidder, and the money arising from the sale thereof to be equally divided among my six following children, to wit: Samuel," &c. The testator having died, proof was made of his will, and letters testamentary were granted, the 3d of May, 1796, to Sarah Magruder, his wife, and his son Nathaniel B. Magruder, named as executrix and executor in the will.

After the decease of the testator, Elias Magruder took possession *of the 100 acres [*54 of land devised to him, and being so in possession he conveyed the tract to David Lynn, who devised the same to the present defendants.

On the 30th of December, 1805, Samuel B. Magruder and three other brothers, sons of Zachariah Magruder, filed their petition to the Chancellor of Maryland, representing that their father, after making particular dispositions of property, devised that the remaining part of his land, called George's Adventure, being about 356 acres, should be sold to the highest bidder, by and at the discretion of his executrix and executor, and the money equally divided amongst his six children, including the petitioners."

The petitioners stated that the executrix was deceased, and that Nathaniel B. Magruder, being insolvent, at the instance of his sureties, his power as executor had been revoked by the Orphans' Court. And the petitioners prayed that a trustee might be appointed "to sell all the property devised to be sold by the will, and such other and further relief," &c. The will was filed as an exhibit.

On the day of filing the petition, the Chancellor decreed, "that the real estate in the said will directed to be sold shall be sold; that Roger Perry be appointed trustee, who shall

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give bond in $2,000, conditioned for the faithful performance of the trust reposed in him by the decree, or to be reposed in him by any future decree or order in the premises, and that he shall proceed to sell," &c.

Afterwards, on the 22d of May, 1806, the trustee reported that he "had sold the real estate in the said will and decree mentioned," and had made distribution, &c. At the close of his report he says, "the 100 acres, part of the said tract devised to be sold in case Elias Magruder should die without heirs, as expressed in the will, still remains unsold." The sale was ratified by the Chancellor.

And afterwards, on the 9th of June, 1812, the trustee made a second report, that he "had sold the remaining part of the real estate of Zachariah Magruder, deceased, consisting of 100 acres of land," &c. This sale was also ratified by the Chancellor, and a deed was executed to Walter Slicer, the purchaser. In the year 1818, a judgment was obtained against Walter Slicer, and two others in the year 1819. On one of the junior judgments execution was issued, under which the land in question was sold to Lamar. On the other junior judgment, obtained at the same term, an execution was issued, and the same tract was sold, after the 55*] above sale, to David Shriver, Jun., *the lessor of the plaintiff. He also purchased, subsequently, the same tract, under the prior judgment.

The first question for consideration arises out of the devise, in the will, to Elias Magruder. Did he take a life estate only, or a fee-simple? That he took an estate in fee-simple conditional in the 100 acres, is urged by the defendants' counsel. And a statute of Maryland of 1786, entitled "An Act to direct descents" (2 Ketty's Laws, chap. 45), which provides that lands held "in fee-simple or fee-simple conditional, or in fee-tail to the heirs of the body generally, shall descend in the same manner, is relied on as giving a fee-simple to the devisee. Under this statute, it must be admitted, whether the estate vested be technically considered a fee-tail general or a conditional fee-simple, in effect, it is a fee-simple.

In 1 Inst., 20 sec., it is said that "all limitations confined to the heirs of the body, either by direct or circuitous expression, and which are not estates-tail under the statute *de donis*, remain conditional or qualified fees at the common law. A gift of land to a man and his heirs generally, if he shall have heirs of his body, without any other expression to qualify the word heirs of his body, is a conditional fee. (Plata, bk. 3, ch. 9, 136.) And in Plow., 233, it is said, "and the Lord Dyer in his argument took exception to the ratification, for that it confesses the estate-tail in King Henry VII., and then says, that he having issue, Prince Arthur, entered and was seized in fee; whereas, he said, the having issue did not make him to have the fee, for the fee either accrued to him by the remainder or never." The same doctrine is found in page 250. (*Machell* v. *Clarke*, 2 Lord Raym., 778.) By the statute *de donis* (Westm., 2, 13, Ed. 1), a fee-simple conditional estate at common law, in certain cases, was converted into a fee-tail, which, by alienation, the ancestor could not change.

The estate under consideration, it is insisted, is a conditional fee-simple; or, in other words, that the fee vested is liable to be defeated on the failure of heirs as provided in the will. On the other side it is argued that the condition was a precedent one, which must happen before the fee vested. The doctrine above cited seems to favor the first of these positions, as does also the rule in *Shelly's* case. By that rule, "in any instrument, if a freehold be limited to the ancestor for life, and the inheritance to his heirs, either mediately or immediately, the first taker takes the whole estate." This rule had its origin in feudal times, and was, perhaps, in no small degree influenced by considerations which have long since ceased to exist. *The rule, Mr. Preston says (1 Pres. [*56 on Estates, 369), "is of positive institution, and has this circumstance of peculiarity and variance from rules of construction." "Instead of seeking the intention of the parties and aiming at its accomplishment, it interferes in some, at least, if not in all cases, with the presumable, and in many instances, the express intention." "In its very object, the rule was leveled against the views of the parties."

That this effect has been given to the rule by some adjudications is admitted. But there is a rule of construction applicable to all instruments, and especially to wills, that is, the intention of the parties, which should control any arbitrary rule however ancient may be its origin. And of this opinion was Lord Mansfield, in *Perrin* v. *Blake* (4 Burr., 2579). He says, "the rule is not a general proposition, subject to no control, where the intention is on the other side, and where objections may be answered." And he agreed, as Mr. Preston remarks, with *Justices* Wilmot and Ashton, that "the intention is to govern, and that *Shelly's* case does not constitute a decisive uncontrollable rule." *Mr. Justice* Buller, in the case of *Hodgson et ux.* v. *Ambrose* (Doug., 337), was of the same opinion, and also Lord Hardwicke, in *Bagshew and Spencer* (2 Atk., 583). Where technical words are used in a deed of conveyance, the legal import of such words must govern. But there is no rule better established than that in giving a construction to a will the intention of the testator must prevail. His expressed intention constitutes the law, unless it shall conflict with some established legal principle. Under this rule the nature and extent of the estate devised to Elias Magruder must depend upon the words of the will.

In the first clause of the devise a life estate is clearly given to him. "I give and bequeath unto my brother, Elias Magruder, during his natural life, 100 acres of land," &c. The second clause of the devise is equally explicit. "In case the said Elias Magruder should have heirs lawfully begotten of him in wedlock, I then give and bequeath the 100 acres of land aforesaid, to him, his heirs and assigns, forever." Now, the condition of having heirs as above expressed is clearly a precedent condition, and must happen before the estate vests. And if any doubt could arise from the above sentences whether the testator intended to vest in Elias more than a life estate, that doubt must be dispelled by the succeeding sentence, "but, should he, the said Elias Magruder, die without an heir so begotten, I give, bequeath, devise, and desire that the 100 acres of land,

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57*] aforesaid, be sold to *the highest bidder, and the money arising from the sale thereof, to be equally divided among my six children."

It would be difficult to convey in more explicit language, than is done in the above sentences, the intention of the testator. He gives a life estate; and then, on the happening of the contingency named, he gives an estate to the devisee and his heirs in fee-simple: but, should the contingency not happen, he directs the land to be sold and the proceeds distributed among his children. No other conclusion can be arrived at, on this view of the will, than that Elias Magruder took only a life estate in the land. His conveyance, therefore, could transfer no interest in the land, beyond his own life.

The next question regards the title under the proceedings before the Chancellor.

These proceedings were by virtue of "An Act of 1785, for enlarging the power of the High Court of Chancery" (1 Maxcy's Laws, ch. 72, sec. 4); which provides, "that if any person hath died or shall die, leaving real or personal estate to be sold for the payment of debts, or other purposes, and shall not, by will or other instrument in writing, appoint a person or persons to sell or convey the same property, or if the person or persons appointed for the purpose aforesaid shall neglect or refuse to execute such trust, or if such person or persons, or any of them, shall die before the execution of such trust, so that the sale cannot be made for the purposes intended, in every such case the Chancellor shall have full power and authority, upon application or petition from any person or persons interested in the sale of such property, to appoint such trustee or trustees for the purpose of selling and conveying such property, and applying the money arising from the sale to the purposes intended, as the Chancellor shall in his discretion think proper."

An objection is made to these proceedings, *in limine*, on the ground that only a part of the heirs interested, united in the application to the Chancellor. But this objection is not sustainable. The petition was for the benefit of all the heirs, and the statute does not require that all shall unite in the petition. "Any person or persons interested" may apply to the Chancellor. Whether applicants or not, all the heirs equally participated in the results of the proceedings and this is a sufficient answer to any technical objection.

But the main point under this head is, whether the sale of the 100 acres now in controversy was of any validity.

That the proceedings before the Chancellor 58*] constituted a suit is *admitted; and also that they are conformably, at least in part, to the mode of procedure in such cases. The Chancellor had jurisdiction of the cause, as presented by the petition; and this being the case, no advantage can be taken of errors, however gross, when the record is used collaterally. If a want of jurisdiction appear on the face of the record, the judgment or decree will be treated as a nullity. But where there was jurisdiction, the record must be received as conclusive of the rights adjudicated. No fact established by the judgment of the court can be controverted. In the language of this court, in the case of *Voorhees* v. *The Bank of the United States* (10 Peters, 450), the record imports absolute verity. But when a judgment or decree is given in evidence, its nature and effect can only be ascertained by an examination of the record. Let this test be applied to the proceedings of the Chancery Court under consideration.

It is admitted, and the fact appears from the record, that at the time these proceedings were instituted, Elias Magruder was living and continued to live for seven years afterwards. And as he had a life estate in the premises in controversy, and the contingency on which the estate was to vest in his heirs, being possible, during his life, the land was not subject to sale under the will. It could only be sold on the devisee's failure to have heirs, which could not occur before his decease.

The petition asks an order to sell the remaining part of the tract called George's Adventure, a part of it having been devised, containing about 356 acres. The sale of the 100 acres, now in contest, was not asked, and indeed could not be, as the tract at that time was not liable to be sold. The decree ordered, "that the real estate in the said will directed to be sold should be sold." Now, this decree could only apply to the 356 acres named in the petition, for the reason that the sale of that tract only was prayed for, and it was the only tract, at that time, which the will authorized to be sold. In the language of the decree, it was the real estate directed by the will to be sold.

To construe the decree as embracing the 100 acres tract, would go beyond the prayer of the petition and the jurisdiction of the court. One of the trustees named in the will was deceased, and the other, being insolvent, had been removed by the Orphans' Court. The substitution of a new trustee gave to him no power beyond the special order of the court. Under the statute it seems not to have *been the prac- [*59 tice of the court to appoint a trustee generally, to carry into effect the will: but to point out, by a special decree, what he shall do and the mode of doing it. His duties being limited by the decree, he is made the instrument of the court, having no discretion or power under the will. Consequently, in his decree the Chancellor required the trustee to give security, and directed him what notice should be given, and in what manner the sale should be made. This mode of executing the act was clearly within the discretion of the Chancellor, specially given to him in the close of the above section. The rule was made and ratified by the Chancellor. A deed was executed by the trustee to the purchaser, and nothing further was done until in June, 1812, when the trustee made a second report, that in pursuance of the above decree, after giving public notice, "he had sold to Walter Slicer the remaining part of the real estate of Zachariah Magruder, deceased, consisting of the 100 acres devised to Elias Magruder."

Now, it is clear that this sale was not made in pursuance of the decree. Neither in the petition nor in the decree was the tract of 100 acres named or referred to. This proceeding, then, by the trustee, was without authority. It could derive no sanction from the decree. From the record, it would seem that there had been no continuance of the cause for six years, and no step taken in it. The second report is then

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made by the trustee as stated. This report was ratified and confirmed "unless by a given day cause to the contrary should be shown," of which public notice was given. No cause being shown, there was a final ratification of the sale on the 22d of February, 1813. At the time of this sale it is admitted that Elias Magruder was deceased, without heirs, in the language of the will, "lawfully begotten of him in wedlock." And here a question arises whether the above sale can be treated as a nullity.

That the trustee was not authorized to sell by the decree has already been shown. It would seem, however, from the form of his report, that he assumed to act only in virtue of the decree.

Does the ratification of the sale bring it within the rule, which applies to a case where the court has jurisdiction, but has committed errors in its proceedings. Had the court jurisdiction of the tract of land in controversy. At the time the decree was entered, that tract was no more subject to the power of the court than every other tract in the county. The devisee was in possession, having a life estate in it subject to become a fee-simple on his having heirs [*60] lawfully *begotten by him. He had no notice of the proceeding, and was in no sense a party to it. The petition did not pray for the sale of this land. In fact that proceeding can in no point of view be considered as authorizing the sale by the trustee. The validity of the sale, then, must rest upon the fact of its having been made by the trustee, and sanctioned by the Chancellor. There would seem to be no ground for doubt on this point.

The Chancellor is authorized to proceed in a summary mode, under the statute, for the sale of land, in the predicament of the above tract, after the decease of the devisee, without heirs. But he can only proceed on the application of persons interested. Here was no such application for the sale of this land. The sale being without authority, the ratification of it by the court must be considered as having been given inadvertently. If given deliberately and on a full examination of all the facts, still it must be regarded as an unauthorized proceeding. There was no case before the court—nothing on which its judgment could rest.

No court, however great may be its dignity, can arrogate to itself the power of disposing of real estate without the forms of law. It must obtain jurisdiction of the thing in a legal mode. A decree without notice, would be treated as a nullity. And so must a sale of land be treated, which has been made without an order or decree of the court, though it may have ratified the sale. The statute under which the proceeding was had requires a decree; at least such has been its uniform construction.

This view being decisive of the title of the lessor of the plaintiff, it is not necessary to consider the other questions in the case.

The judgment of the Circuit Court is affirmed.

ORDER.

This cause came on to be heard on the transcript of the record from the Circuit Court of the United States for the District of Maryland, and was argued by counsel; on consideration whereof, it is now here ordered and adjudged by this court, that the judgment of the said Circuit Court in this cause be, and the same is hereby affirmed, with costs.

Cited—8 How., 541, 542; 2 Wall., 641; 18 Wall., 467; 14 Bank. Reg., 81; 1 Abb., U. S. 309.

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*JOHN McCOLLUM, *Plaintiff in Error*, [*61

v.

JENISON EAGER.

Chancery practice followed in Circuit Court of U. S. for Louisiana—appeal not writ of error—proper mode to bring up decree in chancery for review—appeal only lies from final decree.

In the Circuit Court of the United States for Louisiana, where a party seeks relief which is mainly appropriate to a chancery jurisdiction, chancery practice must be followed.

A writ of error is not the appropriate mode of bringing up, for review, a decree in chancery. It should be brought up by an appeal.

An appeal will lie only from a final decree; and not from one dissolving an injunction, where the bill itself is not dismissed.

THIS case was brought up by a writ of error from the Circuit Court of the United States for the Eastern District of Louisiana.

The case was this:

On the 27th of July, 1838, Charles Bishop executed the following promissory note:

DONALDSONVILLE, 27th July, 1838.

In all the month of May next, 1839, I promise to pay H. Williams and A. F. Rightor or order, the sum of five thousand dollars, value received. (Signed) CHARLES BISHOP.

Which note was indorsed to Eager, a citizen of Kentucky, by Williams and Rightor, waiving the necessity of a demand of payment on the maker, and of protest for nonpayment, and also of notice to themselves as the indorsers of the nonpayment of the note.

On the 17th of August, 1838, John Hagan, Senior, of New Orleans, conveyed to Williams and Bishop, six tracts of land for $50,000, payable in one, two, and three years, with interest, the notes for which were dated on the 1st of August, 1838, and indorsed by Rightor. It was made a condition of sale that, if any one of the notes should not be punctually paid, the whole of the lands should revert to Hagan.

On the 26th of February, 1839, Bishop sold out all his interest in the above purchase to Williams, Rightor, and Andrew McCollum.

On the 3d of August, 1839, the first note given by Williams and Bishop to Hagan, for $16,666.66, was protested for nonpayment.

On the 18th of November, 1839, Eager brought suit by filing a petition in the Circuit Court of the United States, against Williams and Rightor as indorsers upon Bishop's note.

*On the 7th of January, 1840, judg- [*62

ment was entered in favor of Eager for the amount of the note, with interest from the 1st of June, 1839. In March, 1840, a *fi. fa.* was issued; and in April, levied upon one of the tracts of land above mentioned, together with some personal property.

On the 16th of April, 1840, Hagan filed, in the Second District Court of the State of Louisiana, a petition, in the nature of a bill to foreclose a mortgage, reciting that the first note of

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$16,666.66, given for the purchase of the six tracts of land, remained unpaid, and praying a sale of the whole of the tracts, to pay that and the other two notes of the same amount. A judgment in decree upon this petition was entered by consent, with a stay of execution until 1st of January, 1841.

On the 22d of August, 1840, the execution in favor of Eager, which had been lying over for want of bidders, was finally carried out by a peremptory sale of the property which had been levied upon, on a credit of twelve months; when John McCollum (the plaintiff in error) became the purchaser for the sum of $5,442.41, and gave his bond with five sureties for that amount to Jenison Eager.

On the 6th of January, 1841, the stay of execution upon Hagan's judgment or decree having expired, an execution was issued upon it, and Hagan repurchased the six tracts of land.

On the 24th of July, 1841, John McCollum gave a power of attorney to B. W. Lawes to act for him in everything relating to the twelve months' bond which he had given to Eager.

On the 23d of August, 1841, execution was issued upon this bond against McCollum and his suritees; the writ directed the money to be made out of the personal estate, except slaves, but if sufficient personal estate, exclusive of slaves, could not be found in the district, then out of the real estate and slaves of McCollum and his sureties.

In September, 1841, Andrew McCollum, claiming to be the owner of an undivided third part of the property which had been sold by Bishop to Williams, Rightor, and himself, as above stated, filed a petition in the Second District Court of Louisiana against John McCollum, averring that John was in possession of the whole of the property, and praying that he might be compelled to deliver up one third of it and pay damages for its detention.

On the 20th of September, 1841, Rightor in-
63*] tervened in the said *suit, and claimed that the marshal's sale to John McCullum might be set aside for irregularity.

On the 22d of September, 1841, B. W. Lawes, in virtue of the power which had been given to him by John McCollum, filed a petition in the Circuit Court of the United States, in the nature of a bill in equity, stating that McCollum had given his bond for the property purchased at the marshal's sale; that an execution had been issued upon it; that the sale was null and void; that Hagan had evicted McCollum; that the formalities required by law were not observed by the marshal; that Rightor had intervened and sought to annul the sale; that the consideration of the bond had utterly failed, and praying for an injunction to stop the marshal from proceeding further upon it.

On the 1st of October, 1841, an injunction was issued in conformity with the prayer of the petition.

On the 14th of February, 1842, the Circuit Court, Judge McKinley being absent, decreed that the injunction should be dissolved with 20 per cent. damages, 10 per cent. interest, and $800 amount of fees of counsel employed by the plaintiff.

From this decision a writ of error was sued out and the case brought up, in this way, to this court.

Mr. Coxe moved to dismiss the court upon two grounds, viz.:

1. That the decree was not final, and

2. That the case was brought up in an improper manner.

Mr. Justice McLEAN delivered the opinion of the court:

This is a writ of error to the Circuit Court for the Eastern District of Louisiana.

Under the mode of proceeding in Louisiana, a petition was filed by the defendant in error, in the Circuit Court, against Williams and Rightor, on a promissory note given by them for the payment or $5,000 with interest, &c. And no answer being made, a judgment was entered, by default, against the defendants. An execution was issued, which was levied on a certain tract of land, which, on being offered for sale by the marshal a second time, was purchased by John McCollum, the plaintiff in error, on a credit of twelve months. For the payment of the purchase money at the time stated, McCollum gave bond and security.

At the expiration of twelve months, under the law of Louisiana, *an execution was [*64 issued on the bond, which has the effect of a judgment. A levy was made on certain slaves, by the marshal, who returned that after giving notice of sale, all proceedings were stayed on the execution by injunction.

The injunction was obtained by the plaintiff in error on petition, representing that the title to the land purchased by him at marshal's sale, and for which the above bond was given, had failed; and that he had been evicted from the premises. That certain irregularities had taken place in the sale, &c. An injunction was prayed for, and that the bond might be decreed to be cancelled.

On the 14th of February, 1842, "the court ordered, adjudged and decreed, that the injunction granted in this case be dissolved with 20 per cent. damages, 10 per cent. interest, and $800 amount of fees of counsel employed to be allowed as special damage, and for costs of this suit."

A motion is made to dismiss the writ of error, on the ground that it does not lie in the case.

The proceeding on the bond may have been authorized under the Louisiana practice, there being no distinction in the courts of that State between a proceeding at law and in chancery. But the relief sought against the bond is mainly appropriate to a chancery jurisdiction, where such a jurisdiction is established. This being the case, the proceeding at law, though conformable to Louisiana practice in the State courts, was wholly irregular. In the federal courts, the jurisdictions of law and chancery in Louisiana and in all the other States, are distinctly maintained.

If this be viewed as a chancery proceeding a writ of error does not lie, for a decree in chancery can only be removed to this court from the Circuit Court by an appeal. But an appeal will only be from a final decree; and the decree in this case was not final, as the bill was not dismissed.

The writ of error is dismissed.

ORDER.

This cause came on to be heard on the tran

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script of the record from the Circuit Court of the United States for the Eastern District of Louisiana, and it appearing to the court that the case is removed here by a writ of error to an interlocutory order or decree in chancery. It is, therefore, now here ordered and adjudged by this court, that this writ of error be, and the same is hereby dismissed; and that this cause be, and the same is hereby remanded to the said Circuit Court, with directions to proceed therein according to law and justice.

Cited—5 How., 289; 18 How., 86; 12 Wall., 442; 20 Wall., 622; 23 Wall., 288; Woolw., 333.

65*] *EX-PARTE BARRY.

Original jurisdiction of U. S. Supreme Court—habeas corpus.

The original jurisdiction of this court does not extend to the case of a petition by a private individual, for a *habeas corpus* to bring up the body of his infant daughter, alleged to be unlawfully detained from him.

MR. JUSTICE STORY delivered the opinion of the court:

This is a petition filed in this court for a writ of *habeas corpus* to be awarded to bring up the body of the infant daughter of the petitioner, alleged to be now unlawfully debarred from him, and in the custody of Mrs. Mary Mercein, the grandmother of the said child, in the District of New York. The petitioner is a subject of the Queen of Great Britain; and the application in effect seeks the exercise of original jurisdiction in the matter upon which it is founded. No application has been made to the Circuit Court of the United States for the District of New York, for relief in the premises, either by a writ of *habeas corpus* or *de homine replegiando*, or otherwise; and, of course, no case is presented for the exercise of the appellate jurisdiction of this court by any review of the final decision and award of the Circuit Court upon any such proceedings. Nor is any case presented for the exercise of the appellate jurisdiction of this court upon a writ of error to the decision of the highest court of law and equity in the State of New York, upon the ground of any question arising under the 25th section of the Judiciary Act of 1789 (ch. 20.)

The case, then, is one avowedly and nakedly for the exercise of original jurisdiction by this court. Now, the Constitution of the United States has not confided any original jurisdiction to this court, except "in all cases affecting ambassadors, other public ministers, and consuls, and those in which a State shall be a party." The present case falls not within either predicament. It is the case of a private individual who is an alien seeking redress for a supposed wrong done him by another private individual, who is a citizen of New York. It is plain, therefore, that this court has no original jurisdiction to entertain the present petition; and we cannot issue any writ of *habeas corpus*, except when it is necessary for the exercise of the jurisdiction, original or appellate, given to it by the Constitution or laws of the United States. Without, therefore, entering into the merits of the present application, we are compelled, by our duty, to dismiss the petition, leaving the petitioner to seek redress *in such other tribunal of the United [*66 States as may be entitled to grant it. If the petitioner has any title to redress in those tribunals, the vacancy in the office of the judge of this court assigned to that circuit and district creates no legal obstruction to the pursuit thereof.

Cited—14 How., 119; 3 Otto, 22; 2 Wood. & M., 15; Deady, 319; 1 Bond, 201-207.

SPALDING
v.
THE PEOPLE OF THE STATE OF NEW YORK, ex rel. FREDERICK F. BACKUS,

Appeal bond—forfeiture—suit on.

An appeal bond given to the people or to the relator is good, and if forfeited may be sued upon by either.

MR. BEARDSLEY moved to dismiss the writ of error in this case, because Spalding had given a bond to The People of the State of New York, or Frederick F. Backus.

But *Mr. Justice* STORY delivered the opinion of the court, and said that the bond was good, and, if forfeited, might be sued upon in the name of the people or of the relator, at the option of the government.

GLENDY BURKE, *Plaintiff in Error,*
v.
ROBERT McKAY.

Promissory note—protest by general law-merchant confined to foreign bills of exchange—no notice to indorser—State laws may overrule—protest not indispensably made by notary—indorser discharging maker from liability not entitled to notice.

By the general law-merchant, no protest is required to be made upon the dishonor of any promissory note; but it is exclusively confined to foreign bills of exchange.

Neither is it a necessary part of the official duty of a notary, to give notice to the indorser of the dishonor of a promissory note.

But a State law or general usage may overrule the general law merchant in these respects.

Where a protest is necessary, it is not indispensable that it should be made by a person who is in fact a notary.

Where the indorser has discharged the maker of a note from liability by a release and settlement, a notice of nonpayment would be of no use to him, and therefore he is not entitled to it.

THIS case was brought up by writ of error from the Circuit Court of the United States for the Southern District of Mississippi. The suit was brought in the court below by the indorsee against the indorser of the following promissory note:

*$2,800. [*67

CLINTON, MISS., January 20th, 1837.

On the first day of January, eighteen hun-

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dred and forty, we, or either of us, promise to pay Robert Mathews, or order, twenty-eight hundred dollars, for value received.

R. E. STRATTON,
SAM'L W. DICKSON,
B. GARLAND.

The note was indorsed thus:

I assign the within note to Robert McKay, and hold myself responsible for the same, waiving notice of demand and protest if not paid at maturity. ROBERT MATHEWS.

Clinton, 28th April, 1838.

The note was then indorsed by McKay in blank, and passed with two intermediate indorsements, into the hands of Burke, a citizen of Louisiana, the plaintiff below, and also plaintiff in error.

On the trial, the plantiff read the note and the indorsements thereon; he also read, by agreement of parties, a statement in writing of S. Humphreys, who was absent and sick, for the purpose of proving a demand and notice of nonpayment to the indorser, to wit:

UNITED STATES OF AMERICA,
State of Mississippi, Hinds County.

By this public instrument of protest, be it known that, on this fourth day of January, 1840, at the request of James G. Paul, teller, the holder of the original note, of which a true copy is here indorsed, I, S. W. Humphreys, J. P., residing in the town of Clinton, Hinds County, Mississippi, qualified according to law, went to the house of Richard E. Stratton and presented the said note, and demanded payment, which was refused; I also went to the house of Samuel W. Dickson, and demanded payment, which was refused; I also went to the office of Burr Garland, in the town of Clinton, and there was no person of whom to make a demand.

Whereupon, I, the said S. W. Humphreys, J. P., and *ex officio* notary public, at the request aforesaid, do hereby solemnly and publicly protest the said note, as well against the drawer thereof as against the acceptors, indorsers, and all who are or may be concerned, for all exchanges or re-exchanges, costs, charges, damages, and interests, suffered, or to suffer, for nonpayment of said note thus solemnly done and protested.

68*] *Given under my hand and seal, at my office at Clinton, the day and year above written.

S. W. HUMPHREYS, J. P. [SEAL.]
Acting Notary Public.

Notice of protest directed to R. E. Stratton, Mississippi.

Notice of protest directed to Saml. W. Dickson, at Brownsville, Mississippi.

Notice of protest directed to B. Garland, at Clinton, Mississippi.

Notice of protest directed to Robt. McKay, at Holmesville, Pike County, Mississippi.

Notice to Robert Mathews, directed to Carrollton, Carroll County, Mississippi.

Notice to Tho. E. Robins, cashier, directed to Vicksburg, Warren County, Mississippi.

All the above named notices were put in the postoffice at Clinton by me, on the 4th day of January, 1840, before 9 o'clock at night.

S. W. HUMPHREYS, J. P.

The plaintiff also read in evidence the following admission of the defendant:

The defendant, Robert McKay, in this case, admits that, at and before the first and fourth of January, 1840, he did reside at Holmesville, Pike County, Mississippi, and that the certificate of protest and sending notices, &c., made and signed by S. W. Humphreys, and filed in this case, shall be received as the evidence of said Humphreys (who is sick, and cannot attend court), and that said Humphreys, if present, would swear to all the facts stated in the said certificate.

Defendant also admits that, in a settlement with the makers of the note in the declaration mentioned, of and concerning two judgments defendant had against them upon two other notes of same amount which fell due 1st and 4th January, 1838 and 1839, this note was included, and defendant has released said makers from all liability to him on said notes; but defendant denies that he has ever received of said makers full payment of said note; and that, upon a compromise of all claims and controversies between them, he released said drawers as aforesaid from any liability to defendant. Defendant agrees that this statement shall be read and received upon the trial of this case by the court and jury.

Nov. 18, 1842. ROBERT MCKAY.

The defendant admitted his residence was at Holmesville, Pike County, at the maturity of the note; and here plaintiff rested his case.

*The court instructed the jury that, in [**69** order to charge the indorser of a promissory note, the plaintiff must prove that it was protested, on the day of its maturity, by a notary public, and demand made, and notice of nonpayment given by him. That the statement of Humphreys admitted as evidence not proving that fact, they must find for the defendant; whereupon, a verdict for defendant was rendered.

The plaintiff, by attorney, excepted to the charge of the court before the jury left the box; which exceptions were signed and sealed, and ordered to be made a part of the record, which is done accordingly.

S. J. GHOLSON. [SEAL.]

Mr. J. Henderson, for the plaintiff in error.

This action was brought in the Circuit Court of the United States for Mississippi, by Burke, as indorsee of a promissory note, against McKay, an indorser of the same note.

Due demand of payment of the makers of the note was made by a justice of the peace, acting *ex officio* as notary public. The note being dishonored, was protested by said justice of the peace, and due notice of both nonpayment and protest given to the defendant McKay.

It is agreed by the parties on the record that all these proceedings are regular, if the justice of the peace, officiating as a notary, might lawfully discharge such duties.

It is admitted by the defendant, McKay, that he had also previously settled with the makers of the note, and released them from its payment, though he had not then received payment of the money stipulated on settlement.

With this state of the case in proof before the jury, the court charged:

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"That in order to charge the indorser of a promissory note, the plaintiff must prove it was protested on the day of its maturity, by a notary public, and demand made, and notice of nonpayment given by him. That the statement of Humphreys, admitted as evidence, not proving that fact, they (the jury) must find for the defendant."

And which being excepted to, verdict and judgment went according to the charge, and the instruction is now complained of as error.

Three points arise in the case:

1. From the facts of the case, was the defendant entitled to any notice?

2. Is protest of a promissory note necessary?

70*] *3. If protest be necessary, was it legally made in this case by a justice of the peace officiating as notary?

The charge of the court has omitted any notice of the first point, and has, as we contend, decided erroneously on the second and third points.

We maintain.

1. That the defendant in this case is not, under his confession that he had released the drawers of the note from their responsibility, entitled to demand any notice of dishonor of the note in any form. He discharged every interest which entitled him to any notice whatever.

2. But if protest of notice might be required, then we insist all in this case was legally conformed to such requirement.

By statutes of Mississippi (Howard & Hutchins, 430, sec. 24) authorizes justices of the peace to perform duties of the notary public.

3. But our statutes in this respect make no change of the general law merchant, and protest of a note (contrary to the judge's charge) is not necessary. (6 Wheat. Rep., 151, 152; Anth., *N. P.*, 1, and *note*.)

Mr. Justice STORY delivered the opinion of the court:

This is a writ of error to the Circuit Court of the District of Mississippi. The plaintiff in error brought an action of *assumpsit* in that court, against the defendant in error, as indorsee upon a promissory note dated at Clinton, Mississippi, January 20, 1837, whereby R. E. Stratton, Samuel W. Dickson, and B. Garland, or either of them, on the first day of January, 1840, promised to pay Robert Mathews or order, $2,800 for value received. The note was indorsed by Mathews as follows: "I assign the within note to Robert McKay, and hold myself responsible for the same, waiving notice of demand and protest, if not paid at maturity." The note was afterwards indorsed by McKay (the defendant), as it should seem, in blank, and the plaintiff in error in his declaration made title as immediate indorsee to McKay.

At the trial of the cause upon the general issue, the plaintiff read the note and the indorsement, and also proved that, at the maturity of the note, due demand of payment was made of the makers, by S. W. Humphreys, a justice of the peace of Hinds County, Mississippi, styling himself "acting notary public;" who, upon

71*] the nonpayment, *made due protest thereof (the protest being by consent admitted as evidence of the facts), and gave due notice thereof to the payee of the note and to all the indorsers. The defendant (McKay) also admitted that, in a settlement with the makers of the note, in some other transactions, the present note was included, and the defendant released the makers from all liability thereon, but he denied that he had ever received of the makers full payment of the said note; and that, upon a compromise of all claims and controversies between them, he released the makers from all liability to the defendant; and he agreed that the same statement should be read and received at the trial of the case by the court and the jury. The District Judge (who alone sat in the cause) instructed the jury, that, in order to charge the indorser of a promissory note, the plaintiff must prove that it was protested on the day of its maturity by a notary public, and demand made and notice of nonpayment given by him; that the statement of Humphreys, admitted as evidence, not proving that fact, they must find for the defendant. Whereupon the jury returned a verdict for the defendant, and judgment passed accordingly. A bill of exceptions was taken by the plaintiff to the instruction of the court at the trial; and the cause now comes before us upon the writ of error to examine the correctness of that instruction.

And we are all of opinion that the instruction was incorrect, and not maintainable in point of law. In the first place, by the general law merchant no protest is required to be made upon the dishonor of any promissory note: but it is exclusively confined to foreign bills of exchange. This is so well known that nothing more need be said upon the subject than to cite the case of *Young* v. *Bryan* (6 Wheat. R., 146), where the very point was decided. It is true that it is a very common practice for a notary public to be employed to make demand of payment of promissory notes from the makers, and also to give notice of the dishonor to the indorsers thereon. But this is a mere matter of convenience and arrangement between the holder and the notary, and is by no means a requisite imposed or recognized by law, as binding upon the holder. Unless, therefore, there be some statute in Mississippi, requiring the intervention of a notary in such cases (as we understand there is not), or some general usage equally binding, it is clear that the instruction proceeded upon a mistaken ground. In the next place, it is no necessary part of the official duty of a notary (subject to the like exceptions) *to give notice to the indorsers of [*72 the dishonor of a promissory note, although certainly it is a very convenient and useful course in the transaction of such affairs in commercial cities. In the next place, if a protest were necessary, it is equally clear that it is not indispensable in all cases that the same should be actually made by a person who is in fact a notary. In many cases, even with regard to foreign bills of exchange, the protest may, in the absence of a notary, be made by other functionaries, and even by merchants. But where, as in Mississippi, a justice of the peace is authorized by positive law to perform the functions and duties of a notary there is no ground to say that his act of protest is not equally valid with that of a notary. *Quoad hoc* he acts as a notary. (See Howard & Hutchinson's Statutes of Mississippi, ch. 37, sec. 24, p. 430.)

In the next place, in the present case, under

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the circumstances, the indorser (McKay) was not entitled to any notice whatsoever of the dishonor. He had actually discharged the makers from all liability for the payment of the note by his release and settlement with them. Of course the notice could be of no use or value to him; for he would in no event be entitled to any recourse over against them; and, therefore, no notice to him would have been necessary, although it fully appears that he had received due notice of the dishonor.

For these reasons, we are of opinion that the judgment ought to be reversed and a venire facias de novo *awarded.*

ORDER.

This cause came on to be heard on the transcript of the record from the Circuit Court of the United States for the Southern District of Mississippi, and was argued by counsel; on consideration whereof, it is now here ordered and adjudged by this court, that the judgment of the said Circuit Court in this cause be, and the same is hereby reversed, with costs; and that this cause be, and the same is hereby remanded to to said Circuit Court, with directions to award a *venire facias de novo.*

Cited—4 How., 279, 282.

73*] *BENJAMIN J. KNAPP, *Plaintiff in Error,*

v.

EDMUND BANKS.

Jurisdiction—difference between position of plaintiff and that of defendant as to amount of judgment and writ of error.

Where the plaintiff in the court below claims $2,000 or more, and the ruling of the court is for a less sum, he is entitled to a writ of error.

But the defendant is not entitled to such writ where the judgment against him is for a less sum than $2,000 at the time of the rendition thereof.

THIS was a case brought up by writ of error from the Circuit Court of the United States for the Southern District of New York.

Banks had recovered a judgment in that court, against Knapp, for $1,720.

Mr. Ogden moved to dismiss the case for want of jurisdiction, which was opposed by *Mr. Benedict* upon the ground that adding interest upon the judgment down to the time when the writ of error was brought, would make it exceed $2,000; and he cited 3 Peters, 32. to show that the amount in controversy in this court determined the jurisdiction.

Mr. Justice STORY delivered the opinion of the court:

We entertain no doubt whatsoever upon this question. The amount in controversy is to be decided by the sum in controversy at the time of the judgment, and not by any subsequent additions thereto, such as interest. The distinction constantly maintained is this: Where the plaintiff sues for an amount exceeding $2,000, and the *ad damnum* exceeds $2,000, if by reason of any erroneous ruling of the court below, the plaintiff recovers nothing, or less than $2,000, there, the sum claimed by the plaintiff is the sum in controversy for which a writ of error will lie. But if a verdict is given against the defendant for a less sum than $2,000, and judgment passes against him accordingly, there it is obvious that there is, on the part of the defendant, nothing in controversy beyond the sum for which the judgment is given; and consequently he is not entitled to any writ of error. We cannot look beyond the time of the judgment in order to ascertain whether a writ of error lies or not.

ORDER.

Mr. Ogden, of counsel for the defendant in error, moved the court to dismiss this writ of error for the want of jurisdiction, because the matters or sum in controversy, exclusive of costs, did not exceed $2,000; which was opposed by *Mr. Benedict*, of counsel for the plaintiff in error, who contended that although the judgment of the Circuit *Court was [*74 only for $1,720, yet that the interest on that sum added thereto would make it exceed $2,000. To which *Mr. Ogden* rejoined, that the right of the party to a writ of error was controlled by the amount at the rendition of the judgment, and could not be enlarged by time: on consideration whereof, it is the opinion of this court that where the plaintiff in the court below claims $2,000 or more, and the ruling of the court is for a less sum, that he is entitled to a writ of error: but that the defendant in the court below is not entitled to such writ where the judgment against him is for a less sum than $2,000 at the time of the rendition thereof—that this is the settled practice of this court. Whereupon it is now here ordered and adjudged by this court, that this writ of error be, and the same is hereby dismissed for the want of jurisdiction.

February 3d.

Cited—4 Wall., 165; 16 Wall., 345; 5 Otto 695.

LUCIUS W. STOCKTON AND DANIEL MOORE, *Plaintiffs in Error,*

v.

HARRIET BISHOP, *Defendant.*

Execution after writ of error, and bond—quashing—by either court—stay of execution.

An execution, issued in the court below, after a writ of error has been sued out, a bond given, and a citation issued, all in due time, may be quashed either in the court below or this court—these things operating as a stay of execution.

IN the Circuit Court of the United States for the Western District of Pennsylvania, Harriet Bishop, the defendant in error, and a citizen of the State of Ohio, obtained a judgment against Stockton and Moore for $6,500 damages and costs, on the 7th of December, 1843.

On the 15th of December, 1843, Stockton and Moore entered into a bond with Hugh Campbell as surety, for the prosecution of a writ of error to this court, which was approved

NOTE.—*As to jurisdiction of United States Supreme Court, depending upon amount,* see note to Gordon v. Ogden, 3 Pet., 33.

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by the judge, and, on the same day, a writ of error and citation were sued out. On the 16th of December, 1843, the citation was returned served on R. Biddle, Esq., attorney of defendant in error.

On the 11th of January, 1844, the plaintiff below sued out a writ of *fieri facias* and placed it in the hands of the marshal, returnable on the 20th of May.

Mr. Coxe moved to quash the writ of *fieri facias*, as having been irregularly issued.

75*] *Mr. *Justice* STORY delivered the opinion of the court:

Upon the facts stated in the application, there is no doubt that the writ of error, bond, and citation, having been given in due season according to law, operated as a stay of execution, and that a *supersedeas* to the *fieri facias* ought to issue from this court, to supersede and quash the same, as prayed for in the motion. Indeed, the issuing of the execution was wholly irregular, and it might have been quashed by an application to the court below. But it is equally competent for this court to do the same thing in furtherance of the purposes of justice.

The motion is therefore, granted, and a supersedeas will be issued accordingly.

ORDER.

UNITED STATES OF AMERICA, *ss.*;

The President of the United States of America.

To the Honorable the Judges of the Circuit Court of the United States for the Western District of Pennsylvania, and to the Marshal of the United States for the said district, greeting:

WHEREAS, lately in the said Circuit Court,—— before you, or some of you, in a cause between Harriet Bishop, plaintiff, and Lucius W. Stockton and Daniel Moore, defendants, judgment was rendered by the said Circuit Court on the 7th December, 1843, in favor of the said plaintiff and against the said defendants, for the sum of $6,500 and cost of suit, and on the 15th December, 1843, the aforesaid defendants, with sufficient security, filed their bond in error, which was approved by the Judge of the District Court, so as to operate as a *supersedeas*, the defendants having sued out a writ of error in due form and time, and a citation having been regularly taken out, served upon the defendant in error and duly returned, as by the inspection of the transcript of the record of the said Circuit Court, which was brought into the Supreme Court of the United States, by virtue of a writ of error, agreeably to the act of Congress in such case made and provided, fully and at large appears. And whereas, in the present term of January, in the year of our Lord one thousand eight hundred and forty-four, it is made to appear on affidavit to the said Supreme Court of the United States, that, notwithstanding the premises, the aforesaid plaintiff in the said Circuit Court caused a writ of *fieri facias* to be issued on the 11th day of January, 1844, upon the judgment obtained in said cause, and to be 76*] placed *in the hands of the aforesaid marshal for service and satisfaction thereof; on consideration whereof, it is now here ordered by this court that a writ of *supersedeas* be, and the same is hereby awarded to be directed to the aforesaid marshal, commanding and enjoining him and his deputies, to stay every and all proceedings upon the said writ of *fieri facias*, and that he return the said execution with the writ of *supersedeas* to the said Circuit Court, and that the judges of the said Circuit Court do cause the said writ of execution to be quashed, the same having been unjustly, improvidently, and erroneously issued out of the said court, at the instance of the said plaintiff. You, therefore, the marshal of the United States for the Western District of Pennsylvania, are hereby commanded that, from every and all proceedings on the said *fieri facias* or in any wise molesting the said defendants on the account aforesaid, you entirely surcease, as being superseded, and that you do fortwith return the said *fieri facias*, together with this *supersedeas*, to the said Circuit Court, as you will answer the contrary at your peril. And you, the judges of the said Circuit Court, are hereby commanded that such further proceedings be had in the premises, in conformity to the order of this court, and as according to right and justice, and the laws of the United States ought to be had, the said execution notwithstanding.

WITNESS the Honorable Roger B. Taney, *Chief Justice* of the said Supreme Court, the 18th day of March, in the year of our Lord one thousand eight hundred and forty-four.

WM. THOS. CARROLL,
Clerk of the Supreme Court of the United States.

S. C., 4 How., 155.
Cited—11 How., 296; 10 Wall., 202; 12 Wall., 100.

WILLIAM KINNEY AND JAMES J. MECHIE, Executors and Trustees of ROBERT PORTERFIELD, Deceased,

v.

MERIWETHER L. CLARK, WILLIAM P. CLARK, GEORGE R. H. CLARK, AND JEFFERSON R. CLARK, a Minor by the aforesaid GEORGE R. H. CLARK, His Guardian, Heirs, and Devisees of WILLIAM CLARK, Deceased, AND ROBERT O., ANN C., GEORGE W., AND FRANCES JANE WOOLFOLK, Heirs of GEORGE WOOLFOLK, Deceased, ET AL.

Virginia statutes establishing land office—lands of Cherokee Indians excepted—boundaries of such lands—titles may be tried upon caveat—*boundaries examined—Kentucky statute of limitation attaches to legislative grants of Virginia in military district—Kentucky Act of 1809—Chickasaw country included and acts extended over, when.*

An act of the Legislature of Virginia, passed in May, 1779, "establishing a land office, and ascertaining the terms and manner of granting waste and unappropriated lands," contained, amongst other exceptions, the following, viz.: *No entry or location of land shall be admitted within the country and limits of the Cherokee Indians. [*77

The tract of country lying on the west of the Tennessee River, was not then the country of the Cher-

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okee Indians, and, of course, not within the exception.

A title may be tried in Virginia, Kentucky, and Tennessee, as effectually upon a *caveat* as in any other mode; and the parties, as also those claiming under them, are estopped by the decision.

The boundaries of the Cherokees, as fixed by treaties, historically examined, and also the nature, limits, and effect of the grant to Henderson & Company.

Whatever lands in Virginia were not within the exceptions of the Act of 1779, were subject to appropriation by treasury warrants.

As the rule is settled, that the decisions of State courts, construing State laws, are to be adopted by this court, and as the courts of Kentucky have decided that an entry was required to give title on a military warrant, in the military district, this court decides that the legislative grant of Virginia to her officers and soldiers, would not, of itself, prevent the statute of limitations of Kentucky from attaching.

The Kentucky Act of 1809, applied to the Chickasaw country on the west of the Tennessee River, as far as treaties would permit; and upon the extinguishment of the Indian title, this act, together with all the other laws, was extended over the country.

THIS case was brought up by appeal from the Circuit Court of the United States for the District of Kentucky, sitting as a court of equity, and arose upon the following state of facts:

On the 19th December, 1778, the General Assembly of Virginia passed a joint resolution, declaring that a certain tract of country, to be bounded by the Green River and a southeast course from the head thereof to the Cumberland mountains, with the said mountains to the Carolina line, with the Carolina line to the Cherokee or Tennessee River, with the said river to the Ohio, and with the Ohio to Green River, ought to be reserved for supplying the officers and soldiers of the Virginia line with the respective proportions of land, which have been or may be assigned to them by the General Assembly, saving and reserving the land granted to Richard Henderson & Company, and their legal rights to such persons as have heretofore actually located lands and settled thereon, within the bounds aforesaid.

In May, 1779, every purchase of lands, theretofore made by or on behalf of the crown of Great Britain, from any nation of Indians within the limits of Virginia, was declared to enure to the benefit of that Commonwealth, and all sales and deeds made by any Indian, or nation of Indians, to or for the separate use of any person or persons, were pronounced void.

78*] *In May, 1779, also, an act was passed by the General Assembly "for establishing a land office, and ascertaining the terms and manner of granting waste and unappropriated lands." This act contained, amongst other things, the following restrictions: "No entry or location of land shall be admitted within the country and limits of the Cherokee Indians, or on the northwest side of the Ohio River, or on the lands reserved by act of Assembly for any particular nation or tribe of Indians, or on the lands granted by law to Richard Henderson & Company, or in the tract of country reserved by resolution of the General Assembly for the benefit of the troops serving in the present war, and bounded by the Green River and southeast course from the head thereof to the Cumberland mountains, with the said mountains to the Carolina line, with the Carolina line to the Cherokee or Tennessee River, with the said river to the Ohio River, and with the Ohio to the said Green River, until the further order of the General Assembly.

In October, 1779, an act was passed "for more effectually securing to the officers and soldiers of the Virginia line, the lands reserved to them," &c.

The first section imposed a heavy penalty on settlers who should not evacuate the reserved lands.

The second ascertained the proportions or quantity of land to be granted, at the end of the war, to the officers of the Virginia line on continental or State establishment, or to the officers of the navy; and it was also provided that where any officer, soldier, or sailor, shall have fallen or died in the service, his heirs or legal representatives shall be entitled to, and receive the same quantity of land as would have been due to such officer, soldier, or sailor, respectively, had he been living.

On the 18th of May, 1780, Colonel George Rogers Clark (under whom the defendants claim), upon sundry treasury warrants, made with the surveyor several entries of land, in all amounting to 74,962 acres, lying in the then State of Virginia, below the Tennessee River; and afterwards, said Clark, in like manner, on the 26th October, 1780, amended his said entries, "to begin on the Ohio at the mouth of the Tennessee River, running down the Ohio, bounded by the drowned lands of the said river and waters of the Mississippi, for the quantity of 74,962 acres, in one or more surveys.

In October, 1780, an act passed "for making good the future pay of the army."

*It allowed a major-general 15,000 [*79 acres of land, and a brigadier-general 10,000.

It entitled the legal representative of any officer who may have died in the service before the bounty of lands granted by that or any former law, to demand and receive the same in like manner as the officer himself might have done. And as a testimony of the high sense the General Assembly of Virginia entertained of the important services rendered the United States by Major-General Baron Steuben, it was further enacted that 15,000 acres of land be granted to the said Major-General Baron Steuben, in like manner as hereinbefore granted to other major-generals.

In November, 1781, an act passed "to adjust and regulate the pay and accounts of the officers and soldiers of the Virginia line," &c.

The eighth section declared "That whereas a considerable part of the tract of country alloted for the officers and soldiers by an act of Assembly, entitled "An Act for establishing a land office," &c., hath, upon the extension of the boundary line between this State and North Carolina, fallen into that State, and the intentions of the said act are so far frustrated. Be it therefore enacted, That all that tract of land included within the rivers Mississippi, Ohio, and Tennessee, and the Carolina boundary line, shall be, and the same is hereby substituted in lieu of the lands so fallen into the said State of North Carolina, to be in the same manner subject to be claimed by the said officers and soldiers."

The ninth section required the governor, as soon as the circumstances of affairs would ad-

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mit, to appoint surveyors for the purpose of surveying and apportioning the lands theretofore reserved to the officers and soldiers agreeably to their ranks, in such manner and in such proportions as were allowed by act of Assembly as a bounty for military services.

The officers were authorized to depute and appoint as many of their number as they might think proper, to superintend the laying off the lands, with power to choose the best of the same thus to be allotted, and point out the same to the surveyors, who were required to make the surveys, and be subject to the orders of the superintendents throughout the survey.

After the survey, the portions of each rank were to be numbered, and the officers and soldiers were to proceed to draw lots according to their respective ranks, and to locate as soon as they thought proper.

The twelfth section provided "That the [*80 bounties of land given *to the officers and soldiers of the Virginia line in continental service, and the regulations for the surveying and appropriating the same, shall be extended to the State officers.

In May, 1782, an act was passed, entitled, "An Act for providing more effectual funds for the redemption of certificates granted the officers and soldiers raised by this State."

The seventh section provided that, "Whereas it is necessary that the number of claims to any part of the lands appropriated for the benefit of the said officers and soldiers should be speedily ascertained; Be it therefore enacted, That all persons having claims as aforesaid, be required, and they are hereby directed, to transmit authenticated vouchers of the same to the war office, on or before the first of January next," and those without the State were required to do the same on or before the first of June.

The eighth section directed the register of the land office to grant, to the officers and soldiers, warrants for the lands allotted them, upon producing a certificate of their respective claims from the Commissioner of War.

The ninth section enacted "That any officer or soldier who hath not been cashiered or superseded, and who hath served the term of three years successively, shall have an absolute and unconditional title to his respective apportionment of the land appropriated as aforesaid."

The tenth section contained this proviso, "Provided always, and it is hereby enacted, that no surveyor shall be permitted to receive any location upon any warrant for lands within the country reserved for the officers and soldiers, until the apportionment and draft for the same, as directed by the act entitled "An Act to adjust and regulate the pay and accounts of the officers and soldiers of the Virginia line."

On the 18th of December, 1782, a warrant was issued to Robert Porterfield (the complainant), as the heir of Colonel Charles Porterfield, deceased, for 6,000 acres of land; and on the 12th of June, 1783, a warrant was issued to Thomas Quarles for 2,666⅔ acres, which warrant was afterwards assigned to Porterfield, the complainant.

In October, 1783, an act was passed, entitled "An Act for surveying the lands given by law to the officers and soldiers of continental and State establishments," &c.

For the better locating and surveying the lands, given by law to *the officers and [*81 soldiers on State and continental establishments, it enacted that it should be lawful for the deputation of officers, consisting of Major-General Peter Muhlenberg and others, who are enumerated, to appoint superintendents on behalf of the respective lines, or jointly, for the purpose of regulating the surveying of the lands appropriated by law as bounties for the said officers and soldiers. That the deputations should have power to appoint two principal surveyors; that the holders of land-warrants for military bounties, given by law as aforesaid, should, on or before the 15th of March thereafter, deliver the same to the principal surveyors, &c.

The second section declared that priority of location should be by lot, under the direction and management of the principal surveyors and superintendents. That the warrants delivered to the principal surveyors before the 10th of March, should be surveyed first, and those subsequently delivered, in the order of priority.

The third section required the location and surveys to be made under the direction of the superintendents.

The fourth section directed where, and how, the lands were to be surveyed. Those lying on the Cumberland and Tennessee were to be surveyed first; and afterwards those on the northwest side of the Ohio River, until the deficiency of all military bounties, in lands, should be fully and amply made up. "Whatever lands may happen to be left," the act declares, "within the tract of country reserved for the army, on this side the Ohio and Mississippi, shall be saved, subject to the order and particular disposition of the Legislature of this State." And the governor was required to furnish the superintendents with such military aid as he might judge necessary to carry the act into effect. The aid was to be ordered from the Kentucky country, and was not to exceed a hundred men.

In the spring of 1784, the superintendents repaired to Kentucky. They found the country below the Tennessee in possession of the savages, who threatened resistance. The aid expected from Kentucky was not furnished. The attempt to enter and survey the land was, consequently, abortive. But the superintendents proceeded to determine the priority of locations by lot; and entries were made on the books of the surveyors, to the extent of some two or three hundred thousand acres.

Porterfield's entries were of the number. They were made under the authority of the two warrants which have been already stated.

In June, 1784, two surveys were made for Clark by the surveyor *of Lincoln [*82 County, under the authority of the warrants already stated as land office treasury warrants. One of these surveys was for 36,962 acres, and the other for 37,000 acres.

In August, 1784, Porterfield made his entries.

Caveats were entered against the surveys of Clark, which prevented patents from being issued. These were entered in the District Court of the then District of Kentucky, by the superintendents of the Virginia State line, and were not disposed of until after the separation of Kentucky from Virginia.

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In October, 1784, the Legislature of Virginia interposed to prevent the military claimants from taking possession of the lands. The preamble to the act stated, "that it had been represented to the present General Assembly that the taking possession of, or surveying the lands in the western territories of this State, which have been granted by law as bounties to the officers and soldiers of the Virginia line, will produce great disturbances;" and the governor, with the advice of council, was authorized to suspend, for such time as he may think the tranquility of the government may require, the surveying or taking possession of those lands that lie on the northwest side of the river Ohio or below the mouth of the river Tennessee, and which have been reserved, &c.

On the 6th of January, 1785, Governor Henry accordingly issued his proclamation to the effect authorized by this act.

In November, 1786, and January, 1786, three treaties were made with the Indians at Hopewell, by commissioners on the part of the United States; the first, in November, with the Cherokees, and the other two in the following January, with the Choctaws and Chickasaws. That with the Choctaws bears date on the 3d, and that with the Chickasaws on the 10th of January, 1786. By the treaty with the Cherokees the boundary was established as follows: Beginning at the mouth of Duck River, on the Tennessee; thence running northeast to the ridge dividing the waters running into Cumberland from those running into the Tennessee; thence eastwardly along the said ridge to a northeast line to be run which shall strike the river Cumberland forty miles above Nashville; thence along the said line to the river; thence up the said river to the ford where the Kentucky road crosses the river, thence to Campbell's line, near Cumberland Gap, &c., &c., &c. The treaty with the Chickasaws established the following boundary: Beginning on the ridge that divides the waters running into the Cumberland from those run-
83*] ning into the Tennessee *at a point in a line to be run northeast which shall strike the Tennessee at the mouth of Duck River; thence running westerly along the said ridge till it shall strike the Ohio; thence down the southern bank thereof to the Mississippi; thence down the same to the Choctaw line of Natchez district; thence along the said line, or the line of the district, eastwardly, as far as the Chickasaws claimed, and lived, and hunted on, the twenty-ninth of November, one thousand seven hundred and eighty-two.

The fourth article of the treaty with the Chickasaws was as follows: "If any citizen of the United States, or other person, not being an Indian, shall attempt to settle on any of the lands hereby alloted to the Chickasaws to live and hunt on, such persons shall forfeit the protection of the United States of America; and the Chickasaws may punish him or not, as they please."

In 1793, the *caveat* which had been filed against Clark by the superintendents of the Virginia State line, was dismissed, in Kentucky, pursuant to the opinion of the Court of Appeals of Virginia, given in 1791.

In 1794, the General Assembly of Kentucky passed an act requiring the register of the land office to receive, and issue grants on, all certificates of survey which were in the register's office of Virginia at the time when the separation took place, and on which grants had not issued.

On the 15th of September, 1795, grants were issued by Kentucky to Clark for the 73,962 acres.

In 1809, the Legislature of Kentucky passed an act, the second section of which declares, "That no action at law, bill in equity, or other process, shall be commenced or sued out by any person or persons claiming under, or by, an adverse interfering entry, survey, or patent, whereby to recover the title or possession of such land from him or her who shall hereafter settle on land to which he or she shall, at the time of such settlement made, have a connected title in law or equity, deducible of record from the Commonwealth; and when such settler shall have acquired such title or claim after the time of settlement made, the limitation shall begin to run only from the time of acquiring such title or claim, but within seven years next after such settlement made, &c.

In October, 1818, a treaty was made between the United States and the Chickasaws, by which the Chickasaws ceded to the United States all the land between the Tennessee, Ohio, and Mississippi *rivers and a line [*84 therein described on the south, which cession included the lands in controversy.

On the 22d of December, 1818, the Legislature of Kentucky passed an act prohibiting any entry or survey from being made "on any portion of the land lying within the late Chickasaw Indian boundary."

In July, 1819, William Clark, the assignee of George Rogers Clark, the patentee, took possession of the land and placed tenants upon it.

On the 14th February, 1820, the Legislature of Kentucky passed an act providing for the appointment of a superintendent to survey the lands west of the Tennessee River.

On the 26th of December, 1820, the military surveyor was permitted to survey the entries that had been made prior to the year 1792, when Kentucky became an independent State. Porterfield's surveys were commenced and continued from time to time until 1824 and 1825. Five surveys were made at different times during this period, and five patents were issued in conformity with them, which bear date in the last-mentioned years. In May, 1824, Porterfield took possession, by his tenants, of several of the tracts patented to him, and leased them for five years.

In October, 1825, these tenants were turned out of possession by writs of forcible entry and detainer.

Some conveyances and legal proceedings occurred, during the period of which we have spoken; but, as they have no bearing upon the questions before the court in the present case, they have not been mentioned in the statement.

In July, 1836, Porterfield filed his bill in the Circuit Court of the United States for the District of Kentucky, sitting as a court of equity, which, together with two amended bills and a bill of revivor, after having brought into court various parties who were supposed to have an

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interest in the matter, presented the following claim, charges, and prayer.

The bill, after setting forth the title of the complainant, as founded upon the patents of 1824, 1825, and 1826, and alleging that the possession of the country by the Indians was the cause of the delay between the entries and surveys, charged that the defendant, Clark, had no right to make an entry or location on any lands west of the Tennessee River, or on the lands included between the rivers Ohio, Tennessee, and Mississippi, and the North Carolina line, on land office treasury warrant certificates; that, by law, he, Clark, was expressly prohibited 85*] *from making the said entry or location on land within the country and limits of the Cherokee Indians, or the lands reserved by the Virginia Assembly for any particular nation or tribe of Indians, or in that tract of country reserved by resolution of the General Assembly of the State of Virginia for the benefit of the troops serving in the then existing war between Great Britain and the United States of America. The bill avers that the entry of George Rogers Clark was made on lands reserved by resolution of the Assembly of Virginia for the troops then in the service of the United States; that it was made on lands reserved by law for the Indian tribes, and upon lands within the country and limits of the Cherokee Indians. The bill further charges that the said warrants were, by law, prohibited from being located on any lands that were not waste and unappropriated; that, at the time of the entries, the Indian title to said lands west of the Tennessee River and included within the rivers Ohio, Mississippi, Tennessee, and the North Carolina boundary line, was not extinguished. The bill further charges that the entry of Clark is not precise and special, but vague, uncertain, and void; because it called to begin on the Ohio at the mouth of the Tennessee River, running down the Ohio, bounded by the drowned lands of said river and waters of the Mississippi for the quantity of 74,963 acres in one or more surveys; and moreover that the person who in fact made such survey was not authorized and legally appointed surveyor. It then charges that the titles of Clark, and all who claim under him, are void, and prays for a decree compelling them to release their claims to the complainant, and account to him for the rents and profits of the land.

A supplemental bill and answer were afterwards filed, but the matters therein stated are not before the court in the consideration of this case; the charges made in the bill being denied in the answer, and no proof being offered to sustain them.

The defendants all answered; but as they all rely on the same matters of defense, it is not material to notice any of the answers but that of William Clark. He contests, throughout, the right of Porterfield to relief; denies that any part of the land in contest was possessed by Porterfield at the time of filing his bill; on the contrary, he alleges, that by his tenants, he had for more than seven years next before the filing of the bill, been in full and exclusive possession of all the land in contest, claiming and holding the same under the title derived from George Rogers Clark, and he therefore 86*] pleads and *relies upon his possession and the statute of Kentucky, limiting the time of bringing suits in such cases to seven years, in bar of the relief sought by Porterfield. He insists that at the date of Clark's entries, there was no law prohibiting the location of treasury warrants below the Tennessee River, and that the entries were made on land subject to appropriation, and in conformity with law; that they possess the certainty and precision of valid entries, and were afterwards legally surveyed in conformity with law, upon which surveys patents finally issued according to law; and that his title is not only elder in date, but superior in law and equity to that of Porterfield.

Amongst the other matters given in evidence in this case, were copies of some original papers found in the State paper office, in London, relating to the boundary lines adopted at various times between the white people and the Indians, the substance of which is as follows:

1. Deed (or treaty) with the Cherokees, dated on the 18th of June, 1767, which recited that a previous treaty had been made on the 20th of October, 1765, directing the line to be run from where the South Carolina line terminated, a north course into the mountains, whence a straight line should run to the lead mines of Colonel Chiswell (on the Great Kenhawa River), and that the commissioners had found themselves unable to run the line further than the top of a mountain called Tryon Mountain, on the head waters of Pacolet Creek and White Oak Creek, therefore the present treaty established the following: running from the top of Tryon Mountain aforesaid, beginning at the marked trees thereon, by a direct line to Chiswell's mines in Virginia.

2. Treaty between John Stuart, on behalf of His Majesty, the King of England, and the upper and lower Cherokee nations, concluded at Hard Labor, on the 18th October, 1768, establishing the following boundary: From a place called Towahihie, on the northern bank of Savannah River, a north fifty degrees east course, in a straight line to a place called Demesses Corner, or Yellow Water; from Demesses Corner or Yellow Water, a north fifty degrees east course, in a straight line to the southern bank of Reedy River, at a place called Waughoe, or Elm Tree, where the line behind South Carolina terminates; from a place called Waughoe, or Elm Tree, on the southern bank of Reedy River, a north course in a straight line to a mountain called Tryon Mountain, where the great ridge of mountains becomes impervious; from Tryon Mountain, in a straight line to Chiswell's mine, on the eastern bank of the Great Conhoway *(Kenhawa) River, about [*87 a N. by E. course; and from Chiswell's mine, on the eastern bank of the Great Conhoway, in a straight line, about a north course, to the confluence of the Great Conhoway with the Ohio.

3. Treaty with the Six Nations, concluded at Fort Stanwix, on the 5th of November, 1768, in which the sachems and chiefs assert the ownership of, and by which they sold to King George III. all the land, bounded by the following line: Beginning at the mouth of the Cherokee, or Hogohege (Tennessee) River, where it empties in the river Ohio, and running from thence upwards along the south side of the said river Ohio, to Kittanning, which is above Fort Pitt; from thence by a di-

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rect line to the nearest fork of the west branch of the Susquehanna, &c., &c., &c., and extended eastward from every part of the said line, &c., &c.

4. Instructions from Lord Botetourt to Col. Lewis and Dr. Walker, dated Williamsburg, Dec. 20th, 1768, directing them to proceed to Mr. Stuart, superintendent of the southern district, and represent to him that the line from Chiswell's mine to the mouth of the great Kenhaway, contracts the limits of the colony too much, and saying that "if Virginia had been consulted upon this line, there would have been an opportunity of showing that the Cherokees had no just title to the lands between the supposed line and the mouth of the Cherokee River, which in fact were claimed, and have been sold to his majesty, by the northern nations at the late treaty at Fort Stanwix."

5. Report of Lewis and Walker, saying that they had met with a portion of the Cherokee chiefs, who would use their influence to obtain a new boundary.

6. A memorial, from the house of Burgesses of Virginia to the governor, praying that a new boundary line may be adopted, and suggesting one from the western termination of the North Carolina line, in a due west direction to the river Ohio. This memorial was sent to England by the governor, on the 18th December, 1769.

7. An address from the House of Burgesses to the governor, and his answer upon the same subject.

8. Resolution of the House of Burgesses, 16th June, 1770, requesting that a treaty be made with the Cherokees for the lands lying within a line to be run from the place where the North Carolina line terminates, in a due western direction, till it intersects Holstein River, and from thence to the mouth of the Great Kanhawa.

88*] *9. Letter from Lord Hillsborough to Lord Botetourt, dated at White Hall, State paper office, October 8, 1770, saying, I am convinced, from the fullest consideration, that the extension of the boundary line, as proposed by the address of the House of Burgesses in December last, would never have been consented to by the Cherokees.

10. Treaty with the Cherokees, made at Lochaber, in the province of South Carolina, on the 18th October, 1770, adopting as a boundary a line, beginning where the boundary line between the province of North Carolina and the Cherokee hunting-grounds terminates, and running thence in a west course to a point six miles east of Long Island, in Holstein's River, and thence in a course to the confluence of the Great Conhaway and Ohio Rivers.

11. Letter from Lord Dunmore to the Earl of Hillsborough, dated at Williamsburg, March, 1772, saying that the boundary line between the colony and the hunting-grounds of the Cherokee Indians had been run by Mr. Donelson and others; but that it had not been run exactly according to instructions, taking in a larger tract of country than by those instructions they had permission to include; that the commissioners had continued, from the point on Holstein River, where it is intersected by the division line of Virginia and North Carolina, down that river a small distance, to a place from whence they had an easier access than anywhere else to be found, to the head of Louisa (or Kentucky) River.

There were also given in evidence, sundry papers from the State Department, verified, as copies, by the certificate of Fletcher Webster, Esq., acting Secretary of State, the substance of which was as follows:

1. A protection for the Great Warrior of Chote, dated on the 18th of May, 1771, at Toguch, and signed by Alexander Cameron, deputy-superintendent. It states, that he intends to hunt from thence to Long Island and thereabouts, until the arrival of the Virginia commissioners, who are appointed by that government to run the boundary line; and expresses a hope, that if he should meet with any hunting parties, they would remove from the lands which were reserved for the Cherokees.

2. A talk from Alexander Cameron, dated at Lochaber, 5th February, 1772, saying to the Indians that he had informed the governor of Virginia that the course of the boundary line to where they left it on the Cedar River was approved by all the chiefs, and that he had *reminded Colonel Donelson of his prom- [*89
ise of sending a few presents to the Long Island, upon Holston, in the spring.

3. A letter from John Stuart to Ouconestotah, great war-chief of the Cherokee nation, saying that he sent him therewith a copy of the boundary agreed upon, and that persons were appointed to mark it immediately.

4. A treaty of cession to his majesty by the Creeks and Cherokee Indians, of certain lands to the south, dated on the 1st of June, 1773, at Augusta; and a talk to the Cherokees dated at Augusta, on the 3d of June, 1773, reminding them that in 1771 they had marked a line, dividing their hunting-grounds from what they gave up to his majesty in the province of Virginia, and which fell in upon the head or source of Louisa (now Kentucky) River, and down the stream thereof to its confluence with the Ohio, and relinquished all claims or pretensions to any lands to the northeastward of said line; and informing them that his majesty had erected a new province whose boundaries were—beginning on the south side of the river Ohio, opposite the mouth of Sciota, thence, southerly, through the pass in the 'Anasiota mountains, to the south side of the said mountains; thence along the south side of the said mountains, northeastwardly to the fork of the Great Kenhawa, made by the junction of Greenbriar River and the New River; thence along the Greenbriar River on the easterly side of the same, unto the head or termination of its northeasterly branch thereof; thence easterly to the Alleghany mountains; thence by various courses to the southern and western boundary line of Pennsylvania, and along the western boundary line until it shall strike the Ohio River, and thence down the said river Ohio to the place of beginning.

5. Talk from Lord Dunmore to the Little Carpenter and chiefs of the Cherokee nations of Indians, dated at Williamsburg, on the 23d day of March, 1775, warning them not to grant land to Henderson or any other white people.

6. A letter from William Preston to the chiefs of the Cherokee nation, dated at Fincastle County, on the 12th of April, 1775, say-

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ing that he was commanded by Lord Dunmore to send the letter by a special messenger, who was to read it to the council. The letter remonstrates against the sale which they had lately made of that great tract of land on the Ohio, without the advice or consent of the king, and says that, by various treaties, the land had been the property of the king for upwards of thirty years.

90*] *7. A letter from Patrick Henry, Jun., to Oconostotah, dated on the 3d of March, 1777, assuring the Cherokees of the protection of Virginia, and expressing an expectation that he, and his warriors and head men, will not fail to meet Colonel Christian, Colonel Preston, and Colonel Shelby, at the fort, near the Great Island, to confirm the peace.

8. Articles of peace made at Fort Henry, near the Great Island, on Holston's River, on the 20th July, 1777, between the Commissioners from the Commonwealth of Virginia, of the one part, and the chiefs of that part of the Cherokee nation called the Overhill Indians, of the other part.

The fifth article recites that, as many white people have setlled on lands below the boundary between Virginia and the Cherokees, commonly called Donelson's line, it is necessary to fix and extend a new boundary and purchase the lands within it. The new line begins at the lower corner of Donelson's line on the north side of the river Holston, and runs down that river according to the meanders thereof and bending thereon, including the Great Island, to the mouth of Claud's Creek, being the second creek below the warrior's ford at the mouth of Carter's Valley; thence running a straight line to a high point on Cumberland Mountain, between three and five miles below or westward of the great gap which leads to the settlement of the Kentucky. This last-mentioned line is to be considered as the boundary between Virginia and the Cherokees.

9. A letter from Patrick Henry, dated at Williamsburg, on the 15th November, 1777, to Oconastotah, saying that his heart and the hearts of all the Virginians are still good towards the Cherokees.

10. A letter from Patrick Henry to the Cherokees, saying that he is informed that the line which was run was not convenient to the Cherokees; that they wanted it to come higher up the river Holston, and that he has given orders to have it altered a few miles, to take in the fording place into their land.

There was also given in evidence, the deposition of Peter Force, an inhabitant of the city of Washington, who had been for many years engaged in collecting authentic papers connected with the history of the United States, from the settlement of the several colonies (including Virginia), to the adoption of the federal Constitution, under a contract with the Secretary of State, made by authority of an act of Congress. Mr. Force gave it as his opinion, after an examination of books, maps, treaties, and 91*] other authentic papers, that the *country between the Tennessee, Ohio, and Mississippi rivers, and the boundary line between what is now the State of Kentucky and Tennessee, belonged to the Cherokees previous to the year 1779; that all the maps which he had found designated the Cherokee country as being north of the Chickasaws, extending westward to the Mississippi and northward to the Ohio; and that in no instance had he found the lands above described to be marked upon any map as belonging to any other tribe of Indians than the Cherokees. Mr. Force annexed to his deposition copies of sundry papers relating to a treaty made in 1780, between the Lords Commissioners for trade and plantations, and the Cherokees,—together with the treaty itself, which was executed in England by some of the chiefs who had gone there.

Exceptions were filed to the deposition of Peter Force, but they were overruled, and at a subsequent stage of the cause these exceptions were withdrawn.

On the 13th of November, 1841, after hearing an argument for three successive days, the Circuit Court dismissed the bill with costs, and the complainant appealed to this court.

Before the cause was argued, the following paper was filed:

On the question, whether the lands in controversy were regarded as Chickasaw or Cherokee lands, the counsel for the appellants hope they will be at liberty to refer to an original official letter from Governor Thomas Jefferson to Gen. Clark, dated the 29th January, 1780, and now on the files of the Chancery Court at Richmond, in a suit there depending between the administrator of Gen. George Rogers Clark and the Commonwealth, for the settlement of their accounts. This letter is wholly upon the subject of the public service, and, amongst other things, upon the subject of erecting a fort near the mouth of the Ohio. It contains the following passages:

"From the best information I have, I take for granted, that our line will pass below the mouth of Ohio. Our purchases of the Cherokees hitherto, have not extended southward or westward of the Tanissee. Of course the little tract of country between the Mississippi, Ohio, Tanissee, and Carolina line, on which your fort will be, is still to be purchased from them, before you can begin your work. To effect this, I have written to Major Martin, our Cherokee agent, of which letter I inclose you a copy." (This extract is from the first page of the letter.)

"I must also refer to you, whether it will be best to build the fort *at the mouth of [*92 Ohio, before you begin your campaign, or after you shall have ended it. Perhaps, indeed, the delays of obtaining leave from the Cherokees, or of making a purchase from them, may oblige you to postpone it till the fall." (This extract is from the sixth page of the letter.)

It is proper to state that this letter mentions the Chickasaws as a hostile tribe. (See the letter, bottom of p. 4 and top of p. 5.)

Messrs. Morehead and *Chapman Johnson* for the appellants and complainants below.

Mr. Crittenden for the defendants.

[The notes of *Mr. Morehead's* argument, as taken by the reporter, not being within his control when this part of the volume was put to press, the argument is necessarily and reluctantly omitted.]

Mr. Crittenden, for defendant, stated the nature of the two conflicting titles, and then referred to the claim of Porterfield as asserting the superiority of his title, both at law and

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in equity. If these allegations are true, then the complainant has the legal title and cannot sue in equity. His remedy at law is complete, and this court has no jurisdiction. If the elder patent of Clark be a nullity and void on its face, it would be no bar to an action of ejectment and the recovery of the land. (6 Peters, 666.)

But if the original evidence of title exhibited by the parties be referred to as the proper test of the nature of the case, and of the jurisdiction of a court of equity, then it will appear that the present is nothing more than the ordinary case of a junior patentee, seeking, in the familiar and appropriate mode of a bill in equity, to coerce a surrender and conveyance of the legal title of an elder patentee.

In this view of the case he argued,

1. That the complainant had no such claim as could prevail in a court of equity against the elder legal title of the defendant.

2. That if he had shown such right, then that the defendant's title was prior in time and better in equity.

3. That however perfect the complainant's title, and however imperfect the defendant's, the latter is protected and the former barred by the statute of seven years' limitation.

1. Porterfield asserts a military claim under the reservations made in the Virginia Acts of 1779 (1 Litt., 406) and 1781 (1 Litt., 432), and in virtue of the entries made on the military 93*] warrants, together *with the patents issued in 1825 and 1826 under an act of the Kentucky Legislature of 1820. From these sources the complainant derives title, if any he has, and insists—

1. That the acts of the Virginia Legislature operate as a legislative grant of the legal title to the troops alluded to in them, and that his locations were required only to discriminate, as between him and his fellow-soldiers, his portion.

2. That his entries, if such were necessary as original appropriations, are valid and good under the said Act of 1779.

The Act of 1779 required that entries should be made so specially as to enable subsequent locators to locate the adjacent residuum with safety. To do this and to make a valid entry, it must so describe the land as to identify it by notorious objects. Decisions without number might be cited to establish this as the settled rule of law in such cases. (*Speed* v. *Lewis*, Hardin, 477; *Johnson* v. *Pannel's Heirs*, 2 Wheat., 206.)

Tested by this rule, the entry of the complainant cannot be maintained. There is no evidence, nor attempt to prove the identity or notoriety of the objects on which these entries depend; and this fatal defect is obvious.

Are the acts of Virginia legislative grants? The Acts of 1779 and 1781 are acts of reservation, not of grant. They reserved districts of country from other appropriation, that they might therewith satisfy the military claimants. This is manifestly the character of the acts themselves, and though in other and subsequent acts, words and expressions may be found that would give color to the argument that the lands had been "given," "appropriated," &c., yet these must be understood with a reference to the principal acts, which had not given, but reserved them "to be given or granted," as might thereafter be directed. In confirmation of this, the 11th section of the Act of May, 1782, indicates that the portion or bounty land of each military claimant was thereafter to be granted to him by patent. (Revised Code, 395.)

But if, by these acts, Virginia had devested herself and granted the title, to whom did she grant the land? Certainly not to Porterfield, so as to enable him, individually, to maintain an action at law or suit in equity. He would almost have as good a right to sue in the character of a citizen of the Commonwealth, and in virtue of the right which, as such, he had.

If these acts can, in any sense, be regarded as a grant, out of *which the complain- [*94 ant's title was to spring, such title could only vest in him to any specific parcel, when the legal means for its investiture had been performed. Was that to be done by entry? If so, that entry should be so special as at least to identify, if not to make notorious, the land intended to be selected. The common rule requires notoriety, but if we dispense with that, identity is indispensable. This entry does not identify the land. If the entry is neither required by law, or being required, is inoperative for want of specialty, it confers no right, either legal or equitable. What, then, has the complainant done to make this particular land his property? It is not by survey; for, admitting that would have been a sufficient appropriation under the laws of Virginia, no such survey was made. The only survey made was in 1824–1825, long after the date of Clark's patent, and under a law of Kentucky, which authorized surveys to be made upon entries only, and required those surveys to conform to the entry. According to that law, the survey was not recognized as an act of appropriation, but only as a means of perfecting and carrying into grant such entries as were valid by their special description of the land. So that, in any way in which it can be viewed, the right of the complainant must resolve itself into the validity and specialty of his entry.

If it were admitted that a survey was a sufficient appropriation, the survey must contain such a description as would identify the land by the corresponding objects proved to have existed on the land. Up to the time, therefore, of the separation of Kentucky, the complainant had no title derivable from any location or survey; and he must rest for any such title upon the acts of the Virginia Assembly alone. They gave him no individual right to the specific land in question; they gave him no right in it. If any, it must be what the complainant contends it is, viz., a perfect legal title. And if so, his bill in chancery cannot be maintained. That these acts granted no such right, *per se*, is necessarily implied in the decisions of the Kentucky Court of Appeals in the cases of *Jasper, &c.*, v. *Quarles* (Hardin, 464), and *McIlhenney's Heirs* v. *Biggerstaff* (3 Litt., 155). For if such rights had been granted, neither Jaspar or Biggerstaff could have succeeded in equity against the title granted before the claims originated.

Upon general principles, courts of chancery will not, except in favor of an equity clearly made out, disturb the holder of the legal title, however, or by whatever means, obtained; and this is the *settled doctrine of the courts [*95 in Kentucky in reference to cases like the present, of conflicting land claims. (Hardin's

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Reports, 103, 112, 469; 2 Bibb, 168; *Ward, &c.*, v. *Lee*, 1 Bibb, 33, 229; *Garnett* v. *Jenkins*, 8 Peters, 75.)

The Virginia acts in question bear no resemblance to the acts referred to in the case of *Green's Heirs* (2 Wheat., 196); here are no words of present donation or grant, no individual appropriation. These acts were not so understood by either Virginia or Kentucky, as is shown by their compact (1 Litt. Laws of Kentucky, p. 19, sec. 10), and by the subsequent acts of Kentucky in disposing of those lands as her own, and by the act for surveying the military claims.

In 1779, Virginia only reserved these lands "until her further order." The Kentucky decision in *Rollins* v. *Clark* (8 Dana, 19) expressly repudiates the idea of a legislative grant, and the cases of *Bledsoe's Heirs* v. *Wells* (4 Bibb, 329), and *Mellhenney's Heirs* v. *Biggerstaff* (3 Litt., 161), do so by necessary implication. In the case of *Wilcox* v. *Jackson* (14 Peters, 516), it is said that where lands are granted by act of Congress, it must be done "by words of present grant." Virginia thought that something more would be necessary, because she included these military warrants within the act opening a land office, the 11th section of which (Rev. Code, 395, Act of 1782) requires the officers to receive paper money for fees for issuing grants on military warrants. It is brought in, incidentally, it is true, but nevertheless explains the meaning of prior laws.

Having thus examined the title of Porterfield, and the time when it accrued, let us look at the second head of the argument.

2. That Clark's title is prior in time and better in equity. His final amended entry was made on the 26th October, 1780, in virtue of Virginia treasury warrants; was surveyed, as to 36,993 acres, on the 7th June, 1784, and patented under the Kentucky Act of 1794, on the 15th of September, 1795. The entry calls to "begin on the Ohio River, at the mouth of the Tennessee," &c. In its terms, it contains all the precision and certainty required by the Act of 1779, and is a good and valid entry. It includes the land in controversy, as does also the survey and patent founded upon it. The only grounds on which the claim is attempted to be impeached are two:

1. That it is within the military reserve.

2. That it is within the country and limits of the Cherokees.

As to the first, it is sufficient to say that the entry of Clark was made prior to the military reservation; and the acts of reservation 96*] could never have been intended to deprive or affect the existing lawful rights of prior locations (see case of *Grundy*, 2 Wheat., 203); whatever may have been the title transferred by these acts in the unappropriated lands of the reserved district. And all this, as well as the lawfulness and validity of Clark's entry was solemnly adjudged by the Virginia Court of Appeals, as early as the year 1793, in the case of *Marshall, &c., Superintendents of the Virginia State Line*, v. *George Rogers Clark* (Hughes' Reports, 39.)

That decision settled every question as to the lawfulness and validity of the entry in question, except only whether it was within the "Cherokee country or limits;" and this court ascribed such effect to that decision in the case of *Clark's Heirs* v. *Smith* (13 Peters, 195).

Supposing Clark's entry to be within the Cherokee country, his entry and survey might have been void, but his patent would not. It was granted in obedience to the express provisions of the Kentucky Act of 1794, and after the *caveat* of the superintendents to prevent it had been dismissed. (8 Dana, 15.) In that case, the Court of Appeals of Kentucky say that, upon the fact supposed, the patent would not be void; it would confer the legal title on the patentee. The case of *Bledsoe's Devisees* v. *Wells* (4 Bibb, 329), is in principle to the same effect. Such patents convey the legal title, and the party in possession of it, by whatever means acquired, can only be disturbed by one holding a clear equity. (*Rucker* v. *Howard*, 2 Bibb, 165; Hardin, 103, 112; *Ward, &c.*, v. *Lee*, 1 Bibb, 33, 229; Hardin, 15, 105, 469; 8 Peters, 75.)

But was Clark's entry within the "Cherokee country and limits?" It is incumbent upon the complainant to prove that it was, and he has not done it. The Cherokee settlements were far remote on the head waters of the Tennessee.

The Natchez and Chickasaw tribes lived directly west of them and between them and the Mississippi, much nearer the mouth of the Tennessee River.

The ancient maps produced are no evidence, and are admissible by no rule of law that I know of. If they were admissible, they prove nothing but the ignorance of their authors, and destroy each other by their contradictoriness; and if they do not thus destroy each other, they do not show that the Cherokees claimed or owned the lands below the mouth of the Tennessee River.

The testimony of Mr. Force and the royal authentication of *those maps may prove [*97 that they are true copies, but they cannot convert fables into facts, or prove that the originals were correct.

It is insisted upon by the other side that this was the Cherokee country alluded to and intended by the Legislature, because, as they attempt to show, all the other lands of the Cherokees within the limits of Virginia had been before ceded to her. If the facts justified such a conclusion, then, as all these cessions were matters of treaty and history, the court should have taken judicial notice of them and decided differently the case in Hughes, 39. Exclusive of such lawful grounds of judgment, there is no more evidence in this than in that case, that the country in question belonged to the Cherokees.

There is nothing more excusable than ignorance, even in the Virginia Legislature, of the "limits of the Cherokee country:" the limits of roving bands of savages who had no occupancy but of their huts, and were sparingly dotted about in that great western region.

No treaty made with the Indians ever did recognize the lands in question as Cherokee lands. Such a construction of any of the treaties made with those Indians would have entitled the superintendents to a judgment in the case in Hughes, 39. No treaty prior to 1779, did more than settle their eastern boundary by a line of division between them and the whites.

The first agreement or settlement of their

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western boundary was in 1785, by the Treaty of Hopewell, which was by a line from the Cumberland to the Tennessee River, forty miles above Nashville, leaving out and at a great distance the lands in question.

And by a treaty with the Chicasaws in 1786, these lands were recognized as theirs, or "assigned to them for their hunting-grounds."

But the great fact from which the complainant draws all his arguments, namely, that the Cherokees had not, in 1779, any other lands but those below the mouth of the Tennessee, is not true. From their western line, striking the Cumberland forty miles above Nashville, they did own the lands on that river, and between that and the line dividing North Carolina from Virginia, and they owned lands between that river and the Cumberland mountains; all of which were finally purchased from them by the Treaty of Tellico, in 1805, and becoming thereby the property of the State of Kentucky, were disposed of by her. (See the treaties of 1791, 1798, and 1805, recognizing and purchasing these lands as Cherokee lands, in Vol. of Indian treaties, 34, 80, 121, and Statute Law of Kentucky, Vol. II., page 921, 1009.

98*] *To pronounce this to be Cherokee land upon the construction of any treaty, or upon historical evidence, would be to contradict the judicial decisions of Virginia and Kentucky. (Hughes, 39; 8 Dana, 15.) The deposition of General Jackson contributes strongly to prove that it was not Cherokee land; and a further proof that it was not is found in the recitals of the deed from the Cherokees to Henderson & Company, in which they declare the Tennessee River to be their boundary, and claim nothing below or westward of its mouth.

If this was not Cherokee country, the basis fails of all the arguments designed to establish the nullity of Clark's patent.

But suppose it was Cherokee country, is Clark's patent therefore void?

The distinction in the Kentucky courts is this: If no cause of invalidity appear on the face of the patent, it is conclusive at law, and no evidence of any extrinsic fact is admissible to invalidate it (*Bledsoe's Heirs* v. *Wells*, 4 Bibb, 329; 4 Monroe, 51; 5 Monroe, 213; 1 Munf., 134); but that such evidence is admissible when the statute which forbids the appropriation declares, also, that the patent shall be void.

3. However perfect the complainant's title, and imperfect the defendant's, the latter is protected and the former barred by the statute of seven years' limitation.

It has been shown that the patent is not void upon its face, that it was sanctioned by the Kentucky Act of 1794, and that it has been recognized by judicial decisions in 8 Dana, 15, and 18 Peters, 195). That this is sufficient to admit the operation of the statute, was decided in 2 Marshall, 387 (*Skyles' Heirs* v. *King's Heirs*).

The statute requires that he should have a "connected title in law or equity, deducible of record from the Commonwealth." The original defendants are connected by regular derivation of title, with the original title of Clark, and his is deduced from the Commonwealth by all the appointed evidences of title, viz.: an entry, survey, and patent, all of record. The case is thus brought as to title, as well as possession and settlement, within the plain meaning of the statute. See in addition to the authority just cited, *White* v. *Bates* (7 J. J. Marshall, 542), *Gaines, &c.*, v. *Buford* (1 Dana, 481), and 6 J. J. Marshall, 452. According to the decision of the court in *Skile's Heirs* (2 Marshall, 387), the statute was intended to help and protect "invalid titles," to protect settlers under patents which in fact passed no title either in law or equity, being for land granted *before [*99 the origin of the settlers' claim; that the words of the statute, "a connected title in law or equity, deducible of record from the Commonwealth," "does and must mean such title when tested by its own face, and not tried by the title of others." The test is, would it be good against the Commonwealth, "supposing no other to exist on the ground?"

Tried by these rules, can there be a doubt that the claim of the defendants is within the protection of the statute?

But all this is attempted to be evaded upon the ground that the claim was within the Cherokee country, and therefore void. The fact of its being within the Cherokee limits has been already noticed; and the consequence does not follow, that, if so, it is void and beyond the reach of the statute. (*Bledsoe's Devisees* v. *Wells*, 4 Bibb, 329; *Rollins* v. *Clark*, 8 Dana, 15; *Ray* v. *Baker's Heirs*, 1 Ben Monroe, 364; *Gray* v. *Gray*, 2 Ben Monroe, 200; *Jennings* v. *Whitaker*, 4 Monroe, 51; *Pearson* v. *Baker*, 4 Dana, 322; *Cain* v. *Flynn*, 4 Dana, 501; *Finley* v. *Williams*, 9 Cranch, 164; *Boulden et ux.* v. *Massie et al.*, 7 Wheat., 122; *Stringer* v. *Lessee of Young*, 3 Peters, 337; *Bagnell* v. *Broderick*, 13 Peters, 436.)

If this party is to be deprived of the benefit of the statute, because an adversary claimant can show that his title originated in a forbidden and unlawful entry, or other act of appropriation, it must equally apply to all settlers under junior titles, and a claimant, showing his elder and better appropriation, annuls the junior title and sweeps away with it the statute of limitations. Because, as all our laws confirmed the holders of warrants or certificates, &c., to waste and unappropriated lands, they violated the law in locating lands that were appropriated, and their entries, surveys, and patents must therefore be void. Why not apply the same reasoning to surveys and patents founded on entries void for uncertainty and vagueness on their face? The statutes require and command that they shall be special and certain in their description.

If this reasoning prevails, the statute of limitations is in effect repealed, or left in existence in reference alone to cases which do not require its assistance.

Messrs. Chapman and *Johnson*, for appellants, examined the three following points:

1. Whether, upon the merits, the plaintiff or defendants have the better right.

*2. Whether the case is proper for the [*100 jurisdiction of a court of equity.

3. Whether the plaintiff's claim is barred by the statute of limitations.

1. He drew a distinction between treasury warrants and military warrants, as resting upon different grounds, although the law must govern the interpretation of both; but the military warrants are of a higher order. The title o

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the complainant is perfect, unless it be overruled by an elder or better one. In examining Clark's title, he passed by, for the moment, the question whether the survey was made by the proper surveyor or conformed to the entry; but inquired whether the land taken up was "waste and unappropriated land." But first it would be necessary to disembarrass the case of the allegation that it had been already settled by judicial decisions. The present plaintiffs were not parties to any prior case. The first was in 4 Call., 268, where the question arose whether the reserved lands were subject to entry or not. It went up to the Court of Appeals for their opinion, who said that, whether the land was Cherokee land or not was a question of fact depending upon proof, and said also that he who affirmed it would have the burden of proof upon him. It is admitted that where there is a general law with exceptions, he who wishes to bring himself within the exception must show it. It is also true that the Act of 1781 could not devest Clark of any title which had vested in him. The Legislature of Virginia could not effect it under the constitution of the State.

In the case of *Rawlins* v. *Clark* (8 Dana, 15), by the compact between Virginia and Kentucky, the Virginia law was the guide, and the decision is nothing more than the opinion of a State court upon general law, which may be decided in different ways in different States. The Kentucky court was in the same situation as the Virginia court, and had no further evidence of the fact of this being Cherokee country. The latter decision is entitled to less weight, because the preceding decision in Virginia was looked to as authority, and the attention of the court was drawn chiefly to the question of fact. In the case in 13 Peters, the construction of the resolutions of Virginia was not argued, and the state of facts before the court now is not the same as it was then. The court cannot *ex officio* take notice of treaties which are not read and have never been published. This court once and again followed the courts of Tennessee in deciding a question of local law: but on the third time, they reversed their
101*] *opinion, because the courts of Tennessee had done so too. There is now, as then, a different state of information before the court. If Virginia ever put Indian land into the market before the title was extinguished, it was not done designedly, but ignorantly and by construction. This court has said so in the case of *Johnson* v. *McIntosh*, and ought now to relieve Virginia from the imputation.

What is the true construction of the Act of 1779 upon this point? Before the Revolution, Great Britain stood in the light of a protector for the Indians against the intrusion of the whites, claiming that no title should be acquired from them except by purchase; but as long as the title was unextinguished, the Indians were protected in the possession according to their own mode of enjoyment. The right only was claimed to transfer the occupancy when the title should be purchased. It now appears that the title to the land in controversy had not been extinguished in 1779. At that time we had, by the treaties of Hard Labor and Lochaber extinguished all title to land except to that west and south of the ridge which divides the Cumberland from the Tennessee. It must be remembered also that Virginia thought she had Indian land within her limits. Up to 1779, the Chickasaws had never been recognized by the diplomacy of Virginia, who thought all the Indian land was Cherokee. There was a claim presented from 1775 to 1778, respecting Henderson's purchase, and committees were appointed every year, who reported that a compensation should be given for his expenses and a law passed giving him about 250,000 acres. In the same year, 1778, a resolution was passed appropriating land to military claimants, covering Henderson's grant, but excepting it, together with the rights of settlers. The whole of the residue was allotted to soldiers. In 1776, the County of Kentucky had been established. Henderson disclaimed all legal title and put his claim on the ground of a reasonable appropriation. This was the state of things in 1779, when the law passed; but it did not pass alone. It was preceded by an act to establish a land office. As early as 1776, a joint resolution was passed complaining of the difficulty of land titles and making provision to meet it. Virginia intended to sell only the lands that were marketable, but none west of the Tennessee. In 1781, when a change was made, and that land superseded the land which had fallen into North Carolina, there was no saving whatever of any rights. Did she believe their were any legal rights then? If so, she would have saved them. She afterwards asserted her authority *over the [*102 Indian lands, but only claimed a pre-emptive right. In 1784, when the governor was authorized to suspend proceedings, she did not think there were any treasury warrants located there, because military aid was promised to remove incumbents.

What, then, is the construction of the Act of 1779?

It does not put into the market any land to which the Indian title was not extinguished. Although she might have sold the land, subject to the Indian title, there must be strong proof of it, because good faith to the Indians required her not to do it. Where is the law authorizing it? Where are the words in the act? There are none there to justify it. It would be a violent interpretation to make her do the same thing with both kinds of lands. For her own lands she asked forty pounds in depreciated paper per hundred acres. Was the same price asked for a reversion only? But the letter of the law tells us what kind of land was meant, not waste lands only, but unappropriated lands. Can such be called so, to which the Indian title had not been extinguished. She only claimed a reversion, and in the mean time it was solemnly appropriated to the Indians by every guard by which she could do it. It was inaccessible to whites; the public faith was pledged to protect it for an indefinite period of time. Was not this appropriated? And is the question decided by the court of Virginia or Kentucky, or was it before them? How can they be unappropriated? Is it said that Virginia violated her faith by pledging these lands to the soldiers, and authorizing them to take the lands? She never meant to relinquish her right of eminent domain, and suppose that, for self-preservation, she agreed to give them to the soldiers, would it follow that she also in-

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tended to sell them for money? The motives in the two cases are entirely different. But if we say that she intended only to pledge the land to the soldiers, subject to the Indian title, it is not the spirit of her legislation, for all the lands between Tennessee and Green River were free from Indian title, and she offered that or a claim to the reservation in the Indian land. The boon, therefore, was immediate. There is no evidence that she intended to force the Indian land upon the soldiers; but permitted them to wait, if they chose, or take the other lands. There is nothing unjust to the soldier or to the Indian in this. When the Indians objected to the survey, instead of enforcing her right, Virginia suspended her proceedings. Why did not Virginia reserve all Indian lands instead of Cherokee lands? Because the terms **103*]** are synonymous. There were *no Indians there except Cherokees. From 1729 to 1779 she had made all her treaties, and established boundaries with Cherokees. Where are any with Chickasaws? She thought then that she excepted the whole Indian land. It is said that mentioning Cherokees implies that more were there. There were no Indians on this side of the Blue Ridge. They excepted all the Indian country they knew of. If they had thought their allies, the Chickasaws, had not been protected, would they not have done it? Can any construction be sustained which would seize upon friendly Indians' lands, and protect those of a hostile tribe? If you believe that she never intended to open the Chickasaw lands, can you say that she did it ignorantly? The great rule of all contracts, from the most humble parol one to treaties, is the intent of the parties. Look at the injustice and inconsistency which would be charged to Virginia. But suppose I am wrong in all this, and the Cherokees were alone excepted; commissioners were appointed at that or the previous session, by Virginia, to purchase this very land. What was the object of Virginia? To protect the Cherokees, as such? For their personal benefit? Or to describe a tract of country to be free from treasury warrant? Suppose Virginia was mistaken, and it turned out to be Chickasaw country? Was not the intention clear to reserve this land? A mistake in the description would not vitiate the act. Calling the country by a wrong name would not destroy the reservation. The whole analogy of law is against it. A devise would not fail if you can find a person answering the description, although the name be wrong. If the Cherokees had no land there, we must find out the true persons intended to be protected. An interpretation must be adopted which will further and fulfil the spirit of the act. If it can be shown that these lands were not intended to be protected, the cause will be surrendered. They were never intended to be put into the market. It would not be fair to do so to the purchaser, to say nothing of the Indian.

Suppose I am wrong in all this, and the exception is not in favor of the country but personal, can it not be shown to have belonged to the Cherokees? Our argument was not to prove actual *alibi*, but where Virginia supposed the Cherokees to live. Virginia had made four or five land offices, and it is proved what they did not mean to protect, and there would have been no necessity for protecting the Cherokees, unless they had supposed them to live on the west side of the Tennessee River. Between the Green and Tennessee the *country was thrown [***104** open. What, then, did they mean to protect? What was not included within the military reservation was not north or east of the Tennessee. It must have been west and south of it. The argument goes to show the intention of the Legislature.

But to the point whether this was not actually Cherokee country. In examining this fact, what sort of evidence will be required? Is it the evidence of a law, or treaty with the United States? Must we show only *prima facie* evidence? or produce a treaty with the United States? The question is one of *meum* and *tuum*. Is the Treaty of Hopewell conclusive? The establishment of the boundary will decide whether Porterfield or Clark is the owner of this property, and this is a judicial question. The question of boundary may be a political question generally, and the courts cannot decide between sovereign powers, but they are bound to decide a question of property. Neither the executive nor Legislature can act upon it. If a law were passed giving the property to Porterfield, I would think it an insult to the court to offer it here. If this were a question between the Cherokees and the United States, it might be doubtful how far it could be considered. But if the treaty had not settled the point, and abstained from doing so, the court would then take it up, as they did in *Arredondo's* case.

The case in 11 Peters, 186, was correctly decided, because where two sovereign powers agree as to their boundaries, it declares that their jurisdictions come up to the line and bind the citizens of each. But if a claim to property had been made in the part transferred, would the court say that the right to the soil had also passed with the change of jurisdiction? In case of cession, rights would be adjudged by the laws which prevailed before it took place, and it is only the jurisdiction and sovereignty which passes over. But in this case, there is no question of sovereignty involved. The Treaty of Hopewell never intended to settle questions of property. All it intended was to fix the boundary as to the jurisdiction of the parties. The same remarks apply to the case in 14 Peters. North Carolina, in 1783, marked out a line, and in 1784, extended it towards the Indians, giving the surveyors power to open offices, and protecting the Indians as to the rest, and it was doubted whether the Act of 1784 did not repeal the protection of 1783.

The title arose between 1794 and 1797 when the line was run, and it was necessary to inquire at what time the line was adopted. The question of title depended upon the fact whether the property *was in the Indian [***105** territory or not; and this could be settled only by the contracting parties. But that case is not analogous to this. The question is not whether or not Virginia had a right to legislate over it, or a political question at all. The Chickasaws or Cherokees have no interest at all in it.

From 1729 to 1779 the Cherokees were recognized as owning land in the west, but the Chickasaws were not. In 1763, the proclamation of the king prohibited any person from acquiring land west of the mountains, and this had

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not been changed by Virginia, but recognized in 1776. (Chap. 1, page 350 of Revised Code.)

George Walton and others say in their petition that the proclamation prevented them from completing their title. (Journal of the House of Delegates of Virginia, for 1778, pages 64, 97.)

Treaties had been made with the Cherokees at Hard Labor, Lochaber, Fort Stanwix. Henderson had purchased up to the ridge which divides the Tennessee from the Cumberland. The purchase was assumed by Virginia, and Henderson compensated. Inquiry was made of the chiefs as to the nature of the purchase, and commissioners appointed to take testimony. (For these proceedings see journal of May, 1777, pages 44, 49, 56, 65, 70, 20, 41, 48, 136; and May, 1778, pages 30, 36, 70, and Nov., 1778, pages 79, 91.)

As soon as the act passed for Henderson, the resolution was passed appropriating lands for the soldiers. In the act there is a reference to the Proclamation of 1763; in the Act of 1779 for settling titles, no claims are recognized in opposition to the proclamation; all others are.

What was in fact the Cherokee country in 1779?

The Treaty of Hopewell does not touch this point. It intended to act for the future and not for the past. The lines described in two clauses do not touch each other, but leave a gap. It would have been impossible to trace the line between the Cherokees and Chickasaws by a surveyor, for it would depend upon the fact where they lived; and they might have had joint occupancy. No one ever treated with the Chickasaws until 1785.

But is there nothing to show that this was Cherokee country in 1779?

There is the evidence of Mr. Force, a disinterested witness, an *ex-parte*. He produces fourteen maps from 1755 to 1778, made by French and English authority, which put the Chickasaws south of latitude 35, and the Cherokees north of them. The river Tennessee is called in these old maps the river of the Cherokees, and they **106*** are placed *as far west as the Mississippi. By the Treaty of Fort Stanwix the Tennessee River is the south boundary of the Six Nations, and the Cherokees are over it.

The Cherokees were recognized as owners by Virginia in 1769, because she wanted to purchase from them all north of 36.30, to extend the boundary with North Carolina to the Mississippi. (See address of the House of Delegates.) Lord Hillsborough replied that the Cherokees would not consent to it. So, at Lochaber, in 1770, they were recognized as being within the limits of the province of Virginia, because she treated with them and assigned to them the west side of the line therein described, as to the whole extent of Virginia. So in the letter of Lord Dunmore in 1772. In the articles of peace between Virginia and the Cherokees in 1777, a line is agreed upon, and no white man is to go below the said boundary. Virginia could not have intended that this land should be taken up in 1779.

What is Porterfield's title?

[*Mr. Johnson* here went into a minute examination of it, and traced its history.]

But it is said that we are barred by the statute of limitation. This statute is intended to protect him who can trace a title from the Commonwealth, and is a special law. There is another and general act of limitations, and where this is the case the special law must be construed strictly. Clark's title cannot be tried, as is alleged, by itself, because a part of the grant has been sold, as appears from the record, and it is nowhere shown what part. The title professes to be from a land office treasury warrant, and upon land south of the Tennessee; it is, therefore, void upon its face, and not within the fair construction of the act, the third section of which says it shall not apply to cases of conflicting titles. The preamble of the law shows it was intended to apply only to a particular class of cases, and not those within the military district.

Mr. Justice CATRON delivered the opinion of the court:

For the principal facts, we refer to the statement of the reporter.

The first question in order presented by the bill depends on the validity of the complainant's title. But as that of the defendants is the elder, and Clark's entries not objected to on the ground that they are void for want of specialty; and the survey and patent founded on them being in conformity to the locations, we will at once proceed *to the main question [***107** presented by the bill; that is, whether Clark's entries were made in the Cherokee country or limits, and therefore void for this reason as against Porterfield's subsequent entries: The first being on treasury warrants, and the last on military warrants. The Act of 1779, by virtue of which Clark's entries were made, excepted the Cherokee lands from location; and if the land in dispute (in October, 1780) was such, then Clark's entries are void, if not, they are valid; and this fact being found either way, will end the controversy. We are called on to find the fact; and as it has been agitated in regard to this title, for nearly sixty years, uncommon care has been bestowed on the question, and a second argument been ordered.

The defendant's title came before this court in *Clark* v. *Smith* (13 Peters, 200), when the entries of Clark were pronounced special; and the survey and patent declared to conform to the entries: And in which case it was also held, that it was immaterial whether the entry was made on the lands claimed by the Chickasaws or not; it could only be obnoxious to the provisions of the statue of 1779, if made on lands reserved from location by that act; and the lands of the Chickasaws were not thus reserved. So it had been decided by the Court of Appeals of Virginia in *Marshall et al.* v. *George R. Clark* in 1791 (Hughes's R., 40), and which was affirmed in *Rollins* v. *Clark*, by the Court of Appeals of Kentucky, in 1839 (8 Dana's Rep., 26).

The reservation is, "No entry or location of land shall be admitted within the country and limits of the Cherokee Indians." The bill alleges the entry of Clark to be within the excepted lands.

The first inquiry we will make is, how far the contest stands affected by former decisions, made by the Court of Appeals of Virginia, by this court, and by the Court of Appeals of Kentucky.

As to patents made by Kentucky, on war-

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rants issued by that State after the Chickasaw title was extinguished, for lands west of Tennessee River, in the case of *Clark* v. *Smith* as an adjudication is direct to the point that Clark's patent is superior to such titles. This may be true, and yet Clark's entry be void; as Kentucky, it 1794, "not only authorized, but made it the imperative duty of the register to issue a patent on the certificate of survey; as he seems to have done in obedience to the act. We cannot admit that a patent thus issued pursuant to the authority, and mandate of the law, can be deemed void, merely because the entry **108***] of the patentee was invalid." We *use the language of the Court of Appeals of Kentucky, in the case of *Rollins* v. *Clark* (8 Dana, 28).

If Clark's entry was made, however, on lands reserved from location by the Act of 1779, then it is void, because the act did not open the land office for such purpose, nor extend to the excepted lands: and whether the exception reserving the Cherokee country, included the lands west of Tennesee River, was in 1779, and is now, a matter of fact, as already stated, for the court to ascertain. This fact is not concluded by the case of *Clark* v. *Smith*, although materially influenced by it. That adjudication, so far as this question was involved in it, is founded mainly on the case of *Thomas Marshall, George Mater et al., Superintendents of the Virginia State Line*, v. *George Rogers Clark*, (Hughes's Rep., 39), in a suit by *caveat*, to restrain Clark from obtaining a patent on the survey founded on his entries; two entries having been included in it. The cause was tried before the Court of Appeals of Virginia in 1791, on the *caveat*, filed in 1786. The first fact agreed by the parties, and submitted to the court, was whether the locations of Clark could be made west of the Tennesee River on treasury warrants; or, in other words, whether that country was reserved from location, as being the country and limits of the Cherokee Indians. The court held "the solution of the question to depend on a matter of fact to be decided on evidence; and none such appearing, or being supplied by any law, charter, or treaty, produced or suggested, which ascertained what the country or limits of the Cherokees was in 1779, no solution of the question could be given, except that it was the opinion of the court, that the party whose interest it was to extend the exception to the land in dispute, must prove the land to be within the description of that exception." All the other questions were also decided against the caveators, and the *caveat* ordered to be dismissed. The judgment in effect ordered that a patent should issue to Clark on his survey; and, in fact, adjudged the better right to be in him. A suit by *caveat* was the ordinary mode of trying titles in Virginia, before a patent issued, and was equally conclusive on the parties, as if it had been by bill in equity; this is the settled doctrine of Kentucky, and also Tennessee; and must be so from the nature of the suit. The power and jurisdiction of the courts to try titles in this manner, are conferred by statute, which are very similar in the States named; the practice as to the mode of proceeding, and the effect of the judgment being the same in each. For evidence of this, we refer to the many *cases reported by Hughes; and [*109 the cases of *Peck* v. *Eddington* (2 Overt. [Tenn.] Rep., 331); *Bugg* v. *Norris* (4 Yerg. R., 326); and *Peeler and Campbell* v. *Norris* (4 Yerg., 337). "The powers of the courts (it is said in *Bugg* v. *Norris*), will be found co-extensive with any conflicting rights two claimants may have, where the defendant is attempting to perfect his entry into a grant by survey." Each party had the privilege in the case of *The Superintendents* v. *Clark* to submit such facts as were material to sustain his right; if not agreed, an issue could be asked, and a jury impaneled, to find on the contested facts. They were all agreed. On these the court pronounced on the law of the case, and determined who had the better claim to the land, and awarded to him the patent.

The plaintiff or defendant may introduce more or less evidence to sustain his claim; but if he fail, he cannot be heard to say, in a second suit, his principal evidence of title was not introduced in the first, and therefore he will try the same issue again in another form of proceeding on different and better evidence. (4 Yerg., 337,338; *Outram* v. *Morewood*, 3 East's R., 357.)

The patent being awarded to Clark, it was adjudged that he should take the land in fee; and the whole legal estate and seisin of the Commonwealth in the lands. Had the judgment been, that no patent issue to George Rogers Clark, then he would have been estopped to controvert the superior right of the superintendents. If he would have been estopped, so were the superintendents, on the judgment being the other way. (4 Yerg., 333.) Estoppels are mutual. (4 Com. D. Estoppel, B.) They run with the land, into whose hands soever the land comes; by which the parties and all claiming under them, as well as the courts are bound; were it otherwise, litigation would be endless. Such is the established rule. (*Trevinan* v. *Lawrence*, 1 Salk., 276, reported also by Lord Raymond.)

The superintendents were therefore estopped by the judgment of the Court of Appeals of Virginia from averring that Clark's entry lay within the Cherokee country: and how was Porterfield affected by that judgment?

By the Act of Nov. 1787, opening the military lands to location, those west of Tennesee River inclusive, the officers were authorized to appoint so many of there number superintendents as they might deem proper to locate (after selections by survey had been made) all the claims of the officers and soldiers. For this purpose they were given authority to select the lands and distribute them among *the [*110 claimants according to their respective ranks. The Act of Dec., 1782, makes more distinct, and further provision, and gives increased power to the superintendents. The entire country reserved to the uses of the military claimants was surrendered to the possession of the superintendents, as trustees, from which they might select any lands, to comply with the purposes of the trust; as such trustees in possession, they had the right to file the *caveat* against Clark, after they had selected the land, or any part of it (located by him), for the use of the officers and soldiers. When selected and surveyed, then the surveys were to be drawn

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for and allotted as chance might determine; after which, the party thus entitled was authorized to enter of record by an ordinary location, the number he drew in the lottery. Porterfield drew the lands set forth in the bill; to protect his entries the *caveat* was filed, as well as to protect others set forth in the record adjoining Porterfield's; and also to maintain the general right of all the claimants entitled exclusively to locate in the reserved lands.

As Clark would have been estopped to deny the right of the superintendents (had they been successful) to appropriate the land in dispute, it is difficult to say, that Porterfield, for whose benefit especially the *caveat* suit was prosecuted by those acting for his use, is not also estopped, on the principle of mutuality. It is hardly possible to separate the right of those acting as trustees, from that of the *cestui que trust;* still, as the proceedings and judgment in the suit by *caveat* are not set up as a defense in any manner, we can only look to them as furnishing cogent reasons that it could not be proved, during the time the *caveat* was pending, that the lands west of the Tennessee River were part of the Cherokee country in 1779.

In the case of *Clark* v. *Smith*, no evidence was produced to the court, other than that furnished by the treaties with the Cherokees and Chickasaws; together with the history of the country; and which where existing and open to the Court of Appeals of Virginia in 1791; except the treaties made since that time; and these we thought had no material influence on the question; and therefore on the evidence then before us, it was declared that Clark's title was not open to controversy on the ground then, as now) assumed, that the land when located lay within the country of the Cherokee Indians.

Does the record before us and the other matters adduced furnish additional evidence to change the result of that conclusion? As it does not appear in the cases referred to, what 111*] the existing treaties, *contracts, and intercourse with the Cherokees had been in 1791, a reference will be made to them, so far as they may affect this controversy. During the British colonial government of Virginia, by different treaties previous to 1777, the eastern limits of the Cherokees commenced six miles above the Long Island in Holston River (now in the County of Sullivan, Tennessee), from thence to Cumberland Gap; then to the head of the Kentucky River, and down the same to the Ohio. This line ran down the Cumberland Mountain from Holston River to the Gap, and included in part the great road from Virginia to Kentucky passing through Cumberland Gap. The citizens of Virginia settled on the road, and west of the line; irritation on part of the Cherokees was the consequence. In July, 1777, the Long Island Treaty was made at Fort Henry, standing at the island. By that treaty the Indian line was removed further west; commencing six miles above the island, and running with the river to the mouth of Cloud's Creek; being the second creek below Rogersville, in Hawking County, Tennessee, and a few miles below that place; thence to a high point of Cumberland Mountain a few miles below the Gap; here the line stops, and it was the only one between Virginia and the Cherokees existing in 1799 (when the land law was passed), except the boundaries established by the grant to Richard Henderson & Company, dated in March, 1776; the extent and effect of which will be presently seen. As the Treaty of 1777 has a most important bearing on the facts thereafter stated, its material parts are given.

"Article 3d. That no white man shall be suffered to reside in or pass through the Overhill farms without a proper certificate, signed by three magistrates, in the County of Washington, in Virginia, or in the County of Watauga in North Carolina, to be produced to, and approved by the agents at Chota. Any person failing or neglecting to comply herewith, is to be apprehended by the Cherokees, and delivered to the said agent, who they are to assist in conducting to the commanding officer at Fort Henry; and the said Cherokees may apply to their own use all the effects such persons may be in possession of at the time they are taken in the nation. And should any runaway negroes get into the Overhill farms, the Cherokees are to secure them until the agent can give notice to the owner, who, on receiving them, are to pay such a reward as the agent may judge reasonable.

"Article 4th. That all white men residing in or passing through the Overhill country, properly authorized or certified as aforesaid, *are to be protected in their persons and [*112 property, and to be at liberty to remove in safety when they desire it. If any white man shall murder an Indian, he shall be delivered up to a magistrate in Washington County, to be tried and put to death according to the laws of the State. And if any Indian shall murder a white man, the said Indian shall be put to death by the Cherokees, in the presence of the agent at Chota, or two magistrates in the County of Washington.

"Article 5th. That as many white people have settled on lands below the boundary between Virginia and the Cherokees, commonly called Donelson's Line, which lands they have respectively claimed in the course of this treaty, and which makes it necessary to fix and extend a new boundary, and to make a just and equitable purchase of the lands contained therein, it is therefore agreed by and between the said commissioners in behalf of the Commonwealth of Virginia, of the one part, and the subscribing chiefs in behalf of the said Cherokees, on the other part, in free and open treaty, without restraint, fear, reserve or compulsion of either party, that a boundary line between the people of Virginia and the Cherokees be established, and the lands within the same be sold and made over to the said Commonwealth; which line is to begin at the lower corner of Donelson's Line, on the north side of the river Holston, and to run thence down that river, according to the meanders thereof, and binding thereon, including the Great Island to the mouth of Cloud's Creek, being the second creek below the Warrior's Ford at the mouth of Carter's Valley; thence running a straight line to a high point on Cumberland Mountain, between three and five miles below or westward of the great gap which leads to the settlement of the Kentucky.

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"This last mentioned line is to be considered as the boundary between Virginia and the Cherokees. And all the lands between the said line and that run by Colonel Donelson, and between the said river and Cumberland Mountain, as low as the new boundary, is to be the present purchase.

"For which tract of land, or so much thereof as may be within the limits of Virginia when the boundary between the States of Virginia and North Carolina is extended, the said commissioners agree, in behalf of the Commonwealth, to give to the said Cherokees two hundred cows and one hundred sheep, to be delivered at the Great Island when the said line shall be run from the river to Cumberland Mountain, to which the said Cherokees prom-
113*] ised to send deputies *and twenty young men, on due notice of the time being given them.

"And for and in consideration of the said stocks of cattle and sheep, the said chiefs do, for themselves and their nation, sell, make over, and convey to the said Commonwealth, all the lands contained within the above described boundary, and do hereby forever quit and relinquish all right, title, claim or interest in and to the said lands or any part thereof; and they agree, that the same may be held, enjoyed and occupied by the purchasers, and, that they have a just right, and are fully able to sell and convey the said lands in as full, clear, and ample a manner as any lands can possibly be, or ever have been sold, made over or conveyed by any Indians whatever.

"Article 6th. And to prevent as far as possible any cause or pretense, on either side, to break and infringe on the peace so happily established between Virginia and the Cherokees, it is agreed by the commissioners aforesaid and Indian Chiefs, that no white man on any pretense whatsoever shall build, plant, improve, settle, hunt, or drive any stock below the said boundary, on pain of being drove off by the Indians, and his property of every kind being taken from him. But all persons who are, or may hereafter settle above the said line, are quietly and peaceably to reside thereon without being molested, disturbed or hindered, by any Cherokee Indian or Indians; and should the stocks of those who settle near the above line, range over the same into the Indian land, they are not to be claimed by any Indians, nor the owner, or any persons for him, be prevented from hunting them, provided such person do not carry a gun; otherwise the gun and stock are both forfeited to the Indians, or any other person who on due proof can make it appear. Nor is any Indian to hunt or to carry a gun within the said purchase, without license first obtained from two justices; nor to travel from any of the towns over the hills, to any part within the said boundary without a pass from the agent. This article shall be in full force until a proper law is made to prevent encroachment on the Indian lands, and no longer."

This treaty fully explains why the Cherokee country was excepted from the land-law of 1779, and locations on it prohibited; no reasons could add force to its stipulations.

In November, 1785, the next treaty was made at Hopewell with the Cherokees by the United States, and a new boundary was *established, beginning at the mouth of [*114 Duck River on the Tennessee; thence northeast, to the Ridge dividing the waters running into Cumberland River, and the Tennessee: thence eastwardly along said ridge to a point from which a northeast line would strike Cumberland River forty miles above Nashville. The first corner from the beginning on the ridge is about one hundred miles from the mouth of Tennessee River.

In January, 1786, the same commissioners who treated with the Cherokees also made a treaty at Hopewell with the Chickasaws: beginning at the Cherokee corner on the ridge, dividing the waters of the Cumberland and Tennessee rivers, and running westerly with said ridge to the Ohio River, and then down the same.

All lands west of this line were guarantied to the Chichasaws. The treaty was not one of cession on part of these Indians; but the establishment of existing boundaries: the one from the Cherokee corner, to the Ohio, being the only line, dividing territory claimed by the United States, to which the Indian title had been extinguished contained in the treaty, our inquiries need extend no further for the purposes of the present controversy. That it was deemed the ancient boundary of the Chickasaws, by themselves, will appear hereafter: as it will also appear that the Cherokees in no instance, so far as our researches have extended, asserted to the contrary; but that they admitted the fact, on different occasions in a manner free from exception; and which admissions were well calculated to remove any doubt on this point.

That the lands west of the line on the ridge belonged to the Chickasaws, and not to the Cherokees in 1779, is rendered almost certain by the deed the Cherokees made to Richard Henderson, Thomas Hart, Nathaniel Hart, John Williams, John Luttrell, Wm. Johnston, James Hogg, David Hart, and Leonard Hendly Bullock, on the 17th day of March, 1775. The first part of the deed recites "That the Cherokee nation, or tribe of Indians, being the aborigines and sole owners by occupancy from the beginning of time of the lands, on the waters of the Ohio River, from the mouth of the Tennessee River, up the said Ohio, to the mouth of the Great Canaway, or New River, and so across by a southward line to the Virginia line, by a direction that shall strike or hit Holston River six English miles above, or eastward of the Long Island therein; and other territories and lands thereunto adjoining;" do grant, by Oconestoto, chief warrior, and first representative of the Cherokee nation (acting *with [*115 other warriors named), on part of said nation to Richard Henderson and the others, part of said lands for the sum and consideration of ten thousand pounds lawful money of Great Britain, to said Cherokee nation in hand paid; the receipt of which is acknowledged for and on behalf of the nation, by the warriors making the treaty; the lands granted lying on the Ohio River; beginning on the said river Ohio, at the mouth of the Kentucky, Chenoca, or what by the English is called Louisa River; from thence running up the said river and the most northwardly branch of the same to the head spring thereof; thence a southeast course to the top

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ridge of Powel's mountain; thence westwardly along the ridge of said mountain unto a point from which a northwest course will hit, or strike, the head spring of the most southwardly branch of the Cumberland River; thence down the said river, including all its waters, to the Ohio River; thence up the said river as it meanders to the beginning.

Various covenants are contained in the deed, and among others, that the grantees, their heirs and assigns, shall and may from time to time, and at all times thereafter peaceably and quietly, have, hold, occupy, possess, and enjoy the premises granted without the trouble, let, hinderance, molestation, or interruption of the Cherokee nation or anyone claiming under the Cherokees. And Joseph Martin and John Farrer were appointed by the grantors, to put the grantees in possession.

They did take the possession, and founded "The colony of Transylvania," on their grant; and on the 23d day of May, 1775, the first Legislative Assembly of said colony was held therein, and regulations adopted for the future government of the same. Col. Richard Henderson, acting for himself and the other proprietors, communicated with the Assembly, by an address delivered to it; the proprietors exhibited their deed to the soil of Transylvania from the aborigines: Col. Henderson, in person, and John Farrer, as attorney in fact for the Cherokees, attended the convention, when Farrer, in the name of the head warriors, chiefs, and Cherokee Indians, in presence of the convention, made livery and cession, of all the lands in the deed of feoffment above recited; which deed was there again produced. A copy of it, and of the proceedings, appear in Butler's History of Kentucky, 566. The same deed is set forth in Haywood's History of Tennessee.

This deed and the proceedings under it make up the most prominent historical transaction in the early history of Kentucky; and it has 116*] *been relied on by both sides without objection. And as a historical fact, it was quite as prominent in Virginia in 1791, when the *caveat* suit was decided; and also in 1779 when the first land law under consideration was passed. By the Act of October, 1778 (ch. 3), and the resolution of the convention that formed the first constitution of Virginia in 1776 (2 Rev. Code, 350, 353), and the reservation for Henderson & Co. of 200,000 acres at the mouth of Green River, this manifestly appears. The land reserved to Henderson & Co. is declared in full compensation to them and their heirs for the consideration paid to the Cherokees, and for the expense and trouble in acquiring the country and aiding in its settlement.

The Act of October, 1778 (ch. 3), recites, "Whereas it appears to the General Assembly that Richard Henderson & Company have been at very great expenses, in making a purchase of the Cherokee Indians; and although the same has been declared void, yet as this Commonwealth is likely to receive great advantage therefrom, by increasing its inhabitants, and establishing barriers against the Indians, it is therefore just and reasonable the said Richard Henderson & Company be made a compensation for their trouble and expense;" and by the second section the land at the mouth of Green River is granted as the compensation proposed.

The Act of May, 1779 (ch. 6), declares that the Commonwealth has the exclusive right of pre-emption from the Indians of all lands within the limits of its territory, as described in the Constitution of government in the year 1776; that no person had a right to purchase any lands from any Indian nation within the Commonwealth, except persons duly authorized on public account for the use and benefit of the Commonwealth.

That every purchase of lands made by or on behalf of the crown of Great Britain from any Indian nation in the before-mentioned limits, doth and ought to enure forever to and for the use and benefit of this Commonwealth, and that all sales and deeds which have been made by any Indian or Indians, or by any Indian nation for lands within said limits, for the separate use of any person or persons whatsoever, shall be, and the same are hereby declared utterly void and of no effect.

The construction of the Acts of 1778 and 1779, has been that the deed to Henderson & Company was void, as against the Commonwealth; but valid as against the Cherokees, and therefore the title to the lands conveyed passed to the Commonwealth. This assumption has been *maintained from the time the conven- [*117
tion sat in May, 1776; as the resolutions of the convention show. And it received the sanction of the United States at the Treaty of Hopewell with the Cherokees in 1785. The Indians disavowed it, when the treaty commenced. On the 22d of November, before the Chickasaws had arrived at the treaty ground, the commissioners called on the Cherokees for their boundary; the Indians postponed it. On the 24th, they were again called on, and then said, give them a pencil and paper, and leave them to themselves, and they would draw a map of their country. November 26, the map, and a description of the boundary claimed, was presented to the commissioners by Tassel, who spoke on behalf of the Indians. It began on the Ohio above the mouth of the Kentucky River; ran to the Cumberland River where the Kentucky road crossed it; thence to the Chimney-top Mountain in North Carolina, and southward.

Tassel said, on presenting the map: "I know Richard Henderson says he purchased the lands of Kentucky and as far south as the Cumberland, but he is a rogue and a liar, and if he was here I would tell him so. He requested us to let him have a little land on Kentucky River for his cattle and horses to feed on, and we consented, but told him at the same time he would be much exposed to the depredations of the northern Indians, which he appeared not to regard, provided we gave him our consent. If Attacullaculla signed his deed, we are not informed of it; but we know Oconestoto did not, and yet his name is to it; Henderson put it there, and he is a rogue."

To which the commissioners replied: "You know Colonel Henderson, Attacullaculla, and Oconestoto are all dead; what you say may be true; but here is one of Henderson's deeds, which points out the line, as you have done, nearly till it strikes Cumberland; thence it runs down the waters of the same to the Ohio, thence up said river as it meanders to the beginning. Your memory may fail you; this is on record,

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and will remain forever. The parties being dead, and so much time elapsed since the date of the deed, and the country being settled, on the faith of the deed, puts it out of our power to do anything respecting it; you must therefore be content with it, as if you had actually sold it, and proceed to point out your claim exclusive of this land."

Tassel answered: "I know they are dead, and I am sorry for it, and suppose it is now too late to recover it. If Henderson were living I 118* *should have the pleasure of telling him he was a liar; but you told us to give you our bounds, and therefore we marked the line; but we will begin at Cumberland, and say nothing more about Kentucky, although it is justly ours."

On the 2d of December, 1785, the commissioners reported to the Secretary at War, amongst other things, "That in establishing the boundary (with the Cherokees), which is the chief cause of complaint with the Indians, we were desirous of accommodating the southern States and their western citizens, in anything consistent with the duty we owed to the United States.

"We established the line from forty miles above Nashville on the Cumberland, agreeable to the deed of sale to Richard Henderson & Co. as far as the Kentucky Ford; thence to the mountain six miles south of Nollchuckey, agreeable to the Treaty in 1777, &c., with Virginia and North Carolina." The latter treaty is that of Long Island, above set out.

The sale to Henderson & Company, therefore, stands on the same grounds as if it had been made by the authority of the crown of Great Britian, so far as boundary and Indian rights stand affected.

Its southern line from the top of Powell's Mountain ran westwardly on the top of the mountain, to a point from which a northwest course would strike the head spring of the most southwardly branch of Cumberland River, thence down said river, including all its waters, to the Ohio River; thence up that river. The most southwardly branch of the Cumberland, is the south fork running into the Cumberland about 170 miles above Nashville. At Hopewell, the Cumberland River was treated as the southern boundary referred to, by the deed to Henderson & Company: this, however, may have been inaccurate; the top of the ridge dividing the waters of the Tennessee and Cumberland rivers was the western boundary claimed by the Cherokees; and it is not probable that they intended to retain the narrow strip of land between the top of the ridge and the Cumberland River. That this ridge was the true western boundary before 1779, appears from the following facts:

When the map was furnished at Hopewell, the sale to Henderson was disregarded and the original western boundary given, "from the beginning of time," within the expression used in the deed to Henderson & Co. It was returned to the War Office of the United States, a copy of which is found, and was produced on behalf of the complainant, in the American State Papers (Vol. I., page 40), published 119* *by the authority of Congress, edited by the secretary of the Senate and clerk of the House of Representatives, and published in 1832. On this map the Cherokees laid down their western limits, beginning at the mouth of Duck River, then to the ridge, between the Cumberland and Tennessee rivers; then down said ridge to the Ohio, and up the same. At the treaty, Tassel, on behalf of the Cherokees, said: "We will mark a line for the white people; we will begin at the ridge between the Tennessee and Cumberland, on the Ohio, and run along the same, till we get round the white people as you think proper. We will mark a line from the mouth of Duck River to the said line, and leave the remainder of the lands to the south and west of the lines to the Chickasaws." And according to this the Chickasaw limits to the east were recognized by the parties to the Cherokee treaty, in the absence of the Chickasaws. (1 State Papers, 43.)

In January, 1786, the Chickasaws made their appearance at the treaty ground at Hopewell. They agreed on the lines, from the mouth of Duck River to the ridge; and then with it to the Ohio, as the boundary between themselves and the whites (1 State Papers, 57); and to which, the treaty made with them, on the 10th of January, 1786, corresponded. It does not appear any of the Cherokees were present.

In August, 1792, Wm. Blount, Governor of the southwestern territory, and Superintendent of Indian affairs, for the Southern District, and General Pickens, met the Chickasaws, Choctaws, and Cherokees, represented by chiefs, at Nashville, by order of the United States, for the purpose of securing friendly relations with these tribes. Every Chickasaw chief was there except three. John Thompson, interpreter, and two chiefs attended on part of the Cherokees. (1 State Papers, 284.) General Pickens had been one of the commissioners on part of the United States at Hopewell; and Gov. Blount the agent at said treaty for North Carolina, and a witness to it. Piomingo, for the Chickasaws, handed a letter from President Washington, which he had received by Mr. Doughty, and a map of the country made at Hopewell, showing the line established by the treaty; the map being opened and explained, Wolf's friend said the line between the Chickasaw and the United States was right. The map being worn and old, a copy was made, and furnished to the Indians.

Piomingo then said: "I will describe the boundaries of our land, it begins on the Ohio, at the ridge which divides the waters of Tennessee and Cumberland, and extends with that ridge, eastwardly as *far as the most [*120 eastern waters of Elk River; then south, &c., crossing the Tennessee River at the Chickasaw old field." This is opposite the heads of Elk.

Piomingo then addressed the Cherokees, and said: "At the Treaty of Holston (1791), I am told the Cherokees claimed all Duck River. I want to know if it is so?"

Nontuaka, for the Cherokees, replied: "It is true. I told the President so, and coming from him, told my nation so. I never knew before the present that our people divided land and made lines like the white people."

Piomingo replied: "I am the man who laid off the boundary on that map; and to save my own land, I made it plain: I know the fondness of the Cherokees to sell land." Nontuaka replied: "As to the boundary I do not look at it. The President advised us to let one line serve

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for the four nations; he would never ask for any more land south of it, nor suffer others; and all the hunting-ground within said boundary should be for the four nations."

To this the Chickasaw Chief replied: "By marking my boundary, I did not mean to exclude other nations from the benefit of hunting on my lands. I knew the Cherokees had often pretended to take the whites by the hand, but instead of doing it in good faith, they are always sharpening their knives against them. I feared the whites, in retaliation, would fall on the Cherokees, and they might take my land, supposing it belonged to the Cherokees: for this reason I have marked it." The Chickasaws then promised to furnish the Cherokees with a copy of their map; and this was afterwards done.

John Thompson then said: "We (the Cherokees) do not find fault with the line between the white people and the Chickasaws, nor with the place where the Chickasaws' line crosses the Tennessee; but I have not before been so fully informed of the claim of the Chickasaws." (1 State Papers, 286.)

In regard to the line on the ridge, from the Cherokee corner north, to the Ohio, in our opinion, it may be safely affirmed, that so far as the contracts, treaties, and admissions of the Cherokees furnish evidence as part of the history of the country, the lands west of that line belonging to the Chickasaws in 1779, when the Virginia land law was passed; and that this is confirmed in a remarkable degree, by the Treaty of Hopewell with the Chickasaws, and the intercourse had with them respecting that line, then and afterwards.

That Virginia so understood it, can hardly 121*] be doubted. In the *winter of 1779–80, Walker's line was run, establishing the boundary between Virginia and North Carolina; it was marked to the Tennessee River, and the latitude of 36.30 north taken on the Mississippi River: the history of it will be seen in the case of *Fleeger* v. *Pool et al.* (11 Peters, 185.) This led to the discovery that the southern boundary of Virginia ran much further north than she had apprehended. The officers and soldiers had had assigned to their exclusive appropriation the lands south of Green River acquired by the deed of Henderson & Company; a great portion of the best part supposed to belong to Virginia before Walker's line was run, having fallen south of that line, the Act of 1781, after reciting the fact, declared: that all that tract of land included within the rivers Mississippi, Ohio, Tennessee, and the Carolina boundary line, shall be, and the same is hereby substituted in lieu of such lands so fallen into the said State of North Carolina, to be claimed in the same manner by the officers and soldiers as the lands south of Green River: and the act prescribes the mode of locating them. By virtue of this law Porterfield's entries were made. Four years before the Act of 1781 was passed, the Long Island Treaty of 1777 had been made with the Cherokees by Virginia; it was in full force in 1781, when the military claimants were let in to locate on the country. When we consider the strong terms of protection imposed on Virginia by the treaty; the integrity and elevation of character of its people; the danger of resentment on part of the Indians; and it is hardly possible to believe that so gross an infraction of the treaty was intended, as the appropriation of the county in question necessarily involved.

With the Chickasaws, at that day, Virginia had not had any intercourse; these lands lay far off from the residence of the Chickasaws, and were mere hunting-grounds. Virginia might not have known, and we suppose did not know to any degree of certainty, that they belonged to this tribe, or what Indians claimed them, either in 1779 or 1781. But we repeat: one thing is certain, that Virginia treated the lands as subject to appropriation in 1781; which she could not have done without forfeiting her honor, and breaking her treaty, had they been Cherokee lands; and we feel great confidence she intended to do neither. The Treaty of 1777 was equally in force in 1781 as in 1779.

The opinion of the Court of Appeals in 1791 is conclusive to the point—that if the land in dispute was not Cherokee country, it was not within the exception of the land law of 1779; and that Clark's *title is good, as all the [*122 lands in the Commonwealth not excepted, were subject to appropriation on treasury warrants, although claimed by Indians whose lands were not protected from location by statute.

It is next insisted that as there was no other country in Virginia belonging to any tribe of Indians in the west, the reservation must have referred to that west of Tennessee River. However imposing this argument may seem, it is easily explained, when we recollect that in 1779 it was unknown where the southern boundary of Virginia was. The question is, what limits did she assume as hers at that time? The Long Island treaty line of 1777 ran down the Holston to the mouth of Cloud's Creek, and then to a point below Cumberland Gap. Up to these boundaries the Virginians had settled; and west of it they were prohibited from going; the country for half a degree south of Walker's line was in the possession of Virginia; she had Fort Henry there, and governed it. Lands were located and enjoyed under her laws south of Walker's line, east of the line running from the mouth of Cloud's Creek to the mountain; and had the Cherokee country west of the line not been excepted from location, her people would have broken the treaty and obtruded on the Cherokees. After the deed of Henderson & Company had been treated as a valid cession to the State, this was the only definite and established line left between the parties; and the protection of which, excited great anxiety on part of the Indians, as plainly appears by the treaty; it is therefore manifest, the exception in the land law had reference mainly to this line, in support of the treaty as the standing law between the parties to it.

The argument is founded on the fact that the entire line from the Holston to Cumberland Gap fell to North Carolina; as Walker's line runs through the Gap, and north of the high point at which the line terminates; but for the reasons stated, it proves nothing, when explained by the mistake under which Virginia labored in regard to her southern boundary,

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before Walker's line was run. Had the Legislature declared no location should be made west of the Cherokee line, then there would be no difficulty in saying what line was meant: as there was then no recognized Cherokee line in the assumed limits of Virginia but the one from Holston River to the mountain. It is therefore almost as certain this was the line alluded to in the exception of the Act of 1779, as if the Legislature had said so.

To prove that the Cherokees did own the country west of Tennessee River near its mouth, the deposition of Peter Force is intro-
123*] duced *on part of the complainant. The witness expresses it as his opinion that the land in dispute in 1779 belonged to the Cherokees. This opinion is founded on books, maps, treaties, and other papers, in his possession, and supposed by him to be authentic, which for many years he had been collecting as connected with the history of the United States, from the settlement of the colonies to the adoption of the Federal Constitution; pursuant to a contract made in 1833 with the Secretary of State, under the authority of an act of Congress for the publication of these papers. A portion of them are given; and among the number different maps of the country west of the Alleghany mountains, including the country on the rivers Ohio, Tennessee, and Mississippi, from about the thirty-fourth degree to about the thirty-eighth of north latitude.

Most of these maps have statements on them that the country west of Tennessee River was Cherokee land—"country of the Cherokees," &c., being marked on the maps. They were published at different periods previous to the Revolution; the most respectable of them, that of Mitchell, in 1755. The physical geography of the country was obviously little understood, as the maps are very imperfect, and no authority for this purpose at the present day, where any degree of accuracy is required. The only documentary evidence produced by Mr. Force to show the residence of the Cherokees is found in the report in the proceedings to the British government, of Sir Alexander Cuming, who visited the Cherokees in the spring of 1730, obtained their submission to the crown, and took to England some of their chiefs, to ratify a treaty there with the lords commissioners of trade and plantations. This treaty describes no boundaries, but is one of amity, and contains stipulations that the Cherokees in future shall be subject to the sovereignty of the British crown. Sir Alexander visited the Indian towns on the Keowee where the Treaty of Hopewell was made, and went north to Tellico where the King Moytoy resided, and got his submission, and the surrender of his crown. This town Tellico was near the Tennessee River, where it first takes the name; and is in what is now Monroe County, Tennessee, more than 300 miles from the land in dispute. It continued to be an Indian town until the Treaty of 1819, when the Cherokees extinguished their title to the country there.

In January, 1793, Governor Blount, the Superintendent of Indian Affairs, in a letter to the Secretary of War, gives an account of the places of residence of the Cherokees at the be-
124*] ginning, and previous *to the Revolution. He says they lived in towns either on the head waters of the Savannah River (Keowee and Tugelo) or on the Tennessee above the mouth of Holston. He then proceeds to prove that the lands sold to Henderson & Company did not belong to the Cherokees; and also, that the lands formerly sold by them to Henderson & Company, lying on the Cumberland, belonged to the Chickasaws; that the Cherokees had only sold their right to them as a common hunting-ground, and that Virginia had previously purchased them from the northern Indians. And if he is not mistaken, in his representation of the facts and admissions of the Cherokees, stated in his letters of November, 1792, and January, 1793, he does prove that to the lands sold to Henderson & Company, north of Cumberland River, the Cherokees had no title when they made the deed; and that they so admitted; and that the lands ceded by them south of that river by the Treaty of Hopewell belonged to the Chickasaws; or, at least, that this tribe had a better founded claim to them than the Cherokees. (Copies of the letters are found in the State Papers, Vol. I., pp. 325, 431.)

We think that not much reliance can be placed on anything contained in Mr. Force's deposition. And that the conclusion Governor Blount formed is contrary to what Virginia admitted by the treaties of Hard Labor and Lochaber, and by taking title under the deed of Henderson & Company; this deed is in conformity to the foregoing British treaties made with the Cherokees previous to the Revolution, and especially that of 1770, of Lochaber; according to which, the eastern Cherokee line in Virginia was established from a point six miles above the Long Island in Holston; thence through Cumberland Gap, to the head of Kentucky River, and down the same to the Ohio. Virginia never set up any assumptions to the contrary of this being the true line as run by Col. Donelson; by whose name it was known. Nor could the United States be heard to disavow the Cherokee title recognized by the Treaty of Hopewell to the lands lying south of Cumberland River, and recognized as theirs by that treaty.

And in this connection we take occasion to say, nothing short of the clearest proof would induce this court, after the lapse of nearly sixty years, to hold otherwise than that the Chickasaw line, established by the Treaty of Hopewell, from the Cherokee corner to the Ohio River, was conclusive that it was the true line of that people, anterior to any date, known to Virginia as a Commonwealth. As to *the United [*125
States, it was assuredly conclusive; the treaty not being one of cession: And as to the Cherokees, acquiescence from 1785 to 1819, when the United States acquired the Chickasaw title, it ought to conclude them, unless their superior title was plainly and conclusively proved; and the delay in not asserting it accounted for in a satisfactory manner: The same proof is required of the complainant; in which we think he has altogether failed.

The defendants proved themselves to have been more than seven years in possession under Clark's patent before the suit was brought, and therefore rely on the statute of limitations of Kentucky as a defense.

The statute in terms bars suits in equity as

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well as actions at law where seven years adverse possession has been held. This court pronounced it no violation of the compact between Virginia and Kentucky in the case of *Hawkins* v. *Barney* (5 Peters, 458). And so Kentucky has often held. It applies to suits where the plaintiff claims under a patent, survey, or entry, against an adverse title set up under another patent, survey, or entry. The defendant's title must be connected, and deducible of record from the Commonwealth; which means a connected title when tested by its own derivation. On this the bar may be founded, although it be the younger, and void, when contrasted with the plaintiff's elder patent. (*Skyles* v. *King*, 2 A.K. Marshall's R., 387.) But the statute does not bar a legislative grant (3 Monroe's R., 161), and it is insisted for the complainant the acts of Virginia vested in the officers and soldiers an equitable title; which was anterior to Porterfield's entries and patents, and independent of them on which the bill can be sustained, and therefore no bar can be interposed. The rule in this court is settled, that each State has the right to construe its own statutes; and especially those bearing titles. In the case of *Green* v. *Neal* (6 Peters, 291), it was held that this court uniformly adopted the decisions of the State tribunals, respectively, in constructing their statutes; that this was done as a matter of principle, in all cases where the decisions of the State court has become a rule of property. This rule was adopted in *Harpending* v. *The Dutch Church*, and has been in many other cases (16 Peters, 439), and cannot be departed from. The land laws of Virginia are just as much the laws of Kentucky, as they were the laws of Virginia in that country before the separation. By the decisions of the Court of Appeals of Kentucky it is settled, and has not been open to question for many years, that an entry was 126*] required to *give title on a military warrant in the military district; and that all the specialty, &c., to give it validity, was imposed on the enterer, as if it had been made on a treasury warrant; each being governed by the provisions of the Act of 1779. (*McIlhenney* v. *Kingestaff*, 3 Littel's R., 161.) This form was pursued by Porterfield, and was the only means by which he could acquire an individual title that could be enforced in a court of justice; although he had a common interest in the lands pledged for the satisfaction of his claim, that could be made available through the medium of the land office. His claim, as set forth in the bill, was, therefore, subject to be barred: By the proof it is barred; and for this reason also the bill must be dismissed.

As it was urged on part of the complainant with much earnestness that the Act of 1809 was never intended to apply to the land in dispute, then covered by the Chickasaw title, and protected by the Treaty of Hopewell, it is deemed proper to express briefly our opinion on the ground assumed. George R. Clark had mortgaged the land long before the Treaty of 1819 was made; therefore it was subject to sale before the Indian title to occupancy was extinguished: so the *caveat* suit was decided first in Virginia in 1791, and ultimately in Kentucky in 1793, after the Treaty in Hopewell, therefore the title could be litigated. In 1795, a patent issued to Clark pursuant to a statute of Kentucky of the previous year, general in its terms: It follows the land laws extended to the country, so far as the inhibitions of the treaty would permit, or the patent could not have issued.

Kentucky legislated for her entire territory, subject to the restrictions imposed by the treaty; which that State recognized as the paramount law until its restrictions were removed by the treaty of cession; when the Act of 1809, and all the other laws of Kentucky had effect west of Tennessee River, and operated alike in all parts of the state.

For the foregoing reasons the decree of the Circuit Court, dismissing the bill, is ordered to be affirmed.

ORDER.

This cause came on to be heard on the transcript of the record from the Circuit Court of the United States for the District of Kentucky, and was argued by counsel; on consideration whereof, it is now here ordered and decreed by this court, that the decree of the said Circuit Court in this cause be, and the same is hereby affirmed, with costs.

Cited—9 How., 96; 17 Wall., 246; 20 Wall., 150; 8 Otto, 235; 1 Dill., 377.

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*FRANÇOIS FENELON VIDAL, [*127 JOHN F. GIRARD ET AL., Citizens and Subjects of the Monarchy of France, AND HENRY STUMP, *Complainants and Appellants,*

v.

THE MAYOR, ALDERMEN, AND CITIZENS OF PHILADELPHIA, the Executors of STEPHEN GIRARD ET AL., *Defendants.*

Corporation of City—Philadelphia can take real and personal estate by deed in trust—if refused, trust not void—new trustee may be appointed by Court of Equity—the two acts March and April, 1832, interpret the charter of Philadelphia—Conclusiveness of—Construction of Girard's Will—Charities and charitable uses and devises—the excluding christian influences from college founded does not vitiate devise.

The corporation of the city of Philadelphia has power, under its charter, to take real and personal estate by deed, and also by devise, inasmuch as the Act of 32 and 34 Henry VIII., which excepts corporations from taking by devise, is not in force in Pennsylvania.

Where a corporation has this power, it may also take and hold property in trust in the same manner and to the same extent that a private person may do: if the trust be repugnant to, or inconsistent with, the proper purpose for which the corporation was created, it may not be compellable to execute it, but the trust (if otherwise unexceptionable) will not be void, and a court of equity will appoint a new trustee to enforce and perfect the objects of the trust.

Neither is there any positive objection, in point of law, to a corporation taking property upon a trust not strictly within the scope of the direct purposes of its institution, but collateral to them.

Under the general power "for the surpression of vice and immorality, the advancement of the public health and order, and the promotion of trade, in-

NOTE.—*As to the power of corporations to take by devise and bequest, and as to incorporation subsequent to*, see note to Baptist Association v. Hart, 4 Wheat., 1. *As to devise to trustees for charitable uses*, see note

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dustry, and happiness," the corporation may execute any trust germane to those objects.

The charter of the city invests the corporation with powers and rights to take property upon trust for charitable purposes, which are not otherwise obnoxious to legal animadversion.

The two Acts of March and April, 1832, passed by the Legislature of Pennsylvania, are a legislative interpretation of the charter of Philadelphia, and would be sufficient hereafter to estop the Legislature from contesting the competency of the corporation to take the property and execute the trusts.

If the trusts were in themselves valid, but the corporation incompetent to execute them, the heirs of the devisor could not take advantage of such inability; it could only be done by the State in its sovereign capacity, by a *quo warranto*, or other proper judicial proceeding.

The trusts mentioned in the will of Stephen Girard are of an eleemosynary nature, and charitable uses, in a judicial sense. Donations for the establishment of colleges, schools, and seminaries of learning, and especially such as are for the education of orphans and poor scholars are charities in the sense of the common law.

The decision of the Supreme Court of Pennsylvania in the case of Zimmerman v. Andres (January Term, 1844), recognized and confirmed, viz.: "That the conservative provisions of the statute of 43 Elizabeth, chap. 4, have been in force in Pennsylvania by common usage and constitutional recognition, and not only these but the more extensive range of charitable uses which chancery supported before that statute and beyond it."

128*] *The present case distinguished from the case of The Trustees of the Philadelphia Baptist Association v. Hart's executors, 4 Wheat., 1, upon two grounds, viz.:

1. That the case in Wheaton arose under the law of Virginia, in which State the statute of 43 Elizabeth, ch. 4, had been expressly and entirely abolished by the Legislature, so that no aid whatever could be derived from its provisions to sustain the bequest.

2. That the donees were an unincorporated association which had no legal capacity to take and hold the donation in succession for the purposes of the trust, and the beneficiaries were also uncertain and indefinite.

The decisions and *dicta* of English judges, and the recent publication of the Record Commissioners in England, examined as to the jurisdiction of chancery over charitable devises anterior to the statute of 43 Elizabeth.

This part of the common law was in force in Pennsylvania, although no court having equity powers now exists or has existed, capable of enforcing such trusts.

The exclusion of all ecclesiastics, missionaries, and ministers of any sort from holding or exercising any station or duty in a college, or even visiting the same; or the limitation of the instruction to be given to the scholars, to pure morality, general benevolence, a love of truth, sobriety, and industry; are not so derogatory and hostile to the Christian religion as to make a devise for the foundation of such a college void according to the constitution and laws of Pennsylvania.

THIS case came up by appeal from the Circuit Court of the United States, sitting as a Court of Equity, for the Eastern District of Pennsylvania.

The object of the bill filed in the court below was to set aside a part of the will of the late Stephen Girard, under the following circumstances:

Girard, a native of France, was born about the middle of the last century. Shortly before the Declaration of Independence he came to the United States, and before the peace of 1783 was a resident of the city of Philadelphia, where he died, in December, 1831, a widower and without issue. Besides some real estate of small value near Bordeaux, he was, at his death, the owner of real estate in this country which had cost him upwards of $1,700,000, and of personal property worth not less than $5,000,000. His nearest collateral relations were, a brother, one of the original complainants, a niece, the other complainant, who was the only issue of a deceased sister, and three nieces who were defendants, the daughters of a deceased brother.

The will of Mr. Girard, with two codicils, was proved at Philadelphia, on 31st of December, 1831.

*After sundry legacies and devises [*129 of real property to various persons and corporations, the will proceeds thus:

XX. And, whereas, I have been for a long time impressed with the importance of educating the poor, and of placing them, by the early cultivation of their minds and the developments of their moral principles, above the many temptations, to which, through poverty and ignorance, they are exposed; and I am particularly desirous to provide for such a number of poor male white orphan children, as can be trained in one institution, a better education, as well as a more comfortable maintenance, than they usually receive from the application of the public funds: and whereas, together with the object just adverted to, I have sincerely at heart the welfare of the city of Philadelphia, and, as a part of it, am desirous to improve the neighborhood of the river Delaware, so that the health of the citizens may be promoted and preserved, and that the eastern part of the city may be made to correspond better with the interior. Now, I do give, devise and bequeath all the residue and remainder of my real and personal estate of every sort and kind whatsoever situate (the real estate in Pennsylvania charged aforesaid), unto "the Mayor, Aldermen and Citizens of Philadelphia," their suc

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to Inglis v. Trustees of Sailor's Snug Harbor, 3 Pet., 99.

What is a charity—and what bequests are valid as being for charitable purposes, and what not.

Charity has been defined to be a general public use. Amb., 651.

In order to ascertain what are charitable purposes, recourse is usually had to the statute of 43 El., c. 4, which enumerates various kinds of charity, viz., the relief of aged, impotent, and poor people; maintenance of sick and maimed soldiers and mariners, schools of learning, free schools, and scholars in universities; repair of bridges, forts, havens, causeway, churches, sea-banks and highways; education and preferment of orphans; the relief, stock, or maintenance for houses of correction, &c.

Charity is not confined to the objects comprised in this enumeration; it extends to all cases within the spirit and intendment of the statute. The Am. Asylum v. The Phœnix B'k, 4 Conn., 172.

The following have been held to be charitable purposes: gifts for the erections of water-works, for the use of the inhabitants of a town for erecting a town house. Jones v. Williams, Amb., 651; Cogshall v. Pelton, 7 Johns. Ch., 292.

Or to be applied for the "good" of a place. A. G. v. Earl of Lonsdale, 1 Sim., 105.

Or for the general improvement of a town. Howse v. Chapman, 4 Ves., 542; A. G. v. Heelis, 2 Sim. & Stu., 67.

Or for the establishment of a life-boat. Johnson v. Swan, 3 Madd., 457.

Or of a botanical garden. Townley v. Bedwell, 6 Ves., 194.

To the trustees and for the benefit of the British museum. Trustees of the British Museum v. White, 2 Sim. & Stu., 595.

To the widows and orphans. A. G. G. v. Cowper, 2 Sim. & Stu., 93.

Or to the poor inhabitants of a parish. A. G. v. Clarke, Amb., 422; 14 Ves., 364, which is held to apply to those not receiving parochial relief. Bishop of Hereford v. Adams, 7 Ves., 324; A. G. v. Wilkinson, 1 Beav., 372.

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cessors and assigns, in trust, to and for the several uses, intents, and purposes hereinafter mentioned and declared of and concerning the same, that is to say: so far as regards my real estate in Pennsylvania, in trust, that no part thereof shall ever be sold or alienated by the said mayor, aldermen and citizens of Philadelphia, or their successors, but the same shall forever thereafter be let from time to time, to good tenants, at yearly, or other rents, and upon leases in possession not exceeding five years from the commencement thereof, and that the rents, issues, and profits arising therefrom shall be applied towards keeping that part of the said real estate situate in the city and liberties of Philadelphia constantly in good repair (parts elsewhere situate, to be kept in repair by the tenants thereof respectively), and towards improving the same, whenever necessary, by erecting new buildings, and that the net residue (after paying the several annuities hereinbefore provided for) be applied to the same uses and purposes as are herein declared of and concerning the residue of my personal estate: and so far as regards my real estate in Kentucky, now under the care of Messrs. Triplett and Brumley, in trust, to sell and dispose of the same, whenever it may be expedient to do so, and to apply the proceeds of such sale to the same uses and purposes as are herein 130*] *declared of and concerning the residue of my personal estate.

XXI. And so far as regards the residue of my personal estate, in trust, as to two millions of dollars, part thereof, to apply and expend so much of that sum as may be necessary, in erecting, as soon as practicably may be, in the centre of my square of ground between High and Chestnut streets, and Eleventh and Twelfth streets, in the city of Philadelphia (which square of ground I hereby devote for the purposes hereinafter stated, and for no other, forever), a permanent college, with suitable outbuildings, sufficiently spacious for the residence and accommodation of at least three hundred scholars, and the requisite teachers and other persons necessary in such an institution as I direct to be established, and in supplying the said college and out-buildings with decent and suitable furniture, as well as books and all things needful to carry into effect my general design.

The said college shall be constructed with the most durable materials, and in the most permanent manner, avoiding needless ornament, and attending chiefly to the strength, convenience, and neatness of the whole: It shall be at least one hundred and ten feet east and west, and one hundred and sixty feet north and south, and shall be built on lines parallel with High and Chestnut streets and Eleventh and Twelfth streets, provided those lines shall constitute at their junction right angles. It shall be three stories in height, each story at least fifteen feet high in the clear from the floor to the cornice. It shall be fire-proof inside and outside. The floors and the roof to be formed of solid materials, on arches turned on proper centres, so that no wood may be used, except for doors, windows, and shutters. Cellars shall be made under the whole building, solely for the purposes of the institution, &c., &c., &c. (and then follows a long and exceedingly minute description of the manner in which the building shall be erected).

When the college and appurtenances shall have been constructed, and supplied with plain and suitable furniture and books, philosophical and experimental instruments and apparatus, and all other matters needful to carry my general design into execution, the income, issues, and profits of so much of the said sum of two millions of dollars as shall remain unexpended, shall be applied to maintain the said college according to my directions.

1. The institution shall be organized as soon as practicable, and to accomplish that purpose more effectually, due public notice of the intended *opening of the college shall be [*131 given, so that there may be an opportunity to make selections of competent instructors and other agents, and those who may have the charge of orphans may be aware of the provisions intended for them.

2. A competent number of instructors, teachers, assistants, and other necessary agents, shall be selected, and when needful, their places from time to time supplied. They shall receive adequate compensation for their services; but no person shall be employed who shall not be of tried skill in his or her proper department, of established moral character, and in all cases persons shall be chosen on account of their merit, and not through favor or intrigue.

3. As many poor white male orphans, between the ages of six and ten years, as the said income shall be adequate to maintain, shall be introduced into the college as soon as possible; and from time to time as there may be vacancies, or an increased ability from income may warrant, others shall be introduced.

Or to the church wardens in aid of the poor's rate. Doe v. Howell, 2 B. & Adol., 744.

Or the widows and children of seamen belonging to a port. Powell v. A. G., 3 Mer., 48.

And gifts for the promotion of religion, in whatever terms expressed. A. G. v. City of London, 1 Ves. Jun., 243; Powerscourt v. Powerscourt, 1 Molloy, 616.

To constitute a charity in the legal sense, the poor need not be (though they commonly are) its sole or especial objects. A. G. v. Earl of Lonsdale 1 Sim., 109; Am. Asylum v. Phœnix B'k, 4 Conn., 172.

The erection of a monument to perpetuate the memory of the donor, is not a charitable purpose. Mellick v. President of the Asylum, 1 Jac., 180. See Doe, d. Thompson, v. Pitcher, 3 Maule & S., 407; S. C., 6 Taunt., 359.

As to what bequests are valid as being for charitable purposes and what are not. See Going v. Emery, 15 Pick., 197; Bartlett v. King, 12 Mass., 537; Gallego v. Att'y-Gen., 3 Leigh, 450; Baptist Ass. v. Hart, 4 Wheat., 1; 3 Pet., 481; Greene v. Dennis, 6 Conn., 293; Jackson v. Hammond, 2 Ca. Cas., 337; Washburn v. Sewall, 9 Metc., 280; Bartlett v. Nye, 4 *Ib.*, 378; Zimmerman v. Andres, 6 Watts. & S., 218; Gibson v. M'Call, 1 Richardson, 174; Ellis v. Selsby, 1 Mylne & C., 286; 2 Story's Eq. Jur., sec. 1156; State v. Wiltbank, 2 Harr. Del., 18; State v. Walter, 2 *Id.*, 151.

Bequests to the "American Bible Society," to the "American Education Society," to the "American Colonization Society," and to the "American Home Missionary Society," held good. Burbank v. Whitney, 24 Pick., 146; Bartlett v. Nye, 4 Metcalf, 378; Wade v. Amer. Colonization Society, 7 Swedes & Marsh, 694; Brewster v. McCall, 15 Conn., 274.

In Vermont, a bequest to the treasurer, for the time being of the Amer. Bible Society (or any other charitable association), for the use and purposes of said society, is valid, though the objects are vague and indefinite, and though the society is not incorporated. Burr v. Smith, 7 Vt., 241; Stone v. Griffin, 3 Vt., 400.

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4. On the application for admission, an accurate statement should be taken in a book prepared for the purpose, of the name, birthplace, age, health, condition as to relatives, and other particulars useful to be known of each orphan.

5. No orphan should be admitted until the guardians or directors of the poor, or a proper guardian or other competent authority shall have given, by indenture, relinquishment, or otherwise, adequate power to the mayor, aldermen, and citizens of Philadelphia, or to directors, or others by them appointed, to enforce, in relation to each orphan, every proper restraint, and to prevent relatives or others from interfering with or withdrawing such orphan from the institution.

6. Those orphans, for whose admission application shall first be made, shall be first introduced, all other things concurring—and at all future times, priority of application shall entitle the applicant to preference in admission, all other things concurring; but if there shall be, at any time, more applicants than vacancies, and the applying orphans shall have been born in different places, a preference shall be given —first, to orphans born in the city of Philadelphia; second, to those born in any other part of Pennsylvania; third, to those born in the city of New York (that being the first port on the continent of North America at which I arrived); and lastly, to those born in the city of New Orleans, being the first port on the said continent at which I traded, in the first instance as first officer, and subsequently as master and part owner of a vessel and cargo.

132*] *7. The orphans admitted into the college shall be there fed with plain but wholesome food, clothed with plain but decent apparel (no distinctive dress ever to be worn), and lodged in a plain but safe manner; due regard shall be paid to their health, and to this end their persons and clothes shall be kept clean, and they shall have suitable and rational exercise and recreation. They shall be instructed in the various branches of a sound education, comprehending reading, writing, grammar, arithmetic, geography, navigation, surveying, practical mathematics, astronomy, natural, chemical, and experimental philosophy, the French and Spanish languages (I do not forbid, but I do not recommend the Greek and Latin languages), and such other learning and science as the capacities of the several scholars may merit or warrant. I would have them taught facts and things, rather than words or signs; and especially, I desire, that by every proper means a pure attachment to our republican institutions, and to the sacred rights of conscience, as guarantied by our happy constitutions, shall be formed and fostered in the minds of the scholars.

8. Should it unfortunately happen that any of the orphans admitted into the college shall, from misconduct, have become unfit companions for the rest, and mild means of reformation prove abortive, they should no longer remain therein.

9. Those scholars who shall merit it, shall remain in the college until they shall respectively arrive at between fourteen and eighteen years of age; they shall then be bound out by the mayor, aldermen and citizens of Philadelphia, or under their direction, to suitable occupations—as those of agriculture, navigation, arts, mechanical trades, and manufactures, according to the capacity and acquirements of the scholars respectively, consulting as far as prudence shall justify it, the inclination of the several scholars, as to the occupation, art, or trade to be learned.

In relation to the organization of the college and its appendages, I leave, necessarily, many details to the mayor, aldermen and citizens of Philadelphia, and their successors; and I do so with the more confidence, as, from the nature of my bequests, and the benefit to result from them, I trust that my fellow-citizens of Philadelphia will observe and evince especial care and anxiety in selecting members for their city councils and other agents.

There are, however, some restrictions, which I consider it my duty to prescribe, and to be, amongst others, conditions on which my bequest *for said college is made and to [*133 be enjoyed, namely: First. I enjoin and require, that if, at the close of any year, the income of the fund devoted to the purposes of the said college shall be more than sufficient for the maintenance of the institution during that year, then the balance of the said income, after defraying such maintenance, shall be forthwith invested in good securities, thereafter to be and remain a part of the capital; but, in no event shall any part of the said capital be sold, disposed of, or pledged, to meet the current expenses of the said institution, to which I devote the interest, income, and dividends thereof, exclusively: Second. I enjoin and require that no ecclesiastic, missionary, or minister of any sect whatsoever, shall ever hold or exercise any station or duty whatever in the said college; nor shall any such person ever be admitted for any purpose, or as a visitor, within the premises appropriated to the purposes of the said college.

In making this restriction, I do not mean to cast any reflection upon any sect or person whatsoever; but, as there is such a multitude of sects, and such a diversity of opinion amongst them, I desire to keep the tender minds of the orphans, who are to derive advantage from this bequest, free from the excitement which clashing doctrines and sectarian controversy are so apt to produce; my desire is, that all the instructors and teachers in the college shall take pains to instil into the minds of the scholars the purest principles of morality, so that, on their entrance into active life, they may, from inclination and habit, evince benevolence towards their fellow-creatures, and a love of truth, sobriety, and industry, adopting at the same time such religious tenets as their matured reason may enable them to prefer.

If the income arising from that part of the said sum of two millions of dollars, remaining after the construction and furnishing of the college and out-buildings, shall, owing to the increase of the number of orphans applying for admission, or other cause, be inadequate to the construction of new buildings, or the maintenance and education of as many orphans as may apply for admission, then such further sum as may be necessary for the construction of new buildings, and the maintenance and education of such further number of orphans as can be maintained and instructed within such buildings as the said square of ground shall be ade-

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quate to, shall be taken from the final residuary fund, hereinafter expressly referred to, for the purpose, comprehending the income of my real estate in the city and County of Philadelphia, and the dividends of my stock in the Schuyl-
134*] kill Navigation Company—*my design and desire being, that the benefits of said institution shall be extended to as great a number of orphans as the limits of the said square and buildings therein can accommodate.

XXII. And as to the further sum of five hundred thousand dollars, part of the residue of my personal estate, in trust, to invest the same securely, and to keep the same so invested, and to apply the income thereof exclusively to the following purposes, that is to say—(then follows an enumeration of the objects to which the income of the fund is to be applied, being the improvement of the eastern part of the city.)

XXIII. I give and bequeath to the Commonwealth of Pennsylvania, the sum of three hundred thousand dollars, for the purpose of internal improvement by canal navigation, to be paid into the State treasury by my executors, as soon as such laws shall have been enacted by the constituted authorities of the said Commonwealth as shall be necessary, and amply sufficient to carry into effect, or to enable the constituted authorities of the city of Philadelphia to carry into effect the several improvements above specified, namely: 1. Laws, to cause Delaware Avenue, as above described, to be made, paved, curbed, and lighted; to cause the buildings, fences, and other obstructions now existing, to be abated and removed, and to prohibit the creation of any such obstructions to the eastward of said Delaware Avenue. 2. Laws, to cause all wooden buildings, as above described, to be removed, and to prohibit their future erection within the limits of the city of Philadelphia. 3. Laws, providing for the gradual widening, regulating, paving, and curbing Water Street, as hereinbefore described, and also for the repairing the middle alleys, and introducing the Schuylkill water, and pumps, as before specified—all which objects may, I persuade myself, be accomplished on principles at once just in relation to individuals, and highly beneficial to the public: the said sum, however, not to be paid unless said laws be passed within one year after my decease.

XXIV. And as it regards the remainder of said residue of my personal estate, in trust, to invest the same in good securities, and in like manner to invest the interests and income thereof from time to time, so that the whole shall form a permanent fund, and to apply the income of the said fund:

1st. To the further improvement and maintenance of the aforesaid college, as directed in the last paragraph of the XXIst clause of this will.

135*] *3d. To enable the corporation of the city of Philadelphia to provide more effectually than they now do, for the security of the persons and property of the inhabitants of the said city, by a competent police, including a sufficient number of watchmen, really suited to the purpose; and to this end, I recommend a division of the city into watch districts, or four parts, each under a proper head, and that at least two watchmen shall, in each round or station, patrol together.

3d. To enable the said corporation to improve the city property, and the general appearance of the city itself, and, in effect, to diminish the burden of taxation, now most oppressive, especially on those who are the least able to bear it.

To all which objects, the prosperity of the city, and the health and comfort of its inhabitants, I devote the said fund as aforesaid, and direct the income thereof to be applied yearly and every year forever, after providing for the college as hereinbefore directed, as my primary object. But, if the said city shall knowingly and willfully violate any of the conditions hereinbefore and hereinafter mentioned, then I give and bequeath the said remainder and accumulations to the Commonwealth of Pennsylvania, for the purposes of internal navigation; excepting, however, the rents, issues, and profits of my real estate in the city and County of Philadelphia, which shall forever be reserved and applied to maintain the aforesaid college, in the manner specified in the last paragraph of the XXIst clause of this will: And if the Commonwealth of Pennsylvania shall fail to apply this or the preceding bequest to the purposes before mentioned, or shall apply any part thereof to any other use, or shall, for the term of one year from the time of my decease, fail or omit to pass the laws hereinbefore specified for promoting the improvement of the city of Philadelphia, then I give, devise, and bequeath the said remainder and accumulations (the rents aforesaid always excepted and reserved for the college as aforesaid) to the United States of America, for the purposes of internal navigation, and no other.

Provided, nevertheless, and I do hereby declare, that all the preceding bequests and devises of the residue of my estate to the mayor, aldermen and citizens of Philadelphia, are made upon the following express conditions, that is to say: First. That none of the moneys, principal, interest, dividends, or rents, arising from the said residuary devise and bequest, shall at any time be applied to any other purpose or purposes whatever, than those herein mentioned and appointed. Second. That separate accounts, distinct from the other accounts of *the corporation, shall be kept by the [*136
said corporation, concerning the said devise, bequest, college, and funds, and of the investment and application thereof; and that a separate account or accounts of the same shall be kept in bank, not blended with any other account, so that it may at all times appear on examination by a committee of the Legislature, as hereinafter mentioned, that my intentions had been fully complied with. Third. That the said corporation render a detailed account annually, in duplicate, to the Legislature of the Commonwealth of Pennsylvania, at the commencement of the session, one copy for the Senate, and the other for the House of Representatives, concerning the said devised and bequeathed estate, and the investment and application of the same, and also a report in like manner of the state of the said college, and shall submit all their books, papers, and accounts touching the same, to a committee or committees of the Legislature for examination, when the same shall be required.

Fourth. The said corporation shall also cause

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to be published in the month of January, annually, in two or more newspapers, printed in the city of Philadelphia, a concise but plain account of the state of the trusts, devises, and bequests herein declared and made, comprehending the condition of the said college, the number of scholars, and other particulars needful to be publicly known, for the year next preceding the said month of January, annually.

(The 25th section related to the winding up of the Girard Bank, and the 26th appointed Timothy Paxon, Thomas P. Cope, Joseph Roberts, William J. Duane, and John A. Barclay, Executors. Then followed the execution of the will, in regular form, on the 16th day of February, 1830.)

Whereas, I, Stephen Girard, the testator named in the foregoing will and testament, dated the sixteenth day of February, eighteen hundred and thirty, have, since the execution thereof, purchased several parcels and pieces of real estate, and have built sundry messuages, all which, as well as any real estate that I may hereafter purchase, it is my wish and intention to pass by the said will: Now, I do hereby republish the foregoing last will and testament, dated February 16, 1830, and do confirm the same in all particulars.

In witness, I, the said Stephen Girard, set my hand and seal hereunto, the twenty-fifth day of December, eighteen hundred and thirty.

STEPHEN GIRARD. [L. S.]

137*] *Signed, sealed, published, and declared by the said Stephen Girard, as and for a republication of his last will and testament, in the presence of us, who, at his request, have hereunto subscribed our names as witnesses thereto, in the presence of the said testator and of each other, December 25th, 1830.

JOHN H. ERWIN,
SAMUEL ARTHUR,
JNO. THOMSON.

Whereas I, Stephen Girard, the testator named in the foregoing will and testament, dated February 16th, 1830, have since the execution thereof, purchased several parcels and pieces of land and real estate, and have built sundry messuages, all of which, as well as any real estate that I may hereafter purchase, it is my intention to pass by said will; and whereas, in particular, I have recently purchased from Mr. William Parker, the mansion-house, outbuildings, and forty-five acres and some perches of land, called Peel Hall, on the Ridge road, in Penn Township: Now, I declare it to be my intention, and I direct, that the orphan establishment, provided for in my said will, instead of being built as therein directed upon my square of ground between High and Chestnut and Eleventh and Twelfth streets, in the city of Philadelphia, shall be built upon the estate, so purchased from Mr. W. Parker, and I hereby devote the said estate to that purpose, exclusively, in the same manner as I had devoted the said square, hereby directing that all the improvements and arrangements for the said orphan establishment, prescribed by my said will, as to said square, shall be made and executed upon the said estate, just as if I had in my will devoted the said estate to said purpose—consequently, the said square of ground is to constitute, and I declare it to be a part of the residue and remainder of my real and personal estate, and given and devised for the same us and purposes, as are declared in section twen of my will, it being my intention, that the sa square of ground shall be built upon, and in proved in such a manner as to secure a sa and permanent income for the purposes state in said twentieth section.

In witness whereof, I, the said Stephen Gi ard, set my hand and seal hereunto, the twe tieth day of June, eighteen hundred and thirt one. STEPHEN GIRARD. [L. S.]

Signed, sealed, published, and declared, by t said Stephen Girard, as and for a republic tion of his last will and testament, and *further direction in relation to the [*13 real estate therein mentioned, in the presen of us, who, at his request, have hereun subscribed our names as witnesses thereto, the presence of the said testator, and of ea other, June 20, 1831. S. H. CARPENTER,
L. BARDIN,
SAMUEL ARTHUR.

The executors named in the will, duly prov the same with the codicils before the register wills for the city and County of Philadelphi obtained letters testamentary thereon, and to upon themselves the burden of the executi thereof. Inventories and supplementary inve tories of the estate were filed, debts and leg cies paid, and large sums of money paid to siduary legatees. The accounts of the exec tors were filed in the office of the register wills, from which they passed, in due course legal proceedings, to the Orphans' Court for t city and County of Philadelphia.

An Act of the Legislature of Pennsylvani of 24th March, 1832, "To enable the Mayo Aldermen and Citizens of Philadelphia carry into effect certain improvements, and execute certain trusts," recites the bequest $500,000, in Stephen Girard's will, sec. 22, the mayor, aldermen and citizens of Philad phia, in trust, &c., and "for the purpose of e abling the mayor, aldermen and citizens Philadelphia, aforesaid, to effect the improv ments contemplated by the said testator, and execute in all other respects the trusts creat by his will, to enable the constituted autho ties of the city of Philadelphia to carry whi into effect, the said Stephen Girard has desir the Legislature to enact the necessary laws Sections 1 to 9 contain enactments stipulat by the testator in sec. 23 of the will, as the co dition on which $300,000 was bequeathed the Commonwealth of Pennsylvania.

"And forasmuch as in the course of time may appear that powers are not vested in t said, the mayor, aldermen and citizens of Ph adelphia, which may be yet required, to t full execution of those parts of the said will the said Stephen Girard, for the carrying which into effect he has in his said will quested legislative provision, and it is the o ject and intent of this act fully to confer such powers.

"Sec. 10. Be it further, &c., That it shall lawful for the mayor, aldermen and citizens Philadelphia, to exercise all such jurisdictio enact all such ordinances, and do and execu all such acts and *things whatsoever as [*13 may be necessary and convenient for the f and entire acceptance, execution and prosec tion, of any and all the devises and bequest

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trusts and provisions, contained in the said will, which are the subjects of the preceding parts of this act, and to enable the constituted authorities of the city of Philadelphia to carry which into effect, the said Stephen Girard has desired the Legislature to enact the necessary laws.

"11. And be it further, &c., That no road or street shall be laid out or passed through the land in the County of Philadelphia, bequeathed by the late Stephen Girard for the erection of a college, unless the same shall be recommended by the trustees or directors of the said college, and approved of by a majority of the select and common councils of the city of Philadelphia."

By another Act, passed on the 4th of April, 1832, entitled "A supplement to the Act entitled 'An Act to enable the Mayor, Aldermen and Citizens of Philadelphia, to carry into effect certain improvements, and to execute certain trusts,'" the select and common council of the city of Philadelphia are authorized to provide by ordinance, or otherwise, for the election or appointment of such officers or agents as they may deem essential to the due execution of the duties and trusts enjoined and created by the will of the late Stephen Girard.

In October, 1836, some of the heirs of Stephen Girard filed a bill upon the equity side of the Circuit Court of the United States for the Eastern District of Pennsylvania, against the corporation of Philadelphia, the executors, and some of the nieces of Girard, who were made co-defendants. The claim, as presented in the original bill, amended bill, and bill of revivor (in which Henry Stump is made a party as the administrator of one of the deceased complainants), is as follows:

"Your orator and oratrix further show, that amongst other things in their original bill, they have alleged and charged that the testator, Stephen Girard, by a supposed devise in his last will and testament, has in the first place appropriated two millions of dollars to the mayor, aldermen and citizens of Philadelphia, in trust, for the erection and endowment of a college, for the maintenance and education of a class of orphans, attempted to be described by the said testator in his will.

"And your orator and oratrix further state, that in their original bill, they set out that the said testator, in and by his will, after appropri-
140*] ating *the two millions of dollars, as aforesaid, by another supposed devise, dedicated the whole of the *residuum* of his real and personal estate, with certain exceptions mentioned in the said original bill, to the mayor, aldermen and citizens of Philadelphia, in trust, for the progressive enlargement of said college, and that there are no other limitations to the number of orphans to be ultimately admitted into the said college, nor to the cost nor extent of the establishment, but the number and extent of the collegiate buildings and their appendages, that may from time to time be erected within the entire area of forty-five acres and some perches of land, being a country seat called Peel Hall; so that in effect there is no devise over of any part of the said *residuum* of the real and personal estate of the testator, to any other use, purpose or object, after deducting the appropriations that are excepted in the original bill, than the charity connected with the establishment of said college, except it be contingently, in case the said college establishment be not made, as it is contemplated to be, capable of absorbing the whole of the said *residuum* of the real and personal estate, intended to be devised in trust as aforesaid, as by a reference to the said original bill and exhibits, which your complainants pray may be taken as part of this bill, will more fully appear.

"Your complainants suggest and insist to be available, that it will be decided, from a true exposition and construction of the said will, which is submitted to the court, that it was the intention of the testator to dedicate the whole of the rents, issues, and profits of his real estate in the city and County of Philadelphia, in trust, exclusively to the uses and purposes of the charity connected with said college, and not that the said real estate, or the rents, issues, and profits thereof are to be contingently applied to any other use or purpose, unless it be to the payment of a ratable proportion of certain annuities charged on the real estate of the testator, in the State of Pennsylvania, by the eighteenth clause in his will.

"And your orator and oratrix further aver and expressly charge, that the charity connected with the college, if the establishment is erected and managed according to the directions of the testator, and the necessary buildings constructed so as to fill up and improve the whole area of forty-five acres and some perches of land, will require and consume the whole of the *residuum* of his real and personal estate, attempted to be devised as aforesaid for the purposes of erecting, progressively enlarging, and perpetually maintaining said collegiate establishment, for the support and education of as great a number *of orphans as the testator [*141 directs to be admitted therein, so that there will be no surplus of said *residuum* of his real and personal estate supposed to be devised in trust as aforesaid, to be appropriated to any other objects or purposes designated by the testator in his will. And your orator and oratrix aver, that there is no devise over for any other purpose upon any contingency of the said two millions of dollars, supposed to be devised to the mayor, aldermen and citizens of Philadelphia, in trust, for the erection and endowment of said college, and that no part of said two millions of dollars, according to the will of the testator, can be applied in any event to any other use, purpose or object, except to the charitable objects depending upon the erection, endowment and perpetual support of said college. And your orator and oratrix aver and insist to be available, that the said supposed devise of two millions of dollars to the mayor, aldermen and citizens of Philadelphia, in trust, for the erection and endowment of said college, for the benefits of uncertain objects of charity, supposed to be intended by the testator, is void.

"And your complainants maintain, that the mayor, aldermen and citizens of Philadelphia, were, at the death of the testator, incapable of executing any such trust, or of taking and holding a legal estate for the benefit of others; and that whatever may be the capacity of said mayor, aldermen and citizens of Philadelphia, to hold property for the use of others, or to execute a trust, the objects for whose benefit the

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said devise in trust is supposed to have been made, are indefinite, vague, and uncertain, as will appear from an examination of said will; so that no trust is created that is capable of being executed, or is cognizable either at law or in equity, and no estate passed by said supposed devise, that can vest in any existing or ascertainable *cestui que trust;* that if the objects or persons for whose benefit the said devise is supposed to have been made, were susceptible of ascertainment, yet such beneficiaries, when ascertained, would be wholly incapable of transmitting their equitable title in perpetual succession, so that the said two millions of dollars, for want of a good and effectual devise, has descended by operation of the law governing descents in the State of Pennsylvania, and the treaty stipulations between France and the United States, to the heirs-at-law of Stephen Girard, the testator, according as such laws and treaty stipulations affect the rights of such of the heirs as are aliens and such as are citizens of the United States.

"Your orator and oratrix expressly charge
142* in their original bill, that *the said supposed devise to the mayor, aldermen and citizens of Philadelphia, in trust of the whole of the *residuum* of the real and personal estate of the testator, for the erection, progressive enlargement, and perpetual support of said college, is void, and that your complainants were heirs-at-law of said testator, and each entitled to one third part of the estate of the testator, undisposed of or ineffectually disposed of by his last will, according to the law governing descents in the State of Pennsylvania, and the treaty stipulations between France and the United States; and that the testator at the time of his death left certain other heirs, namely, Maria Antoinetta, wife of John Hemphill, Henrietta, wife of John Y. Clark, and Caroline, wife of John Haslam, which said Maria, Henrietta, and Caroline, are nieces of the said testator, and daughters of John Girard, late at Philadelphia, deceased, and they and their husbands, except the husband of said Caroline, are all made defendants to said bill, together with Mark Richards, who is the trustee of Caroline, all of w hich said defendants are citizens of the State of Pennsylvania. And your orator and oratrix further allege that the last named heirs are the only persons entitled besides your complainants to any part of the real or personal estate of which the said testator died seized or possessed, and which remained undisposed of or ineffectually devised by his will.

"And your complainants, as they are informed, verily believe and expressly charge, that notwithstanding the invalidity of said supposed devise or devises in trust, the said mayor, aldermen and citizens of Philadelphia, soon after the death of the testator entered upon and possessed themselves of the two millions of dollars, supposed to be devised to them in trust for the erection and support of said college, and also of the whole of the *residuum* of the real and personal estate of the testator, supposed to be devised to them for the same purposes, and have ever since continued to hold and manage the same according to the terms of said supported trust, or under the pretext of applying the said two millions of dollars, and the said *residuum* of the real and personal estate of the

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e statute 39 Elizabeth, chap 5,

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not passed, and is considered as abandoned. As to the second, this charity is as precise as any which has ever been established. The trust is to build upon a place specially marked out; the children are to be poor, born in Philadelphia, then in New York, then New Orleans. The description is specific and limited. In England, a charity, however general, always succeeds; there is no case in which it has failed. The only question there is about its administration; whether by the Chancellor in his ordinary jurisdiction, or under the sign-manual of the crown. The statute 32, 34 Henry VIII., which forbade devises to corporations in mortmain, never was in force in Pennsylvania. The settlers agreed in England upon the laws which should govern them.

147*] *White and Brockden's History of Laws, Appendix 1, says that wills, &c., in writing and attested should have the same force as to land that conveyances had. This was on 5th May, 1682. The same rule was established on the 7th December, 1682, if the will were proved in forty days. (Same book, Appendix, 4, chapter 45.)

On the 1st January, 1693, this law was in force. The Legislature requested the governor to declare what laws were in force, who complied and declared that this was, amongst others. (Same book, Appendix, 7, 8.)

In 1683, a law restrained the testator, if he had a wife and child, from willing away more than one third; but in 1693, the full power was restored. (Same book, Appendix, 9.)

After a slight alteration (see Appendix, 12), the statute of wills was passed in 1705, which was in force until Girard's death. It declares that wills in writing, and attested, shall be good as conveyances. The power to make a will is general, and to devise to anyone. If corporations, therefore, can take by deed, they can by devise.

The corporation has power to take. If the statutes of mortmain are in force, they do not intercept the grant on its way to the corporation; there must be an office found to escheat the property to the State. (7 Serg. & Rawle, 313; 14 Peters, 122; Shelford, 8.)

The policy of the mortmain statutes of England has not been adopted in Pennsylvania. The Act of 1791 (Purdon, 182, 183) forbids corporations from holding property "exceeding £500 in income," but permits them to hold any quantity of unproductive land.

The statutes of mortmain do not extend to Pennsylvania. If they do, it is contrary to the English decisions about their colonies. (2 Merivale, 143; 2 Maddock's Ch. Pr., 61, *note* 62; 8 Wheat., 476.)

If they had been considered as being in force, there would have been escheats under them; but none are found.

The rule prescribed by the court in 3 Binney, 597, was that where there was a Pennsylvania statute on the same subject with an English statute, the latter was not in force. But this could not be carried out universally, for the statute 4 Anne and the Pennsylvania law of 1714 were declared both to be in operation.

The city of Philadelphia has an unlimited power to acquire land. The charters of 1701 and 1789 both give it. (2 Smith's Laws, 462.) The power is to hold to them and their successors forever, or they can alienate it as a natural person can.

Has the city power to take in trust?

*The old doctrine was that a corpora- [*148
tion could not be seized to a use. (Sugden on Uses, 10.)

But it has been since settled that a corporation may be a trustee. If it receives a deed, the legal estate will pass, provided the statutes of mortmain do not prohibit it. If the trust is void, equity will decree a reconveyance; but this cannot be necessary, unless the legal estate had passed. And if a corporation is incapable of executing the trust, equity will appoint some person who is not. (1 Saunders on Uses, 346, 349; Willes on Trustees, 31; Levin on Trusts, 10, 11; 2 Thomas's Co. Litt., 706, *note;* 1 Cruise's Digest, 403, tit. 12, Trust, chap. 1, sec. 89.)

Also, that a corporation may be a trustee. (2 Vernon, 411; 2 Bro. Par. Ca., 370; 7 Bro. Par. Ca., 235.)

Where a corporation abused a trust and was dismissed. (See 3 Bro. Chan. Cas., 171, 371; 4 Vesey, 453; 2 Vesey, Jun., 46; 1 Vesey, 467; 14 Vesey, 253; 12 Mass. Rep., 547; 17 Serg. & Rawle, 89; 3 Rawle, 170.)

The cases in 12 Mass. Rep., 547, and 17 Serg. & Rawle, 89, may not appear at first to sustain the doctrine, but the cases are right. That of 3 Rawle, 170, is very much like the present, and establishes the doctrine, that if the trust is for the welfare of the corporation, it may take it.

The Acts of the legislature of Pennsylvania of 24th March and 4th April, 1832, are strong indications of what the law is in that State. That of March (sec. 10, 11) gives the corporation power to carry out the trust; enacts that no road shall pass through the land, and gives power to appoint officers. Both acts acknowledge and assist the trust, and imply that the corporation had power to take it. This is evidence of an existing power. (4 Peters, 503.)

The charter of Philadelphia (page 73 of city ordinances), in the 16th section, grants a general power to make laws for the welfare of the people.

The case in 1 Vesey, 534, does not warrant the inference drawn from it by the counsel on the opposite side. (See as to this case, Boyle on Charitable Uses, 84.)

As to the uncertainty of the beneficiaries.

It is an error to suppose that a trustee must take for beneficiaries known and established. Suppose a marriage settlement for life with power to devise. Where is the estate beyond the life until the power is executed? It vests in no one. A charitable use is only a power *of appointment, and the children, in [*149
this case, when named, have a good right to the use. So it is in churches. When a minister is elected, he takes the estate according to the foundation; and so also with shoolmasters, who have sometimes a freehold. (Shelford, 762, 763, 765, 767, 780.)

If the trustee will not nominate, chancery will. (3 P. W., 146; 3 Atkyns, 164.)

The tenure of the *cestui que use* is fixed; the boys of merit are to remain in the college until they are from fourteen to eighteen years of age. They are easily ascertainable. It is true that no one has a claim until the appointment is made. But this is the case with many trusts

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of private property where the estate is uncertain until certain issue are born. Where there is a power to name some one of kin to take, a remote relation may be selected. (1 Atkyns, 469; 4 Russell, 292.) A power to appoint amongst "poor relations" may be either a charity in the legal sense of the term, or an ordinary provision of kindness. (7 Vesey, Jun., 436; 2 Atkyns, 328; 17 Vesey, Jun., 371; 1 Shoales & Lefroy, 111; Boyle on Charities, 31 -34.) The only difference between the two is that in the first case, it will last longer than in the other. A power of appointment is sometimes vested in particular persons from special confidence, and sometimes it passes to heirs. Charities are kept up forever.

Uncertainty is indispensable to all charities. If anyone has a right to claim by law, it ceases to be a charity.

Where did the favor with which charities are regarded, and the motive by which they are established, spring from? The doctrine is traced up to the civil law. But where did Justinian get these ideas? They came from Constantine, the first Christian emperor, and they can be traced up to a higher source than that—the Bible. The Anglo-Saxons received all their principles from the same authority. Orphan-houses were exempted from taxation. Originally the injunction of the Bible was to "honor thy father and thy mother;" but the domestic affections are selfish, and it was reserved for Christianity to enjoin the duty of "loving thy neighbor as thyself." The Jewish lawyer asked who his neighbor was, and it was hard to convince him that a Samaritan could be so. There was the same difficulty as now respecting the uncertainty of the beneficiary. The lesson of charity is taught, too, in the case of the woman who, in her humility, claimed only the crumbs that fell from the table, and in the beautiful parable of visiting the sick and the prisoner: "Inasmuch as ye [150* have *done it to the least of these, ye have done it unto me." Even in the older Jewish records, we find the same lesson of philanthropy taught where the sheaf is left for the unknown and unacknowledged stranger. It is the uncertainty of the person upon whom the benefit may fall that gives merit to the action. A legacy to a friend is no charity. The first trustee for a charity was St. Paul. The sick are always uncertain; and to all hospitals, the objection now made would apply (2 Domat. 169, title 2, sec. 3; 2 Vesey, 273; 1 Vernon, 248; 7 Vesey, 76; 17 Vesey, 371), that it becomes a charity as soon as uncertainty begins. (Ambler, 422; 5 Rawle, 151; manuscript case from Pennsylvania, not yet reported, that beneficial societies are not charities.)

Mr. Binney then proceeded with his own argument, and stated the following points:

1. That such uses as those in Mr. Girard's will are good at the common law in England, which is the common law of Pennsylvania.

2. That the city being in possession of the trust, nothing more is necessary for them, as they want no remedy whether there would be one at common law or not.

3. That such trusts are entitled to protection in equity, upon the general principles of equity jurisdiction, which protects all lawful trusts whether there be a trustee or not.

4. That they in fact enjoyed this protection in chancery before the 43 Eliz. by the original jurisdiction of that court, and have had it ever since.

5. That 43 Eliz. is only an ancillary remedy, long disused in England from its inconvenience, and is supplied by chancery, not as an usurper on the statute, but as the rightful original tribunal for such trusts.

6. That whatever the 43 Eliz. imparted to the law of Charles, except the mere remedy by commission from the Lord Chancellor, is thoroughly adopted in Pennsylvania, together with the great body of the equity code of that kingdom.

7. That the law in Pennsylvania is the same as the law in all the other States except Virginia and Maryland.

1. Such uses were good at common law.

They can be traced up to an early period, anterior to Richard II., and the principle upon which they are founded even up to the time of the Conquest. (4 Reeve, 80; Moore, 122.) The principle of these charities is also engrafted upon the old English tenures (Co. Lit., 94 *b*; *Littleton, sec. 132, 136), where [*151 provision was made that the soul of the donor should be prayed for. (Co. Litt., 96 *a*.)

The tenure was called "frankalmoign." There was another instance where 100 pence were to be distributed to 100 poor men on a certain day. (Co. Litt., 96 *b*; 2 Inst., 456, 406.) There were perpetual charities in trust. (6 Co. Rep., 2; Co. Litt., 149 *a*; Brooke's Abr., part 2, Tenure, 53.) Some of the early statutes recognized them.

The stat. 17 Edward II. (ch. 12), passed in 1334, related to the Knights Templars; at the dissolution of the order, the lands were assigned to the Knights of St. John for the same godly uses to which they had been applied, viz.: relieving the poor, &c.

There arose a contest between religious houses and the king about mortmain, and afterwards about superstitious uses. Monastic houses were the conservators of public records and the sources of instruction.

15 Richard II. (ch. 5) was the last of the statutes of mortmain. Chap. 6 allowed spiritual corporations to hold the property of the church and the glebe, subject to making donations for the poor.

Henry IV. (ch. 2) allowed the vicar to be endowed, &c.

2 Henry V. (ch. 5) recited that abuses existed in charities, and ordered a commission of inquiry to reform them.

23 Henry VIII. (ch. 7, see 4 Pickering, 239), called the statute of mortmain, aimed a blow at these charities. It was passed in 1531, and the king was married to Anna Boleyn in 1532.

27 Henry VIII. (ch. 25) was the first poor-law of England.

1 Edward VI. (ch. 14, 5 Pickering, 267) endeavored to preserve some of the charities from destruction. Boyle (263, *note*) refers to this statute, which required commissioners to execute charities for the benefit of the poor. See, also, stat. 2 Edward VI. (5 Pickering, 299); stat. 1 and 2 Philip and Mary (ch. 8, 6 Pickering, 234). The monasteries were by this time put down and the charities destroyed.

Then came the statute 39 Elizabeth, chap 5,

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from which the Pennsylvania Act of 1791 is taken; this statute was continued in force until repealed by 9 George II. From the circumstance that the charities were put down by the destruction of the monasteries arose the necessity of the 39 and 43 of Elizabeth, which intended to lessen the evil of pauperism by hunting up charities, but which established no new principle in the laws of England. (4 Inst., 66.)

2 Gibson's Codex (1155), where the statute of
152*] 39 Elizabeth is *found. This last law is a general one, and covers a larger extent of ground than the 43 Elizabeth (ch. 4). Chapters 2 and 3 show the character of chap. 4. Chap. 2 is a poor-law, and so is chap. 3, for mariners. The 43 Elizabeth enumerates twenty-one charities, but the 39th comprehends all lawful ones. Hospitals were included in the latter but not in the former. The stat. 7 Jac., 1 (ch. 3) has for its object to bind out poor boys. In *Girard's* case the boys must not only be poor, but orphans, a double merit.

There is a *dictum* of Lord Roslyn in 3 Vesey, Jun., 726, in relation to a will being an appointment at common law; but the point decided in that case has nothing to do with the present.

But there is not a single case where the validity of a charitable use has been directly questioned at law; wherever the question came up, it was always incidentally.

The Year Book of 38 Edward III. forms the basis of Co. Litt. (sec. 383). There was a condition subsequent, which, if violated, gave the heir a right to enter. What was then called a condition is now called a trust. (Sugden on Powers, 121; Perkins, 563; Anderson's Rep., 43, 108; 3 Dyer, 255 *d*, same in Jenkins, 6.).

The last case mentioned occurred in the 8 and 9 Elizabeth, and is *The Trinity College* case. The question was, whether a devise to the college, which was not a spiritual corporation, was good, and it was ruled to be so.

The *Skinner's* case occurred in 24 and 25 Elizabeth (Moore, 129), where the use was to pray for the soul of the donor. So much of the use as was etseemed superstitious was set aside, and the rest confirmed. See, also, Moore, 594, or same case in Popham, 6, where the heir of the executor who had a trust estate recovered from the heir of the donor.

In *Porter's* case (1 Co. Rep., 22, 92), the question was not raised whether a charitable use was good at common law.

We see from these cases what the condition of England was about the time of 34 Elizabeth. The statute 23 Henry VIII. did not go into effect for twenty years. (Duke, 360; 4 Co. Rep., 116; 8 Co. Rep., 130.)

All these cases sustained charities for the poor and were anterior to 39 Elizabeth.

This court has affirmed the validity of charities at common law. A dedication to pious uses is sustainable only upon that ground. (6 Peters, 498, 431; 12 Wheat., 582; 10 Peters, 712; 2 Peters, 256; 9 Cranch, 212; 4 Peters, 487; 4 Serg. & Rawle, 212.)

153*] *The common law of England is in force in Pennsylvania. In the case of the Bush Hill estate it was ruled that the burden of proof is on him who affirms that any particular part of the common law is not so in force. (9 Serg. & Rawle, 307.)

2. The city is in possession, and wants no remedy. If the use is good, the owner of the legal estate cannot recover. (2 Dowl. & Ryland, 523; 5 Maddock, 529, 429.)

But it is said that the use is not good because the proposed college is unchristian. The bill filed in the cause makes no such objection. If zeal for the promotion of religion were the motive of the complainants, it would have been better to have joined with us in asking the State to cut off the obnoxious clause than to use the plea in stealing away the bread of orphans. We are not here to defend Mr. Girard's religious belief, whatever it was. During his life he exhibited his philanthropy at a perilous moment. When the yellow fever burst upon Philadelphia in 1794, almost every one fled, regardless of his property. Girard walked the wards of hospitals, not subdued by the groans of the dying or deterred by the fear of death to himself. All that he had was freely given to alleviate the wretched sufferers. More charitable even than the good Samaritan, he had not only poured oil upon their wounds, but stood by them to the last. The difficulties that surrounded his plan of a college were great. His desire was to include the orphan poor of all sects, Jews as well as Christians, and those who had no religion at all. He might have placed it under the protection of some one religious denomination, but then it would have become a religious establishment, and met with opposition from other quarters. If all sects were to be admitted, what could he do other than what he did? If any clergyman was to be admitted, he would of course teach the doctrines of his own church. No two sects would agree. Some would adopt one part of the Bible, some another. If they agreed as to what was to be left out as apocryphal, they would differ about the translation of the rest. The Protestant would not receive the Douay Bible. See the difficulties that exist in New York about the introduction of the Bible as a school book. Girard did what was in conformity with law, and often done practically. He had to abandon his scheme or prevent discord by adopting the plan which he followed. The purest principles of morality are to be taught. Where are they found? Whoever searches for them must go to the source from which a Christan man derives his faith—the Bible. It is therefore affirmitively recommended; *and in such [*154 a way as to preserve the sacred rights of conscience. No one can say that Girard was a deist. He has not said a word against Christianity. In the Blucher school in Liverpool there are no preachers. There is no Chaplain in the University of Virginia. By excluding preachers, Girard did not mean to reflect upon Christianity. It is true they cannot hold office. But the constitution of New York excludes clergymen from offices, civil or military. If the situation of a schoolmaster is an office, then a clergyman cannot be a public teacher. Girard only says that laymen must be instructors, and why cannot they teach religion as well as science? Sunday schools are not prohibited. It is said by the opposite counsel that these poor victims are cast into a prison and shut up for the sake of an experiment. But there is no prohibition against their going out to church—to as many churches as their friends choose to

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take them to. All that is done by the will is to secure the college from controversy. It is optional with the friends of the orphans whether to permit them to go there or not. Cannot the trustees erect a hospital without the walls where the sick can be sent and have the services of clergymen when necessary? But religion can be taught in the college itself. What, for example, is there to prevent "Paley's Evidences" from being used as a school book?

The law of Pennsylvania is not infringed.

In the case of *Updegraff* (11 Serg. & Rawle, 400), the court said that Christianity was part of the law. But it was Christianity with liberty of conscience to all men. This is exactly what Girard thought.

By the 3d sec. of the 3d art. of the Constitution of Pennsylvania, "all men have a right to worship according to their conscience." If worship were prohibited in the college (which it is not), it would not be against law. The Constitution says that no man is disqualified who acknowledges the existence of God and believes in a future state of rewards and punishments. Christianity is a part of the law, so that blasphemy can be punished, but not for the purpose of invading the conscience of other persons. But, at all events, the college is not yet built nor the regulation enforced. It is too soon now to set it aside. The city is in possession of the property, and so it must remain. The administration of the charity is a matter for the courts of Pennsylvania exclusively.

3. That such trusts are entitled to protection in equity upon the general principles of equity jurisdiction, which protects all lawful trusts whether there be a trustee or not.

155*] *In England the power of the king as *parens patriæ* is delegated to the Court of Chancery. Where there are no trustees or objects of the charity, it is then administered according to the pleasure of the king. See this investigated in Story's Equity, 404. The ancient rule, says Coke, is good; the authority of chancery is plentiful, and the court will not let a trust fail for want of a trustee. (Co. Litt., 290, note 1; Co. Litt., 113; Wilmot's Notes, 21–24; 2 Eq. Ca. Abr., 198; 1 Vesey, Jun., 475; 2 Story on Equity, 320.)

The court did not derive this power from the statute, but from its jurisdiction over trusts. (2 Story, 430; 2 Milne & Keen, 581.)

Equity is a part of the law of Pennsylvania, and this is a branch of equity powers. The Supreme Court has the powers of a court of chancery. (1 Dallas, 211, 213, 214; 1 Binney, 217.)

In Pennsylvania specific performance is obtained at law by cautionary verdicts. (3 Serg. & Rawle, 484; Anderson, 392.)

4. Such trusts in fact enjoyed protection in chancery before the 43 Elizabeth, by the original jurisdiction of that court, and have had it ever since. (Duke, 135, 154, 242, 380, 519, 644; 2 Gibson's Codex, 1158, *note* 7; 1 Chan. Ca., 157; 2 Levin, 167; 2 P. W., 119; 2 Vernon, 342; 3 Atkyns, 165; 2 Vesey, 327, 425; Wilmot's Notes, 24; 1 Blythe, 312, 334, 342, 346, 347, 357, 358, 67, 61.)

There is a *dictum* of Lord Rosslyn that it did not appear, that chancery had such jurisdiction before the statute of Elizabeth; but he has been misreported, or if he said so, he is not sustained by the old authorities. (Tothill, 58; Choice Cases in Chancery, 155, in 34th of Elizabeth; Duke, 163.)

There was a decree made in 24 of Elizabeth before the statute and upon the judicial power of chancery. It related to a deed of bargain and sale, which was not enrolled and did not pass the land. (Duke, 131, 138, 359–361; 1 Milne & Russell, 376.)

The book lately published in England by the Record Commissioners, furnishes numerous instances of the exercise of this chancery jurisdiction anterior to the statute of Elizabeth.[1]

*If this part of the common law be [*156 not in force in Pennsylvania, the complainants

1.—SCHEDULE OF CASES FROM CHANCERY PROCEEDINGS IN TIME OF ELIZABETH.

[Proceedings in Chancery, Vol. I.]

Record Commission.

Babington v. Gull, clerk. Bill complaining that plaintiff's mother had placed 600 marks in the hands of defendant, for the purpose of founding a chantry in the church of St. Peter at Haworth, in Nottinghamshire, which he had neglected to do.

Answer of William Gull, that he had received the money mentioned in the bill, for the purpose therein; but adding that if the endowment of the chantry were not completed within four years, which are not expired, the money was to be applied in finding three priests to sing daily in the said church; and that he is willing to pay the said money according to the direction of the court.

The prayer is, the plaintiff being without remedy of common law, to issue subpœnas, and to call defendant before him to be examined, and to do and receive according as faith, reason, and good conscience require; and this for the love of God, and in way of charity.

Wakering v. Bayle (Henry VI.) Bill to compel defendant, who is feoffee in trust to make an estate in certain lands in Tottenham and Hornsey, to the hospital of St. Bartholomew, in West Smithfield, for the endowment of a chapel there; "because great multitudes of Christian people of all parts of England and other nations for sickness, poverty, and misery, continually of custom resort to the said hospital, and there relieved; and finally have their Christian sepulture round about the said chapel."

Praying a subpœna, and as in the preceding case, as shall be thought unto your good lordship best, right of conscience to be had and done at the reverence of God, and in way of charity.

Pledges of prosecution. } ROB. PALMER, } Of London,
} WELLS HALLE, } gentlemen.

Parker *et al.*, in behalf of themselves *et al.*, the Inhabitants of the Town of Brentwood, Essex, v. Wistan Browne. (Eliz., B., 6, 12, 13.) Bill to establish donations. A chapel of ease to the parish church of Southwilde, in which parish the town of Brentwood is situated, and a free school and almshouse, there the said chapel being within the manor of Corbedhall, granted to Sir Anthony Browne, knight, deceased, by letters patent from Edw. VI.

Town of Bury St. Edmunds, by Robert Goldeny *et al.*, Governors of Free Grammar School of King Edward VI., in Bury St. Edmunds, v. Goodney *et al.* (Eliz.) Bill to quiet possession of lands held by complainants in right of grammar school.

Buggs *et al.*, feoffees in trust for the Parish of Harlon, v. Sompner *et al.* (Eliz., B., 6, 17, 18.) Bill to establish charitable uses, in a tenement called the Old Pole, and lands thereto belonging, in Harlon, conveyed and settled tempore Henry VIII. by John Swerder, to feoffees in trust for poor of the said parish of Harlon.

Bullatt and Purcas, Church-wardens, v. Fitche. (Eliz., B., 6, 18.) Bill for performance of charitable institutions. Land called Church Pightle, held from time immemorial for repairing the parish church of Lyndsell.

Blonkinsopper v. Awnderson. (Eliz., B., 6, 19.) Bill to establish a charitable donation. An annuity of £8 for certain paupers and a schoolmaster, in the parish of Burgh under Stainsmore, devised by Sir Cuthbert Buckle, knight, late Lord Mayor of London, to be charged on his messuage called the

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must prove it. If they think so, why do they not resort to the local courts? It can be shown, however, that Pennsylvania has actually adopted the laws that govern charitable uses.

157*] *To begin with the charter. "The laws for governing property are the same as those of England." (5 Smith, app., 407, sec. 5, 6; Amended Charter, 1701, app., 413; Act of 1718, 1 Smith, 105; Act of 1777, 1 Smith, 429, sec. 2; 1 Dallas, 67, where it is said as **158***] *the opinion of the court, "that the common law has always been in force;" 1 Dallas, 73, 211; 3 Serg. & Rawle, 578, 378; 1 Binney, 519, 579; 4 Binney, 77.)

The Act of 1730 authorizes persons to hold **159***] land for charitable *uses. This is said to be an enabling act: but it is upon a different principle from the English statutes which are intended to aid, in some measure, a religion not fully tolerated by law. But in Pennsylvania there is universal toleration, and all sects stand **160***] upon equal *ground. In England, the mass is held to be superstitious. (Boyle, 242.)

The statute 23 Henry VIII., a mortmain act, avoided deeds "for superstitious uses." But what were deemed to be so in England, are not **161***] *held to be so in Pennsylvania. So a statute of Henry VIII., prohibited gifts to Catholics.

In 1548, 2 and 3 Edward VI. (c. 1), the act of uniformity establishing the church, directed **162***] all ministers to observe the mode *therein pointed out. The Book of Common Prayer was thus legalized.

1 Mary (session 2, ch. 2) repealed the above.

1 Elizabeth (ch. 2) re-established the Act of Edward, and extended to the people the mandate to use the Book of Common Prayer.

This was again repealed in the time of the Commonwealth.

The 13 and 14 Charles II. (ch. 14) was another uniformity act; and this was the state of the laws relating to religion when the charter of Pennsylvania was granted in March, 1681.

Gifts to Catholic congregations were void. (Moore, 784, cited in Boyle, 265; 1 Salk., 162; 1 Eq. Ca. Abr., 96.)

When the statutes of conformity were in force all gifts contrary to them were void; and this is the origin of the doctrine of *cy pres*. (2 Vernon, 266.)

In 1688 (1 William and Mary, ch., 18), toleration was extended to all who would sign the thirty-nine articles with some exceptions. This act is all that now supports a use in favor of dissenters. (2 Vesey, 273, 275; 2 Eq. Ca. Abr., 193; 3 P. W., 144, 344; 1 Vesey, 225; 3 Merivale, 409.) See also 11 William and Mary, ch. 4, sec. 3, in which the toleration act is extended to the colonies.

There is not a word in the charter respecting toleration of any religion. Sec. 22 protects the Church of England by saying that preachers sent by the Bishop of London may reside in the province.

The stat. 5 Anne (ch. 5, sec. 8), in 1706, secured the rights of the Church of England, as established in that country and the territories thereunto belonging. From the commencement of the reign of Anne to 1712 various disputes occurred between the colonists and the crown and governor respecting recognition of affirmation; the right was asserted by the Legislature for the third time in 1710. (Wise & Brockden, app. 2, p. 43, 46, 50; 1 Votes of Assembly, part 2, p. 130; Proceedings of Council, 517.)

In 1712, the Act of Assembly was passed permitting religious societies to purchase ground, &c., and declaring that gifts should go according to the intentions of the donors. The Assembly remembered *Baxter's* case, and intended to prohibit the doctrine of *cy pres*. Whether

Spittle or Stainsmore, and lands thereto belonging.

Fytch and Goodwin, Church-wardens, and Wyndell *et al.*, Overseers of the Parish of Borking, v. Robinson *et al.* (Eliz., B., 6, 29.) Bill to recover a legacy to charitable uses. The sum of £400 bequeathed by Joan Smyth, widow, to be invested for producing a yearly fund for the relief of the poor of Bocking.

Thomas Tychmer *et al.*, Church-wardens of the Parish Church of Barrington, and Shevyn Reynolds, the elder, and several others, co-feoffers of lands in trust, v. Lancaster. (Eliz., B., 6, 31.) Bill for injunction in support of a charity. A tenement and lands in Barrington, lately held of the master and fellows of Michael House in Cambridge, as of their manor of Barrington, devised by the will of Thomas Lames to charitable uses for the poor of Barrington.

George Carlton on behalf of himself *et al.*, Inhabitants of Elm, v. John Blyth *et al.* (Eliz., C., c. 6.) Bill to recover charitable donations. A legacy of £13 13*s.* 4*d.* bequeathed by the will of John Allen, deceased, to be invested at interest for the benefit of the poor of the parish of Elm.

Robert Porot *et al.*, Inhabitants and Parishioners of the Parish of Cornworthy v. Stephen Cruse. (Eliz., C., c. 6.) Bill to appoint new trustees for a charity. A tenement called the church-house in the parish of Cornworthy, conveyed by Sir Pearce Edgecombe, knight, or some of his ancestors, to feoffees in trust for the benefit of the parish of Cornworthy.

John Irish *et al.*, Tenants of the Manor of Congresbury, v. Thomas Ashe *et al.* (Eliz., C., c. 22.) Bill for performance of will for charitable uses. The manor or lordship of Congresbury and lands in Congresbury and Lawrence Wille, devised by the will of John Carr to the defendants upon sundry trusts.

The Mayor and Citizens of Chester v. Brooke and Offley. (Eliz., C., c. 23.) Bill to establish a charity. Legacies left by the will of Robert Offley, of London, haberdasher, for the benefit of apprentices and other inhabitants of the city of Chester.

The Vicar and Church-wardens of the Parish of Christ Church within Newgate v. The Vicar and Church-wardens of the Parish of All Saints, Barking. (Eliz., C., c. 24.) Claim of donation to charitable uses. A legacy of £4 per annum bequeathed by the will of Jane Watson, and claimed by both these parishes.

The Mayor, Bailiffs, and Burgesses of Dartmouth v. Nicholas Ball. (Eliz., D., d. 2.) Bill for appointing new trustees for charitable uses. Lands in Clifton Dartmouth Hardness, and in Stoketlemyer, &c., conveyed by Nicholas James to feoffees in trust for the benefit of the poor of said borough, and for repairing the church and harbor.

The Church-wardens, Parishioners, and Inhabitants of the Town and Parish of Danburye v. Thomas Emery *et al.* (Eliz., D., d. 7.) Bill to regulate charitable donations of land—lands in Burleigh purchased by certain well-disposed persons in trust for the poor of Danburye.

The Mayor, Bailiffs, and Burgesses of Clifton Dartmouth Hardness v. Furseman *et al.* (Eliz., D., d. 11.) Bill for performance of charitable trusts—lands in Clifton Dartmouth Hardness, conveyed by William James to feoffees in trust for the poor of Dartmouth and other charitable purposes.

Blacknall *et al.*, on behalf of the Inhabitants of Elkesley, v. Spiry *et al.* (Eliz., E., c. 4.) To establish a charitable donation. A parcel of ground in the parish of Elkesley, called Normanton Field, containing 500 acres, which was of ancient time given and conveyed to certain feoffees in trust for the said parish.

George Carleton, Esq., for himself and the rest of the Inhabitants of the Parish of Elm, v. John

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dissenters were tolerated was discussed till 1755. (Smith's History of New York, ch. 4, p. 218, 255, 257.)

By the 8 George I. (ch. 6) Quakers were allowed to affirm. Various occurrences took place between 1719 and 1730 when the act of that year was passed, narrowing the ground of 163*] prior acts. In *1730, in the case of *Christ Church*, an opinion was given by counsel recognizing the law of charitable uses.

In *Remington* v. *The Methodist Church* this act was construed and a trust for the general Methodist Church held not to be good, because it was not for the benefit of citizens of Pennsylvania.

In 1776, the first constitution of Pennsylvania (Smith, 430) brought charitable uses under the protection of the fundamental law. Sec. 45 says all religious societies and bodies of men for advancement of learning or good and pious uses shall be encouraged and protected in their property, &c. No act of incorporation was necessary, because it says, "united or incorporated" for "learning" as well as "religion." The people had been struggling for seventy-six years to obtain from the crown the privilege of holding ground for churches. It was a part of their love of freedom. And now we are told that they have no rights except under the Act of 1730.

The Legislature made no corporation for any purpose whatever until 1768. (1 Smith, 279.)

The proprietary incorporated churches, because it was said they had lost legacies; and this was the apology to the crown for going against the English policy. There was only one attempt to destroy a charitable use before the Revolution. In 1769 a will gave a legacy to an hospital and the poor, to two corporations, Christ Church and St. Peter's. The heir brought an ejectment in 1776, and the church took the opinions of Wilcox and Wilson, both of whom affirmed that the bequest was good at law. In 1779, the cause was ended without a decision of the question. These corporations were established in 1765 and became trustees for others. The property held is now of great value, and the trust is still kept up without any mismanagement.

After the Act of 1730, the governor said in 1734 that there was a Catholic church in Philadelphia where mass was said contrary to law; but the Assembly replied, that in the colony there was a toleration of all religions, and there the matter ended. Worship is held there now.

The city of Philadelphia still holds and administers Franklin's legacy; and so of those of Kirkpatrick, Blakeley, Scott and Goudenot. There are two other legacies, and the Freemason's Lodge gave a sum of money, all of which are now administered. There is a separate book called "Devises and Grants."

Are all these to be broken up?

*The spirit of the statute of Elizabeth [*164 is extended to Ireland. (4 Dana's Abr., 5, 6; Shelford, 60.)

They are also in Pennsylvania as part of the common law; bequests for pious uses are made by all descriptions of persons, no matter how uncertain the objects of the charity may be. The Quakers have held their schools through trustees, and never been incorporated since the settlement of the colony. (See 3 Watts, 440.)

See 5 Watts, 493 where a trust for a school was said to be "vague and uncertain;" but the court said not, "for the neighbors got the benefit of it." Charity schools have been favorites in the State, sustained by usage, without any reference to the statute of Elizabeth.

Manuscript case of *Zimmerman* decided in the Supreme Court of Pennsylvania, on 6th January, 1844, where there was a bequest to an

Blythe *et al.* (Eliz., E., e. 5.) For charitable purposes a legacy or sum of £13, 13s. 4d. bequeathed by the will of John Allen, deceased, for the use of the parish of Elm.

Walter Jenkins *et al.*, Tenants and Inhabitants of the Manor and Parish of Fairford, v. Oldesworth. (Eliz., F., f. 3.) To establish right of copyholders and charitable donation. The manor of Fairford, late the estate of Roger Lygor, Esq., and Katherine, his wife.

The Mayor, Jurats, and Commonalty of the Town of Feversham, v. Lady Hannots *et al.* (Eliz., F., f. 7.) To establish a devise to a corporation. A messuage, garden and lands in Feversham and all other his lands, &c., in the Isle of Hartye, &c., all which after the decease of his said wife, he devised to the said mayor, jurats, and commonalty in fee—for the benefit of the said corporation repairing the harbor and highways thereof.

Richard Estmond *et al.*, Inhabitants of the Town of Gillingham, v. E. Lawrence, (Eliz., G., g. 12.) Bill of revivor to establish certain charitable uses. Divers messuages, lands, and tenements, parcel of the copyholds of the Queen's manor of Gillingham, which the bill states to have been held time immemorial for the support of a charity school, and other charitable purposes in Gillingham.

Goodson *et al.* v. Monday *et al.* (Eliz., G., g. 12.) For performance of a trust for charitable uses. Divers messuages and lands in Ailesbury, &c., sometime the estate of John Bedford, who by a feoffment dated 10th July, 1494, conveyed the same to certain feoffees in trust, among other things for the repair of the highways about Ailesbury and Hartwell.

Sir Arthur Havenyngham and other Inhabitants of Havenyngham v. Th. Tye *et al.* (Eliz., H., h. 1.) To obtain attornment and rent for charitable purposes. Fifty acres of land, meadow and pasture, called the town land of Havenyngham, lying in Badyngham, in the occupation of defendant Tye, the reversion being in feoffees for the use of said town.

Thomas Sayer *et al.*, Overseers of the Poor of Hallingbury Morley, v. Lambe *et al.* (Eliz., H., h. 2.) To establish a charitable donation. A sum of £20 given by the will of Thomas Lambe, deceased, to be for the perpetual benefit of the poor of Hallingbury parish, and which the bill prays may be laid out in the purchase of land for that purpose.

[Proceedings in Chancery, Vol. II.]

Lyon and wife v. Hewe and Kemp. (Temp., Edw. IV.) This is a bill, answer, and replication. The complaint being that the defendants had disposed of property, left for religious and charitable purposes contrary to the will of the plaintiff, Ellen's late husband.

Huckmore v. Lang—to recover title deeds for charitable uses.

Buggs *et al.*, Inhabitants of Parish of Harton, v. Sebley. For establishing charitable donations. A copyhold tenement which was surrendered by one John Godralf to the use of the poor of the said parish.

Sayer and Pryor, Overseers of Poor of Parish of Morley, v. Lambe *et al.* To recover charitable donation. £20 bequeathed by the will of Thomas Lambe to the inhabitants of the town of Hallingbury Morley—the income thereof to be forever applied to the use of the poor of the said town.

Heron and Browne, Ex'rs of Freston, v. Sproxton *et al.* (Eliz.) For performance of a will respecting charitable donations. Divers messuages, lands, and tenements in Altoffts, &c., &c., late the estate of John Freston—who by his will gave large sums of money for building and endowing an almshouse in Kirkethorpe, and a free school in Normanton, repairing highways and other purposes.

Fisher, for himself and other the Inhabitants of

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unincorporated society for the benefit of poor orphans, and the court said it was good under the constitution, although the statute of 43 Elizabeth is not in force.

7. The American cases are as follows: 12 Mass. Rep., 537, 546; 9 Cranch, 292, 43; 9 Cowen, 427, 437; 2 Peters, 566; 3 Peters, 501; 3 Shotwell, 9; 3 Paige, 300; 16 Pickering, 107; 6 Paige, 640; 7 Paige, 77; 7 Vermont Rep., 241; 4 Dana, 354; 3 Edwards, 79; 1 Voss, 96; 20 Wendell, 119; 24 Pickering, 146; 1 Hoffman, 202.

The Virginia and Maryland cases are not cited because they followed the rule laid down by this court in the case of *The Baptist Association.*

Mr. Sergeant, on the same side:

The condition of the law in England and Pennsylvania has been well examined. Lord Roslyn has said that chancery did not take cognizance of charitable uses before the statute of Elizabeth, but Lord Redesdale and Eldon say otherwise. Roslyn is known to us as the insulter of Dr. Franklin, and now the same great people whom he represented are harrassed because this same Lord Roslyn doubted almost the statute of Elizabeth. When the rubbish of three centuries is swept away and the old records of England brought to light and punished, there is evidence enough that the law of charities before the time of Elizabeth was the same that it is now in Pennsylvania. But the counsel on the other side complain that they cannot understand the law of Pennsylvania. It is not necessary that they should; for all that is asked by us is that she may be suffered to **165*]** *enjoy the contributions of her own wise and good, accumulating from the time that the first white man came there to settle with the Bible in his hand. Girard came there after the constitution of 1776 and before that of 1791; he lived in an atmosphere of charities in Philadelphia; he saw Franklin's charity established and upheld by law, administered by the city, and never heard its validity questioned. No tribunal in the State was ever asked or would be permitted to question Franklin's charity. Girard knew where to find the best legal advice, and undoubtedly had it. In Pennsylvania no argument would be listened to, such as we have heard here. We are invited to explain the law by those who do not want to understand it. It has been said by the other side that no law can be considered as settled which has not been mooted; that is, that if all the courts, for an indefinite period, decide in the same way, it is of no account unless some ingenious and subtle mind calls the law into question. In one case, this court waited for the State court in Ohio to expound its laws, and then followed the decision. In another case, the court in Tennessee construed its laws; this court adopted it. The court in Tennessee reversed its decision; this court did so too. The present is a question of Pennsylvania law, and we have heard the last decision of its highest State court in January, 1844, read from the manuscript report. This concurs with all previous decisions; and yet the counsel on the other side say that they want a fixed system of law. Virginia and Maryland are the only two States where the law is otherwise, and they followed what they understood to be the decision of this court in the case of *The Baptist Association.* The question is not whether the Pennsylvania law is right or wrong, for we do not wish to impose it upon anyone else. But the only question is, what does the law of Pennsylvania say upon the point. Girard's will was made by the advice of the best counsel that could be found; it was proved as soon as he died; the executors went on to perform their trust, in presence of the proper courts

the Town of Irchester, v. Bletsoo. In support of a charitable donation. Divers messuages, lands, &c., in Irchester, &c., which in time of King Henry VII. were given and granted by Will. Taylor and John Lely to trustees for the use of the poor of Irchester, and repair of the bridges there.

Stock *et al.*, on behalf of the Poor of Icklingham, v. Page *et al.* For performance of a charity. A capital messuage called the Town-house with fourscore acres of land and a sheepwalk in Icklingham, settled from ancient time in feoffees for the use of the poor of said town.

W. Fisher, Master of the Hospital of St. Mary of Ilford, v. Anne Seward, widow. (Eliz.) Bill of revivor to recover dues of a charity. Titles of demesne lands of the farm of Eastbury and the tithes of, &c., settled for the relief of poor persons in the hospital of Ilford.

Th. Foxe, for himself and other the Inhabitants of the Parish of Kybworth, v. Benbe, *et al.* (Eliz.) For the support of a charity. Nine messuages and six cottages and six yards land in the towns, fields, and parish of Kybworth, &c., given for the support of a schoolmaster and grammar school at Kybworth.

Z. Babington, Master or Warden of St. John Baptist in the city of Litchfield, v. Sale *et al.* (Eliz.) For the support of a charity. A capital messuage and divers other houses and 100 acres of land in Litchfield, &c., held for the support of poor persons in the said hospital, and also of a free grammar school.

The Mayor and Burgesses of Kings Lynn v. Howes, clerk. (Eliz.) For performance of a charitable donation. John Titley, Esq., by his will gave a payment, charged upon his dwelling-house at Lynn, for the maintenance of a preacher there, and other charitable purposes.

It. Newton, clerk, and the Church-warden and Inhabitants of the Parish of Little Monden v. Dane. (Eliz.) To establish a charitable donation. A messuage, &c., devised by the will of Rafe Fordam to defendant, for certain charitable purposes stated in the bill.

Rycardes, Moore, and King, for themselves and the rest of the Inhabitants of Rodborough, v. Payne *et al.* (Eliz.) To protect a charitable donation. Certain lands, &c., in Rodborough, &c., which in the time of King Henry VI. were given by Margery Breyseyn and others to the church-wardens and inhabitants of Rodborough, for the performance of divine sevice in chapel of ease to said parish, but which defendants claim as having been forfeited to the crown, being given for superstitious uses.

[Proceedings in Chancery, Vol. III.]

Spenser *et al.*, trustees, v. Grant and wife Joan. (Eliz.) Claim to a rent charge given in trust to plaintiff for charitable purposes. Agnes Chepsey, of Nottingham, demised unto Coles, and Joan, his wife, divers messuages, &c., at a certain rent, which she afterwards demised to the plaintiffs in trust to pay into the hands of the chamberlain of Northampton, for and towards two fifteenths of the said town; which rent, after the decease of the said Agnes, the defendant Joan and her then husband, the other defendant, refused to pay to plaintiffs.

Smith and Willis, Church-wardens of St. Aldatis, Oxford, on behalf of the parish, v. Smith Ald. and Furney's feoffees. Against defendants as feoffees in trust to perform and carry into effect such trusts to charitable uses. Edgecombe being seized of certain houses, &c., in city of Oxford, conveyed the same to certain feoffees in trust; who, from the profits thereof were to repair the church, to relieve the poor, and for other good and charitable purposes. They conveyed the same to new feoffees, of whom the defendants are survivors, and refuse to account.

The Inhabitants of Thirplangton v. Jarvis, only

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and with universal consent; they paid large sums over to the city. The claimants then brought an ejectment, and exhibited this will to the Supreme Court of Pennsylvania, who found no objection to it. The city of Philadelphia brought a suit under it for some property; no judge nor counsel ever hinted that the will was void. Five years passed. The Legislature had passed a law immediately recognizing the will as existing and valid in all its parts. The preamble does so. In the case of *The Town of Pawlet*, *Mr. Justice* Story says, "the crown **166*]** *has recognized the existence of the town." Does the recognition of this will by the Legislature go for nothing? The capacity of performing certain acts is admitted by the Legislature, and is this not as effectual as a recognition by the crown? Ten charities are going on now in Philadelphia. Custom and usage make the common law of England. Why has not Pennsylvania a right to enjoy her common law, not imported in parcels and packages from England, but modified and altered by circumstances and made suitable to the people.

If we are not strong enough to stand alone, we might ask support from the other States whose law is the same with ours. Where did the doctrine of charities spring from? and from what quarter did it enter into the heart of man? We are authorized to denounce as an infidel, or worse, the man who hath not charity in his heart. As surely as the pilgrims acknowledged a higher power, so surely did they recognize the obligation to take care of their fellow-creatures. The people of the State are now a hospitable and charitable people, and woe be to him who endeavors to intercept the flow of the current. Where money is given to the poor, is anyone at liberty to take it? Thou shalt not steal. This is property under the protection of the court, and the right to it as sacred as that of any man to the enjoyment of his own. The voice of Pennsylvania is accordant and unbroken. We are called upon to examine what the Chancellor did before the 43 of Elizabeth, three centuries ago; but this does not concern us. It is now settled even there, that no charity shall fail; if it is indefinite, the king shall administer it. Whether there are trustees or not, whether there be a corporation or not, all take. This charity would be safe in England; and yet it is said we must lose it unless we can show how matters were conducted three hundred years ago. This is a heavy burden to lay on a charity. In Pennsylvania, as in England, the law of charity established itself. No man can say when it began; it has always existed as far as we know. What is the common law of England? Leaving out its being the perfection of reason, it is such an application of rules as will promote the welfare of society. The law of charity has existed in England for sixteen hundred years, some centuries before Alfred. Before Penn came over, there was a settlement of Swedes near Philadelphia, at Weccacoe, a brave and moral people. They built a place of worship, and about 1700 a better one, which remains to this day. The charter of that church bears date in 1765, but the first church was built in 1677. Where was the law of charities for these hundred *years? **[*167** and what protected the graves around the church all this time? The same law that exists still. Christ Church was seventy years without a charter. In Walnut Street there was a chapel abhorrent to English law, where mass was said. It stood until it was taken down and replaced by a larger one. Who ever offered to take away this church? What is the condition of the Philadelphia Library with its 50,000 volumes? It has always acted without a charter. Story supposes that the rudiments of this law of charities came from the civil law. Thurlow

surviving feoffee. To compel performance of trusts in a deed of feoffment for charitable uses, and to convey to other trustees, a house on Thirplangton and tenements in East Langton, &c.

Turney and Roberts v. Buckmasters. To protect the plaintiffs in the execution of the will of Thomas Knighton for charitable uses. Lands lying within manor of Leighton Bussard. The defendants allege the same to have been left to superstitious uses, and endeavored to get the same into their own hands.

The Master and Brethren of the Hospital of Robert, Earl of Leicester, in Warwick, v. Lee *et al.* (1610.) For payment of an annuity of £20 given to a charity. Robert, late Earl of Leicester, being seized in fee of an annuity of £20, issuing out of a farm called, &c., the inheritance of defendant Ogden, by deed gave the same to the said hospital.

Henry Hall and John Hall, on behalf of themselves and others, the Freeholders and Inhabitants of Witham, Essex, v. Panke. (39 Eliz.) For the support and continuance of a charity. By the gift and grant of well disposed persons, divers lands and tenements in Witham, and also divers sums of money, were given for the reparation of the church, the relief of the poor, and other charitable purposes: which lands were settled in feoffees; and the defendant having got possession thereof, and moneys, and the deeds of settlement, refuses to perform said trusts, or to appoint new feoffees in the names of those dead.

John Lloyd, D. D., vicar, Thomas Baker, and Richard Wilborn, Church-wardens, and Poor of Writtle, v. John Aware *et al.*, surviving feoffees in trust for said Parish. (1598, 38 Eliz.) For the continuance of a charity. A messuage and land called Bookes in the parish of Writtle, which in the year 1509 was given by Thomas Hawkins to feoffees in trust for the poor of the said parish.

R. Wyllet and Thomas Sudbury, Church-wardens and Inhabitants of the Town of Middleton, v. Agnes Middleton, widow. (13 Eliz.) To recover a charitable pension. A yearly rent of 6*s.* 8*d.* payable to the parish of Middleton, charged upon a messuage and land in Middleton.

John Whitehurst and Thomas Amery, for themselves and other Inhabitants and Parishioners of the Parish of Dulerne in the County of Stafford, v. George Warner. (1573, 15 Eliz.) For support of a charity. Robert Warner, deceased, and others, inhabitants of the said parish, having a sum of money to invest for the erecting of a grammar school and providing a schoolmaster, purchased therewith certain lands in Kenwalmerche, &c., in Devonshire, and applied the rents and profits according to the trust; which lands afterwards became vested in defendant as surviving feoffee, who had received other money to purchase a messuage and land in Fradley in the County of Stafford, which he neglected to do.

George Warner v. Whitehurst *et al.* (20 Eliz.) Cross-bill setting forth the bill. A decree and an award had been made by the several contending parties; and for carrying the said award into execution, and to protect the plaintiff against his arbitration bond signed by him, this proceeding is instituted.

Fisher *et al.*, inhabitants of Warwick, v. Robert Philipps and Thomas Cawdrey. (1574, 15 Eliz.) For the recovery of sundry bequests of money left by will of Thomas Okery, deceased, to be applied to charitable uses in the town of Warwick.

John Rawley *et al.*, Inhabitants of the Parish of Wilborough, v. Lewis *et al.* To appoint new trustees of a charity. Lands and tenements in parish of Wilborough, containing 120 acres, of which the defendants were surviving feoffees in trust for repairing the parish church.

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and Eldon thought so too. In 1188 the civil law came into England, and the canon law soon afterwards, and is part of the law of that country to this day. But how did it get into the civil law? It is said from Constantine. But wherever Christianity went, charity went too. Gibbon says "the apostate Julian complained that Christians not only relieved their own poor, but those of the heathen also." The revealed law is part of the law of England. Blackstone says so. When did Christianity come into England? It reached Rome in the time of the Apostles, where Paul and Peter both suffered. But when England? Some say at the same time that it was carried to Rome, and was there trodden down for a time. The latest period is 597, the arrival of Augustine. An Archbishop of Canterbury was then appointed, and there has been one ever since. If Christianity carried the law of charity to Rome, it must have done so to England too. It was a part of the common law after the sixth century. Where is there a spot upon earth, where Christianity is found, that the law of charity does not exist also? Alfred sent an embassy to the Christian churches in Syria, in the ninth century, and had the ten commandments translated into Saxon. From one great source have flowed two sorts of charities, one religious, the other more general. The only difficulty that ever existed in Pennsylvania related to the first class —religious charities. In the 14th century lived Wickliffe, called the day-star of the Reformation; a man confounded with turbulent men, but a professor of divinity and singularly learned. It was an object in that day to save England from paying tribute to the Pope. From that time a religious struggle ensued. Henry VIII. found the Roman Catholic religion firmly established, the revealed law being part of the law of England. All parties admitted this. From the time of Augustine down, the common law had been undergoing changes to suit the spirit of the age, but the revealed law was a part of it all the time. (Tothill, 126, quoted by *Judge* Baldwin in *McGill and Brown.*)

168*] To this same *great source we owe the idea of a paternal power in the State—a *parens patriæ*—not the king, nor the Chancellor, but a power existing somewhere to take care of the sick, the widow, and the orphan. Take this away, and we become a nation of savages. If there is no protection for the infant and the aged, the charm of civilization is lost. In Pennsylvania all this is cared for; by hospitals and houses of refuge. No power is able to stop the flow of charity, because there is liberty of conscience. The same law that enjoins upon a witness in court to tell the truth, instructs him to give to the poor. One is not less binding than the other. All that is asked of government is, that under the protection of law, the great duty of charity may be fulfilled; and it is proposed now to say to everyone that he shall not do so; that his gift shall be forfeited. The law of charitable uses furnishes this protection. In the 17 Edward II., in 1324, the Knights Hospitalers were made new trustees of a charity when the Templars were dissolved. Story (Equity, 403, 412) says, that charities are liberally construed, and in 415, "if the bequest be for charity, no matter how uncertain the beneficiaries may be, a court will sustain the legacy." (See also 3 Peters, 484; 4 Wheat., 41; 7 Vermont Rep., 289.)

A bequest is not void for uncertainty of persons. (7 Cranch, 45; 2 Story, 206; 6 Peters, 436, 437; 2 Peters, 256.)

The law of charities existed in England prior to the time of Elizabeth. (2 Russell, 407.)

The opinion given by Judge Baldwin in the case of *McGill and Brown*, embraces all the law of Pennsylvania. The law of this court is not different. The two cases cited in the decision of *The Baptist Association* appear now to be reported differently in five different books, and this court afterwards said that a dedication to pious uses should be protected. The case of *The Baptist Society* is reported in 8 Peters. If the counsel on the other side construe this case rightly, then all charitable uses are swept away; but how, then, did it happen that *Chief Justice* Marshall afterwards said that eleemosynary corporations are to be encouraged. There cannot be a right without a full remedy; and if a man has a right to give, his donation must be protected.

The Constitution of 1776 (sec. 46) says, "all religious or charitable societies ought to be encouraged and protected." What does the 43 Elizabeth do? It directs charities to be looked up, amounting to twenty-one. Is not the fundamental law of a State of as much potency *as a British statute? The latter only [***169** looks to the past; the former to the future. The statute only includes twenty-one; the constitution takes in all. It says "other pious and charitable purposes." These words must be understood in their appropriate sense, according to their meaning in England at that time. It is of higher authority than the British statute, because it prohibited the Legislature from doing anything contrary to the principle which it established. The constitution is a great landmark; no one can dispute its authority without treating the People of Pennsylvania with disrespect. In *Beatty and Kirk* (580) the court say "the bill of rights of Maryland recognizes the statute of Elizabeth to some extent." Why is not a recognition to the full extent by Pennsylvania equally valid? Pennsylvania even adopts "superstitious uses," as they are called in England. Her settlers were of every shade of opinion.

The monasteries in England were seized upon by Henry VIII., but the rapacity of his favorites was even greater than his own. England presents now a great contrast of rich and poor. Some of the largest fortunes are owing to the benefactions of this king, such as that held by the family of Russel. The owner of the "poor flat, Bedford level," complained that Burke received £300 a year. Religious supremacy was established in the king. He laid down six articles, containing the points in dispute between himself and Rome. Who can tell what was then held to be "a superstitious use?" At the end of the Reformation, it was punishable to believe what the statute of 31 Henry VIII. ordered. The test of "superstitious uses" was constantly changing down to the time of Charles II.; the Presbyterians, Independents, &c., when uppermost, all trying to compel conformity. Then our ancestors came, abhorring religious supremacy, bringing with them liberty of conscience, and the whole law of religious charities,

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They asked the crown to give them religious endowments, but not charities, and were at last compelled to take the Act of 1730. Churches of all sects had been built, even Roman Catholic. In *Magill and Brown* (page 55, *note*) Judge Baldwin mentions forty-six charities, none of which were religious. The statutes 23 Henry VIII. (ch. 19), and 13 Elizabeth (ch. 1), make decrees of synods a part of the law of the land.

The Pennsylvania Act of 1791 (Purdon's Digest, p. 181), recites that any persons who mean to associate for the purposes of charity, may be incorporated with the approbation of [*170] the Attorney-General. *There never has happened a case where the property of any religious society, Jew or Catholic, was seized upon.

There are two objections made to the validity of the devise.

1. That the proposed system of education is unchristian.

2. That the beneficiaries are too uncertain.

As to the first, all conscientious scruples honestly entertained, are entitled to great respect. If any man who has charge of an orphan boy is afraid to send him to the college, he may keep him away without censure. It is merely an invitation to come. The constitution of Pennsylvania respects all scruples of conscience, and if children were to be dragged in and kept by force, it would be a violation of its principles. But the will in effect says "obey conscience and yield it to nobody." This scruple is of recent origin. It is not alleged in the bill. Perhaps the complainants felt no scruples then, but do now. If they slumbered so long, they ought to have some charity for Mr. Girard, in whose breast they never awaked. But a great prize is now to be reached, and the judgment may be affected by the will. Two things must be made out to overthrow the devise upon this ground.

1. That it is a superstitious use.

2. That it is inseparable from the trust.

The question is more suitable to a theological board than a court of justice. That the law of charity is the law of the land, is not a proposition depending upon theological inquiry. In *Baxter's* case, the court was not called upon to say which party was right, but only to decide what it was that the statute said; and because Baxter was a non-conformist, the trust was declared void. What could a Pennsylvania judge have done in such a case? He would find liberty of conscience established by the constitution; that in the Constitution of the United States it is provided that Congress shall make no law affecting religion; and that Mr. Madison once affixed his veto to a bill incorporating a church, under an apprehension that it trenched upon this delicate ground. It never was held that a charitable devise must make provision for religious education. In the list of forty-six before cited, thirty-seven are for mere charity. Does anyone desire that the old times in religion should return, when a man was allowed to do good only in a particular way, and in no other? What was the spirit that led to burning the convent near Boston? Precisely this. Religious acrimony now destroys property, if it does not doom to the stake. [*171] *We have nothing to do with Mr. Girard's religious opinions. If anyone thinks he can lead a better life, with equal humility and more zeal, let him try. Instead of there being anything against religion in the will, there is a manly and unaffected testimony in its favor. The boys are directed to "adopt such religious tenets as mature reason may prefer;" any tenet, without exception. The will, then, holds religion to be inseparable from human character, but thinks the best way of forming that portion of the character is by attending to it at mature age. It is a speculative question. Can it be said that Girard had no respect for religion? He showed a religious heart by bestowing upon the poor what God had given him, so that, like Franklin's legacy, "it might go round." His desire was that the children should be educated in the manner which he thought the best, to make them religious. Who is to decide whether it is the best way or not? The objection assumes that the Bible is not to be taught at all, or that laymen are incapable of teaching it. There is not the least evidence of an intention to prohibit it from being taught. On the contrary, there is an obligation to teach what the Bible alone can teach, viz., a pure system of morality.

Is it true that ministers alone can teach religion? The officer at the head of the institution (Professor Bache) is a religious man. Can he not expound religion as well as science to his pupils? The laymen are the support, at last, of all churches. The next position will be that clergyman are responsible for everything, and that a man can do nothing for himself. Everyone has to teach his own children. Why can he not equally instruct those of other people? The orphans are not to enter the college until a contract is made for them by somebody. According to the common law, an infant can bind himself to some extent by a contract. So he can here. It must be sanctioned by his guardians too. No one objects to a child being bound out in a vessel where, of course, there is a great chance of his dying without the benefit of religious services, and where his voice, when in extremes, cannot reach an ear which, it is said, it ought to do. We must, upon this doctrine, condemn the House of Refuge. But we may trust that the cry of a child will be heard in mercy, although it may not reach the ear of a priest. If a father should refuse to instruct his children in religion, can the State interpose? Suppose that the will had made no provision on the subject, and the governors of the college had adopted this same regulation, would the court have denounced it as a violation of their duty? *The case [*172 of *The University of Virginia* is far beyond this. There is no professor of theology, nor instruction in divinity. These things are purposely omitted, from a fear that the institution might become sectarian. If Virginia pemits it, she is the judge of its propriety, and not we. But Girard has neither prohibited religious instruction nor a professorship. What will the United States do with the Smithsonian legacy? Congress cannot connect religion with it. Clothing and feeding the poor are worthy objects. Girard is said to have expressed himself in terms derogatory to Christianity. Suppose he had used a different phraseology, and said that none but laymen should be admitted into the college. This would not have been objec-

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tionable, and yet precisely the same result have been brought about. Children are to be fed and clothed. This is not a superstitious use, and must stand. Will you destroy the patient, if there is an unsound limb? The case is left with the court with a perfect conviction that it will not put the knife to the throat of this most useful charity.

Mr. Webster, for the appellants, in reply:

The complainants in this cause are the next of kin to Stephen Girard, who come here to try the validity of a devise, purporting to establish what has been called a charity. The counsel on the opposite side have assailed their motives, accusing them of wishing to steal the bread of the orphan, and have censured them for coming to this court instead of resorting to the tribunals of Pennsylvania. The plaintiffs are foreigners, and have a right to come here under the Constitution of the United States. Are they to be reproached for it? But the answer to this objection has already been furnished by the opposite counsel, when they say that in Pennsylvania the complainants would not have been permitted to question the devise. Here, they are sure of a patient hearing. The cause was not argued in the Circuit Court, because the question arose in that court in 1833, upon the construction of the will of Sarah Zane,[1] and the court, in its opinion, decided the point. It would, therefore, have been useless to renew the argument there, but the best way was to bring the subject directly up for review.

It was said by the opening counsel (*Mr. Jones*), that in England charities are often superintended by the king in virtue of his prerogative, and that no analogous power can ex- **173*]** ist in a republican government, *where there can be no *parens patriæ;* and it was also said that in order to establish a peculiar and local common law in Pennsylvania, one decision is not enough, but there must be a series of decisions to sustain a system of law. Both these positions are correct.

But the attention of the court will be directed in the first place to that clause in the will which excludes clergyman, &c., from the college; and it is worthy of reflection whether the devise must not be maintained, if maintained at all, upon the ground of its being a charitable devise, and as such entitled to special favor. It is a proposition of the highest magnitude, whether in the eye of jurisprudence it is any charity at all; the affirmative cannot be supported by law, or reasoning, or decisions. There are two objections to it.

1. The plan of education is derogatory to the Christian religion, tending to weaken men's respect for it and their conviction of its importance. It subverts the only foundation of public morals, and therefore it is mischievous and not desirable.

2. It is contrary to the public law and policy of Pennsylvania.

The clause is pointedly opprobrious to the whole clergy; it brands them all without distinction of sect. Their very presence is supposed to be mischievous. If a preacher happens to have a sick relative in the college, he is forbidden to visit him. How have the great body of preachers deserved to be denied even the ordinary rights of hospitality? In no country in the world is there a body of men who have done so much good as the preachers of the United States; they derive no aid from government, constitute no hierarchy, but live by the voluntary contributions of those to whom they preach. It astonishes the old world that we can get on in this way. We have done something in law and politics towards our contribution for the benefit of mankind; but nothing so important to the human race as by establishing the great truth that the clergy can live by voluntary support. And yet they are all shut out from this college. Was there ever an instance before, where, in any Christian country, the whole body of the clergy were denounced? The opposite counsel have gone as far back as Constantine in their history of charities; but have they found or can they find a single case, where opprobrium is fixed upon the whole clergy? We have nothing to do with Girard's private character, which has been extolled for benevolence. Be it so. We are asked if he cannot dispose of his property. But the law cannot be altered to suit Girard. What is charity? It is the indulgence of kind affections — love — sympathy for our fellow-creatures. In a narrow sense *it means **{*174** alms, relief to the poor. But the question is, what is it in a legal sense? The object here is to establish a school of learning and shelter; to give a better education. The counsel upon the other side are right in speaking of charity as an emanation of Christianity. But if this be so, there can be no charity where the authority of God is derided and his word rejected. If it becomes an unbeliever, it is no longer charity. There is no example in the books of a charity where Christianity is excluded. There may be a charity for a school without a positive provision for Christian teachers; but where they are expressly excluded, it cannot be such a charity as is entitled to the special favor and protection of a court. It is said by the counsel on the other side that Pennsylvania is not an infidel State, but a Christian community; and yet children who are orphans, with no parents to look after them, are directed to be shut in to stay until they approach manhood, during the age when the character is formed, and if they happen to have any connections or friends who are clergymen, they are excluded from ever seeing them. There are two objectionable features in this restriction in the will. The first is, that all clergymen are excluded from the college; and the second, that a cruel experiment is to be made upon these orphans, to ascertain whether they cannot be brought up without religion.

[*Mr. Webster* here read a passage from one of the works of the late Bishop White upon this point.]

The doors of the college are open to infidels. The clause, as it stands, is as derogatory to Christianity as if provision had been made for lectures against it. If it be said that infidels will not be encouraged, the answer is, that a court can only judge of the tendency of measures. The trustees must not be supposed to violate the will. But it is said by the counsel that lay teaching can be substituted for clerical. There are at least four religious sects which do not allow this mode of teaching religion; and

1.—See Appendix.

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it is as much against the spirit of the will as teaching by clergymen. The object is to have no religious teaching at all, because in this way controversy will be avoided. Lawyers are as much sectarians as clergymen, and lay teaching leads as directly to controversy as lay preaching. The intention of the will is, that the boys shall choose their own religion when they grow up. The idea was drawn from Paine's Age of Reason (211), where it is said "let us propagate morality unfettered by superstition." Girard had no secrets, and therefore used the 175*] *words which he considered synonymous with "superstition," viz.: "religious tenets."

Ministers are the usual and appointed agents of Christ. In human affairs, where the ordinary means of attaining an object are rejected, the object is understood to be rejected also; much more is this the case when the means are of divine authority. In the New Testament preaching is ordered both before and after the crucifixion. "If any man refuse to hear," &c. "Go ye into all the world and preach the gospel to every creature." Different sects have different forms of worship, but all agree that preaching is indispensable. These appointed agencies have been the means of converting all that part of the world which is now Christian. What country was ever Christianized by lay teaching? By what sect was religious instruction ever struck out of education? None. Both in the Old and New Testaments its importance is recognized. In the Old it is said "Thou shalt diligently teach them to thy children," and in the New, "Suffer little children to come unto me and forbid them not." But this will requires religion to be put off till mature years, as if a knowledge of man's duty and destiny was not the earliest thing to be learned. Man is the only sentient being who knows that he is eternal; the question "If a man dies, shall he live again?" can be solved by religion alone.

Is this school a charity? What is to become of the Sabbath. It is not intended to say that this institution stands upon the same authority as preaching, but still it is a part of Christianity. All sects have a day which is holy, and hold its observance to be important. Lay teachers will not do. Where are the children to go to church, even if they go out of the college? There is no Christian father or mother who would not rather trust their children to the charity of the world at large, than provide in this way for their bodily comforts. The single example of the widow's mite, read as it has been to hundreds of millions of people, has done more good than a hundred marble palaces. No fault can be found with Girard for wishing a marble college to bear his name forever, but it is not valuable unless it has a fragrance of Christianity about it.

The reasons which the testator gives are objectionable and derogatory to Christianity; they assume that a difference of opinion upon some religious tenets is of more importance than a Christian education, and in order to get rid of superfluous branches, they lay the axe to the root of the tree itself. The same objec-176*] tion is made *by all the lower and vulgar class of the opponents of Christianity. The first step of infidelity is to clamor against the multitude of sects. Volney, 84 (Ruins of Empires), says, "they all preach damnation against each other, and all cry out 'our holy religion.'" The opposite counsel say that Girard was in a difficulty, because if he had thrown open the college to all sects indiscriminately, they would not have agreed with each other. But if it had been so, these orphan children would not have been in a worse condition than other children, and what father would not have preferred that his children should go to this college under any form, than under no form of religion? All sects believe in a future state and in a creator of the world. Suppose we carried out these principles of exclusion into our social relations. Differing as we do about government, it would tear up society by the roots. All preachers unite in many points; they would all agree with Franklin, who is reported in the letters of John Adams to his wife, to have said in the days of trouble, "let us have prayers."

[*Mr. Binney* here cited the following authorities to show that Jewish charities can be sustained: 1 Ambler, 228, *note;* 2 Swanston, 487; 7 Vesey, 417; Sheltford, 107; Boyle, 27.]

Mr. Webster said the distinction between the Jewish cases and the present is, that the former were within the ordinary rules of law, whereas this devise could only be sustained by being brought under the peculiar favor of the court, as it belongs to that class of charities. But what would be the condition of a youth coming fresh from this college? He could not be a witness in any court. He had never been taught to believe in a future state of rewards and punishments, because this is a "tenet" upon which he is enjoined not to make up his mind until he can examine for himself. What parent would bring up his child to the age of eighteen years without teaching him religion? What is an oath in heathen lands as well as our own? It is a religious appeal, founded upon a conviction that perjury will be punished hereafter. But if no superior power is acknowledged, the party cannot be a witness. Our lives and liberties and property all rest upon the sanctity of oaths. It is said that there will be no teaching against Christianity in this college, but I deny it. The fundamental doctrine is, that the youthful heart is not a proper receptacle for religion. This is not the charity of instruction. In monasteries, education was always blended with religious teaching. The statute 4 Henry IV. (ch. 12), in 1402, established charities of religion (2 Pickering, 433), and directed the schoolmaster to perform *divine service, and instruct the children. [*177 (1 Edward 6, ch. 14, to the same effect.) 2 Swanston (526, 529) says that care was always taken to educate youths in the doctrines of Christianity, which is a part of the common law of England. That it is so, see 1 Benson, 296; 2 Strange, 834; 3 Merivale, 405; 2 Burn's Ecclesiastical Law, 95; 2 Russell, 501; Younge & Collyer's Reports in Chancery, 418, *Attorney-General* v. *Cullum*, a full authority.

In this last case there was a charity for the use of the parish, but no provision for religious education. The court said that if the fund were to be applied to education at all, a part of it must go to religious education; not the particular doctrines of the Church of England, but religion in a more comprehensive sense.

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Bache, in his Course of Education in Europe, describes a monitorial school in Liverpool upon Bell's plan, but divine service is performed every Sunday. In Shepherd, 105, the cases are summed up.

As to the Smithsonian legacy and the University of Virginia, the former is not carried out, and the latter is no charity. Upon this branch of the case the whole argument may be presented in the following question: "Is a school, founded clearly on the principles of infidelity, a charity in the appropriate sense of that word?"

2. What is the law or public policy of Pennsylvania?

If there be a settled policy there, no gift or devise to overturn it can be recognized. It is an independent State, a popular government recognizing all guarantees of popular liberty. It is lawful to speak or write against all these guarantees, such as trial by jury, &c., but if the aid of a court be asked to carry on these attacks, it will be refused.

Mr. Girard in his lifetime might have paid people to write against the right of suffrage, but it is a differemt thing when it assumes the shape of a charitable devise, and requires the strong aid of a court to carry out the design. The Christian religion is as much a part of the public law as any of these guarantees. The charter says that Penn came over to spread the Christian religion; and the Legislatures have often acted upon this principle, as where they punished the violation of the Lord's day. That it is a part of the common law, see 11 Serg. & Rawle, 394 (*Updegraff* v. *The Commonwealth*). So the court set aside a trust because it was inconsistent with public policy. (See the case of *The Methodist Church*, 5 Watts.) The policy of a country is established either by law, or **178*]** courts, or general consent. *That Christianity is a part of the public law of Pennsylvania by general consent, if there were no other source of authority, the churches, meeting houses, spires, and even grave-yards over the face of the country all show. The dead prove it as well as the living.

If the trust cannot be executed, can it be reformed?

Who is to do it? The doctrine of *cy pres* cannot apply and give the benefit to some other society. It would be an extravagant application of the doctrine. Who is to supply the place of the trust stricken out? The trustee cannot. It is a case were there is no doubt of the intentions of the testator. They are positive. In other cases there is room for discretion, but none here. The testator calls these articles restrictions and limitations. Courts of equity have gone to an extravagant length in *cy pres* cases, but it is impossible to reach this.

7 Vesey (490) said that if authority were out of the way, the gift would be void, and the case be one of intestacy; but the court thought itself bound to follow authority and decree that the testator should be charitable in the court's way. (See also Strange, 127, *Attorney-General* v. *Dowling*.) But the entire doctrine of *cy pres* is rejected by the Pennsylvania courts. (See 17 Serg. & Rawle, 93; 1 Watts, 226.)

As to the second division of the argument of the case, what is the law of Pennsylvania with respect to such devises?

This court will adopt the construction which the courts of a State place upon its laws. (2 Cranch, 87; 11 Wheat., 361; 2 Peters, 58; 6 Peters, 290; 12 Wheat., 153.) There have been four cases decided in Pennsylvania, viz.: 17 Serg. & Rawle, 88, *Witman* v. *Lex;* 1 Pennsylvania Rep., 49, *McGin* v. *Aaron;* 3 Rawle, 170, *Mayor, &c.*, v. *Elliott, &c.;* 1 Watts, 218, *Methodist Church* v. *Remington*. All these cases are in our favor, except a single *dictum* in one of them. The opposite counsel are obliged to reject the points decided in two. In the first case it was decided that the statute of Elizabeth was not in force, and the devise was not so uncertain as to be void. The second was a gift to a congregation for a house of religious worship; in the third there was no uncertainty in the *cestui que trust*, and in the fourth the trust was declared void.

The old records of England do not militate against the decision of this court in the case of *The Baptist Association* (4 Wheat., 1). There is believed to be no case in them of an indefinite charity in *perpetuity sustained by the [*179 authority of Chancery prior to the time of Henry VIII. Corporations competent to take, whether aggregate or sole, are not included within this remark. Decisions before the 43 Elizabeth are apt to be misunderstood, because the term "charity" is applied to cases where there is no uncertainty. (1 Proceedings in Chancery, 208.) Of the fifty cases cited from the old records, only three are given at length in one of which the objects of the trust are specially declared, and in the other two there was a license from the king. All the cases referred to did not take place before the time of Elizabeth.[1]

1.—The following remarks upon the old records of England, were hastily drawn up and presented to the court by Mr. Cadwallader, one of the counsel for the complainants:

The new information developed by the researches of the counsel of the appellees, upon the obscure subject of the law of charities before the statutes 39 and 43 Eliz., tends rather to confirm than to invalidate the opinion of this court expressed in the Baptist Church case, that there is no satisfactory evidence of an uncertain charity of indefinite duration having been enforced before the statute, or since the statute without its aid.

Cases of frankalmoigne, the Templars, the Hospitalers, &c., &c., were those of corporations sole or aggregate. Counsel on both sides concur that the dissolution of monasteries, and of certain ecclesiastical aggregate and sole corporations, and the recusancy and consequent disfranchisement of many incumbents of benefices of this description, had, by the time of Elizabeth, caused many charities, previously valid, to fail for want of their anterior support of corporate trustees or administrators. The recitals and enactments of the statutes of this and the previous reigns, and particularly of the 39 and 43 Eliz., may be explained by a due regard to this portion of the previous history of England. This is affirmed on both sides of the argument. It is not perceived that any just reasoning on this foundation tends to support the propositon that indefinite uncertain charities could subsist without the aid of an incorporation. On the contrary, the natural inference appears to be, that they could not be otherwise maintained, without statutory assistance.

Judicial recognitions of charities before 39 and 43 Eliz. are liable to be misapplied, unless due care be observed in ascertaining the definition of a charity as understood at that day. The cases in which nothing more is said than that the trust, or use, or purpose was a charitable one, prove nothing. Whatever the true modern technical definition may be, the passages cited from Reeves' History prove that the term "charity" in the olden time was frequently applied to trusts which were neither us

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180] *The acts of the Legislature of Pennsylvania after the death of Girard can have no effect upon the rights of parties which were then vested.

The case in 3 Peters 99, 115 (*Inglis* v. *The* 181*] *Trustees of the* *Sailor's Snug Harbor*), rested upon the ground that the devise was good as an executory devise.

If the devise in trust be void in this case, what becomes of the fee? It must rest somewhere. In England, where a devise was made to a corporation which could not take, the fee was decided to be in the heir-at-law. (Hobart, 136.) But where a court of chancery charges itself with the whole administration of a charity, it takes possession of the fee as an incident to this power. In Pennsylvania there is no such authority anywhere, and this court cannot exercise it. What is done in England is done by virtue of the statute of Elizabeth, which has no force in this case. Suppose the corporation had renounced the trust, what would have become of the fee? Could the court in such case have devested the heirs of the fee and appointed another trustee? There is no power to remodel a trust as in England, or to exercise a right of visitation.

There is a want of power in the trustee to administer the charity. The fee must rest in the entire body of the corporation whilst others 182*] *are administering the trust. It is true that sometimes trusts have been conferred on the heads of corporations, and the whole body been held responsible. But the will here can give no power. There is no connection between this trust and the powers of the corporation. The school is out of the city, and the only interest which the city has in it, is that some of the poor may be provided for. But suppose a defalcation to take place. The mayor, &c., are chosen for the purpose of laying city taxes for city purposes. Can they levy a tax to replace the sum thus abstracted? Are the whole people of the city responsible by taxation for an abuse of trust? Yet they are a part of the corporation which is the trustee. The 16th section of the charter contains the power to hold land, but this does not go far enough. If the city cannot execute the trust, what becomes of it? It was the intention of the testator that a particular trustee and no other should execute it, and if that trustee is incapable of doing it, the trust must fail altogether.

By the Pennsylvania statutes of 1730, 1791, and 1833, the policy of the State is shown to be that a moderate limit is fixed for the amount of property held for religious or charitable purposes, first of £500, and afterwards $2,000. These laws are intended to act upon just such devises as this. Can it be said, with these laws in view, that an unincorporated body, such as these boys, or anyone in trust for them, can hold property to the amount of $2,000,000? The policy of the State is to prevent large amounts in perpetuity, and if anyone desires to exceed the limits fixed in those laws he must apply to the Legislature for a special permission. (Constitution of Pennsylvania, sec. 37; Purdon's Digest, title Estates tail.)

Where is the supervisory power over this trust? In 2 Vesey, 43 (*Attorney-General* v. *Foundling Hospital*), it is said that chancery must supervise. When it is given to a corporation with power to trustees to go on, there is no need of a supervisory power except to proteet the fund. (2 Bro. Chan. Ca., 220, 236.)

In 17 Vesey, 409, it is said that if there are no visitors appointed in the charter, the Chancellor interferes to visit, through a petition addressed to him as keeper of the great seal, representing the king in person. But there is no such power to be found anywhere in Pennsylvania. Girard should have provided for a charter, and the Legislature could have seen how much property was going into mortmain, and directed accordingly.

The city is incapable of executing this trust, because it cannot make *contracts [*183 beyond the range of its charter. Suppose the trust should not be faithfully carried out by any agents, and the corporation be held responsible. In Pennsylvania, in case of a judgment against a corporation, any money on its way to the treasury can be arrested. In Bridgeport, Connecticut, the corporation issued bonds upon which there was a judgment, and private property in dwelling-houses seized in execution; yet these persons could not prevent the bonds from being issued. There is no security anywhere for any species of property except by holding corporations to a strict exercise of their power. No good can be looked for from this college. If Girard had desired to bring trouble, and quarrel, and struggle upon the city, he could have done it in no more effectual way. The plan is unblessed in design and unwise in purpose. If the court should set it aside, and I be instrumental in contributing to that result, it will be the crowning mercy of my professional life.

certain in their objects nor perpetual in their duration; in other words, to subjects for which a trust could have been maintained according to the ordinary rules of property, as contradistinguished from the rules of charities. Edwards v. Kimpton, read from Record Commission (1 Calendar of Proceedings in Chancery, 280), was the case of a rent granted for the relief of the converts inhabiting the house belonging to the Master of the Rolls. In Lyon v. Hews (same publication, Vol. II., p. 44), both bill and answer mention works of charity as the objects of the trust to be enforced, and state that the property had been left for religious and charitable purposes. But the purposes and objects of this trust were specifically declared, and were, 1st. Finding a priest by a year in a certain church; 2d. Making an aisle in the porch of the same church; 3d. Marriage of five poor maidens; and 4th. Amending the highways in the lane behind the mews. Of these uses none was to be extended to a perpetuity, and none was in any greater degree uncertain than must necessarily be the case with objects of a power or discretion exercisable within the period of a perpetuity. So in Alderman Symond's case, in Moore's Reading (Duke, 163); the "charitable use," decreed before the statute, "upon ordinary and judicial equity in chancery," though not described as to its objects, appears to have been one of which a final disposition could be made within a reasonable period. The case in 38 Assizes (222 *a.*, Vol. III.), was one in which the distribution, for the good of the testator's soul, was to be made by his executors; *i. e.*, within a life in being. Of the fifty cases quoted from these calendars, three only are stated at length. Of the rest nothing more than a meager abstract is presented. Of the three which are given at large, one (Lyon v. Hews) is mentioned above. In each of the two others, a patent or license had been obtained from the crown, enabling the trustees to hold the land conformably to the provisions of the trust. In many of the other cases, the proceedings, if given in full, would doubtless indicate the same thing. The statutes of Mortmain must otherwise have prevented the grants from

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Mr. Justice STORY delivered the opinion of the court:

This cause has been argued with great learning and ability. Many topics have been discussed in the arguments, as illustrative of the principal grounds of controversy, with elaborate care, upon which, however, in the view which we have taken of the merits of the cause, it is not necessary for us to express any opinion, nor even to allude to their bearing or application. We shall, therefore, confine ourselves to the exposition of those questions and principles which, in our judgment, dispose of the whole matters in litigation; so far at least as they are proper for the final adjudication of the present suit.

The late Stephen Girard, by his will dated the 25th day of December, A. D. 1830, after making sundry bequests to his relatives and friends, to the city of New Orleans, and to certain specified charities, proceeded in the 20th clause of that will to make the following bequest, on which the present controversy mainly hinges: "XX. And whereas I have been for a long time impressed," &c. (See the statement prepared by the reporter.)

The testator then proceeded to give a minute detail of the plan and structure of the college, and certain rules and regulations for the due management and government thereof, and the studies to be pursued therein, "comprehending reading, writing, grammar, arithmetic, geography, navigation, surveying, practical mathematics, astronomy, natural, chemical, and ex-
184*] perimental philosophy, the *French and Spanish languages" (not forbidding but not recommending the Greek and Latin languages), "and such other learning and science as the capacities of the several scholars may merit or warrant." He then added, "I would have them taught facts and things rather than words or signs; and especially I desire that by every proper means a pure attachment to our republican institutions, and to the sacred rights of conscience as guarantied by our happy constitutions shall be formed and fostered in the minds of the scholars."

The persons who are to receive the benefits of the institution he declared to be, "poor white male orphans between the ages of six and ten years; and no orphan should be admitted until the guardians or directors of the poor, or other proper guardian, or other competent authority, have given by indenture, relinquishment or otherwise, adequate power to the mayor, aldermen and citizens of Philadelphia, or to directors or others by them appointed, to enforce in relation to each orphan every proper restraint, and to prevent relatives or others interfering with, or withdrawing such orphan from the institution." The testator then provided for a preference, "first, to orphans born in the city of Philadelphia; second, to those born in any other part of Pennsylvania; third, to those born in the city of New York; and last, to those born in the city of New Orleans." The testator further provided that the orphan "scholars who shall merit it, shall remain in the college until they shall respectively arrive at between fourteen and eighteen years of age."

The testator then, after suggesting that in relation to the organization of the college and its appendages, he leaves necessarily many details to the mayor, aldermen and citizens of Philadelphia, and their successors, proceeded to say: "There are, however, some restrictions which I consider it my duty to prescribe, and to be, amongst others, conditions on which my bequest for said college is made and to be enjoyed, namely: First, I enjoin and require," &c. (See statement of the reporter.) This second injunction and requirement is that which has been so elaborately commented on at the bar, as derogatory to the Christian religion, and upon which something will be hereafter suggested in the couse of this opinion.

The testator then bequeathed the sum of $500,000 to be invested, and the income thereof applied to lay out, regulate, and light and pave a passage or street in the east part of the city of Philadelphia, fronting the river Delaware, not less than twenty-one feet wide and to be called Delaware Avenue, &c.; and to this intent to obtain such *acts of As- [*185

being available. One of the cases mentioned in the Calendar (Vol. II., p. 364, Newton v. Kitteridge), a bill to protect the complainant's title against an inquisition for charitable uses, by which his land had been found to have been given to the poor of Aldham, certainly occurred after, and was founded on the 43 or 39 Eliz. The same thing is probably true of very many of the others of which the date is not given. It is remarkable that although all of the cases in the Calendar on various subjects are entitled as of the reign of Elizabeth, or of earlier reigns, some of them, in the places where abstracted, are stated to have occurred during the usurpation, and others at dates in the reign of James I. Of all the cases in the Calendar, only seven, including the three above mentioned, are shown to have occurred before the statute 39 Eliz. But all this is perhaps unimportant here. Upon such examination as has been practicable, it is apprehended that none of the cases previous to 39 Eliz., and none of those of uncertain date, can be said affirmatively to have been instances of indefinite perpetual charity.

To understand some of them it is necessary to refer to 1 Edw. VI. (ch. 14), which made masters of grammar schools corporations sole; and to understand a larger number of them, it will be right to refer to the doctrine which prevailed before the statute of Elizabeth, under which gifts of chattels to the poor of a municipal or religious corporation were sustained as gifts to the corporation; a doctrine which affirms the competency of the corporation, and the incapacity of the poor. This doctrine is thus laid down in the note to the case in 38 Assizes mentioned above. It is there stated to have been the opinion of the court that if a man give bond or other thing to A and B, parishioners of a certain church, and to the parishioners of the said church the gift is good, and it vests in the church, &c. The same doctrine, in those days, was held in the case of land where there had been a license or dispensation with the mortmain acts. Of course the same rule applied where there was a trust for a corporation, or for its poor, or its members. If the purposes of the grant were consistent with the objects of the charter, the gift could be sustained independently of the peculiar law of charities. Now, with the exception of four or five instances where the charity does not appear to have been of undefined duration, and of which the date, whether before or after the statute 39 Eliz. does not appear, it is believed, subject to correction, that in all the cases cited from this Calendar, and not already particularly noticed, there had been a grant or devise to, or in trust for, a municipal or private corporation; and in most instances the proceeding was by, or on behalf of such a corporation. These cases, therefore, furnish strong negative evidence that the law before the statutes 39 and 43 Eliz. did not rest on the same footing as it has since stood upon. If it had been thus established, the trustees for the inhabitants of a municipality, or for the poor of a parish or a church would not have needed the protection of the corporations and *quasi* corporations under whose capacity to take and to enjoy, they appear to have thought it necessary to shelter themselves.

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embly, and to make such purchases or agreement as will enable the mayor, aldermen and citizens of Philadelphia to remove or pull down all the buildings, fences, and obstructions, which may be in the way, and to prohibit all building, fences, or erections of any kind to the eastward of said avenue, &c., &c.; and he proceeded to give other minute directions touching the same.

The testator then bequeathed to the Commonwealth of Pennsylvania the sum of $300,000 for the purpose of internal improvement by canal navigation, to be paid into the State treasury as soon as such laws shall be enacted by the Legislature to carry into effect the several improvements before specified, and certain other improvements.

The testator then bequeathed the remainder of the residue of his personal estate in trust to invest the same in good securities, &c., so that the whole shall form a permanent fund, and to apply the income thereof to certain specified purposes, which he proceeds to name; and then said: "To all which objects," &c. (See statement of the reporter.)

These are the material clauses of the will which seem necessary to be brought under our review in the present controversy. By a codicil dated the 20th of June, A. D. 1831, the testator made the following provision: "Whereas I, Stephen Girard, the testator named in the foregoing will and testament, dated February 16th, 1830, have since the execution thereof, purchased several parcels and pieces of land and real estate, and have built sundry messuages, all of which, as well as any real estate that I may hereafter purchase, it is my intention to pass by said will; and whereas, in particular, I have recently purchased from Mr. William Parker, the mansion-house, outbuildings, and forty-five acres and some perches of land, called Peel Hall, on the Ridge road, in Penn Township: Now, I declare it to be my intention, and I direct, that the orphan establishment, provided for in my said will, instead of being built as therein directed upon my square of ground between High and Chestnut and Eleventh and Twelfth streets, in the city of Philadelphia, shall be built upon the estate so purchased from Mr. W. Parker, and I hereby devote the said estate to that purpose, exclusively, in the same manner as I had devoted the said square, hereby directing that all the improvements and arrangements for the said orphan establishment, prescribed by my said will, as to said square, shall be made and executed upon the said estate, just as if I had in my will devoted the said estate to said purpose—consequently, the said square of ground is to 186*] constitute, *and I declare it to be a part of the residue and remainder of my real and personal estate, and given and devised for the same uses and purposes as are declared in section twenty of my will, it being my intention that the said square of ground shall be built upon, and improved in such a manner as to secure a safe and permanent income for the purposes stated in said twentieth section." The testator died in the same year; and his will and codicil were duly admitted to probate on the 31st of December of the same year.

The Legislature of Pennsylvania passed the requisite laws to carry into effect will, so far as respected the bequests of the $500,000 for the Delaware Avenue and the $300,000 for internal improvement by canal navigation, according to the request of the testator.

The present bill is brought by the heirs-at-law of the testator, to have the devise of the residue and remainder of the real estate to the mayor, aldermen and citizens of Philadelphia in trust as aforesaid to be declared void, for the want of capacity of the supposed devisees to take lands by devise, or if capable of taking generally by devise for their own use and benefit, for want of capacity to take such lands as devisees in trust; and because the objects of the charity for which the lands are so devised in trust are altogether vague, indefinite, and uncertain, and so no trust is created by the said will which is capable of being executed or of being cognizable at law or in equity, nor any trust estate devised that can vest at law or in equity in any existing or possible *cestui que trust;* and therefore the bill insists that as the trust is void, there is a resulting trust thereof for the heirs-at-law of the testator; and the bill accordingly seeks a declaration to that effect and the relief consequent thereon, and for a discovery and account, and for other relief.

The principal questions, to which the arguments at the bar have been mainly addressed, are: First, whether the corporation of the city of Philadelphia is capable of taking the bequest of the real and personal estate for the erection and support of a college upon the trusts and for the uses designated in the will. Second, whether their uses are charitable uses valid in their nature and capable of being carried into effect consistently with the laws of Pennsylvania. Third, if not, whether, being void, the fund falls into the residue of the testator's estate, and belongs to the corporation of the city, in virtue of the residuary clause in the will; or it belongs, as a resulting or implied trust, to the heirs and next of kin of the testator.

As to the first question, so far as it respects the capacity of the *corporation to take [*187 the real and personal estate, independently of the trusts and uses connected therewith, there would not seem to be any reasonable ground for doubt. The Act of 32 and 34 Henry VIII. respecting wills, excepts corporations from taking by devise; but this provision has never been adopted into the laws of Pennsylvania or in force there. The Act of 11th of March, 1789, incorporating the city of Philadelphia, expressly provides that the corporation, thereby constituted by the name and style of the Mayor, Aldermen and Citizens of Philadelphia, shall have perpetual succession, "and they and their successors shall at all times forever be capable in law to have, purchase, take, receive, possess, and enjoy lands, tenements and hereditaments, liberties, franchises and jurisdictions, goods, chattels, and effects, to them and their successors forever, or for any other or less estate," &c., without any limitation whatsoever as to the value or amount thereof, or as to the purposes to which the same were to be applied, except so far as may be gathered from the preamble of the act, which recites that the then administration of government within the city of Philadelphia was in its form "inadequate to the suppression of vice

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and immorality, to the advancement of the public health and order, and to the promotion of trade, industry, and happiness, and in order to provide against the evils occasioned thereby, it is necessary to invest the inhabitants thereof with more speedy, rigorous, and effective powers of government than at present established." Some, at least, of these objects might certainly be promoted by the application of the city property or its income to them—and especially the suppression of vice and immorality, and the promotion of trade, industry, and happiness. And if a devise of real estate had been made to the city directly for such objects, it would be difficult to perceive why such trusts should not be deemed within the true scope of the city charter and protected thereby.

But without doing more at present than merely to glance at this consideration, let us proceed to the inquiry whether the corporation of the city can take real and personal property in trust. Now, although it was in early times held that a corporation could not take and hold real or personal estate in trust upon the ground that there was a defect of one of the requisites to create a good trustee, viz., the want of confidence in the person; yet that doctrine has been long since exploded as unsound, and too artificial; and it is now held, that where the corporation has a legal capacity to take real or personal estate, there it may take and hold it **188*]** upon trust, in the same *manner and to the same extent as a private person may do. It is true that, if the trust be repugnant to, or inconsistent with the proper purposes for which the corporation was created, that may furnish a ground why it may not be compellable to execute it. But that will furnish no ground to declare the trust itself void, if otherwise unexceptionable; but it will simply require a new trustee to be substituted by the proper court, possessing equity jurisdiction, to enforce and perfect the objects of the trust. This will be sufficiently obvious upon an examination of the authorites; but a single case may suffice. In *Sonley* v. *The Clockmaker's Company* (1 Bro. Ch. R., 81), there was a devise of freehold estate to the testator's wife for life, with remainder to his brother C. in tail male, with remainder to the Clockmaker's Company, in trust to sell for the benefit of the testator's nephews and nieces. The devise being to a corporation, was, by the English statute of wills, void, that statute prohibiting devises to corporations, and the question was, whether the devise being so void, the heir-at-law took beneficially or subject to the trust. Mr. Baron Eyre, in his judgment, said, that although the devise to the corporation be void at law, yet the trust is sufficiently created to fasten itself upon any estate the law may raise. This is the ground upon which courts of equity have decreed, in cases where no trustee is named. Now, this was a case not of a charitable devise, but a trust created for nephews and nieces; so that it steers wide from the doctrines which have been established as to devises to corporations for charities as appointments under the statute of 43 Elizabeth: *a fortiori*, the doctrine of this case must apply with increased stringency to a case where the corporation is capable at law to take the estate devised, but the trusts are utterly *dehors* the purposes of the incorporation. In such a case, the trust itself being good, will be executed by and under the authority of a court of equity. Neither is there any positive objection in point of law to a corporation taking property upon a trust not strictly within the scope of the direct purposes of its institution, but collateral to them; nay, for the benefit of a stranger or of another corporation. In case of *Green* v. *Rutherforth* (1 Ves. R., 462), a devise was made to St. John's College in Cambridge of the perpetual advowson of a rectory in trust, that whenever the church should be void and his nephew be capable of being presented thereto, they should present him; and on the next avoidance should present one of his name and kindred, if there should be anyone capable thereof in the college; if none such, they should present the *senior divine then [***189** fellow of the college, and on his refusal the next senior divine, and so downward; and, if all refused, they should present any other person they should think fit. Upon the argument of the cause, an objection was taken that the case was not cognizable in a court of equity, but fell within the jurisdiction of the visitor. Sir John Strange (the Master of the Rolls) who assisted Lord Hardwicke at the hearing of the cause, on that occasion said: "A private person would, undoubtedly, be compellable to execute it (the trust); and, considered as a trust, it makes no difference who are the trustees, the power of this court operating on them in the capacity of trustees. And though they are a collegiate body whose founder has given a visitor to superintend his own foundation and bounty; yet as between one claiming under a separate benefactor and these trustees for special purposes, the court will look on them as trustees only, and oblige them to execute it under direction of the court." Lord Hardwicke, after expressing his concurrence in the judgment of the Master of the Rolls, put the case of the like trust being to present no member of another college, and held that the court would have jurisdiction to enforce it.

But if the purposes of the trust be germane to the objects of the incorporation; if they relate to matters which will promote, and aid, and perfect those objects: if they tend (as the charter of the city of Philadelphia expresses it) "to the suppression of vice and immorality, to the advancement of the public health and order, and to the promotion of trade, industry, and happiness," where is the law to be found which prohibits the corporation from taking the devise upon such trusts, in a State where the statutes of mortmain do not exist (as they do not in Pennsylvania), the corporation itself having a legal capacity to take the estate as well by devise as otherwise? We know of no authorities which inculcate such a doctrine or prohibit the execution of such trusts, even though the act of incorporation may have for its main objects mere civil and municipal government and regulations and powers. If, for example, the testator by his present will had devised certain estate of the value of $1,000,000 for the purpose of applying the income thereof to supplying the city of Philadelphia with good and wholesome water for the use of the citizens, from the river Schuylkill (an object which some thirty or forty years ago would have been thought of transcendant benefit), why, although

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not specifically enumerated among the objects of the charter, would not such a devise upon 190*] such a trust have been valid, *and within the scope of the legitimate purposes of the corporation, and the corporation capable of executing it as trustees? We profess ourselves unable to perceive any sound objection to the validity of such a trust; and we know of no authority to sustain any objection to it. Yet, in substance, the trust would be as remote from the express provisions of the charter as are the objects (supposing them otherwise maintainable) now under our consideration. In short, it appears to us that any attempt to narrow down the powers given to the corporation so as to exclude it from taking property upon trusts for purposes confessedly charitable and beneficial to the city or the public, would be to introduce a doctrine inconsistent with sound principles, and defeat instead of promoting the true policy of the State. We think, then, that the charter of the city does invest the corporation with powers and rights to take property upon trust for charitable purposes, which are not otherwise obnoxious to legal animadversion; and, therefore, the objection that it is incompetent to take or administer a trust is unfounded in principle or authority, under the law of Pennsylvania.

It is manifest that the Legislature of Pennsylvania acted upon this interpretation of the charter of the city, in passing the Acts of the 24th of March, and the 4th of April, 1832, to carry into effect certain improvements and execute certain trusts, under the will of Mr. Girard. The preamble to the trust act, expressly states that it is passed "to effect the improvements contemplated by the said testator, and to execute, in all other respects, the trusts created by his will," as to which, the testator had desired the Legislature to pass the necessary laws. The tenth section of the same act, provides "That it shall be lawful for the mayor, aldermen and citizens of Philadelphia, to exercise all such jurisdiction, enact all such ordinances, and to do and execute all such acts and things whatsoever, as may be necessary and convenient for the full and entire acceptance, execution, and prosecution of any and all the devises, bequests, trusts, and provisions contained in the said will, &c., &c.; to carry which into effect," the testator had desired the Legislature to enact the necessary laws. But what is more direct to the present purpose, because it imports a full recognition of the validity of the devise for the erection of the college, is the provision of the 11th section of the same act, which declares "That no road or street shall be laid out, or passed through the land in the County of Philadelphia, bequeathed by the late Stephen Girard for the erection of a college, unless the 191*] same shall be recommended by *the trustees or directors of the said college, and approved by a majority of the select and common councils of the city of Philadelphia." The other act is also full and direct to the same purpose, and provides, "That the select and common councils of the city of Philadelphia, shall be, and they are hereby authorized to provide, by ordinance or otherwise, for the election or appointment of such officers and agents as they may deem essential to the due execution of the duties and trusts enjoined and created by the will of the late Stephen Girard." Here, then, there is a positive authority conferred upon the city authorities to act upon the trusts under the will, and to administer the same through the instrumentality of agents appointed by them. No doubt can then be entertained, that the Legislature meant to affirm the entire validity of those trusts, and the entire competency of the corporation to take and hold the property devised upon the trusts named in the will.

It is true that this is not a judicial decision, and entitled to full weight and confidence as such. But it is a legislative exposition and confirmation of the competency of the corporation to take the property and execute the trusts; and if those trusts were valid in point of law, the Legislature would be estopped thereafter to contest the competency of the corporation to take the property and execute the trusts, either upon a *quo warranto* or any other proceeding, by which it should seek to devest the property, and invest other trustees with the execution of the trusts, upon the ground of any supposed incompetency of the corporation. And if the trusts were in themselves valid in point of law, it is plain that neither the heirs of the testator, nor any other private persons, could have any right to inquire into, or contest the right of the corporation to take the property, or to execute the trusts; but this right would exclusively belong to the State in its sovereign capacity, and in its sole discretion, to inquire into and contest the same by a *quo warranto*, or other proper judicial proceeding. In this view of the matter, the recognition and confirmation of the devises and trusts of the will by the Legislature, are of the highest importance and potency.

We are, then, led directly to the consideration of the question which has been so elaborately argued at the bar, as to the validity of the trusts for the erection of the college, according to the requirements and regulations of the will of the testator. That the trusts are of an eleemosynary nature, and charitable uses in a judicial sense, we entertain no doubt. Not only are charities for the maintenance *and [*192 relief of the poor, sick, and impotent, charities in the sense of the common law, but also donations given for the establishment of colleges, schools, and seminaries of learning, and especially such as are for the education of orphans and poor scholars.

The statute of the 43 of Elizabeth (ch. 4) has been adjudged by the Supreme Court of Pennsylvania not to be in force in that State. But then it has been solemnly and recently adjudged by the same court, in the case of *Zimmerman* v. *Andres* (January Term, 1844), that "it is so considered rather on account of the inapplicability of its regulations as to the modes of proceeding, than in reference to its conservative provisions." "These have been in force here by common usage and constitutional recognition; and not only these, but the more extensive range of charitable uses which chancery supported before that statute and beyond it." Nor is this any new doctrine in that court; for it was formally promulgated in the case of *Witman* v. *Lex* (17 Serg. & Rawle, 88), at a much earlier period (1827).

Several objections have been taken to the present bequest to extract it from the reach of these decisions. In the first place, that the cor-

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poration of the city is incapable by law of taking the donation for such trusts. This objection has been already sufficiently considered. In the next place, it is said, that the beneficiaries who are to receive the benefit of the charity are too uncertain and indefinite to allow the bequest to have any legal effect, and hence the donation is void, and the property results to the heirs. And in support of this argument we are pressed by the argument that charities of such an indefinite nature are not good at the common law (which is admitted on all sides to be the law of Pennsylvania, so far as it is applicable to its institutions and constitutional organization and civil rights and privileges), and hence the charity fails; and the decision of this court in the case of *The Trustees of the Philadelphia Baptist Association* v. *Hart's Executors* (4 Wheat. R., 1), is strongly relied on as fully in point. There are two circumstances which materially distinguish that case from the one now before the court. The first is, that that case arose under the law of Virginia, in which State the statute of 43 Elizabeth (ch. 4) had been expressly and entirely abolished by the Legislature, so that no aid whatsoever could be derived from its provisions to sustain the bequest. The second is, that the donees (the trustees) were an unincorporated association, which had no legal capacity to take and hold the donation in succession for the purposes of the trust, and the beneficiaries also were uncertain **193***] and indefinite. *Both circumstances, therefore, concurred; a donation to trustees incapable of taking, and beneficiaries uncertain and indefinite. The court, upon that occasion, went into an elaborate examination of the doctrine of the common law on the subject of charities, antecedent to and independent of the statute of 43 Elizabeth (ch. 4), for that was still the common law of Virginia. Upon a thorough examination of all the authorities and all the lights (certainly in no small degree shadowy, obscure, and flickering) the court came to the conclusion that, at the common law, no donation to charity could be enforced in chancery, where both of these circumstances, or rather, where both of these defects, occurred. The court said: "We find no *dictum* that charities could be established on such an information (by the Attorney-General) where the conveyance was defective or the donation was so vaguely expressed that the donee, if not a charity, would be incapable of taking." In reviewing the authorities upon that occasion, much reliance was placed upon *Collison's* case (Hobart's Rep., 136; S. C., cited Duke on Charities, by Bridgman, 868, Moore, R., 888), and *Platt* v. *St. John's College*, Cambridge (Finch. Rep., 221; S. C., 1 Cas. in Chan. R., 267; Duke on Charities, by Bridgman, 379, and the case reported in 1 Chancery Cases, 134). But these cases, as also *Flood's* case (Hob. R., 136; S. C., 1 Equity Abridg., 95, pl. 6), turned upon peculiar circumstances. *Collison's* case was upon a devise in 15 Henry VIII., and was before the statute of wills. The other cases were cases where the donees could not take at law, not being properly described, or not having a competent capacity to take, so that there was no legal trustee; and yet the devises were held good as valid appointments under the statute of 43 Elizabeth. The *dictum* of Lord Loughborough in *Attorney-General* v. *Bowyer* (3 Ves., 714, 726), was greatly relied on, where he says: "It does not appear that this court at that period (that is, before the statute of wills) had cognizance upon information for the establishment of charities. Prior to the time of Lord Ellesmere, as far as tradition in times immediately following goes, there were no such informations as this on which I am now sitting (an information to establish a college under a devise before the statute of mortmain of 9 Geo. II., ch. 36); but they made out their case as well as they could at law." In this suggestion Lord Loughborough had under his consideration *Porter's* case (1 Co. Rep., 16). But there a devise was made in 32 Henry VIII., to the testator's wife, upon condition for her to grant the lands, &c., in all convenient speed after his decease *for the maintenance and con- [***194**
tinuance of a certain free school, and almsmen and almswomen forever. The heir entered for and after condition broken, and then conveyed the same lands to Queen Elizabeth in 34 of her reign; and the queen brought an information of intrusion against Porter for the land in the same year. One question was, whether the devise was not to a superstitious use, and therefore void under the Act of 23 Henry VIII. (ch. 2), or whether it was good as a charitable use. And it was resolved by the court that the use was a good charitable use, and that the statute did not extend to it. So that here we have a plain case of a charity held good, before the statute of Elizabeth, upon the ground of the common law, there being a good devisee originally, although the condition was broken and the use was for charitable purposes in some respects indefinite. Now, if there was a good devisee to take as trustee, and the charity was good at the common law, it seems somewhat difficult to say, why, if no legal remedy was adequate to redress it, the Court of Chancery might not enforce the trust, since trusts for other specific purposes, were then, at least when there were designated trustees, within the jurisdiction of chancery.

There are, however, *dicta* of eminent judges (some of which were commented upon in the case of 4 Wheat. R., 1), which do certainly support the doctrine that charitable uses might be enforced in chancery upon the general jurisdiction of the court, independently of the statute of 43 of Elizabeth; and that the jurisdiction had been acted upon not only subsequent but antecedent to that statute. Such was the opinion of Sir Joseph Jekyll in *Eyre* v. *Countess of Shaftsbury* (2 P. Will. R., 102; 2 Equity Abridg., 710, pl. 2), and that of Lord Northington in *Attorney-General* v. *Tancred* (1 Eden, R., 10; S. C., Ambler R., 351; 1 Wm. Black, R., 90), and that of *Lord Chief Justice* Wilmot in his elaborate judgment in *Attorney-General* v. *Lady Downing* (Wilmot's Notes, p. 1, 26), given after an examination of all the leading authorities. Lord Eldon, in the *Attorney-General* v. *The Skinner's Company*, (2 Russ. R., 407), intimates in clear terms his doubts whether the jurisdiction of chancery over charities arose solely under the statute of Elizabeth; suggesting that the statute has perhaps been construed with reference to a supposed antecedent jurisdiction of the court, by which void devises to charitable purposes were sustained. Sir John Leach, in the case of a

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charitable use before the statute of Elizabeth (*Attorney-General* v. *The Master of Brentwood School*, 1 Mylne & Keen, 376), said: "Although 195*] at this time no legal devise could be made to a corporation for a charitable use, yet lands so devised were in equity bound by a trust for the charity, which a court of equity would then execute." In point of fact the charity was so decreed in that very case, in the 13th year of Elizabeth. But what is still more important is the declaration of Lord Redesdale, a great judge in equity, in *The Attorney-General* v. *The Mayor of Dublin* (1 Bligh. R., 312, 347, 1827), where he says: "We are referred to the statute of Elizabeth with respect to charitable uses, as creating a new law upon the subject of charitable uses. That statute only created a new jurisdiction; it created no new law. It created a new and ancillary jurisdiction, a jurisdiction created by commission, &c.; but the proceedings of that commission were made subject to appeal to the Lord Chancellor, and he might reverse or affirm what they had done, or make such order as he might think fit for reserving the controlling jurisdiction of the Court of Chancery as it existed before the passing of that statute; and there can be no doubt that by information by the Attorney-General the same thing might be done." He then adds, "the right which the Attorney-General has to file an information, is a right of prerogative. The king, as *parens patriæ*, has a right, by his proper officer, to call upon the several courts of justice, according to the nature of their several jurisdictions, to see that right is done to his subjects who are incompetent to act for themselves, as in the case of charities and other cases." So that Lord Redesdale maintains the jurisdiction in the broadest terms, as founded in the inherent jurisdiction of chancery independently of the statute of 43 Elizabeth. In addition to these dicta and doctrines, there is the very recent case of *The Incorporated Society* v. *Richards* (1 Drury & Warren R., 258), where Lord Chancellor Sugden, in a very masterly judgment, upon a full survey of all the authorities, and where the point was directly before him, held the same doctrine as Lord Redesdale, and expressly decided that there is an inherent jurisdiction in equity in cases of charity, and that charity is one of those objects for which a court of equity has at all times interfered to make good that which at law was an illegal or informal gift; and that cases of charity in courts of equity in England were valid independently of and previous to the statute of Elizabeth.

Mr. Justice Baldwin, in the case of *The will of Sarah Zane*, which was cited at the bar and pronounced at April Term of the Circuit Court, in 1833, after very extensive and learned researches into the ancient English authorities and statutes, arrived at the same conclusion 196*] in which the District Judge, the late lamented Judge Hopkinson, concurred; and that opinion has a more pointed bearing upon the present case, since it included a full review of the Pennsylvania laws and doctrines on the subject of charities.

But very strong additional light has been thrown upon this subject by the recent publications of the commissioners on the public records in England, which contain a very curious and interesting collection of the chancery records in the reign of Queen Elizabeth, and in the earlier reigns. Among these are found many cases in which the Court of Chancery entertained jurisdiction over charities long before the statute of 43 Elizabeth; and some fifty of these cases, extracted from the printed calendars, have been laid before us. They establish in the most satisfactory and conclusive manner that cases of charities where there were trustees appointed for general and indefinite charities, as well as for specific charities, were familiarly known to, and acted upon, and enforced in the Court of Chancery. In some of these cases the charities were not only of an uncertain and indefinite nature, but, as far as we can gather from the imperfect statement in the printed records, they were also cases where there were either no trustees appointed, or the trustees were not competent to take. These records, therefore, do in a remarkable manner confirm the opinions of Sir Joseph Jekyll, Lord Northington, Lord Chief Justice Wilmot, Lord Redesdale, and Lord Chancellor Sugden. Whatever doubts, therefore, might properly be entertained upon the subject when the case of *The Trustees of the Philadelphia Baptist Association* v. *Hart's Executors* (4 Wheat., 1) was before this court (1819), those doubts are entirely removed by the late and more satisfactory sources of information to which we have alluded.

If, then, this be the true state of the common law on the subject of charities, it would, upon the general principal already suggested, be a part of the common law of Pennsylvania. It would be no answer to say, that if so it was dormant, and that no court possessing equity powers now exists, or has existed in Pennsylvania, capable of enforcing such trusts. The trusts would nevertheless be valid in point of law; and remedies may from time to time be applied by the Legislature to supply the defects. It is no proof of the non-existence of equitable rights that there exists no adequate legal remedy to enforce them. They may during the time slumber, but they are not dead.

But the very point of the positive existence of the law of charities in Pennsylvania, has been (as already stated) fully recognized and *enforced in the State courts of Penn- [*197 sylvania, as far as their remedial process would enable these courts to act. This is abundantly established in the cases cited at the bar, and especially by the case of *Witman* v. *Lex* (17 Serg. & Rawle, 88), and that of *Sarah Zane's Will*, before *Mr. Justice* Baldwin and *Judge* Hopkinson. In the former case, the court said "that it is immaterial whether the person to take be *in esse* or not, or whether the legatee were at the time of the bequest a corporation capable of taking or not, or how uncertain the objects may be, provided there be a discretionary power vested anywhere over the application of the testator's bounty to those objects; or whether their corporate designation be mistaken. If the intention sufficiently appears in the bequest, it would be valid." In the latter case certain bequests given by the will of Mrs. Zane to the yearly meeting of Friends in Philadelphia, an unincorporated association, for purposes of general and indefinite charity, were, as well as other bequests of a kindred

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nature, held to be good and valid; and were enforced accordingly. The case, then, according to our judgment, is completely closed in by the principles and authorities already mentioned, and is that of a valid charity in Pennsylvania, unless it is rendered void by the remaining objection which has been taken to it.

This objection is that the foundation of the college upon the principles and exclusions prescribed by the testator, is derogatory and hostile to the Christian religion, and so is void, as being against the common law and public policy of Pennsylvania; and this for two reasons: First, because of the exclusion of all ecclesiastics, missionaries, and ministers of any sect from holding or exercising any station or duty in the college, or even visiting the same: and second, because it limits the instruction to be given to the scholars to pure morality, and general benevolence, and a love of truth, sobriety, and industry, thereby excluding, by implication, all instruction in the Christian religion.

In considering this objection, the court are not at liberty to travel out of the record in order to ascertain what were the private religious opinions of the testator (of which, indeed, we can know nothing), nor to consider whether the scheme of education by him prescribed, is such as we ourselves should approve, or as is best adapted to accomplish the great aims and ends of education. Nor are we at liberty to look at general considerations of the supposed public interests and policy of Pennsylvania upon this subject, beyond what its constitution and laws and judicial decisions made known to **198*]** us. The question, what *is the public policy of a State, and what is contrary to it, if inquired into beyond these limits, will be found to be one of great vagueness and uncertainty, and to involve discussions which scarcely come within the range of judicial duty and functions, and upon which men may and will complexionally differ; above all, when that topic is connected with religious polity, in a country composed of such a variety of religious sects as our country, it is impossible not to feel that it would be attended with almost insuperable difficulties, and involve differences of opinion almost endless in their variety. We disclaim any right to enter upon such examinations, beyond what the State constitutions, and laws, and decisions necessarily bring before us.

It is also said, and truly, that the Christian religion is a part of the common law of Pennsylvania. But this proposition is to be received with its appropriate qualifications, and in connection with the bill of rights of that State, as found in its constitution of government. The constitution of 1790 (and the like provision will, in substance, be found in the constitution of 1776, and in the existing constitution of 1838) expressly declares, "That all men have a natural and indefeasible right to worship Almighty God according to the dictates of their own consciences; no man can of right be compelled to attend, erect, or support any place of worship, or to maintain any ministry against his consent; no human authority can, in any case whatever, control or interfere with the rights of conscience; and no preference shall ever be given by law to any religious establishments or modes of worship." Language more comprehensive for the complete protection of every variety of religious opinion could scarcely be used; and it must have been intended to extend equally to all sects, whether they believed in Christianity or not, and whether they were Jews or infidels. So that we are compelled to admit that although Christianity be a part of the common law of the State, yet it is so in this qualified sense, that its divine origin and truth are admitted, and therefore it is not to be maliciously and openly reviled and blasphemed against, to the annoyance of believers or the injury of the public. Such was the doctrine of the Supreme Court of Pennsylvania in *Updegraff* v. *The Commonwealth* (11 Serg. & Rawle, 394).

It is unnecessary for us, however, to consider what would be the legal effect of a devise in Pennsylvania for the establishment of a school or college, for the propagation of Judaism, or Deism, or any other form of infidelity. Such a case is not to be presumed to exist in a Christian country; and therefore it must be made out by clear *and indisputable proof. [***199** Remote inferences, or possible results, or speculative tendencies, are not to be drawn or adopted for such purposes. There must be plain, positive, and express provisions, demonstrating not only that Christianity is not to be taught; but that it is to be impugned or repudiated.

Now, in the present case, there is no pretense to say that any such positive or express provisions exist, or are even shadowed forth in the will. The testator does not say that Christianity shall not be taught in the college. But only that no ecclesiastic of any sect shall hold or exercise any station or duty in the college. Suppose, instead of this, he had said that no person but a layman shall be an instructor or officer or visitor in the college, what legal objection could have been made to such a restriction? And yet the actual prohibition is in effect the same in substance. But it is asked: why are ecclesiastics excluded, if it is not because they are the stated and appropriate preachers of Christianity? The answer may be given in the very words of the testator. "In making this restriction," says he, "I do not mean to cast any reflection upon any sect or person whatsoever. But as there is such a multitude of sects and such a diversity of opinion amongst them, I desire to keep the tender minds of the orphans, who are to derive advantage from this bequest, free from the excitement which clashing doctrines and sectarian controversy are so apt to produce." Here, then, we have the reason given; and the question is not, whether it is satisfactory to us or not; nor whether the history of religion does or does not justify such a sweeping statement; but the question is, whether the exclusion be not such as the testator had a right, consistently with the laws of Pennsylvania, to maintain, upon his own notions of religious instruction. Suppose the testator had excluded all religious instructors but Catholics, or Quakers, or Swedenborgians; or, to put a stronger case, he had excluded all religious instructors but Jews, would the bequest have been void on that account? Suppose he had excluded all lawyers, or all physicians, or all merchants from being instructors

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or visitors, would the prohibition have been fatal to the bequest? The truth is, that in cases of this sort, it is extremely difficult to draw any just and satisfactory line of distinction in a free country as to the qualifications or disqualifications which may be insisted upon by the donor of a charity as to those who shall administer or partake of his bounty.

But the objection itself assumes the proposi-
200*] tion that Christianity *is not to be taught, because ecclesiastics are not to be instructors or officers. But this is by no means a necessary or legitimate inference from the premises. Why may not a layman instruct in the general principles of Christianity as well as ecclesiastics. There is no restriction as to the religious opinions of the instructors and officers. They may be, and doubtless, under the auspices of the city government, they will always be, men, not only distinguished for learning and talents, but for piety and elevated virtue, and holy lives and characters. And we cannot overlook the blessings which such men by their conduct, as well as their instructions, may, nay must impart to their youthful pupils. Why may not the Bible, and especially the New Testament, without note or comment, be read and taught as a divine revelation in the college—its general precepts expounded, its evidences explained, and its glorious principles of morality inculcated? What is there to prevent a work, not sectarian, upon the general evidences of Christianity, from being read and taught in the college by lay teachers? Certainly there is nothing in the will that proscribes such studies. Above all, the the testator positively enjoins, "that all the instructors and teachers in the college shall take pains to instil into the minds of the scholars the purest principles of morality, so that on their entrance into active life they may from inclination and habit evince benevolence towards their fellow-creatures, and a love of truth, sobriety, and industry, adopting at the same time such religious tenets as their matured reason may enable them to prefer." Now, it may well be asked, what is there in all this, which is positively enjoined, inconsistent with the spirit or truths of Christianity? Are not these truths all taught by Christianity, although it teaches much more? Where can the purest principles of morality be learned so clearly or so perfectly as from the New Testament? Where are benevolence, the love of truth, sobriety, and industry, so powerfully and irresistibly inculcated as in the sacred volume? The testator has not said how these great principles are to be taught, or by whom, except it be by laymen, nor what books are to be used to explain or enforce them. All that we can gather from his language is, that he desired to exclude sectarians and sectarianism from the college, leaving the instructors and officers free to teach the purest morality, the love of truth, sobriety, and industry, by all appropriate means; and of course including the best, the surest, and the most impressive. The objection, then, in this view, goes to this,—
201*] either that the testator has totally omitted to provide for religious instruction in his *scheme of education (which, from what has been already said, is an inadmissible interpretation), or that it includes but partial and imperfect instruction in those truths. In either view can it be truly said that it contravenes the known law of Pennsylvania upon the subject of charities, or is not allowable under the article of the bill of rights already cited? Is an omission to provide for instruction in Christianity in any scheme of school or college education a fatal defect, which avoids it according to the law of Pennsylvania? If the instruction provided for is incomplete and imperfect, is it equally fatal? These questions are propounded, because we are not aware that anything exists in the constitution or laws of Pennsylvania, or the judicial decisions of its tribunals, which would justify us in pronouncing that such defects would be so fatal. Let us take the case of a charitable donation to teach the poor orphans reading, writing, arithmetic, geography, and navigation, and excluding all other studies and instruction; would the donation be void, as a charity in Pennsylvania, as being deemed derogatory to Christianity? Hitherto it has been supposed that a charity for the instruction of the poor might be good and valid in England even if it did not go beyond the establishment of a grammar school. And in America, it has been thought, in the absence of any express legal prohibitions, that the donor might select the studies, as well as the classes of persons, who were to receive his bounty without being compellable to make religious instruction a necessary part of those studies. It has hitherto been thought sufficient, if he does not require anything to be taught inconsistent with Christianity.

Looking to the objection, therefore, in a mere juridical view, which is the only one in which we are at liberty to consider it, we are satisfied that there is nothing in the devise establishing the college, or in the regulations and restrictions contained therein, which are inconsistent with the Christian religion, or are opposed to any known policy of the State of Pennsylvania.

This view of the whole matter renders it unnecessary for us to examine the other and remaining question, to whom, if the devise were void, the property would belong, whether it would fall into the residue of the estate devised to the city, or become a resulting trust for the heirs-at-law.

Upon the whole, it is the unanimous opinion of the court, that the decree of the Circuit Court of Pennsylvania dismissing the bill, ought to be affirmed, and it is accordingly affirmed, with costs.

*ORDER. [*202

This cause came on to be heard on the transcript of the record from the Circuit Court of the United States for the Eastern District of Pennsylvania, and was argued by counsel; on consideration whereof, it is now here ordered, adjudged and decreed by this court, that the decree of the said Circuit Court in this cause be, and the same is hereby affirmed, with costs.

Cited—6 How., 322; 9 How., 80; 17 How., 384, 397, 398; 24 How., 505; 7 Wall., 12, 14; 17 Wall., 334; 5 Otto, 309; 11 Otto, 366; Taney, 359, 362; 1 Wall., Jun., 216; 3 Woods, 459, 460, 477.

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JOHN L. CHAPMAN, *Plaintiff*,

v.

HENRY H. FORSYTH AND THOMAS LIMERICK, Merchants and Copartners, under and by the firm, name and style of FORSYTH & LIMERICK, *Defendants*.

Bankrupt Act—fiduciary debts contracted before passage of, no objection to discharge for other debts—omission to state fiduciary nature of debt in schedule will invalidate discharge—debt proved and dividend paid, estoppel—recovery of fiduciary debt after discharge.

Under the late Bankrupt Act of the United States, the existence of a fiduciary debt, contracted before the passage of the act, constitutes no objection to the discharge of the debtor from other debts.

A factor, who receives the money of his principal, is not a fiduciary within the meaning of the act.

A bankrupt is bound to state, upon his schedule, the nature of a debt if it be a fiduciary one. Should he omit to do so, he would be guilty of a fraud, and his discharge will not avail him; but if a creditor, in such case, proves his debt and receives a dividend from the estate, he is estopped from afterwards saying that his debt was not within the law.

But if the fiduciary creditor does not prove his debt, he may recover it afterwards, from the discharged bankrupt, by showing that it was within the exceptions of the act.

THIS case came up on a certificate of division from the Circuit Court of the United States for the District of Kentucky.

The record was as follows:

The following statement of questions and points of law which arose in this case, and the adjournment thereof into the Supreme Court of the United States for decision was ordered to be entered, to wit:

"This was an action of *assumpsit* for the proceeds of 150 bales of cotton, shipped to and sold by defendants, as the property of the plaintiff, the defendant having been a factor," &c.

The defendant, Forsyth, pleaded he had been duly discharged as a bankrupt, on his own voluntary petition.

To this the plaintiff replied; the replication **203*]** was demurred to, and *upon the hearing and argument of the demurrer, which presented the whole case, the following questions of law arose, and on which the judges were opposed in opinion:

1st. Could the defendant be discharged, as a bankrupt, from any part of his debts, on his own petition, when he was indebted, in a fiduciary capacity, in part, within the exception in the first section of the bankrupt law; that is, were all persons indebted excluded, that held and owed moneys in the capacity of trustees (as a class), from the benefit of the act, although they owed other debts besides the moneys held in trust?

2. Is a commission merchant and factor (who sells for others), or indebted in a fiduciary capacity, within the act, provided he withholds the money received for property sold by him, and which property was sold on account of the owner, and the money received on the owner's account?

3d. Whether, when the decree of discharge, and the regular certificate of being a bankrupt, have been obtained without contest in the District Court, they are conclusive and binding on all persons named as creditors by the bankrupt in his petition and list of creditors; and whether a creditor, who did not prove his debt, and which the bankrupt owed said creditors in a fiduciary capacity, can come into court, and sue the bankrupt for such fiduciary debt, notwithstanding the decree of discharge and certificate, the debt having been set forth in the petition and list as an ordinary debt, not due in a fiduciary character.

Which divisions of opinion, at the request of the plaintiff, are certified to the Supreme Court of the United States, for their opinion and certificate on the three questions on which the judges of this court were opposed in opinion.

The case was submitted upon the following printed arguments by *Mr. Morehead* for the plaintiff, and *Mr. Loughborough* for the defendant:

This was an action of *assumpsit* for the proceeds of 150 bales of cotton, shipped to and sold by the defendant, as the property of the plaintiff, the defendant having been a factor, &c.

Upon a demurrer to the replication to the plea of the defendant, Forsyth, three questions arose:

1. On the first question the counsel for Chapman does not propose to submit argument. The only authorities of which he is aware, that bear materially on the point, are the decisions on the circuits, and with them the court is familiar.

*2. On the second question, the under- [**204** signed would remark, that the words of the statute, "while acting in any other fiduciary capacity," would seem to have been inserted expressly to embrace all other cases of trust besides those specifically mentioned. A factor with goods, and money in his hands belonging to his principal, is in estimation of law, a trustee. His relation with the principal is a fiduciary relation. The language of the act is extremely comprehensive, and it is contended that the case under consideration is within the equity of it.

3. The opinion of the late *Judge* Thompson in the matter of *Brown*, settles that a fiduciary creditor may or may not, at his election, come in under the bankruptcy, and if he declines to do so, his debt is not discharged. So at least the undersigned understands the opinion as given in the public prints, not having seen any authoritative report of the case.

It is submitted that such is the true doctrine on the subject.

J. T. MOREHEAD, for Chapman.

The questions presented in this case arise under the late bankrupt law of the United States.

1. The first has already been considered in many of the circuits, and several of the members of this court have pronounced opinions upon it.

It is contended by the counsel of *Forsyth et al.*, that the exception in the first section of the Bankrupt Act, in reference to fiduciary debts, is of such debts, not of the persons owing them, if they owe other debts which have not arisen from a breach of trust since the passage of the act. In this case the debt arose prior

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to the passage of the act. This has been held to be the correct exposition of the act in the Ohio circuit (*Matter of Lord*, 5 Law Reporter, 258), in the New York circuit by the late Judge Thompson in *The Matter of Brown* (5 Law Reporter, 258), and in the Massachusetts circuit, in *The Matter of Tebbetts* (5 Law Reporter, 259.) Decisions have been made in other circuits, of which the counsel has not seen reports in print.

This question has doubtless been maturely considered by all the members of this court, and the counsel for Forsyth would not hope to exhibit any new views of the subject.

2. The debt of a commercial factor to his principal is not an excepted debt. These factors are of various kinds, and the case 205*] *does not state whether the factor, respecting whom the question is asked, acted under an ordinary or a *del credere* commission; a point, perhaps, worthy of consideration.

The excepted debt is one which has arisen "in consequence of a defalcation as a public officer, or as executor, administrator, guardian, or trustee, or while acting in any other fiduciary capacity." These expressions are not appropriate to commercial affairs. "Defalcation" is ordinarily used to express the misapplication of the funds with which he is intrusted by a public officer, or some express trustee. Does a commission merchant act in any other such fiduciary capacity as is meant by the act? The term fiduciary is a legal, not a commercial one. It has a comprehensive import, which may be given to it without including a mercantile debt; and, according to the course of trade in this country, a very common mercantile debt.

A very large proportion of the debts which have been discharged by the courts under the bankrupt law, are the debts of factors to their principals. Millions have been so discharged, which will be revived, if this court shall decide them to be fiduciary, within the meaning of the act.

3. Upon the last point it is contended that the proceedings in bankruptcy in the District Court, when in conformity to the act, are a suit, the decision of which by the decree of bankruptcy, and the discharge of the applicant, is conclusive upon the parties thereto, who are the petitioner himself and at least all such of his creditors as are named in his list, and to whom notice is given.

Such is the nature of the proceedings authorized by the act. Process is to be served upon the creditor, or a notice in writing sent to him. In effect, the proceeding is a suit by the debtor against his creditors for a discharge.

It was not necessary for the applicant to have stated in his petition the nature or origin of the debt. It was enough that he stated, as in this case, the name of his creditor, his residence, and the amount due to him. See the first section of the act.

What is a fiduciary debt may, in a given case, be a matter of doubt. This contest shows it. Shall an applicant, acting upon his best lights, stating the name and residence of his creditor, and the sum due to him, and expressly summoning him in, to contest, if he chooses, be prejudiced because he has not denominated the debt fiduciary, when he and his counsel did not deem it to be so? Shall the creditor thus notified lie by, and, after the adjudication of the District *Court, come forward with the ob- [*206 jections which he should have made there?

The certificate of the District Court is made conclusive everywhere, except in cases where there has been fraud, or the willful concealment of property. Fraud is not suggested here. The expressions of the act in conferring jurisdiction upon the District Court, and in declaring the effect and conclusiveness of its adjudications, are most broad.

The District Court had jurisdiction to grant or refuse the discharge of Forsyth. The exercise of this jurisdiction involved the consideration of the question, whether the existence of the debt to Chapman was a bar to the discharge. Contest might have been made in the District Court on that ground, and, it is contended, should have been made there.

The decree of discharge having been made by the District Court, is it not to be held that the questions now made have been already decided between these parties, by a court of competent jurisdiction? P. S. LOUGHBOROUGH.

Mr. Justice M'LEAN delivered the opinion of the court:

This was an action of *assumpsit* for the proceeds of 150 bales of cotton, shipped to and sold by defendants as the property of the plaintiff, the defendants being factors. The defendant, Forsyth, pleaded that he had been duly discharged as a bankrupt, on his own voluntary petition. A replication was filed, to which there was a demurrer.

The suit was brought in the Circuit Court for the District of Kentucky; and on the argument of the demurrer the following points were made, on which the opinions of the judges were opposed; and at the request of the parties the points were certified to this court.

1. "Could the defendant be discharged as a bankrupt from any part of his debts on his own petition, when he was indebted in a fiduciary capacity, in part, within the exception in the first section of the Bankrupt Law; that is, were all persons indebted, excluded, that held and owed moneys in the capacity of trustees (as a class), from the benefit of the act, although they owed other debts besides the moneys held in trust?

2. "Is a commission merchant and factor, who sells for others, indebted in a fiduciary capacity within the act, provided he withholds the money received for property sold by him, and which property *was sold on ac- [*207 count of the owner, and the money received on the owners' account.

3. "Whether, when the decree of discharge and the regular certificate of being a bankrupt, have been obtained without contest in the District Court, they are conclusive and binding on all persons named as creditors by the bankrupt in his petition and list of creditors; and whether a creditor, who did not prove his debt, and to whom the bankrupt was indebted in a fiduciary capacity, can come into court and sue the bankrupt for such fiduciary debt, notwithstanding the decree of discharge and certificate, the debt having been set forth in the petition and list as an ordinary debt, not due in a fiduciary character."

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These questions are far less important than they would have been had the bankrupt law not been repealed. But they are still important as affecting a large class of citizens, and to a large amount.

The first section of the bankrupt law provides that, "all persons whatsoever, residing in any State, territory, or district of the United States, owing debts which shall not have been created in consequence of the defalcation as a public officer, or as executor, administrator, guardian, or trustee, or while acting in any other fiduciary capacity," shall, on a compliance with the requisites of the bankrupt law, be entitled to a discharge under it.

The debts here specified are excepted from the operation of the act. This exception applies to the debts and not to the person, if he owe other debts. The language is, all persons owing debts, not of the description named, may apply, &c. Now, an indebtment by an individual, not created as above stated, is within the provisions of the act, although he may be under fiduciary obligation. This is the natural import of the provision, and it is sustained by reason. It was proper that Congress should not relieve from debts which had been incurred by a violation of good faith, whilst, from other obligations a full discharge to the same person should be given. But, to have refused a discharge because the individual owed a fiduciary debt, would, by withholding a general privilege, have superadded a penalty to a past transaction without notice. That this consideration influenced the Legislature is shown by the fourth section, which provides, "that no person who after the passage of the act shall apply trust funds to his own use," shall be discharged. Now, if a person who owed a fiduciary debt was not entitled to a discharge from other debts by the first section, this provision was useless. A misapplica-
208*] tion *of trust funds, as declared, covers the enumerated cases in the first section. But, whilst the first section only withholds from the jurisdiction of the Bankrupt Court fiduciary debts, the fourth declares that if such debts have been contracted subsequent to the law, the individuals shall not be discharged. From this provision the strongest implication arises, that if the fiduciary debts were contracted before the passing of the act, the petitioner would, for other obligations, be entitled to a discharge. Viewing, then, the first and fourth sections of the act, we are of the opinion that fiduciary debts, contracted before the passage of the act, constitute no objection to a discharge of the same person for other debts.

The second point is, whether a factor, who retains the money of his principal, is a fiduciary debtor within the act.

If the act embrace such a debt, it will be difficult to limit its application. It must include all debts arising from agencies; and indeed all cases where the law implies an obligation from the trust reposed in the debtor. Such a construction would have left but few debts on which the law could operate. In almost all the commercial transactions of the country, confidence is reposed in the punctuality and integrity of the debtor, and a violation of these is, in a commercial sense, a disregard of a trust. But this is not the relation spoken of in the first section of the act.

The cases enumerated, "the defalcation of a public officer," "executor," "administrator," "guardian," or "trustee," are not cases of implied, but special trusts, and the "other fiduciary capacity" mentioned, must mean the same class of trusts. The act speaks of technical trusts, and not those which the laws implies from the contract. A factor is not, therefore, within the act.

This view is strengthened, and, indeed, made conclusive, by the provision of the fourth section, which declares that no "merchant, banker, factor, broker, underwriter, or marine insurer," shall be entitled to a discharge, "who has not kept proper books of accounts." In answer to the second question, then, we say, that a factor, who owes his principal money received on the sale of his goods, is not a fiduciary debtor within the meaning of the act.

The answer of the first question leads, necessarily, to the answer of the third. For if fiduciary debts are not within the act, a discharge can in no respect affect the interest of the fiduciary creditor. Without his consent, it is clear the Bankrupt Court can take no jurisdiction of his debt. And, although the bankrupt may include the *debt in his schedule, and the [*209 discharge may be general, yet as the law gave the court no jurisdiction over the debt, it is not discharged.

The fourth section provides, "that the discharge and certificate, when duly granted, shall, in all courts of justice, be deemed a full and complete discharge of all debts, contracts, and other engagements of such bankrupt, which are provable under the act, and may be pleaded as a complete bar," &c.

Now, it is supposed that, if a fiduciary debt, within the act, be placed upon his schedule by the bankrupt, that it is incumbent on the creditor to preserve his right, by showing, before the Bankrupt Court, the nature of his debt. And that, consequently, should he fail to appear after notice, he will be barred, as other creditors, by the discharge.

The bankrupt is bound to show on his schedule the nature of his debts, at least so far as to enable the court to take jurisdiction of them. If, for instance, he owe a debt as executor, and he state it on his schedule as an ordinary debt, he commits a fraud on the law, and the discharge cannot avail him. If, in this respect, he suppress the truth or state falsehood, he is guilty of fraud, and this may be shown against his discharge.

But as the discharge operates only on debts, contracts, &c., which are provable under the act, it is said that consent cannot include fiduciary debts.

Such debts, without the assent of the creditor, are clearly not within the act. But if his debt shall be found on the schedule, and he not only proves it but receives his proportionate share of the dividend, he is estopped from saying that it was not within the law. He is a privileged creditor, and is not bound by the bankrupt law; but he may waive his privilege. As a creditor, he has a right to come into the Bankrupt Court and claim his dividend. He does not establish his claim as a fiduciary one, but as a debt "provable within the statute." And having done this, he can never controvert the discharge.

From these considerations, we are lead to say,

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in answer to the third question, that, unless a fiduciary creditor shall come into the Bankrupt Court, prove his debt, &c., he is not bound by the discharge, but may sue for and recover his debt from the discharged bankrupt, by showing that it was within one of the exceptions of the first section.

Cited—5 Otto, 708; 1 Bank. Reg., 32; 2 Bank. Reg., 35; 3 Bank. Reg., 464; 5 Bank. Reg., 351, 352; 8 Bank. Reg., 314-316; 1 Ben., 332; 5 Biss., 327-329; 6 Blatchf., 304; 17 Blatchf., 105, 321; 18 Blatchf., 25, 536.

210*] *PETER HARMONY ET AL., Claimants of the Brig Malek Adhel,

v.

THE UNITED STATES.

THE UNITED STATES

v.

THE CARGO OF THE BRIG MALEK ADHEL.

Act to protect commerce and punish piracy—seizure, detention and condemnation of vessel under—what acts justify—proceeds of sale—distribution in discretion of court—the word "piratical" defined—condemnation of cargo not justified under the act—costs in admiralty in discretion of court—incidental notice of on appeal—where owners of cargo innocent, costs thrown on vessel.

Under the Act of Congress of March 3, 1819 (ch. 76, 200), to protect the commerce of the United States and punish the crime of piracy, any armed vessel may be seized and brought in, or any vessel the crew whereof may be armed, and which shall have attempted or committed any piratical agression, search, restraint, depredation, or seizure upon any vessel; and such offending vessel may be condemned and sold, the proceeds whereof to be distributed between the United States and the captors, at the discretion of the court.

It is no matter whether the vessel be armed for offense or defense, provided she commits the unlawful acts specified.

To bring a vessel within the act it is not necessary that there should be either actual plunder or an intent to plunder; if the act be committed from hatred, or an abuse of power, or a spirit of mischief, it is sufficient.

The word "piratical" in the act is not to be limited in its construction to such acts as by the laws of nations are denominated piracy, but includes such as pirates are in the habit of committing.

A piratical aggression, search, restraint, or seizure is as much within the act as a piratical depredation.

The innocence or ignorance on the part of the owner of these prohibited acts, will not exempt the vessel from condemnation.

The condemnation of the cargo is not authorized by the Act of 1819.

Neither does the law of nations require the condemnation of the cargo for petty offenses, unless the owner thereof co-operates in, and authorizes the unlawful act. An exception exists in the enforcement of belligerent rights.

Costs in the admiralty are in the sound discretion of the court; and no appellate court should interfere with that discretion, unless under peculiar circumstances.

Although not *per se* the proper subject of an appeal, yet they can be taken notice of incidentally, as connected with the principal decree.

In the present case, as the innocence of the owners was established, it was proper to throw the costs upon the vessel, which was condemned, to the exclusion of the cargo, which was liberated.

THIS case came up by appeal from the Circuit Court of the United States for the District of Maryland, having originated in the District Court.

On or about the 30th of June, 1840, the brig Malek Adhel sailed from New York bound to Guayamas, in California, under the command of Joseph Nunez. The vessel was armed with a cannon and *some ammunition, and [*211 there were also pistols and daggers on board. It appeared from the evidence, which is hereinafter particularly set forth, that she stopped several vessels upon the high seas, and at length put into the port of Fayal, where she remained for some days. Departing thence, she arrived at Bahia, in Brazil, about the twenty-first of August, 1840, where she was seized by the Enterprise, a vessel of war belonging to the United States, and sent into the port of Baltimore for adjudication. A libel was there filed against vessel and cargo upon five counts, all founded upon the Act of Congress to protect the commerce of the United States, and to punish the crime of piracy, passed on the 3d of March, 1819 (ch. 76, 200.) Two other counts were afterwards added in an amended information, charging the acts complained of to have been done in violation of the laws of nations.

A claim was filed for the brig, her tackle, apparel, furniture, and cargo, on behalf of

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NOTE.—*As to pirates and piracy, definition of, and who are liable for*, see note to United States v. Palmer, 3 Wheat., 610.

NOTE.—*Admiralty.*

Who is liable for necessaries and supplies for, and repairs to a ship, and for the conduct and acts of the master and mariners.

There is no doubt that the owner is personally liable for necessaries, and repairs made to a ship, by order of the master. Webster v. Seekamp, 2 Barn. & Ald., 352; Gracie v. Palmer, 8 Wheat., 605; The Nathaniel Hooper, 3 Sumn., 576; Hoole v. Grovernman, 1 Cranch, 214; McIntyre v. Brown, 1 Johns., 229; Kleine v. Catara, 2 Gall., 61, 76.

The owner is, of course, liable unless the credit is given to others. So, the captain is liable if he orders the repairs, unless the credit is given to the owner. Emery v. Cobb, 5 Carr. & Payne, 358; Cox v. Reid, 1 *Id.*, 602.

For necessary supplies to a vessel, the owner, master and charterer are all liable; and the remedy against each remains good, unless credit be given to one exclusively. Henshaw v. Rollins, 5 Miller, La., 295.

The owner, who has the mere legal title, but not the control and management of the vessel, or the right to receive her freight and earnings, is not responsible for supplies and necessaries. Duff v. Bayard, 4 Watts. & Serg., 240; Vallego v. Wheeler, Cowp., 143; Hallett v. Columbian Ins. Co., 8 Johns., 209; Cheriot v. Barker, 2 Johns., 346; Reynolds v. Toppan, 15 Mass., 370.

Who is to be regarded as contracting party, and owner, *pro hac vice*, for the voyage. Briggs v. Williamson, 7 Barn. & Cress., 30; Jennings v. Griffiths, Ryan & Moody, 43; Reeve v. Davis, 1 Adolph. & Ellis, 312; Wendover v. Hogeboom, 7 Johns., 308; Leonard v. Huntington, 15 *Id.*, 298; Thorn v. Hicks, 7 Cow., 697; H. Black., 114, 117 (n); 7 Term, 306; Dean v. M'Ghie, 4 Bing., 45; S. C., 12 B. Moore, 185; Ship Blaireau, 2 Cranch, 240; Mercadier v. Chesapeake Ins. Co., 8 Cranch, 39; Taggand v. Loring, 16 Mass., 336; Oliver v. Green, 3 Mass., 133; Fletcher v. Braddick, 5 Bos. & Pull., 182.

If the purchaser of a vessel has a right to control the vessel and receive her earnings, he will be liable for supplies, though the vendor had the possession, and actually receives the earnings. Flanders v. Merritt, 3 Barb., 201.

The person owning the beneficial interest, though not the legal title, will be liable. Strader v. Lambeth, 7 B. Mon., 589.

The weight of our American decisions has been in favor of the position, that a mortgagee

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Peter Harmony, Leonardo Swarez, and Bernard Graham.

The evidence produced upon the trial in the District Court will be recapitulated when the proceedings before the Circuit Court are stated; under which evidence the case was argued, together with the following admission of the proctors for the United States:

United States v. The Malek Adhel and cargo. } District Court, U. S.

The proctors of the United States in this case admit, for the purposes of this case, and to have the same effect as if fully proven, that the claimants were, when the Malek Adhel left New York, the exclusive owners of that vessel, and were such owners during the period the acts stated in the information are alleged by the United States to have been done. And they also admit that the claimants never contemplated or authorized said acts. They further admit that the equipments of the said vessel when she left New York, and ever afterwards, were the usual equipments of a vessel of her class, on an innocent commercial voyage from that port to Guayamas, the voyage stated in the evidence in this case. NATH'L WILLIAMS,
and REVERDY JOHNSON,
Proctors for the United States.

BALTIMORE, 15 June, 1841.

The District Court condemned the vessel, restored the cargo to the claimants, apportioned a part of the costs upon the claimants, and directed the residue to be deducted from the **212*]** proceeds of the property *condemned. Both parties appealed from this decree; the claimants from the condemnation of the vessel, and the United States from that part of it which restored the cargo.

The cause came before the Circuit Court upon the evidence which had been given before the District Court (reduced to writing by consent), and upon additional evidence which is set forth in the following deposition. It was corroborated in its main points by the evidence of two other persons.

John Myers, a witness, produced and examined on the part of the United States, deposes as follows:

That he was not first mate when he joined the Malek Adhel; Peterson was first mate; witness joined her 23d June, 1840. On Friday, afterwards, Peterson came on board, hauled the vessel out into the stream. On Sunday, Captain Nunez told Peterson to go on shore on account of a quarrel; Peterson was intoxicated; witness was then made first mate; witness told the captain that one of the crew (W. R. Crocker) was competent to go out as second mate, and he was then promoted to that office. On Tuesday, 30th June, took pilot, got under weigh about ten or eleven o'clock that day, and went to sea; discharged the pilot on afternoon of same day; fourth or fifth day out, captain said the chronometer wouldn't speak, had forgotten to wind it up; on the sixth of July, saw a vessel standing to the northward, and we to the eastward, five or six miles apart; ran down to the vessel and hove maintopsail back; ran to leeward and then to windward of her, and fired a blank cartridge; hailed the vessel and asked "where from?" they said from Savannah, bound to Liverpool; we hailed her again, and told her to send her boat alongside; she sent her boat with four men and an officer, and they came alongside; Captain Nunez asked if they had a chronometer; officer in the boat said he did not know whether they had or not; would go on board and see; went on board and returned in about half an hour with a chronometer; brought it on board, and while we were regulating our chronometer, our captain and four men went on board the other vessel, which was the Madras, of Hull; captain stayed on board a short time and then returned; they then took their chronometer and returned to their vessel, the Madras; while we were hoisting our boat up and securing her, the Madras made sail; as soon as the boat was secured, we ran to leeward some distance, and fired another blank cartridge, but not in the direction of the Madras, and then proceeded on our own course. Next, about *9th or 10th July, a vessel [***213** was standing to the westward, we to the eastward; captain said he would run after the vessel and catch her, as he wanted to send a letter to New York; made sail after her, and finding we did not come up very fast, we fired a blank cartridge; they still not taking any notice, our captain told the men to load a gun with shot; loaded the gun with shot and fired, when the other vessel hove her maintopsail back; we were about half a mile apart; we both had our American flag flying at first; when the second

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of a ship out of possession is not liable for repairs or necessaries procured on the order of the master, and not upon the particular credit of the mortgagee, who was not in the receipt of the freight; though the rule is otherwise when the mortgagee is in possession and the vessel is employed in his service. M'Intyre v. Scott, 8 Johns., 158; Champlin v. Butler, 18 *Id.*, 169; Ring v. Franklin, 2 Hall, N. Y., 1; Birbeck v. Tucker, 2 Hall, N. Y., 121; Tucker v. Buffington, 15 Mass., 471; Colson v. Bonzey, 6 Greenleaf, 474; Winslow v. Tarbox, 18 Me., 132; Cutler v. Thurlo, 20 *Id.*, 213; Lord v. Ferguson, 9 N. H., 380; Miln v. Spinola, 4 Hill, 177; 8 Serg. & Rawle, 118; Cutler v. Thurlo, 20 Me., 213; Brooks v. Bondsay, 17 Pick., 441; McCartee v. Huntington, 15 Johns., 298; Fisher v. Willing, 8 Serg. & R., 118.

A mortgageor in possession of a vessel may pledge the freight. Keith v. Murdoch, Wheat. Dig., 586, pl. 11; 7 Cow., 697; Ring v. Franklin, 2 Hall, 1; 9 N. H., 380; Hesketh v. Stevens, 7 Barb., 488; Baker v. Buckle, 7 J. B. Moore, 349; Twentyman v. Hart, 1 Starkie, 336.

A vendee of a ship, whatever equitable title might exist in him, is not liable for supplies furnished before the legal title was conveyed to him, and registered in the manner prescribed by the registry acts, and when he was unknown to the tradesman who supplied the materials. Harrington v. Fry, 2 Bing., 179; Irving v. Richardson, 2 Barn. & Adolph., 193.

The charterer is owner *pro hac vice*, for the voyage, and liable for supplies. Cowp., 143; 1 Johns., 229; 8 Johns., 272; 16 Mass., 336; 5 Bos. & Pull., 182; Str., 1251; Cutler v. Winsor, 6 Pick., 335; Thompson v. Hamilton, 12 Pick., 428; Tucker v. Buffington, 15 Mass., 481; 3 Kent (5th Ed.), 136-139; Thompson v. Shaw, 4 Greenl., 264; Hallet v. Col. Ins. Co., 8 Johns., 272.

But the owner will be liable if he receives a portion of the earnings. Skolfield v. Potter, Law Rep., July 1849, p. 115; The Nathaniel Hooper, 3 Sumn., 575; Arthur v. The Cassius, 2 Story C. C., 93-94.

But not when he receives a proportion of the profits for the use of the vessel, or a determinate sum. Cutler v. Winsor, 6 Pick., 335; Thompson v. Hamilton, 12 Pick., 428; Perry v. Osborne, 6 Pick., 422.

The hirer of a vessel on shares, and not the general owners, will be liable to the owner of goods used for the benefit of the vessel, if he have the possession and entire control and direction of the ves-

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shot was fired, Captain Nunez ordered the Mexican or Columbian flag to be hoisted; we then hailed; they said they were from Liverpool, bound to Charleston; her name was the brig Sullivan; she was an American vessel; had "Sullivan, New York," on her stern; hailed her, and told her to send a boat alongside; while they were coming, our captain told Martin (called Peter Roberts in the shipping articles) to tell the crew not to speak any English, while the boat was alongside; this order the captain first told him in Spanish, then in English; when the boat came alongside, they asked where we were from; captain told Martin in Spanish, to say, we were from Vera Cruz, bound to Barcelona, and out forty-five days; Martin did so; our captain then told him we wanted some lamp-oil; the officer in the other boat said he did not know whether they had any, but he would go on board and see; when they reached their own vessel, they hoisted their boat, and proceeded on their course; we had lamp-oil sufficient to last us twelve months; after they proceeded on their course, we made sail likewise; ran to leeward and fired a shot at her; this fire our captain ordered Martin to make; he (Martin) generally acted as gunner. Martin belonged to Malaga, and spoke Spanish; at the time of second fire the vessels were about an eighth of a mile apart, hailing distance; we then kept on, and she did the same; the gun was fired at her; we were then standing to eastward, she to westward; did not see where the ball struck.

The next vessel we saw and spoke was the Tea Brothers; this was two or three days after the affair with the Sullivan; passed her without doing anything. Next vessel we met, was the "Vigilant, of Newcastle, England;" spoke her; she showed English colors; hailed her, and told her to send her boat alongside; she did so. Nunez asked if they had a chronometer; they said they had none; they were out of water, and wanted bread; we gave them two small barrels and some bread, by our captain's orders; we went on our course. The next vessel we 214*] met was the San Domingo, *two days afterwards; our captain was acquainted with the passengers on board; he asked them to dine with him, which they did; after they left, Captain Nunez told witness that the passenger had been a slaver, and was just returning from a prosperous voyage; the vessel belonged to Terceira, one of the Western Islands; she was Portugese; we laid together that night, and the next morning the Portugese sent on board of us to buy provisions; we then parted company, and two or three days after, went into Fayal; Nunez said his intention in going to Fayal was to repair the vessel and get his chronometer rated; remained there five or six days; had one carpenter employed four days, who did some slight work; he made a side ladder and some awning extensions, and put her to her head to find out leak. The principal leak was about eight or ten inches above the water line; the vessel leaked at sea, but not at Fayal; leaked as bad after we left there as she did before; the place of the leak discovered at Rio; there never having been oakum at all in that part of the seam, could put a knife in the seam; leak came into cabin; that leak was not stopped at Fayal.

We took in at Fayal potatoes, bread, and beef, for the use of the crew; we also took in two men as passengers, and a cabin boy; one of the passengers was named Silvie and the other Curry; the boy is here; the last I saw of the passengers was at Rio; got under way from Fayal on Tuesday; do not know whether Nunez knew the two passengers before he saw them at Fayal; came to anchor and waited until Wednesday; there was a pleasure party to come on board to sail about the harbor; in attempting to tack she missed stays, captain at the helm; missed stays a second time; we were about twenty yards from the rocks; Nunez knew nothing of the usages of an American vessel before we left New York; I always worked the vessel myself; Nunez might have known, but he did not speak English well enough to make the men understand. After the sailing match about the harbor, we left Fayal with the whaling vessel Minerva, from New Bedford; Nunez went on board of her and took the chronometer to have it rated; had had nothing done with it at Fayal; Nunez knew nothing about managing a chronometer, though it is a captain's duty. Captain Nunez remained on board the Minerva five or six hours; he went on shore at Fayal before we had our sails furled; he went in a shore boat. After Nunez came from the Minerva we made sail and proceeded on our course; he brought chro-

sel. Sprout v. Donnell, 26 Maine, 185; Emery v. Hersey, 4 Greenl., 407.

But not where the owner retains such control, and hires and pays the master and crew. 1 Johns., 229; 1 Sum..., 351; 2 Sumn., 589; 8 Wheat., 652; 4 Wash. C. C., 110; 4 Cow., 478; 13 Conn., 299.

Where the freighter hires the possession, command and navigation of the ship, for the voyage, he becomes the owner, and is responsible for the conduct of the master and mariners; and the general owner is not liable for the non-delivery of goods shipped, or for goods lost. 2 Brod. & Bing., 430; 3 Cranch, 30; 8 Wheat., 605; Pitkin v. Brainerd, 5 Conn., 451; Latham v. Lawrence, 13 Conn., 299; Clarkson v. Edes, 4 Cow., 470; Reynolds v. Toppan, 15 Mass., 370; Emery v. Hersey, 4 Greenleaf, 407; Leader v. Clark, 1 Hall (N. Y.), 355; Calvin v. Newberry, 6 Bligh. (N. S.), 189; Pickman v. Woods, 6 Pick., 251.

In Massachusetts, the charterer of a vessel is declared to be the owner, in respect to the responsibility for embezzlements by the crew, in case he navigates the vessel at his own expense. Revised Statutes of 1836, par. 1, c. 32, § 3.

In case of abandonment to indemnities, the latter become by relation owners from the time of the loss, on account of which the abandonment was made; and they are consequently liable for all repairs and necessary expenses incurred after the loss. United Ins. Co. v. Robinson, 2 Cai., 280; Same v. Scott, 1 Johns., 106; Reade v. Commercial Ins. Co., 3 Johns., 352; 2 Emerig. Assur., 194, 196; Pothier Contract d'Assurance, N., 188; Lee v. Boardman, 3 Mass., 417.

The owners of a ship, as well as the master, are responsible for the goods, which they have undertaken to carry, if stolen or embezzled by the crew, or by any other person, though no fault or negligence may be imputable to them. Shieffelin v. Harvey, 6 Johns., 170; Watkinson v. Laughton, 8 Johns., 213.

The responsibility of the owners for the acts of the master is not, however, universal; but is confined to cases within the scope of the authority confided to him. Reynolds v. Toppan, 15 Mass., 370; The Rebecca, Ware, 188; Druid, 1 Rob. Adm., 391; The Waldo, 4 Vol. Law Rep., 382; The Brig Casco, *Ib.*, 471.

They are not, therefore, liable for acts of piracy committed by him. Dios v. The Owners of the Revenge, 3 Wash. C. C., 262; The Dundee, 1 Hagg. Adm., 109, 113, 120.

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nometer with him; next day we saw a vessel
215*] *standing to westward with all sail set, going directly before the wind; we were standing to southward; Nunez ordered to chase her; finding we did not come up very fast we fired, by Nunez's orders, a blank cartridge towards her: she still went on her course; Nunez ordered one of the guns to be shotted and fired at her, which was done; she then hove her maintop back; we were then about a mile astern of her; we rounded to, to fire at her; we came up, hailed her; she said she was from Palermo, bound to Boston; she was the Emily Wilder; told her to send her boat alongside with their chronometer; they came alongside with the chronometer, we rated ours by it; I rated it and found a difference of time, and noted it in the log-book; after comparing the time of the two, they then took chronometer and went on board again; I made the entry in the log-book; we each made sail and stood on our course; they asked us no questions, except where we were from; Nunez said, from New York, bounded around Cape Horn; we stood to southward until 4th of August, the day before, captain said he was going to Rio; I told him it was a bad place to go, because it was a rendezvous for American vessels of war; on the 4th of August Nunez came on deck about half past seven in the evening, and found fault with some orders witness had been giving, and Nunez told me he did not want me to do more work on board the ship, and I accordingly went off duty; we ran on our course; that night Captain Nunez had the watch from eight to twelve; I heard a noise on board, went up and saw a vessel close ahead on the weather bow; when we came up Nunez hailed her, and told them to heave the maintop back; they did so, and we did the same; this was about ten o'cock at night; hailed them again, and told them to send their boat aboard of us with the captain and his papers; this they said they could not do, as their boat leaked and the night was dark; Nunez then got angry and told us to double shot the gun; it was done, and fired towards the strange vessel; Martin directed the gun; we were within close hailing distance. Curry, the forementioned passenger, then hailed in English and told them again to send their boat; the other captain answered in Portugese or Spanish. Curry told witness that the answer was, "they might sink their brig, but he could not come on board." Nunez then told us to lower out boat and go on board the strange brig; Curry, Crocker, the second mate, Peter Roberts (Martin), John Gray, and Dill or Smith, then went on board the stranger; Curry and Crocker had each a pair of pistols, they were buckled in a
216*] belt *round their bodies; our boat returned in about three quarters of an hour with Curry and the captain of the strange brig, and three of her men; Curry and the captain came on board the Malek Adhel, the men remained in their boat alongside; the strange captain gave Nunez a tin box with the ship's papers, I believe; ship's papers are carried in such boxes. Curry and Captain Nunez took them down below; strange captain remained on deck; I saw them down the companion-way, examining the papers in the cabin; they had them about a quarter of an hour, and then brought them up and gave them to the Portuguese captain; Nunez spoke English and told Curry to tell strange captain he must pay twenty dollars for the shot Nunez had fired at him, and ten dollars for a keg of oil which had been knocked over by the recoil of the gun. Nunez also told Curry in English to look and see if there were any guns and powder on board the other vessel, and if there were any, to spike the guns and bring the powder on board, and see if any sweetmeats were on board, and bring them on board also; they then shoved off, Curry with them, and went to the Portuguese vessel; Nunez told me that the Portuguese vessel was from Rio Grande, bound to Oporto, with a cargo of hides and horns; in half an hour after our boat returned with those who originally went on board the Portuguese vessel, and brought a jar of sweetmeats, one dog, and twenty dollars for the shot; after the boat was secured Captain Nunez put me on duty again; this was two o'clock in the morning; Curry told me he had got twenty dollars for the shot, but was ashamed to ask for the other ten for the oil; I saw Curry give the captain the money in Spanish dollars; Curry said he wouldn't take Brazilian money, which was first offered him by the Portuguese captain; after that we left the vessel and proceeded on our course. The next vessel we met was on the 10th or 12th of August; they were standing to northward, we to southward, when she came abeam of us, she tacked ship and went in the same direction with us; in about two hours after we hove our maintop back and ran foul of each other; Captain Nunez got enraged and told them to shot the gun and fire at the stranger; it was done; we fired a second shot; Nunez ordered the second shot.

When the first shot was fired, we were within close hailing distance; and also when each shot was fired; we fired five times, gun shotted each time. After the fifth fire all our powder was gone: Nunez then told Martin something witness did not understand, and Martin then told the crew he (Captain Nunez) said he would give *$500 to any volunteers of his [*217 crew, who would go and bring the captain aboard. Nunez asked me to go. I told him I did not like it. He told me not to be afraid, and gave me his dirk; I threw the dirk down on the deck, and said to Nunez, I was afraid to go on board with the boat, for fear they would throw something in the long boat and sink her when we were alongside. Nunez said he wanted to bring the other captain on board the Malek, and give him twenty-five lashes; we were then some distance astern. Nunez told Martin to take two men, Dell and Helm, and go on board; they did so, and remained half an hour; they returned and brought back with them the time. I saw one shot go through the flying jib; it was the second shot. When Martin came back, he told Nunez he must send his chronometer with an officer, and rate it; I took the chronometer, went on board the other vessel, and rated it. Strange captain asked me why Nunez had fired at him; I said I did not know; the captain had ordered it. He asked me where we were bound. I said, "God only knows." When I returned to the Malek Adhel, I told Nunez what had happened, and he laughed. The strange brig was the Albert; she was an English brig and bound to Rio; her stern sign was disfigured; she had English colors flying. We then proceeded on our course, and made

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the Brazils about the 20th or 21st of August; the land was some miles north of Cape Antonio. The passengers on board told me they were to go to Bahia. We got to Bahia about six o'clock in the evening, and Curry, Silvie, and the captain went ashore. They came on board again about nine o'clock next morning, and Nunez told me to make ready to clear the cargo, as he was going to repair his vessel. Nunez stayed about half an hour on board and went ashore again. Next morning got all clear, and about half past eleven Nunez came on board; the men told me they would do no more work until they saw the American consul; this was told me before Nunez came on board; when he came I told him: he asked me if I wanted to see the consul too. I said "Yes." He then said, "Very well, I will go ashore and see." He went on shore, and the next morning between nine and ten o'clock he came on board again. He told me to tell all the crew, who wanted to see the consul, to come aft, and go on the larboard side; the whole crew went on the larboard side, Martin among them. The second mate, Mr. Crocker, and four or five men, went on shore that day; they stayed on shore until about three o'clock, and then returned. Captain Nunez came on [*218] board *the next morning, and told me the consul wanted to see me, and that I must go on shore with him. We went to the consul's office, and he asked me about these charges. I had kept an account of some small transactions on a piece of paper; I gave it to the consul. The captain said I could be discharged, if I desired it; but the consul said, "Not until the affair was settled." By small transactions, witness means the firing, &c. Captain Nunez admitted that it was all right, as I had put it down. I told the American consul the same story as I am now telling. When we were going ashore, Nunez said, "Suppose I sell the brig, how much she worth?" He also said one man had offered to give him $22,000 for her. I told him I did not know how much she was worth. I stayed on shore until two o'clock, and then went on board again; that night, about one or two o'clock, a vessel ran foul of us, and tore away our jib-boom. The next morning while we were repairing it, the captain came on board and told me the consul wanted to see me. I went, returned afterwards on board, got my clothes and went ashore, where I remained nine or ten days; went on board, afterwards, the American brig Yankee, and remained there until the Enterprize, a United States schooner, arrived and took the Malek and her crew. There were four men shipped by the captain at Bahia, after I left the brig; they were one Portuguese, one Spaniard, one English, and one American. The crew were examined in succession by the consul. We left Bahia on the 26th September, under the charge of Lieut. Drayton, on board the brig; nine men and two officers were put on board; we went then to Rio; four of our crew were from the schooner Enterprize; we left Martin and the cook behind at Bahia. The day I returned from the consul's on board the Malek, Nunez and the cook had a quarrel, and Nunez struck the cook; cook said, "When I shipped, I did not know I shipped on board a shaver." I saw Captain Nunez at Rio, in prison. We stayed at Rio from the 2d of October until the 1st of March. We were taken before the authorities at Rio; they let the captain out of prison. I saw him afterwards walking about in Rio. I left Rio in the Malek, under the command of Lieut. Ogden, and with the crew who are now in prison, where we have been since we arrived. Lieut. Ogden had on board, besides ourselves, four men and one midshipman. I kept the log-book of the Malek; Captain Nunez got it from me, to take it to the consul the day we went before him. It was laid before the consul, and I never saw it afterwards. The log-book contained some of the *particulars about the firing. (Here [*219 a book is shown to the witness.) This book was kept by the captain. Lieut. Drayton kept a log-book from Bahia to Rio.

Cross-Examination.

Upon cross-examination, the witness further deposed: While I was on board the Yankee, a midshipman and four men came on board and ordered me on board the shooner Enterprize. I was not imprisoned at Bahia. Peter Roberts (Martin) was among the men who went on the larboard side. I do not know whether the pistols Curry carried were loaded or not; one pistol out of the four was loaded, I know. The men who accompanied Curry were unarmed, to the best of my knowledge. The Albert answered the hail of the Malek Adhel. Our brig had her name on the stern. I saw Curry put the money down on the cabin table. I did not tell anyone I had seen the money counted out. On my examinaton at Bahia, I stated that Curry had told me that he had received the money. I do not recollect whether I stated then that I saw it. The cook's deposition was not taken, that I know of. Silvie and the boy were in the cabin with Nunez and Curry. I am from Philadelphia, but have sailed out of New York for the last five years. Have sailed as mate twice before. Before the offer of $500, made by Nunez to his crew to board the Albert, he had not ordered the crew, nor had they refused to go.

Further Cross-Examination of John Myers.

John Myers, upon his further cross-examination, deposed as follows:

We left Captain Nunez at Bahia. When we first arrived at Rio, I did no see him. The second time I went ashore I saw him in jail. I do not know how long he remained in jail. We remained at Rio four months. I never saw Nunez after the frigate Potomac arrived. The Enterprize and the Malek Adhel went into Rio together. Nunez was at liberty on shore after the Enterprize arrived. I saw Nunez three or four days before we sailed from Rio; he told me he was going to take command again of the Malek Adhel. Martin went with the rest of the crew before the consul. I saw him in the consul's office. I never saw Martin at Rio; we left him at Bahia. I saw both Curry and Silvie at Rio, but do not know how they got there. A vessel bound direct from Bahia to Guayamas would not stop at Rio. I did not see either Curry or Silvie after the Potomac *arrived. I should think the Potomac [*220 was at Rio twelve or fifteen days before we sailed for home.

At November Term, 1841, the Circuit Court affirmed the decree of the District Court, dismissed the appeals, and ordered each party to

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pay their respective costs in that court. Both parties appealed to the Supreme Court.

Messrs. Z. Collins Lee and *R. Johnson* for the United States.

Messrs. Meredith and *Nelson*, Attorney-General, for the claimants.

Mr. Lee made the following points on behalf of the United States, as appellants:

1st. That the cargo of the said vessel was subject to forfeiture, and ought to have been condemned; and the decree, so far as regards it, ought to be reversed.

2d. That no part of the costs and expenses incurred in the prosecution should be paid out of the proceeds of the property condemned; but that Peter Harmony & Co. should be decreed to pay the same.

And on behalf of the United States, as appellees,

3d. That the Malek Adhel, her takle, apparel, and furniture, were properly condemned; and that the decree, so far as regards them, ought to be affirmed.

Mr. Lee argued that the brig was "an armed vessel, or a vessel of which the crew were armed" within the true meaning and intent of the Act of Congress of the 3d March, 1819 (3 Story's Laws, p. 1738); the 1, 2, 3, and 4 sec. of which were continued by the Act of 15th May, 1820 (3 Story, 1798), and afterwards without limitation by the Act of 30th January, 1823 (3 Story, 1874). And in the second place, that from the evidence exhibited on the record, the aggressions, restraints, and depredations proved were "piratical" and such as the act of Congress contemplated and intended to punish.

And lastly, that, assuming the said brig not to be "an armed vessel" within the meaning of the act, yet the aggressions and depredations perpetrated on the Portuguese vessel were, according to the law of nations, piratical.

To sustain the above propositions he referred to the following authorities:

Act of Congress of 1790 (ch. 36, 1 Story, 82), defining piracy.

Act of 1825 (ch. 276, 3 Story, 1999), defining and punishing as piratical certain offenses therein named.

221*] *Also, the following cases:

United States v. *Palmer* (3 Wheat., 610; p. 626), as to the construction of the Act of 1790; *The Marianna Flora* (11 Wheat., 37), and to show that a single piratical act is sufficient, referred to the speech of *Chief Justice* Marshall in the case of *Jonathan Robbins*, reported in the appendix to 5 Wheat., p. 8, 12; 3 Wash. C. C. R., 221, 214, case of *United States* v. *John Jones*; 5 Wheat., 145, 149, 153, and *notes*; 5 Wheat., 412, 192; 2 Azuni, 351; 4 Bla. Com., 72, defining sea-robbery; 2 East, Pleas, 707; Vattel, ch. 15, sec. 226; Grotius, ch. 15, sec. 85; Molloy, 57.

Upon the question of the forfeiture of the cargo:

Dodson Adm. Rep., 470; case of *The Neptune*, 5 Robinson and Wheaton on Captures; 1 Haggard, 142, case of *The Hallen;* 3 Dallas, 133, case of *The Adams*, and commented on the opinion of the court in the case of *The Marianna Flora* (11 Wheaton).

Mr. Meredith, for the claimants:

There are two questions in the case.

1. The construction of the act of Congress.

2. The bearing of the evidence.

The innocence of the owners is admitted on the record. They were sole owners during the voyage, and engaged in a lawful trade. The vessel was properly equipped for such voyage, and the owners had nothing to do with the acts complained of. These admissions were not gratuitous, but proved, and placed in this form for convenience.

Does the Act of 1819 reach such a case? She was armed only as the voyage required, and the captain departed from the orders of the owners. It is an important question, because if decided in the affirmative, the risks of ship owners will be increased, and in violation of the natural principles of justice.

It is an open question. Some expressions of opinion by the court in the case of *The Marianna Flora* appear to incline to the construction of the other side, but there is no decision in any case. The only question there was one of damages; the claim of forfeiture was abandoned by the captors and by the United States. There was nothing to call for an opinion as to the construction of the Act of 1819. The passage quoted by the opposite counsel was in answer to an argument used at bar that there was nothing suspicious in the case; but there has been no adjudication upon the point.

*If the Act of 1819 includes the case [*222 of an innocent owner, it must be because,

1. That such owner was liable under the maritime law, or

2. That Congress intended to extend the law.

1. As to maritime law.

The owner, if liable, must be so *in personam* or *in rem*.

His liability *in personam*, although varying in some particulars, is mainly the same with the liability of an employer at common law. The master is his agent. In civil cases the captain can sometimes bind his owner to a greater degree than other agents can, but not for torts. The owner is always responsible for the negligence of his agent in acts done within the scope of his authority, but not where the act is willful and beyond the authority. And this is equally true whether the agent was or was not engaged at the time about the business of his principal.

The whole law is collected in Story on Agency, 456. (See, also, Skinner's Reports, 22; 1 East, 106; 4 Barnewall & Alderson, 592; 1 Wendell, 343; cases collected; 1 Hill's Report, 480.)

These cases show that the owner is responsible for negligence or unskillfulness, but not for willful torts.

The maritime law has the same rule. (8 T. R., 533; Story on Agency, 327, sec. 319; Curtis, 195, *note*, 205, *note;* 1 Taunton, 567; Ingersoll's Roccus, 23, *notes* 11, 12, 13, 15; Salkeld 282; 19 Johnson, 235, referred to in Story; Abbot, 19; 2 Brown's Admiralty Law, 140.)

Is the owner bound *in rem?*

It would be contrary to reason and justice to hold him so. If he is not bound in damages why is his vessel responsible? There is no moral delinquency in the owner. The ship, it is true, is considered sometimes as the offender but only when something is done for which the owner is responsible, either for his own acts or those of his agent acting within the scope

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of his authority. (2 Brown's Admiralty, 142, 143.)

The torts of the master cannot hypothecate the ship; she is seized only until the captain gives bail. (Abbott, 99, *note* 1; same principle, Dupoocean's Bynkershoek, ch. 18, p. 129, 150, 151. 152. 154.)

In prize cases there is no forfeiture except on the presumed liability of the owner. The modern doctrine is that contraband does not affect the ship, or even cargo, if it is put on board without the knowledge of the owner, even by the captain.

223*] *Bynkershoek (ch. 12, p. 93) says, that if the owner knows of it, or the captain is executing the orders of the owner, the vessel is forfeited—otherwise not. (See, also, 1 Rob. Adm. Rep., 67–70, 104, 130; 3 Rob. Adm. Rep., 162, 178.)

The owner is not responsible in damages where the vessel becomes a pirate. 3 Wash. C. C. R., 262, was a case of a privateer, where the owner's bond was liable and ship too, because of an understood contract to that effect between the government and all privateers; but not so as to other vessels.

A piratical capture does not devest the owner of his property. (1 Molloy, 88, sec. 31, book 1, ch. 4; 1 Robinson, 81, 229; 6 Robinson, 229; 1 Beawes's Lex Mercatoria, 6th ed., 364; 1 Bolle's Rep., 285.)

Did Congress intend to extend the provisions of the maritime law?

Before saying so, the court will look to the injustice of such a construction, and its dangerous consequences to ship-owners. The act was not intended to repair private losses, but to punish crimes; and such a construction will punish one man for offenses committed by another.

The state of the country when the act was passed was referred to by the other side, to illustrate its meaning. It was shortly after a general peace, except as to South America. Sailors were discharged from navies; privateers abounded, and the transition was easy to piracy. In all the cases, in this court the vessels had been privateers. The act, therefore, did not contemplate merchant vessels armed for defense, but ships fitted out as privateers. The vessel is confiscated by the act, but there is a singular omission as to the cargo. Why not include it, if merchant vessels were embraced by the act? The omission was intentional, because on the same day an act was passed to suppress the slave trade, in which the cargo is forfeited as well as the ship. In 5 Wheat., 338, the court were prepared to construe an act as we contend for; the owners there were said to be innocent, because the ship was in the possession of piratical captors. (5 Wheat., 352.) Yet the words of that act were as peremptory for that case as the Act of 1819 is for ours. In page 367 the court say, that the vessel would have been restored if she was in possession of piratical captors, because the owners would have been innocent.

In 13 State Trials (*Dawson's* case), taking the vessel from the owners was itself held to be an act of piracy.

2. What is the bearing of the evidence?

The offenses of "aggression, search," &c., 224*] must be "piratical," *that is, with an intention to commit piracy; not piracy under the law of 1790, but under the law of nations, because it punishes the vessels of other nations as well as our own, and the last section refers to piracy under the law of nations, which is sea-robbery, forcible depredation at sea, *animo furandi*. At common law there is no piracy. The English statute did not change the nature of the offense, but only the mode of punishing it. Is there any proof of an intention to commit robbery? If not, the case is not within the act of Congress. There seems to have been a hallucination in the captain's mind, bordering on madness; wanted always to rate his chronometer. He had many opportunities to plunder, but did not; some vessels passed by, others were supplied with provisions. He did not think he had done wrong, because he permitted his crew to go freely to the American consul at Bahia, and would not take Brazilian dollars for the powder and oil which he had lost.

But the cargo is sought also to be condemned, At first the information contained only counts depending upon the act of Congress; two were afterwards added upon the law of nations, with a view of reaching the cargo. The capture itself was a harsh measure; the papers showed the ship to have been American property; the crew were faithful to their duty, and it would have been praiseworthy to have despatched her on her voyage, in charge of the mate. The protection of commerce does not require that the cargo in this case should be aimed at as well as the ship. The offense charged in these two counts is a "hostile aggression with intent to plunder." If this is piracy under the law of nations, it is merged in the Act of 1819, but the offenses charged are only misdemeanors. (2 Brown's Admiralty Rep., Appendix, p. 519.)

The Constitution gives Congress power to define and punish piracies and offenses against the laws of nations. If Congress has not done it, this court cannot punish petty offenses.

Mr. Nelson, Attorney-General, on the same side, examined the facts in the case as disclosed by the record, and then commented on the Acts of 1819, 1823, 1825, 1790, to show the history of the legislation upon the subject of piracy. The "restraints, aggressions," &c., must be "piratical," as that term is understood by the laws of nations. The 5th section of the Act of 1819 declares that persons who commit piracy, as understood by the laws of nations, shall suffer death. The 8th section of the Act of 1790 was said by the court (5 Wheat., *184, 185, 202, 206), not to be repealed; [*225 this decision was given on the 1st of March, 1820, and an act of Congress passed immediately thereafter (15th May, 1820), the third section of which declared what should be piracy (3 Story, 1798), making robbery a necessary ingredient. The Act of 1825, by implication, repeals the 8th sec. of the Act of 1790, by declaring such offenses to be felony. No person could be indicted under the acts of Congress as a pirate, because the Act of 1825 says he shall be punished with death as a felon. The consequence is, that there is no piracy recognized by the laws of the United States, except that known to the law of nations, and the Act of 1819 must be so construed. The offenses charged in the five first counts under that act must, therefore, be shown to be piratical under

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the law of nations: that is, committed for the purposes of robbery. Does the evidence justify this? The court, acting as a jury, must acquit unless the affirmative be made out clearly. The acts of the captain are like those of an insane man.

[*Mr. Nelson* here commented on these acts, in the case of each vessel successively.]

In the case of *The Palmyra* (12 Wheat., 15), it is said that a petty aggression is not a cause of condemnation, unless it indicates a bad mind.

Ought the vessel to be condemned?

There is no other law to condemn it except that of 1819. The policy of that law was to bear upon armed vessels, or the crews of which were armed. But neither branches of the alternative includes this case. The crew cannot be said to have been armed, within the meaning of the act, because the agreement says that the vessel had only ordinary equipments. All vessels going to the Pacific carry arms for defense. In the case of *The Palmyra*, the court said, a vessel might be armed for commercial purposes. So here. Why did not the Act of 1819 include the cargo? because it struck at privateers who have no cargo. In all revenue laws, the cargo is condemned as well as the vessel.

If the acts of the master were piratical, that very fact protects the owners, because the first offense was against them in devesting them of their property and converting it to his own purposes. He was guilty of barratry, at least. Can the owners lose their property through an act of piracy? The 8th sec. of the Act of 1790 makes it piracy to run away with a vessel or voluntarily give her up to a private. If this act be in force, the captain was a pirate. **226***] *All the cases say that piracy does not devest ownership. (5 Wheat., 338, 357, 358.) There need not be personal violence in running away with a ship. (1 Gallison, 247, 253, 256.) The proof here shows that the captain had been negotiating in Fayal for a sale of the vessel.

Ought the cargo to be condemned?

The Act of 1819 clearly does not embrace the cargo, and there must be something more proved than an "aggression" or "restraint." The opposite counsel cannot proceed on a statute for half and the law of nations for the other half, because Congress has exercised its power in the premises. How does the law of nations reach the cargo of an unoffending owner? If the vessel be construed to be the offender, the cargo is not. In war, the cargo is condemned, but then different rules apply. The vessel must be taken *in delicto*.

The Marianna Flora (11 Wheat., 40, 57), in which case the capturing vessel was attacked. But, here, the Enterprize was not.

As to costs—they are within the discretion of the court. (Dunlap's Practice, 164; 2 Mason, 58; 4 Gallison, 414.)

Costs cannot be appealed from. (3 Peters, 307, 319.)

Mr. R. Johnson, for the United States, in reply:

There are three questions:

1. What is the true construction of the Act of 1819, as to the vessel?

2. What is the law of nations as to the cargo?

3. Does the evidence show the ship to within the act of Congress, and the cargo to within the law of nations?

1. The act of Congress had two objects view, first, to protect commerce; and seco to punish piracy personally. Piracy had b in part defined and punished by the Act 1790. That of 1819 was passed when comme was suffering, and its object was to punish racy up to the full extent of the law of natio it is punished with death.

There are three objections made by the ot side:

1. That the act does not cover the case of innocent owner, but that the United St must always show that the owner was eithe pirate himself or knowingly fitted out his sel for such purposes.

2. That the vessel must be armed for " fensive purposes," and that the mere fact being armed is not enough.

3. That the acts are not piratical, becaus is not shown that they were done for the p poses of plunder.

*1. As to the innocence of the owner. [*22 Must his guilt be established? The langu of the act is "to protect merchant vessels fr piratical agressions and depredations," and President is authorized to instruct officers send in any armed vessel or crew which sh have attempted any piratical agression upon American vessel or any other. It is not th business to ask who is the owner; the fact enough. It is said that the vessels must fitted out for the purpose of depredating: the history of the matter is, that the vessels tended to be reached were not so fitted o but seized upon by the crews for piracy. T construction of the other side entirely defe the object of protecting commerce. There no words in the law relating to the owne the vessel is declared to be the guilty thi The only facts necessary to be proved are t the vessel was armed, and that a pirati agression was committed. Merchant ves can aid in these captures. If Congress had tended to exempt the property of innoc owners, they would have left some discret in the court; but the language is, the ve shall be condemned. It is said to be unj to punish the innocent for the guilty; but object of Congress was to stop the crime breaking up the means of committing it.

In the case of *The Marianna Flora*, t court said that innocence of owners was no cuse. This was not a mere *dictum*, as opposite counsel have said, but a point in case.

2d objection. That this vessel was not arm within the meaning of the act. The only f which the law looks to, is, whether the ves was armed at the time of committing the gression. Here, both vessel and crew w armed. But it is said that the arms were on board for an innocent voyage. True. so it was in the case of *The Marianna Flo* and the court said she might have commit an aggression within the meaning of the a What difference does it make, when the obj of the law is to protect commerce? It is said what number of guns must be on boa or to what extent the crew must be arm What the law regarded was, that neit

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should be so far armed as to be capable of injuring commerce. It is said that the agression must be piracy as described in the 5th section; that it must amount to sea-robbery. But it is perfectly clear Congress did not intend this; they knew what piracy was by the law of nations, and have declared that an "attempt" to commit a depredation shall be punished. A "search," "aggression" or "restraint" are all punishable; and these are all beyond the limits 228*] of *national law. These offenses are not punished personally, but in the 5th section piracy is punished with death. The offenses, therefore, are not the same. In the case of *The Palmyra* (12 Wheat., 14, 15), it was argued that the vessel could not be condemned until the person was convicted; but the court said it was not necessary, because there was no personal punishment provided in the sections against restraint, &c. There is something more meant, therefore, than piracy at common law. There need not be robbery; a "restraint" is enough. In the 3d section, where merchant vessels are authorized to capture, the word "piratical" is dropped; the act meant to protect against all aggressions, and considered them all as piratical.

[*Mr. Johnson* here examined the cases of aggression *seriatim*.]

3d objection. That the acts were not piratical, because it is not shown that they were committed for the sake of plunder. But the amount is not material in a question of robbery, and violence threatened is as criminal as if used; and it was argued on the other side, that there was sufficient evidence to show that the captain had run away with the ship, which was piracy. The money was paid by the Portuguese vessel under fear. The boarding party was armed with pistols and a dirk. Fear was purposely instilled, or why did the captain send his men armed. The firing into the other vessels was willful and malicious. In *The Mariana Flora*, the court said, if death had ensued from firing, it would have been a grave inquiry whether some greater punishment should not be inflicted, although it was under a mistake.

2d point. What is the law of nations as to the cargo? Did it originally cover the case; and if so, has it been abrogated by Congress?

Where a party roves the sea to commit murder and get gain by violence, is at war with the whole world; and when his property is seized, a right of condemnation ensues as in the case of other enemies' property. But it is objected that this cargo is the property of innocent persons. The answer is, that the same motives which induced the Act of 1819 to give the vessel to the captors, induces the law of nations to give them the cargo also. Nor has this rule been changed by legislation. In the case of *United States* v. *Smith* (5 Wheaton), the court say that the 8th section of the 1st article of the Constitution, giving power to Congress to define and punish piracies and offenses against the law of nations, includes the power of punishing lesser offenses than piracy. Congress did not intend, by the Act 229*] *of 1819, to take away any of the admiralty jurisdiction which had previously been vested in the judiciary. We must resort to the law of nations. The power to "define and punish" means to inflict personal punishment, and the jurisdiction of admiralty is always *in rem*. It is untouched by the law. If a pirate were to claim a cargo, would a court give it to him? and yet the court can only condemn or restore. Admiralty law gives to the captors the property in the thing captured; and if the vessel be condemned, what can save the cargo? the same reason applies to both, which is, holding out an inducement to captors to be vigilant. If the captain were the owner of both ship and cargo, would the court condemn his vessel and restore his cargo? In 11 Wheaton, before cited, the owner of the ship is held responsible for the acts of the agent, and what good reason can be given why the owner of the cargo should not also be so, especially when he is the same person who owns the ship.

Mr. Justice STORY delivered the opinion of the court:

This is an appeal from a decree of the Circuit Court of the United States for the District of Maryland, sitting in admiralty, and affirming a decree of the District Court rendered upon an information *in rem*, upon a seizure brought for a supposed violation of the Act of the 3d of March, 1819 (ch. 75, ch. 200), to protect the commerce of the United States, and to punish the crime of piracy. The information originally contained five counts, each asserting a piratical aggression and restraint on the high seas upon a different vessel: one, the Madras, belonging to British subjects; another, the Sullivan, belonging to American citizens; another, the Emily Wilder, belonging to American citizens; another, the Albert, belonging to British subjects; and another upon a vessel whose name was unknown, belonging to Portuguese subjects; and this last count contained also an allegation of a piratical depredation. The Malek Adhel and cargo were claimed by the firm of Peter Harmony & Co., of New York, as their property, and the answer denied the whole *gravamen* of the information. At the hearing in the District Court, the vessel was condemned and the cargo acquitted, and the costs were directed to be a charge upon the property condemned. An appeal was taken by both parties to the Circuit Court; and upon leave obtained, two additional counts were there filed, one alleging a piratical aggression, restraint, and depredation upon a vessel belonging to Portuguese subjects, whose name was unknown, in a hostile manner and with intent to destroy *and plunder the ves- [*230 sel, in violation of the law of nations; and another alleging an aggression by discharge of cannon and restraint upon a British vessel called the Alert, or the Albert, in a hostile manner, and with intent to sink and destroy the same vessel, in violation of the law of nations. Upon the hearing of the cause in the Circuit Court, the decree of the District Court was affirmed; and from that decree an appeal has been taken by both parties to this court.

It was fully admitted in the court below that the owners of the brig and cargo never contemplated or authorized the acts complained of; that the brig was bound on an innocent commercial voyage from New York to Guayamas, in California; and that the equip-

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ments on board were the usual equipments for such a voyage. It appears from the evidence that the brig sailed from the port of New York an the 30th of June, 1840, under the command of one Joseph Nunez, armed with a cannon and ammunition, and with pistols and daggers on board. The acts of aggression complained of were committed at different times under false pretenses, and wantonly and willfully without provocation or justification, between the 6th of July, 1840, and the 20th of August, 1840, when the brig arrived at Bahia; where, in consequence of the information given to the American consul by the crew, the brig was seized by the United States ship Enterprize, then at that port, and carried to Rio Janerio, and from thence brought to the United States.

The general facts are fully stated in a deposition of one John Myers, the first mate of the Malek Adhel; and his testimony is corroborated by the other evidence in the cause, in its main outlines and details. The narrative, although long, cannot be better given than in his own words. He says, among other things, "On Tuesday, the 30th of June." (Here the judge read a part of the evidence of Myers, which is set forth in the statement of the case by the reporter.)

Now, upon this posture of the case, it has been contended, 1st. That the brig was not an armed vessel in the sense of the Act of Congress of 1819 (ch. 75, ch. 200). 2. That the aggressions, restraints, and depredations disclosed in the evidence were not piratical within the sense of the act. 3. That if the case in both respects is brought within the scope of the act, still neither the brig nor the cargo are liable to condemnation, because the owners neither participated in nor authorized the piratical acts, but are entirely innocent thereof. 4. That if the brig is so liable to condemnation, the cargo is not, either under the act of Congress or by the law of nations.

231*] *We shall address ourselves accordingly to the consideration of each of these grounds of defense. The Act of 1819 (ch. 75, ch. 200) provides, in the first section, that the President is authorized and requested to employ the public armed ships of the United States with suitable instructions "in protecting the merchant ships of the United States and their crews from piratical aggressions and depredations." By the second section the commanders of such armed vessels are authorized "to subdue, seize, take, and send into any port of the United States any armed vessel or boat, or any vessel or boat the crew whereof shall be armed, and which shall have attempted or committed any piratical aggression, search, restraint, depredation, or seizure upon any vessel of the United States, or of the citizens of the United States, or upon any other vessel," &c. By the third section it is provided "that the commander and crew of any merchant vessel owned wholly or in part by a citizen thereof, may oppose and defend against any aggression, search, restraint, depredation, or seizure, which shall be attempted upon such vessel, or upon any other vessel owned as aforesaid by the commander or crew of any other armed vessel whatsoever, not being a public armed vessel of some nation in amity with the United States, and may subdue and capture the same," &c. Then comes the fourth section (upon which the five counts of the original information are founded), which is as follows: "That whenever any vessel or boat from which any piratical aggression, search, restraint, depredation, or seizure shall have been first attempted or made, shall be captured and brought into any port of the United States, the same shall and may be adjudged and condemned to their use and that of the captors, after due process and trial in any court having admiralty jurisdiction, and which shall be holden for the district into which such captured vessel shall be brought; and the same court shall thereupon order a sale and distribution thereof accordingly, and at their discretion." The fifth section declares that any person who shall on the high seas commit the crime of piracy as defined by the law of nations, shall, upon conviction thereof, be punished with death.

Such are the provisions of the Act of 1819 (ch. 75, ch. 200). And it appears to us exceedingly clear, that the Malek Adhel is an "armed vessel" within the true intent and meaning of the act. No distinction is taken, or even suggested in the act, as to the objects, or purposes, or character of the armament, whether it be for offense or defense, legitimate or illegitimate. The policy as well as the words of the act equally extend to all [*232 armed vessels which commit the unlawful acts specified therein. And there is no ground, either of principle or authority, upon which we are at liberty to extract the present case from the operation of the act.

The next question is whether the acts complained of are piratical within the sense and purview of the act. The argument for the claimants seems to suppose that the act does not intend to punish any aggression, which, if carried into complete execution, would not amount to positive piracy in contemplation of law. That it must be mainly, if not exclusively, done *animo furandi*, or *lucri causa*; and that it must unequivocally demonstrate that the aggression is with a view to plunder, and not for any other purpose, however hostile or atrocious or indispensable such purpose may be. We cannot adopt any such narrow and limited interpretation of the words of the act; and in our judgment it would manifestly defeat the objects and policy of the act, which seems designed to carry into effect the general law of nations on the same subject in a just and appropriate manner. Where the act uses the word "piratical," it does so in a general sense; importing that the aggression is unauthorized by the law of nations, hostile in its character, wanton and criminal in its commission, and utterly without any sanction from any public authority or sovereign power. In short, it means that the act belongs to the class of offenses which pirates are in the habit of perpetrating, whether they do it for purposes of plunder, or for purposes of hatred, revenge, or wanton abuse of power. A pirate is deemed, and properly deemed, *hostis humani generis*. But why is he so deemed? Because he commits hostilities upon the subjects and property of any or all nations, without any regard to right or duty, or any pretense of public authority. If he willfully sinks or destroys

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an innocent merchant ship, without any other object than to gratify his lawless appetite for mischief, it is just as much a piratical aggression, in the sense of the law of nations, and of the act of Congress, as if he did it solely and exclusively for the sake of plunder, *lucri causa*. The law looks to it as an act of hostility, and being committed by a vessel not commissioned and engaged in lawful warfare, it treats it as the act of a pirate, and of one who is emphatically *hostis humani generis*. We think that the aggressions established by the evidence bring the case completely within the prohibitions of the act; and if an intent to plunder were necessary to be established (as we think it is not), the acts of aggression and hostility and 233*] plunder committed on the *Portuguese vessel are sufficient to establish the fact of an open although petty plunderage.

Besides, the argument interprets the act of Congress as though it contained only the word "depredation," or at least coupled aggression and depredation as concurrent and essential circumstances to bring the case within the penal enactment of the law. But the act has no such limitations or qualifications. It punishes any piratical aggression or piratical search, or piratical restraint, or piratical seizure, as well as a piratical depredation. Either is sufficient. The search or restraint may be piratical although no plunder follows, or is found worth carrying away. What Captain Nunez designed under his false and hollow pretenses and excuses it may not be easy to say, with exact confidence or certainty. It may have been to train his crew to acts of wanton and piratical mischief, or to seduce them into piratical enterprises. It may have been from a reckless and wanton abuse of power, to gratify his own lawless passions. It could scarcely have been from mental hallucinations; for there was too much method in his mad projects to leave any doubt that there was cunning and craft and worldly wisdom in his course, and that he meditated more than he chose to explain to his crew. They never suspected or accused him of insanity, although they did of purposes of fraud.

The next question is, whether the innocence of the owners can withdraw the ship from the penalty of confiscation under the act of Congress. Here, again, it may be remarked that the act makes no exception whatsoever, whether the aggression be with or without the cooperation of the owners. The vessel which commits the aggression is treated as the offender, as the guilty instrument or thing to which the forfeiture attaches, without any reference whatsoever to the character or conduct of the owner. The vessel or boat (says the act of Congress) from which such piratical aggression, &c., shall have been first attempted or made shall be condemned. Nor is there anything new in a provision of this sort. It is not an uncommon course in the admiralty, acting under the law of nations, to treat the vessel in which or by which, or by the master or crew thereof, a wrong or offense has been done as the offender, without any regard whatsoever to the personal misconduct or responsibility of the owner thereof.

And this is done from the necessity of the case, as the only adequate means of suppressing the offense or wrong, or insuring an indemnity to the injured party. The doctrine also is familiarly applied to cases of smuggling and other misconduct under our revenue laws; and has *been applied to other kindred [*234 cases, such as cases arising on embargo and non-intercouse acts. In short, the acts of the master and crew, in cases of this sort, bind the interest of the owner of the ship, whether he be innocent or guilty; and he impliedly submits to whatever the law denounces as a forfeiture attached to the ship by reason of their unlawful or wanton wrongs. In the case of *The United States* v. *The Schooner Little Charles* (1 Brock. Rep., 347, 354), a case arising under the embargo laws, the same argument which has been addressed to us, was upon that occasion addressed to *Mr. Chief Justice* Marshall. The learned judge, in reply, said: "This is not a proceeding against the owner; it is a proceeding against the vessel for an offense committed by the vessel; which is not the less an offense, and does not the less subject her to forfeiture because it was committed without the authority and against the will of the owner. It is true that inanimate matter can commit no offense. But this body is animated and put in action by the crew, who are guided by the master. The vessel acts and speaks by the master. She reports herself by the master. It is therefore not unreasonable that the vessel should be affected by this report." The same doctrine was held by this court in the case of *The Palmyra* (12 Wheat. R., 1, 14), where, referring to seizures in revenue causes, it was said: "The thing is here primarily considered as the offender, or rather the offense is primarily attached to the thing: and this whether the offense be *malum prohibitum* or *malum in re*. The same thing applies to proceeding *in rem* or seizures in the Admiralty." The same doctrine has been fully recognized in the High Court of Admiralty in England, as is sufficiently apparent from *The Vrow Judith* (1 Rob. R., 150); *The Adonis* (5 Rob. R., 256); *The Mars* (6 Rob. R., 87), and indeed in many other cases, where the owner of the ship has been held bound by the acts of the master, whether he was ignorant thereof or not.[1]

The ship is also by the general maritime law held responsible for the torts and misconduct of the master and crew thereof, whether arising from negligence or a willful disregard of duty; as, for example, in cases of collision and other wrongs done upon the high seas or elsewhere within the admiralty and maritime jurisdiction, upon the general policy of that law, which looks to the instrument itself, used as the means of the mischief, as the best and surest pledge for the compensation and indemnity to the injured party.

*The act of Congress has therefore [*235 done nothing more on this point than to affirm and enforce the general principles of the maritime law and of the law of nations.

The remaining question is, whether the cargo is involved in the same fate as the ship. In respect to the forfeiture under the Act of 1819, it is plain that the cargo stands upon a very different ground from that of the ship. Nothing

1.—See 3 Wheaton's Rep., Appendix, p 37 to p. 40.

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is said in relation to the condemnation of the cargo in the fourth section of the act; and in the silence of any expression of the Legislature, in the case of provisions confessedly penal, it ought not to be presumed that their intention exceeded their language. We have no right to presume that the policy of the act reached beyond the condemnation of the offending vessel.

The argument, then, which seeks condemnation of the cargo, must rely solely and exclusively for its support upon the sixth and seventh counts, founded upon the law of nations and the general maritime law. So far as the general maritime law applies to torts or injuries committed on the high seas and within the admiralty jurisdiction, the general rule is, not forfeiture of the offending property; but compensation to the full extent of all damages sustained or reasonably allowable, to be enforced by a proceeding therefor *in rem* or *in personam*. It is true that the law of nations goes in many cases much farther, and inflicts the penalty of confiscation for very gross and wanton violations of duty. But, then, it limits the penalty to cases of extraordinary turpitude or violence. For petty misconduct, or petty plunderage, or petty neglect of duty, it contents itself with the mitigated rule of compensation in damages. Such was the doctrine recognized by this court in the case of *The Marianna Flora* (11 Wheat. R., 1, 40), where an attempt was made to inflict the penalty of confiscation for an asserted (but not proved) piratical or hostile aggression. Upon that occasion, the court said: "The other count" (which was similar to those now under our consideration) "which seeks condemnation on the ground of an asserted hostile aggression, admits of a similar answer. It proceeds upon the principle that, for gross violations of the law of nations on the high seas, the penalty of confiscation may be properly inflicted upon the offending property. Supposing the general rule to be so in ordinary cases of property taken *in delicto*, it is not, therefore, to be admitted, that every offense, however small, however done under a mistake of rights, or for purposes wholly defensive, is to be visited with such
236*] harsh punishments. Whatever *may be the case, where a gross, fraudulent, and unprovoked attack is made by one vessel upon another upon the sea, which is attended with grievous loss or injury, such effects are not to be attributed to lighter faults or common negligence. It may be just in such cases to award to the injured party full compensation for his actual loss and damage; but the infliction of any forfeiture beyond this does not seem to be pressed by any considerations derived from public law." And the court afterwards added: "And a piratical aggression by an armed vessel sailing under the regular flag of any nation, may be justly subjected to the penalty of confiscation for such a gross breach of the law of nations. But every hostile attack in a time of peace is not necessarily piratical. It may be by mistake or in necessary self-defense, or to repel a supposed meditated attack by pirates. It may be justifiable, and then no blame attaches to the act; or it may be without any just excuse, and then it carries responsibility in damages. If it proceed farther, if it be an attack from revenge or malignity, from a gross abuse of power, and a settled purpose of mischief, then it assumes the character of a private unauthorized war, and may be punished by all the penalties which the law of nations can properly administer;" that is (as the context shows), confiscation and forfeiture of the offending vessel.

Now, it is impossible to read this language and not to feel that it directly applies to the present case. In the first place, it shows that the offending vessel may by the law of nations, in the case supposed of an attack from malignity, from a gross abuse of power, and a settled purpose of mischief, be justly subjected to forfeiture. But it is as clear that the language is solely addressed to the offending vessel and was not intended as of course to embrace the cargo, even if it belonged to the same owner, and he did not participate in or authorize the offensive aggression. For the court afterwards, in another part of the case, where the subject of the cargo was directly under consideration, said: "But the second count" (founded on the law of nations) "embraces a wider range; and if it had been proved in its aggravated extent, it does not necessarily follow that the cargo ought to be exempted. That is a question which would require grave deliberation. It is in general true that the act of the master does not bind the innocent owner of the cargo; but the rule is not of universal application. And where the master is also agent and the owner of the cargo, or both ship and cargo belong to the same person, a distinction may, perhaps, arise in the principle of decision." So that the *court studiously avoided giving a con- [*237
clusive opinion upon this point. Looking to the authorities upon this subject, we shall find that the cargo is not generally deemed to be involved in the same confiscation as the ship, unless the owner thereof co-operates in or authorizes the unlawful act. There are exceptions founded in the policy of nations, and, as it were, the necessities of enforcing belligerent rights against fraudulent evasions, where a more strict rule is enforced and the cargo follows the fate of the ship. But these exceptions stand upon peculiar grounds, and will be found, upon a close examination, to be consistent with, and distinguishable from, the general principle above suggested. Many of the authorities upon this subject have been cited at the bar, and others will be found copiously collected in a note in the appendix to the 2d vol. of Wheat. Rep., p. 37–40.

The present case seems to us fairly to fall within the general principle of exempting the cargo. The owners are confessedly innocent of all intentional or meditated wrong. They are free from any imputation of guilt, and every suspicion of connivance with the master in his hostile acts and wanton misconduct. Unless, then, there were some stubborn rule, which upon clear grounds of public policy, required the penalty of confiscation to extend to the cargo, we should be unwilling to enforce it. We know of no such rule. On the contrary, the act of Congress, pointing out, as it does, in this very case, a limitation of the penalty of confiscation to the vessel alone, satisfies our minds that the public policy of our government in cases of this nature is not intended to embrace the cargo. It is satisfied by attaching the penalty to the offending vessel, as all that public

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justice and a just regard to private rights required. For these reasons, we are of opinion that the decrees condemning the vessel and restoring the cargo, rendered in both the courts below, ought to be affirmed.

There remains, then, only the consideration of the costs, whether the courts below did right in making them exclusively a charge upon the proceeds of the condemned property. Costs in the admiralty are in the sound discretion of the court; and no appellate court should ordinarily interfere with that discretion, unless under peculiar circumstances. Here, no such circumstances occur. The matter of costs is not *per se* the proper subject of an appeal; but it can be taken notice of only incidentally as connected with the principal decree, when the correctness of the latter is directly before the court. In the present case the cargo was acquitted, 238*] and there is no ground to *impute any fault to it. If it had been owned by a third person, there would have been no reason for mulcting the owner in costs, under circumstances like the present, where it was impracticable to separate the cargo from the vessel by any delivery thereof, unless in a foreign port, and no peculiar cause of suspicion attached thereto. Its belonging to the same owner might justify its being brought in and subjected to judicial examination and inquiry, as a case where there was probable cause for the seizure and detention. But there it stopped. The innocense of the owner has been fully established; the vessel has been subjected to condemnation, and the fund is amply sufficient to indemnify the captors for all their costs and charges. We see no reason why the innocent cargo, under such circumstances, should be loaded with any cumulative burdens.

Upon the whole, we are all of opinion that the decree of the Circuit Court ought to be, and it is affirmed without costs.

ORDER.

This cause came on to be heard on the transcript of the record from the Circuit Court of the United States for the District of Maryland, and was argued by counsel; on consideration whereof, it is now here ordered, adjudged and decreed by this court, that the decree of the said Circuit Court in this cause be, and the same is hereby affirmed, without costs.

Cited—13 How., 76, 116; 20 How., 334; 7 Wall., 156; 6 Otto, 480; Blatchf. Pr., 358; 3 Ware, 311; Abb. Adm., 390, 545; 2 Cliff., 420, 427; 2 Curt., 310.

BROCKETT ET AL.

v.

BROCKETT.

Appeal—not necessary for all parties to join in bond—former decree—petition to open—time to appeal—citation.

Where there are many parties in a case below, it is not necessary for them all to join in the appeal bond. It is sufficient if they all appeal and the bond be approved by the court.

No appeal lies from the refusal of the court below to open a former decree.

But if the court entertains a petition to open a decree, the time limited for an appeal does not begin to run until the refusal to open it, the same term continuing.

Where an appeal is prayed in open court, no citation is necessary.

THIS was an appeal from the chancery side of the Circuit Court of the United States for the District of Columbia.

The case was not reached in regular order, but a motion was made, under the rule, to dismiss the appeal under the following state of facts:

*A final decree was pronounced in [*239 the court below on the 19th of May, 1843, from which an appeal was prayed. A petition to reopen the decree was filed during the term, and referred to a master, who reported on the 9th of June following. Upon his report the court refused to open its former decree, and from this refusal, as well as from the original decree, an appeal was prayed, in which all the parties joined. On the 15th of June, the bond was executed by three of the parties, not being all.

Messrs. Jones and *Brent* moved to dismiss the appeal on the following grounds, and cited 8 Peters, 526.

1. For irregularity, on account of the failure of the appellants to give the proper appeal bond; the bond given having been executed by only a part of the defendants in the court below, and for other reasons in the record.

2. That notwithstanding said bond may be regular, the appeal ought to be dismissed as to that part taken from the refusal of the court below, to open the final decree made upon the 10th of May, 1843; the said refusal having been made in the discretion of the court below and not "a final decree or order" from which an appeal can be taken.

3. That the parties are not named in the writ of error and citation.

Messrs. Bradley and *Neale* opposed the motion.

The motion in this case is put upon two grounds. As to the first, the bond, it will be seen by reference to the record, that a final decree was rendered on the 10th day of May, 1843, from which an appeal was prayed by all the parties.

During the same term a petition was filed by Robert Brockett to have that final decree opened for certain purposes. And the court referred it to the commissioner. The commissioner made his report, and on the 9th day of June, 1843, the same term still continuing, the court refused to open the final decree; and from this refusal, as also from the final decree of the 10th of May, an appeal was taken, and the court then directed the penalty of the bond. All the parties joined in this appeal also. The bond bears date the 15th June, 1843, and is executed by three of the parties in the decree, and by their sureties.

Under this state of facts the appellants maintain, First. That the bond was properly given, and as the law requires.

*The law requires that all should [*240 join in the appeal, but does not direct or require that they should all join in the bond. The whole object of the law in that respect is security. That is a question for the court below; if the security is sufficient, the bond is sufficient.

Second. The appeal was properly taken. The

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cause was not finally disposed of till the adjournment of the term. All judgments and decrees are under the control of the court during that period, and may be opened or revised.

The petition for the opening of the decree was addressed to the discretion of the court. The court entertained it. By this the effect of the final decree was suspended. Substantially, the decree was not final until the 9th June, 1843.

That appeal was taken, as has been said, to the former decree, and it is clear the Circuit Court did not consider the former decree as final, because they did not direct the amount of the penalty in the bond.

A third point has been suggested as to the writ of error and the citation, and the case in 8 Peters is relied on. The answer is, no writ of error was necessary here, nor citation, because the appeal was taken in open court. The case does not apply.

The cases in 2 Peters and 7 Peters do not apply. The appeals in these cases were taken by a part only of the parties. Besides, Mandeville's was a partnership case.

Mr. Justice STORY delivered the opinion of the court:

A motion has been made to dismiss this appeal upon several grounds. The first is, that although all the defendants have appealed from the decree of the court below, yet a part of them only have assigned the appeal bond. This objection is not maintainable. It is not necessary that all the defendants should join in the appeal bond, although all must join in the appeal. It is sufficient if the appeal bond is approved by the court, as satisfactory and complete security, by whomsoever it may be executed.

The next ground is, that an appeal has been taken from the refusal of the court below to open the former decree, rendered for the appellant. It is plain that no appeal lies to this court in such a matter, as it rests merely in the sound discretion of the court below. And if this had been the sole appeal in the case, the appeal must have been dismissed. But an appeal has also been taken to the first decree (which was a final decree) rendered by the 241*] court. That decree *was rendered on the 10th of May, 1843. During the same term a petition was filed by the defendants on the 26th day of the same month, to have the final decree opened for certain purposes; and the court took cognizance of the petition and referred it to a master commissioner. His report was made on the 9th of June following, the same term still continuing; and the court then refused to open the final decree; and from this refusal as well as from the final decree, the defendants took an appeal, and gave bond with sufficient sureties, on the 15th day of the same month, and the appeal was then allowed by the court. Before that time the court had not fixed the penalty of the bond.

Now, the argument is, that as the original final decree was rendered more than one month before the appeal, it could not operate under the laws of the United States as a *supersedeas*, or to stay execution on the decree; because to have such an effect the appeal should be made and the bond should be given within ten days after the final decree. But the short and conclusive answer to this objection is, that the final decree of the 10th of May was suspended by the subsequent action of the court; and it did not take effect until the 9th of June, and that the appeal was duly taken and the appeal bond given within ten days from this last period.

Another and the last ground of exception is to the want of proper parties to the writ of error and citation. No writ of error lies in this case, but an appeal only; and the appeal having been made in open court, no citation was necessary.

Upon the whole, we are of opinion that the motion to dismiss the appeal ought to be overruled, and it is accordingly overruled.

S. C., 3 How., 691.
Cited—14 How., 2; 16 How., 511; 7 Wall., 578; 10 Wall., 289; 2 Otto, 695; 3 Otto, 418; 4 Otto, 717; 5 Otto, 258, 287; 6 Bank. Reg., 234; 17 Blatchf., 89.

WILLIAM A. DROMGOOLE, FREDERICK G. TURNBULL, AND CHARLES A. LACOSTE, *Plaintiffs in Error*,

v.

THE FARMERS' AND MERCHANTS' BANK OF MISSISSIPPI.

Jurisdiction of U. S. C. Court—Mississippi statute—suit on promissory note—parties.

A statute of Mississippi allows suit to be brought against the maker and payee, jointly, of a promissory note, by the indorsee.

But an action of this kind cannot be maintained in the courts of the United States, although the plaintiff resides in another State, provided the maker and payee of the note both reside in Mississippi.

THIS case was brought up by writ of error from the Circuit Court of the United States for the Southern District of Mississippi.

*In 1838, the following promissory [*242 note was executed:

$2,899 50–100 PRINCETON, WASHINGTON Co., May 17th, 1838.

On the 1st of January, 1839, we, or either of us, promise to pay to the order of Briggs, Lacoste & Co., two thousand eight hundred and ninety-nine 50–100 dollars for value received, payable and negotiable at the Planters' Bank of Mississippi, at Natchez.

WILL. A. DROMGOOLE,
F. G. TURNBULL.

The makers and payees were all residents of the State of Mississippi. Lacoste, in the partnership name, indorsed it to the Farmers' and Merchants' Bank of Memphis, the stockholders of which are alleged to reside in Tennessee. The bank brought suit upon it in the Circuit Court of the United States for the District of Mississippi. The suit was brought against Dromgoole and Turnbull as the makers, and also against Lacoste; the junction being permitted by a Statute of Mississippi. The defendants pleaded in abatement as follows:

"And the said defendants who are citizens of the State of Mississippi, in their own proper persons, come and defend the wrong and injury, and say: that the persons composing the commercial firm of Briggs, Lacoste & Co., to

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whom the said promissory note declared upon was made and delivered at the time of its date and delivery then were, and yet are, citizens of and resident in the State of Mississippi, and were so at the time of the supposed transfer and delivery of the said promissory note to the said plaintiffs, by reason whereof, this honorable court cannot in law have or entertain jurisdiction of this cause, and this they, the said defendants, are ready to verify. Wherefore, the said defendants pray judgment of the said writ and declaration, and that the same may be quashed. SANDERS, for defendants."

To this plea the plaintiffs demurred, and the court sustained the demurrer. Judgment was accordingly entered for the plaintiffs, and to review the opinion of the court upon the demurrer, the present writ of error was brought.

The case was argued by *Mr. Walker* for the appellants, who relied upon the cases in 16 Peters, 86 and 315.

Mr Justice STORY delivered the opinion of the court:

This is a writ of error to the Circuit Court of the United States for the Southern District of Mississippi.

243*] The original action was brought by the Bank of Memphis, alleging the stockholders to be citizens of Tennessee, against the plaintiffs in error (the original defendants), alleging them to be citizens of Mississippi; and it was founded upon a promissory note made by Dromgoole and Turnbull (two of the defendants), dated at Princeton, Washington County, Mississippi, May 17th, 1838, whereby on the 1st of January, 1839, they, or either of them promised to pay to the order of Briggs, Lâcoste & Co., $2,899.50, for value received, payable and negotiable at the Planters' Bank of Mississippi, at Natchez. The declaration alleged title in the bank to the note by the indorsement of the payees, Lâcoste using the name and description of Briggs, Lâcoste & Co., to them; and the suit was brought jointly against both the maker and the payee, in conformity to a statute of Mississippi, authorizing such a proceeding. The defendants pleaded that they are citizens of Mississippi, and that the persons composing the firm of Briggs, Lâcoste & Co., were, and yet are citizens and residents of Mississippi, and were so at the time of the supposed transfer and delivery of the promissory note to the bank. To this plea there was a demurrer and joinder, on which the Circuit Court gave judgment for the bank; and the present writ of error is brought to revise that judgment.

The 11th section of the Judiciary Act of 1789 (ch. 20) provides, "Nor shall any district or circuit court have cognizance of any suit to recover the contents of any promissory note, or alter those in action in favor of an assignee, unless the suit might have been prosecuted in such court to recover the said contents, if no assignment had been made, except in cases of foreign bills of exchange." Now, the present case falls directly within the prohibition of this clause. The suit is brought by the plaintiffs to recover the contents of a promissory note of which they are the indorsers of the payee, and the payee and the makers are all citizens of Mississippi. The ground on which the original judgment was given, probably, was that the statute of Mississippi required all the parties to the note to be joined in the suit; and as all the plaintiffs were citizens of Tennessee, and all the defendants citizens of Mississippi, it was a case falling directly within the general provisions of the 11th section of the Judiciary Act of 1789 (ch. 20), which gives jurisdiction to the Circuit Court in cases where "the suit is between a citizen of the State where the suit is brought, and a citizen of another State." But it has been already decided by this court, that the statute of Mississippi is of no force or effect in the *courts of the United States [*244 and that independently of that statute no such joint action is by law maintainable. This was decided in *Keary* v. *The Farmers' and Merchants' Bank of Memphis* (16 Peters, 89). The other point, that the case falls within the prohibition of the 11th section of the Judiciary Act the 1789 (ch. 20), was as fully recognized by this court in *Gibson and Martin* v. *Chew* (16 Peters, 315).

There is nothing, then, in the present case which is open for argument.

The judgment of the Circuit Court of the Southern District of Mississippi is, therefore, reversed, and the cause remanded to that court with directions to enter a judgment for the defendants.

ORDER.

This cause came on to be heard on the transcript of the record from the Circuit Court of the United States for the Southern District of Mississippi, and was argued by counsel; on consideration whereof, it is now here ordered and adjudged by this court, that the judgment of the said Circuit Court in this cause be, and the same is hereby reversed with costs; and that this cause be, and the same is hereby remanded to the said Circuit Court, with directions to that court to enter judgement for the defendants.

Cited—6 How., 37, 39; 18 How., 520; 1 Biss., 101, 277; 17 Blatchf., 2.

THOMAS GRIFFIN AND HUGH ERVIN v. ROBERT THOMPSON.

No discharge of judgment, where marshal, without plaintiffs' consent, accepted depreciated currency in satisfaction of execution.

A marshal has no right to receive bank notes in discharge of an execution unless authorized to do so by the plaintiff.

If the marshal does receive such papers, the court, in the exercise of its power to correct the irregularities of its officer, will refuse a motion of the defendant to have satisfaction entered on the judgment, and refuse also to quash a second *fieri facias*.

UPON a certificate of division from the judges of the Circuit Court for the Southern District of Mississippi.

This was a motion made by Thomas Griffin and Hugh Ervin to have satisfaction entered on an execution of *fieri facias*, which issued from the clerk's office of the court against them on the 4th day of June, 1840, in favor of Robert

NOTE.—*As to payment in forged or depreciated paper, effect of*, see note to Bank of United States v. Bank of Georgia, 10 Wheat., 333.

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Thompson, for the sum of $1,740.02, with interest thereon at the rate of 8 per cent. per annum, from the 7th day of November, 1839, until paid, together with costs. And also to quash an execution of *fieri facias* which issued
245*] against them, *in favor of said Thompson, on the same judgment, on the 6th day of November, 1841.

In support of this motion, the plaintiffs below read in evidence first, an execution of *fi. fa.*, numbered 874, which was sued out of the court against Griffin in favor of Thompson on the 1st day of January, 1840, returnable on the 1st Monday of May ensuing, for the sum of $1,740.02 and the costs, this being the amount of a judgment recovered in the court on the 7th day of November, 1839. Upon this execution was indorsed the return of the marshal, dated May the 4th, 1840, setting forth the levy of that process on the 25th of March, 1840, on certain subjects of property, the execution of a forthcoming bond by Griffin with Ervin as surety for the delivery of the property at the day and place of sale, and the forfeiture of the bond by the failure of the obligors to comply with its condition. Accompanying this return is a receipt in these words:

January 2d, 1840. Received on this execution one thousand dollars in post-notes of the Mississippi Union Bank

WM. M. GWIN, *Marshal*,
By his deputy, JNO. F. COOK.

The plaintiffs next produced in evidence their forfeited forthcoming bond with the execution of *fiire facias* sued thereon, in favor of Thompson on the 4th of June, 1840, returnable to the 1st Monday of November with the following indorsements and returns thereon, viz.:

Indorsement on Fi. Fa.

No security of any kind is to be taken. This execution is entitled to a credit of one thousand dollars, paid 2d January, 1840, in Union post-notes. See marshal's return on *fi. fa.* No. 874, to May Term, 1840.

(Signed) WM. BURNS, Cl'k.

Marshal's Return.

Made on this case four hundred dollars, Nov. 3d, 1840. Received balance of this case, in full for costs, &c., say five hundred and fifteen 30-100 dollars. WM. G. GWIN, Marshal.

Nov. 3d, 1840. By W. L. BATTO, Dept.

They then read in support of their motion the execution of *fieri facias* sued forth against them in favor of Thompson, on the 6th day of November, 1841, which execution is the same that the plaintiff in the court below moved to quash. Upon it is the following indorsement:
246*] *Indorsement.

This execution is entitled to a credit of $803.47, paid 3d November, 1840, on *fi. fa.* No. 451, to Nov. Term, 1840. No security of any kind is to be taken for balance.

W. H. BROWN, Cl'k.

Marshal's return, "stayed by *supersedeas*," received April 1, 1842. A. MILLER, Ml.'
By dept. J. S. GOOCH.

They then read in evidence to the court the following receipts which were proved to be signed by, and in the handwriting of John F. Cook, who, at the date of said receipts, and before, was a deputy of William M. Gwin, Marshal of the Southern District of Mississippi, which receipts are in the words and figures following, to wit:

Received of Thomas Griffin the sum of eight hundred dollars, to be applied to part payment of an execution obtained *vs.* him at the Nov. Term, 1839, of Circuit Court United States as security for I. Griffin, which amount I am to credit said execution with.

December 10th, 1839.

W. M. GWIN, Marshal,
By his deputy, JNO. F. COOK.

"Received of Thomas Griffin the sum of two hundred dollars in Union Bank money, to be applied to a certain execution I hold *vs.* said Griffin, or I am to return the said money to the said Griffin. JNO. F. COOK.

Feb'y 17th, 1840.

The said sums of $800 and $200, mentioned in said receipts, constituting the $1,000 in post-notes of the Mississippi Union Bank, returned by the marshal as received on 2d of January, 1840, on execution of *fieri facias* hereinbefore referred to, dated 1st January, 1840.

They also read in evidence to the court the following additional receipts, to wit:

Thompson
v.
Griffin and Surety. } Circuit Court U. S. *fi. fa.* to Nov. Term, 1840.

Received of Thomas Griffin in the above stated case, the sum of four hundred dollars in Louisiana money.

Nov. 3d, 1840. W. M. GWIN, Marshal.
Per deputy, JNO. F. COOK.

Received of Thomas Griffin the sum of five hundred dollars, to *be applied to the [*247 payment of an execution, in the hands of the marshal, of Thompson *v.* Thomas Griffin and sureties.

Nov. 1840. WM. M. GWIN, Marshal.
By his deputy JNO. F. COOK.

The said Robert Thompson then, in opposition to said motion, read in evidence of the court, the judgment pronounced at its November Term, 1841, quashing so much of the return of the marshal made on the execution of *fieri facias* numbered 874, which issued on the 1st day of January, 1840, as stated that he had "received on said execution one thousand dollars in post-notes, of the Mississippi Union Bank," which judgment is in the words and figures following, to wit:

"Robert Thompson
v.
Thomas Griffin.

"Motion by the plaintiff to quash that part of marshal's return on *fi. fa.* No. 874, to May Term 1840, which is as follows: 'January 2d, 1840. Received on this execution one thousand dollars in post-notes of the Mississippi Union Bank.'

"Motion sustained and said marshal's return on said *fi. fa.* quashed, and an alias *fi. fa.* ordered to May Term, 1842."

The said Thompson then introduced Joseph Holt as a witness, who, being sworn, stated that he was one of the plaintiff's attorneys of record who obtained the said judgment of $1,740.02 against said Thomas Griffin at the November Term, 1839, of the court; and that as the attorney of record of the said plaintiff (Robert Thompson), he had full authority to

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collect said judgment, and to control the executions which might issue thereon; that supposing the execution on said judgment when issued would come into the hands of the said "Jno. F. Cook," deputy-marshal; he had a conversation with him a short time after the judgment was rendered, say sometime in the month of November, 1839, in which he notified the said Cook distinctly, that good money would be required to be collected on said judgment, and that he must receive no other kind of money on the execution, when it should come into his hands. That he saw said Cook several times during the ensuing winter, but that he (Cook) never mentioned to him that he had made any collection of said judgment. That the first knowledge or intimation witness had of the receipt of the $1,000 in post-notes of [*248] the Mississippi Union Bank, *mentioned in the return of the said Cook on the execution as collected 2d January, 1840, was in the month of May, 1840, when going into the marshal's office at Jackson, Mississippi, he found the said execution had just been returned, with the receipt of the $1,000, in post-notes of the Mississippi Union Bank, indorsed thereon as aforesaid.

Witness at once refused to receive said post-notes from the marshal, in part satisfaction of said execution, and has ever since refused, and still refuses to receive them. Witness further stated, that at the time referred to (May, 1840) said post-notes had greatly depreciated in value, and were not worth more than fifty cents to the dollar, and that on the 17th of February, 1840, said post-notes were worth but seventy-five cents to the dollar. That he immediately entered a motion to quash said return of the said deputy-marshal (Cook), which motion was sustained by the court at its November Term, 1841. Witness further stated that in a conversation he had held with said Thomas Griffin, he (Griffin) had stated that the $800 mentioned in said receipt, dated 10th December, 1839, and the $200 mentioned in said receipt, dated 17th February, 1840, constituting together the $1,000 returned as made on 2d January, 1840, in "post-notes of the Mississippi Union Bank," were paid by him to said John F. Cook, deputy-marshal as aforesaid, at times mentioned in the said receipts respectively, in post-notes of the said Mississippi Union Bank. It was also in proof that, on the 10th day of December, 1839, the post-notes of the Mississippi Union Bank were current in the State of Mississippi, and were generally received by the sheriffs and marshal unless instructions to the contrary were given by plaintiffs or their attorneys. It was also admitted that Griffin had no actual notice of the instructions given by the plaintiff's attorney in this case to said John F. Cook, deputy-marshal. This was all the evidence offered either in support or in opposition to the plaintiff's motion. Whereupon on the question whether satisfaction should be entered on said execution of *fieri facias*, which was sued out on the 4th of June, 1840, in favor of said Robert Thomas v. Thomas Griffin and Hugh Ervin for the sum of $1,740.02 with interest and costs as aforesaid; and also on the question whether said execution of *fieri facias* which was sued out against the said Griffin and Erwin on the 6th of November, 1841, should be quashed, the judges were opposed in opinion, and the questions were ordered to be certified to this court for decision.

The cause was argued by *Mr. Henderson* for Griffin, the defendant in *the original [*249 suit below, who had made the motion to have satisfaction entered on the judgment and to quash the second *fieri facias;* and by *Messrs. Harrison* and *Holt* for Thompson, the plaintiff below.

Mr. Henderson, for plaintiffs:

This was a motion in the court below to have satisfaction entered on a certain execution against the plaintiffs, in the motion which issued against them on 4th June, 1840; and to have a subsequent execution quashed, which was issued on the same judgment, 6th Nov., 1841, and after said judgment was wholly satisfied, as the plaintiffs in the motion allege.

The first execution issued 1st January, 1840, for $1,740.02, returnable to May Term, 1840, which the marshal returned bonded, and with a credit in these words:

"January 2, 1840. Received on this execution one thousand dollars in post-notes of the Mississippi Union Bank."

After the return, viz., 4th June, 1840, the plaintiff sued out another execution, on which is indorsed by the clerk:

"This execution is entitled to a credit of one thousand dollars, paid 2d Jan'y, 1840, in Union post-notes."

This execution returned to Nov. Term, 1840, bears the marshal's indorsement, as follows:

"Made on this case four hundred dollars, Nov. 3, 1840. Rec'd balance of this case in full, for costs, &c., say five hundred and fifteen 30-100 dollars. Nov. 3, 1840."

On 6th Nov. 1841, notwithstanding the previous satisfaction, so made and returned, another execution issued, credited only by $803.47, paid 3d November, 1840.

This constitutes the plaintiff's case in motion, though some receipts and statements of account were presented, substantially in accordance with the foregoing returns of the marshal.

The defendant in the motion then exhibited a judgment of November Term, 1841, of the court below, quashing so much of the marshal's return on the first execution as denoted the receipt of $1,000 Union post-notes, on 2d January, 1840, which judgment was entered, on the now defendant's motion, with the court's order for the execution, which subsequently issued, of 6th Nov., 1841.

The attorney of the plaintiff in the execution (the defendant in *this motion) testified [*250 that in November, 1839, he informed Cook, deputy-marshal, that "good money" would be required.

That he knew nothing of the collection of the Union Bank notes till in May, 1840, and he then refused to receive them.

That in May, 1840, these notes were down to fifty cents in the dollar, and on 17th February, 1840, they were worth but seventy-five cents to the dollar.

Record states it was in proof these notes were current 10th Dec., 1839, and that the defendants in the execution (plaintiffs in this motion) knew nothing of plaintiff's instruction to Cook, the deputy-marshal.

On the case so presented, the court below divided in opinion, whether or not the execu-

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tion of June 4, 1840, should be discharged as against the defendants therein; and that issued against them of November 6, 1841, quashed.

The sole question presented by the record is: Does the record in its proofs show the defendants, in the executions which issued on January 1, 1840, and June 4, 1840, lawfully paid and discharged them? For if so, the motion in the court below should be sustained.

The record presents no case of the marshal assuming to settle a plaintiff's debt, without a writ authorizing him.

No case of a false return of the execution.

No case of a sheriff's assuming to discharge an execution by an offset of his own debt to the defendant in execution.

No case of taking promissory notes in discharge of an execution,

No case, in our opinion, of the sheriff having seized, or received anything, in satisfaction of the execution, which the law did not authorize him, in his discretion, to receive in discharge of the writ. We make no question against the adjudged cases upon such and similar facts.

Nor shall we contend, if this motion was against the marshal to pay the plaintiff in execution in lawful coin, he could resist the motion, by showing he had received, in satisfaction of the execution of the defendant, copper coin, or unlegalized foreign coin, or bullion, or treasury notes of the United States, or bank notes of the States.

But the first question is: Are not State bank notes a good tender, if not objected to? All our State courts uniformly decide they are, and so decided this court in 10 Wheat. Rep., 347; *Idem.*, *Gwin* v. *Breedlove*, decided at this term.

And bank notes certainly constitute good and 251*] lawful payment, if *received; and the effect of such payment cannot, for cause of depreciation of the notes before redeemed, or the like, be avoided, and the original demand resorted to; as if promissory notes only had been received. All our State courts decide this principle continually, and so in England. (Burrough's Rep., 457.)

These principles of tender and payment in bank notes, as between debtor and creditor, have never been questioned. Copper coin, treasury notes, and bank notes are the greater part of our currency; and as all society use them as currency, as the law recognizes and legalizes their circulation, debtors may lawfully tender them in payment, and creditors may lawfully receive them, though not legally bound so to do.

The marshal is the plaintiff's agent, who, by his execution, may receive payment of the plaintiff's debt. He who may lawfully receive payment, may have lawful tender of payment made to him. What sophistry can plausibly maintain, that a tender of bank notes to the principal, and not objected to, is a good tender; or payment in such notes to the principal is a good payment; and yet the like tender, and like payment, is not equally good when made to the agent?

But it is said in this case, the principle forbid the marshal to receive bank notes. Admit the fact thus; it is also admitted in the record, the defendant in execution, who tendered and paid his bank notes to the marshal, was ignorant of plaintiff's instruction; and we maintain this fact can only avail the plaintiff in execution as between himself and the marshal, who may have disregarded his instruction. (See decision, *Gwin* v. *Breedlove*.)

But the marshal's return of satisfaction of the execution in bank notes, in no state of case, as against the debtor in execution, can be treated as a nullity; and so I understand the intimation of the court in the case of *Gwin* v. *Breedlove*.

But the proof in this case is not, as in the case of *Gwin* v. *Breedlove*, that specie would be required of the officer; on the contrary, the inference is irresistibly otherwise. The testimony of plaintiff's attorney for the execution is, that in November, 1839, he told Cook, the deputy, that "good money would be required." And it is in proof also, that this bank paper was current—was "good"—as late as 10th December, 1840, and no proof it was depreciated before 17th February, 1840, being one and a half months after its payment; while the historical fact is, the bank did not suspend *specie payments till 22d March, 1840. [*252 The payment of these notes on execution was 2d January, 1840.

It is in proof, too, that much of the remaining amount due by this execution was paid in bank notes of the State of Louisiana.

Why, then, has not the plaintiff in execution sought to have execution for the whole amount of the judgment? Why, but that he has regarded the Louisiana bank notes "good money" within the meaning of his instructions.

We contend, too, the plaintiff adopted this payment of $1,000 on the first execution of 1st January, 1840, by issuing his 2d execution, of 4th June, 1840, with a credit indorsed of the $1,000 previously paid. The attorney proves he knew the payment of this $1,000 in May, 1840; and in June following he issued his second execution, adopting the payment by way of credit.

This was after he had told the sheriff he would not receive it, and the legal presumption must be, he had changed his purpose, and that the clerk but obeyed his instructions in proceeding to collect the remainder by a further execution.

This court, as matter of evidence, are bound to regard this act as *prima facie* the act of the party, and a subsequent ratification of the previous payment. In conformity with this legal aspect of the proof, the balance due is returned, fully satisfied on the 2d execution, 3d November, 1840. One year afterwards, November Term, 1841, a motion was made and sustained, not against the marshal, but *ex-parte* against Griffin, to eradicate and annul to his prejudice a payment made by him twenty-two months before on executions returned finally satisfied one year before. Griffin is not shown to have had any notice of that motion, and is first admonished in April, 1842, by another execution, that his payments were unsatisfactory to the plaintiff. If, then, the rule of law was, as the plaintiff in execution insists, viz.: that a defendant in execution can make no safe payment of the execution to the sheriff in bank notes, though the sheriff be content to receive them, unless the plaintiff shall approve such payment as a discharge of the defendant; yet

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the rigor of such a rule should, in common and equal justice, require the plaintiff to notify his objection to the defendant, so soon at least as the return of the execution, shall advise the plaintiff of the manner of its payment. Here the plaintiff slept upon his collection of the defendant, implying his approval (if such approval as to the defendant be necessary), without notice to the defendant, of any exception for nearly two years after execution, 253*] *evidencing the objectionable payment was returned; and the plaintiff admits he knew the fact. Must defendants in execution, though not required by the sheriff, always pay in specie, or be subject to traps of this sort forever after, or how long after?

We consider this case is not governed in any degree by the Process Act of Congress, of May 19, 1828. The motion in this case now pending, and the motion and judgment therein rendered in the court below, to quash the marshal's return on the execution of January 1st, 1840, are predicated on no statute of Mississippi, nor in conformity to any established rule of proceedings, or of decision. They are motions of first impression pursued upon general common law principles. In this view of the subject, I notice the case in 5 Howard, 624. The facts in that case present no proper analogy to this. There the sheriff was also the defendant. Hence, besides other inconsistencies of his case, he could not avail himself of our position that, as defendant, he paid the sheriff, ignorant that the plaintiff entertained objections to the currency in which payment was made. He, in fact, could not pay himself. It is only by this explanation of the case that the decision can be sustained. The language of the court, then, that "the return was not a legal return, and the plaintiff was not bound by it, unless he had agreed to receive such money or notes in payment," is language only properly predicable of a controversy between the plaintiff and the sheriff, or as in that case against the defendant, too, he being the sheriff.

This court, in the case of *Gwin* v. *Breedlove*, in referring to the above case in 5 Howard, are not understood to mean more by the reference than to show the case not then applicable as a precedent; while it is submitted, as a fair conclusion, whether the principles adopted in the case of *Gwin* v. *Breedlove* do not go to show, this court would not extend the decision of that case beyond its peculiar facts.

This court, in *Gwin* v. *Breedlove*, again declare, as in 10 Wheat., that payment in bank notes is good, unless objected to. And they apply the declaration of this rule in a case where payment was to the marshal in bank notes, on execution, where it was in proof that, as between the marshal and plaintiff in execution, he had been forbidden to receive bank notes; and the integrity of the rule must come to this, or it is no rule as to payments made on execution.

Such payment, received without objection by the sheriff (who undoubtedly has the right to receive payment), must have some recogni- 254*] tion *in law, or it is a nullity. And if such payment is a nullity, it is so, whatever the form of return. A payment, therefore, of an execution in bank notes, with a return "satisfied," will, of course, not prevent the plaintiff from pursuing the defendant with further executions, if he can show that such payment was made in bank notes; for such payment, if good at all, is good for itself, and not made good or bad according as the sheriff may report the facts in his return. If it can ever be good, it is only so because it is a discharge lawfully made of the defendant's debt.

The reasoning of the court in *Gwin* v. *Breedlove*, we think, shows that such payment is a good and valid payment, and discharges the debtor in execution, if received without objection by the sheriff; and that such payment, though not binding the plaintiff in his demand against the sheriff, does bar him from further process against the defendant.

The rule of law is, that whatever the sheriff may lawfully take in discharge of an execution, must bar the plaintiff from further execution *vs.* the defendant, though plaintiff get nothing from the sheriff. (12 T. R., 207; 4 Mass. R., 403; 7 T. R., 428; 2 Lord R., 1072.)

When a sheriff seizes goods to satisfy an execution, he cannot compel the plaintiff to receive the goods or property in kind (except in cases of extent); and though he waste the goods, the defendant is discharged. Either plaintiff or defendant in execution may controvert, with the sheriff, the truth of his return.

The sheriff is estopped by his own return. The sheriff cannot be heard to testify in disproof of his own return. (3 Howard, 68.)

And, *quære:* Is not the rule universal, that the plaintiff, as to the defendant in execution, is bound and precluded by sheriff's return?

Now, it is in proof, by return on the second execution, of 4th June, 1840, that the marshal received $515.30, as balance in full of debt and cost. Whilst this remains true and uncontradicted, what pretext has the plaintiff for further execution against the defendant? If the balance of the case, in full, for costs and all, have been received by the marshal on the execution, what right has the plaintiff further against the defendant?

And this execution and its return have not been complained of, have not been quashed, or in any way set aside. If it stands, therefore, for any evidence, it is evidence, full and complete, to discharge the defendant, as sought for by his motion in this case.

**Messrs. Harrison* and *Holt*, for [*255 Thompson:

The motion in this case was on behalf of defendant and sureties, to have satisfaction entered on the judgment, and the last execution of *fi. fa.* which issued, quashed. The plaintiff resists the motion on several grounds. As to the $800 for which a receipt of the deputy-marshal (Cook) was produced, dated in November or early in December, 1839, it is insisted that this sum cannot be taken in part discharge of the execution, because it was collected before the execution issued, and of course without warrant of law. The officer derived his power solely from the process, and acting before its existence, his act was unofficial, could not be obligatory on the principal marshal and sureties, or on the plaintiff. The following authorities are full to the point that money collected by an officer after the return day of an execution is no satisfaction of it. (4 Rand., 336; 1 Bibb, 608; 5 Littel, 19; 2 J. J. Mar-

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shall, 29, 30; 5 Howard, 246.) So in 3 Stewart & Porter, 385–388, it was held that the receipt of money by an officer before an execution issued, was no satisfaction of the *fi. fa.* which afterwards came into his hands.

But it is further urged that neither the $800 received in 1839, nor the $200 received in February, 1840, can be taken in part payment of the execution, because these sums were collected, not in money, but in depreciated post-notes of the Mississippi Union Bank, not only without the assent of the plaintiff, but in direct violation of the instructions of his attorneys.

The command of the process to the officer, was that he should cause to be made so many dollars, which in legal estimation are gold or silver dollars—the constitutional coin of the United States. The special authority thus given, being matter of law, of which all concerned were bound to take notice, could not be departed from to plaintiff's prejudice, without his assent expressed or implied—neither of which is shown or alleged. This question has been settled repeatedly, by tribunals of the highest respectability. (4 Howard Miss., 404; 5 Howard Miss., 246, 621–624; 9 Johns., 261, 262; 1 Cowen, 46; 4 Cowen, 558; 2 J. J. Marshall, 70, 71; 2 N. Carolina Rep., 529; Dudley's Law and Equity R., 356; Martin's L. R. N. S., 205.)

Inasmuch as the execution process, and the forms of returns upon it as existing in Mississippi are the creatures of the local laws of that State, it is believed that the decisions of her Supreme Court cited should be conclusive of the questions involved.

256*] **Mr. Justice* DANIEL delivered the opinion of the court:

This court is unable to perceive upon what principle of law either of the objects sought by the motion of the plaintiffs in the Circuit Court could have been accorded to them. It cannot be questioned that the defendant in that motion was entitled to the full benefit and operation of his execution, and these were to cause to be made for him of the goods and chattels, lands and tenements, of his debtor, the sum of $1,740.02 of lawful money of the United States. With his claim thus solemnly ascertained of record, we are aware of no authority, from any source, which can compel him to commute it, or to receive in satisfaction thereof any other thing which he shall not voluntarily elect. But least of all should such an authority be recognized in a quarter more fruitful than any other of abuses in its exercise; for instance, from the will either of the debtor, or the officer whose position would enable him in some degree to practice on both creditor and debtor. To permit either the debtor or the officer to impose upon the creditor the receipt of depreciated paper in payment, would be to permit not merely a repeal of the judgment, but a violation, a virtual abrogation, indeed, of the contract on which it was founded; for none can fail to perceive the thousand fraudulent devices for profit or favor which the toleration of such a practice would naturally call into action to defeat the rights of creditors. The courts of justice might thus be made to subserve only the purposes of dishonesty, and be transformed into engines of monstrous wrong. It has been argued in support of this motion, that bank notes constitute good and lawful payment if received; that as the law recognizes their circulation, debtors may lawfully tender them in payment, and creditors may lawfully receive them though not legally bound to do so. From these postulates it is then attempted to draw the following conclusions: 1. That the marshal is the plaintiff's agent, who by the execution may receive the plaintiff's debt. 2. That he who may lawfully receive payment, may have a lawful tender of payment made to him. 3. That if a tender or payment of bank notes to the principal, not by him objected to, is a good tender or payment, the like tender or payment to the agent is equally good. This argument, to say the least of it, is wholly untenable. 'Tis undoubtedly true that the creditor may receive either bank notes or blank paper in satisfaction of his debt, for the reason that his power over that debt is supreme, and he may release it without payment of any kind, if he think proper. But the fallacy of the argument here *consists in totally miscon- [*257 ceiving the situation and functions of the marshal. He is properly the officer of the law rather than the agent of the parties, and is bound to fulfil the behests of the law; and this, too, without special instruction or admonition from any person. If, then, when commanded to levy a sum of money, he make a return that he has not done this, but has of his own mere will substituted for money depreciated bank notes, his return is an admission, on oath, that he has both disobeyed his orders and transcended his powers, for legally he has no powers save those he derives from the precept he is ordered to obey. Can it be doubted that upon application from those whose interests are involved in the performance of his duties by the marshal, it is the right and the duty of the court in such a case to correct the irregularities of its officer, and to compel him to perform his duty? There is inherent in every court a power to supervise the conduct of its officers, and the execution of its judgments and process. Without this power, courts would be wholly impotent and useless. The returns of the marshal in this case upon the final process in his hands, showing the receipt by him of depreciated bank paper in satisfaction of that process which ordered him to collect money, are held to be departures from the performance of his duty as plainly enjoined by the process itself, are deemed therefore illegal and void, and ought upon the application of the party injured thereby to have been set aside and annulled by the court. In conformity with the principles herein sanctioned, we therefore order it to be certified to the judges of the Circuit Court for the Southern District of Mississippi, that satisfaction should not be entered on the execution of *fieri facias* which was sued out in this case on the 4th of June, 1840, in favor of the said Robert Thompson against the said Thomas Griffin and Hugh Ervin, for the sum of $1,740.02 with interest and costs; and further, that the execution of *fi. fa.*, which was sued out against the said Thomas Griffin and Hugh Ervin on the sixth day of November, 1841, should not be quashed; and that the motion of the plaintiff in the Circuit Court should be overruled.

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ORDER.

This cause came on to be heard on the transcript of the record from the Circuit Court of the United States for the Southern District of Mississippi, and on the points and questions on which the judges of the said Circuit Court were opposed in opinion, and which were certified to this court for its opinion agreeably to 258*] the act of Congress *in such case made and provided, and was argued by counsel; on consideration whereof, it is the opinion of this court that satisfaction should not be entered on the execution of *fieri facias*, which was sued out in this case on the 4th of June, 1840, in favor of the said Robert Thompson against the said Thomas Griffin and Hugh Ervin for the sum of $1,740.02, with interest and costs: and further, that the execution of *fi. fa.*, which was sued out against the said Thomas Griffin and Hugh Ervin on the 6th day of November, 1841, should not be quashed: and that the motion of the plaintiff in the Circuit Court should be overruled. Whereupon it is now here ordered and adjudged that it be so certified to the said Circuit Court.

Cited—2 How., 261; 3 How., 720; 1 Abb. U. S., 176; 2 Wood. & M., 80.

BUCKHANNAN, HAGAN & CO., for the use of GEORGE BUCKHANNAN, *Plaintiffs*.

v.

WILLIAM TINNIN, RALPH CAMPBELL, AND JOHN G. ANDREWS, *Defendants*.

Execution—acceptance of depreciated bank notes by marshal in discharge of—plaintiff's assent presumed.

If the marshal receives bank notes in discharge of an execution, and the plaintiff sanctions it, either expressedly or impliedly, he is bound by it, and a motion to quash the return ought to be refused.

THIS case came up on a certificate of division in opinion from the Circuit Court of the United States for the Southern District of Mississippi.

Buckhannan, Hagan & Co. recovered a judgment in the court below against Tinnin, and issued a *fieri facias* on the 16th December, 1839. A part of the money was received in bank notes, under the circumstances stated in the motion to quash that part of the return, upon which motion the judges were divided in opinion.

It was as follows:

This was a motion made by plaintiff in the above entitled case, to quash so much of the marshal's return on an execution of *fieri facias*, which issued from the clerk's office of this court, on the 16th day of December, 1839, in favor of Buckhannan, Hagan & Co., use of George Buckhannan, against William Tinnin, Ralph Campbell, and John G. Andrews, for the sum of $4,492.54, with interest from 23d of May, 1839, until paid, together with costs, as in the words and figures following, to wit:

259*] *"Received on this execution thirteen hundred dollars, in Union money, 17th February, 1840."

And in support of said motion, said execution of *fieri facias* was read in evidence to the court, which execution of *fieri facias*, together with the return and indorsements thereon, which were also read in evidence to the court, are in the words and figures following, to wit:

UNITED STATES OF AMERICA, Southern District of Mississippi, } ss.

The President of the United States, to the Marshal of the Southern District of Mississippi, greeting: Whereas, at the May Term, 1839, of the Circuit Court of the United States for said district, George Buckhannan, John Hagan, and Edward Whittlesey, under the firm of Buckhannan, Hagan & Co., for the use of George Buckhannan, recovered judgment against William Tinnin for the sum of $4,492.54, with interest thereon at the rate of eight per cent. per annum from the 23d day of May, A. D. 1839, until paid, together with costs and charges by said plaintiff in and about their suit in that behalf expended, whereof the said defendant was convicted, as appears to us of record. And whereas, on the nineteenth day of June, A. D. 1839, an execution of *fieri facias* issued from our said court, directed to the marshal of said district, for the amount of said judgment, interest, and costs as aforesaid, which execution was levied on certain property of said defendant, which property was suffered to remain in possession of said defendant, upon executing a forthcoming bond according to law, with Ralph Campbell and John G. Andrews as security, which said bond was returned to our said court, at the November Term thereof, A. D. 1839, by the marshal aforesaid forfeited, and thereby has the force and effect of a judgment, according to the statute in such case made and provided, as well against the said sureties as against the defendant to said originial execution for said debt, interest and costs. Now, therefore, you are hereby commanded, that of the goods and chattels, lands and tenements, of the said William Tinnin, Ralph Campbell, and John G. Andrews, late of your district, you cause to be made the amount of said judgment, interest, and costs so recovered as aforesaid; also the sum $89.67 including the costs accrued since the emanation of said execution, and that you have the said moneys before our said Circuit Court, at a term to be held on the first Monday of May next, *to render to the said plaintiffs; and [*260 have, also, then and there this writ.

WITNESS the Honorable Roger B. Taney, Chief Justice of the Supreme Court of the United States, at Jackson, the first Mon-
[L.S.] day of November, A. D. 1839, and in the 64th year of the Independence of the United States.

Issued the 16th day of December, 1839.

WM. BURNS, Clerk.

Indorsed. "No security of any kind is to be taken. WM. BURNS, Clerk.

Marshal's Return.

Received on this execution thirteen hundred dollars in Union money. 17 February, 1840, and balance suspended by order of plaintiffs.

W. M. GWIN, Marshal,
By J. F. COOK, Deputy.

NOTE.—*As to payment in forged or depreciated paper, effect of*, see note to Bank of United States v. Bank of Georgia, 10 Wheat., 333.

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Fees.		
Com'n $1,300 - - -	$19 00	
½ com's on $3,282.21 -	34 32	
Levy, ent'g and ret'g - -	6 50	
Mileage - - - -	1 50	
		$61 32

It was admitted that the words "Union money," in said return, signified notes of the Mississippi Union Bank, and that on the 17th day of February, 1840, said notes were worth but seventy-five cents to the dollar.

Which was all the evidence offered on the trial of said motion, which motion was contested by the said William Tinnin, Ralph Campbell, and John G. Andrews; and on the question, whether that portion of said marshal's return, which is in the words and figures following, to wit:

"Received on this execution thirteen hundred dollars in Union money, 17 February, 1840," should be quashed, the judges were opposed in opinion, which is ordered to be certified to the Supreme Court of the United States for decision.

The cause was submitted upon printed argument by *Messrs. Duncan* and *Holt* for the plaintiffs in the court below.

On a certificate to the Supreme Court, from **261*]** the judges of the *United States Circuit Court for the Southern District of Mississippi, that in this case they were opposed in opinion.

Upon a *fieri facias* from said court in favor of the plaintiffs against the defendants, dated 16th December, 1839, returnable on the first Monday in May, 1840, the marshal, on the 17th day of February, 1840, without the assent of plaintiffs, received $1,300 in notes of the Mississippi Union Bank, then depreciated twenty-five per cent.

The marshal returned that he had received Union money; and the plaintiffs moved to quash so much of the return; and it was admitted on the trial that the Union money was bank notes of the Union Bank, and that those notes were depreciated twenty-five per cent. The District Court had uniformly quashed such returns, and the Supreme Court of the State had repeatedly quashed such returns. The Circuit Judge, differing in opinion, brings the question before this court.

Plaintiffs argue that the marshal had no right to receive any property in discharge of the execution, because the process required him to make money. The authority of the marshal was special, and derived from the law of the land, and the defendants and all others had notice of the extent of the powers delegated by the law to the officer; and if he took anything but dollars, which in legal intendment must be gold and silver, he was abusing his trust and acting without authority. The marshal was bound to bring into court the dollars, not property.

Plaintiffs rely on the following authorities: 4 Howard, 404; 5 Howard, 246, 621–624; 9 Johns., 261, 262; 1 Cowen, 46; 4 Cowen, 553; 2 J. J. Marshall, 70, 71; 2 North Carolina Rep., 529; Dudley's Law and Equity R., 356; Martin's L. Acts, 205.

Upon the manner of executing process, and the forms of process and returns, and their effects in any State, the decisions of the Supreme Courts of such State are entitled to great weight, if not conclusive.

Mr. Justice DANIEL delivered the opinon of the court:

The principles ruled in the case of *Thompson* v. *Griffin and Ervin* as those which define the duties and should govern the conduct of the marshal in levying executions committed to his hands, have been here again considered and approved. They would be decisive also of the case now under consideration, but for two points of difference between this and the case of *Thompson* v. *Griffin et al.* These two points arise, 1st, upon the time intervening between the return of the marshal and the plaintiff's motion, as tending to show an acquiescence by *the plaintiff; and, second, upon the [*262 additional evidence in this case amounting to proof of approbation or sanction by the plaintiff, express or implied, of the conduct of the marshal. In *Thompson* v. *Griffin et al.* application was made to the court at the earliest practicable period to set aside the marshal's return, and there was throughout no fact or circumstance tending to show a recognition, by the party, or a moment's acquiescence by him in the irregularity complained of. In the present case, the return of the marshal showing the receipt by him of the depreciated bank notes bears date on the 17th February, 1840; the motion to quash was made in May, 1842. Thus an interval of more than two years was permitted to elapse between the return and the motion; a period during which the party must be presumed to have been cognizant of the return, a public and official proceeding to be found amongst the files and records of the court to which access might at all times have been had. If this fact stood alone, unassociated with and unexplained by any other, it would of itself imply at least, on the part of the plaintiff, laches and negligence in the prosecution of his interests, if not an assent by him to the acts of the officer. This fact of time, however, is by no means solitary or isolated in the evidence in this cause. The language of the return certainly imports no objection by the plaintiff or by any other to the receipt of the $1,300, or to the medium in which they were collected: so far from this, when taken altogether, that language strongly implies, if it does not directly declare, that the plaintiff, or whosoever he was that took control of the matter, approved of the proceeding so far as it had gone, and objected only to a collection of the residue of the execution at that time. It should not be lost sight of, either, in construing this language, that no exception to any one kind of medium, or preference for any other, is indicated in the inhibition as stated; it is a simple direction to proceed no farther. It cannot be objected to the return in question, that it is the act or declaration of the officer whose conduct in making it is impeached. Although the act of that officer, it is a sworn return, and must stand until falsified. It is introduced by the plaintiff himself in support of his motion; is indeed the only evidence he has adduced to sustain it; he relies on this return, and in so doing must take it entire; he cannot be permitted to garble it. The return must be received as stating the truth.

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It must be received in all its parts; and if so, it comes (especially when viewed in connection with the interval between the dates of that re-263*] turn and of the motion in this *case), on the part of the plaintiff, an acquiescence if not a direct sanction, which at this day this court is unwilling to disturb. Great wrong might, by so late an interference, be visited upon the officer, who may have been reposing upon the conduct of this plaintiff; and the danger of a result like this is enhanced by the total absence of anything like proof to show that the plaintiff ever refused to receive the amount collected by the marshal, and may not have actually received and applied it to his own use, or at what rate of value if so received. This court is of the opinion upon the case certified to them, that the return of the marshal of the 17th of February, 1840, should not, under the facts disclosed in this case, be quashed.

ORDER.

This cause came on to be heard on the transcript of the record from the Circuit Court of the United States for the Southern District of Mississippi, and on the point and question on which the judges of the said Circuit Court were opposed in opinion, and which was certified to this court for its opinion, agreeably to the act of Congress in such case made and provided, and was argued by counsel; on consideration whereof, it is the opinion of this court that the return of the marshal of the 17th of February, 1840, should not, under the facts disclosed in this case, be quashed. Whereupon, it is now here ordered and adjudged by this court, that it be so certified to the said Circuit Court.

Cited—1 Abb. U. S., 176.

JOHN MURPHY AND JOHN DARRINGTON, Administrators of WILLIAM MATHESON, Deceased, *Plaintiffs in Error*,

v.

ANGUS STEWART, Administrator of ALEXANDER GRANT.

Judgment arrested, misjoinder of counts—order arresting vacated—nolle prosequi *as to one count judgment on the other* nunc pro tunc—*where declaration alleges partnership, general verdict presumes the fact—amendment, in discretion of court below.*

The court below, on motion, arrested a judgment for the plaintiff, after verdict, but without entering also that he took nothing by his writ.

The declaration contained two counts; in the first, the plaintiff sued as administrator; and in the second, in his own personal right. A general verdict was given, and the judgment arrested on account of the misjoinder of counts.

Afterwards, and before a writ of error was brought, a motion was made by the plaintiff to set aside the order arresting the judgment, and for leave to enter a *nolle prosequi* upon the second count.

Affidavit was filed by the plaintiff's counsel, stating that the only evidence offered on the trial was given on the part of the plaintiff, and that the defendant *offered no evidence whatever. The [*264 nature of the evidence was also stated, and the facts stated in the affidavit were not controverted.

The court below set aside the order arresting the judgment, a year after it was made, and allowed the verdict to be amended by entering the same *nunc pro tunc*, on the first count only.

In this there was no error.

All that is required is that the court should amend the verdict with a reasonable time; and this may be done upon the judge's notes of the evidence given at the trial or upon any other clear and satisfactory evidence. The practice is a salutary one and in furtherance of justice.

The necessity of a *profert* of letters of administration depends upon the local laws of a State.

Where the declaration alleges a partnership, and the jury find a general verdict, they must be presumed to have found that fact; and proof that the chose in action was indorsed in blank was sufficient to sustain the first count. The plaintiff has a right to elect in what right he sues.

After all, the question of amendment was a question of discretion in the court below, upon its own review of the facts. This court has no right or authority, upon a writ of error, to examine the question; it belonged appropriately and exclusively to the court below.

THIS cause was brought up by writ of error from the Circuit Court of the United States for the Southern District of Alabama.

In 1818 and 1820, the following promissory note and due-bill were given:

$3,428.18. 30th September, 1818.

Four months after date I promise to pay Grant & McGuffie, or order, three thousand four hundred and twenty-eight dollars eighteen cents, value received. WM. MATHESON.

Indorsed,

GRANT & MCGUFFIE.

CHARLESTON, 25th February, 1820.

Due Grant & McGuffie, or bearer, on demand, three hundred and forty-four dollars sixty-six cents, with interest from date.

$344.66. WILLIAM MATHESON.

In 1838, Angus Stewart, as the administrator of Grant, who was alleged to be the surviving partner of Grant and McGuffie, brought a suit in the Circuit Court of the United States for the Southern District of Alabama against Murphy and Darrington, administrators of Matheson.

The record (as brought up by a *certiorari*)

NOTE.—*Executors and Administrators, what demands they can sue in their individual name.*

Administrators may sue in their own right for causes of action accruing to them after the death of their intestate. Mercein v. Smith, 2 Hill, N. Y., 210.

When a contract is made with an executor or administrator, personally after the death of the testator or intestate, or where money is received by the person sued, after such death, the executor or administrator may sue, either in his own name or as executor or administrator. Merritt v. Seaman, 6 Barb. N. Y., 330.

An administrator may maintain debt in one State, in his individual capacity, upon a judgment recovered by him in another State as administrator. Talmadge v. Chapel, 16 Mass., 71.

Where an administrator pays a debt for which his intestate was liable as surety, he may recover the amount either in his own name or as admistrator. Mowry v. Adams, 14 Mass., 327.

An executor or administrator, thus vested with a representative character, may sue either in his own name, or as executor or administrator upon a note given to him as executor, for a debt due to his testator or to the estate. Merritt v. Seaman, 6 N. Y. (2 Seld.), 168; Mowry v. Adams, 14 Mass., 327; Talmage v. Chapel, 16 Mass., 73; Biddle v. Wilkins, 1 Pet., 692; Bright v. Currie, 5 Sandf. N. Y., 433; S. C., 10 N. Y. Leg. Obs., 104.

But, although the executor may elect in what capacity he will sue, an action brought by him, in his individual capacity, is, in general, most appropriate. *Ib.*, Grinnell v. Buchanan, 1 Daly (N. Y. Super. Ct.), 538.

An administrator is the legal owner of the assets,

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showed that the declaration contained the two following counts, first:

265*] *Angus Stewart, who is a citizen of the State of South Carolina, and administrator of all and singular the goods and chattels, rights and credits, of Alexander Grant, deceased, who was survivor of McGuffie, late merchants and partners, trading under the name and firm of Grant & McGuffie, who at the time of their death, and at the time of the execution of the contract hereinafter set forth, were also citizens of the State of South Carolina, complains of John Murphy and John Darrington, administrators, with the will annexed, of William Matheson, deceased, citizens of the State of Alabama, in custody, andsoforth, in a plea of trespass on the case, andsoforth; for that, whereas the said William Matheson, in his lifetime, on the 30th day of September, 1818, at Charleston, to wit, in the district aforesaid, made his promissory note in writing, by which he promised to pay said Grant & McGuffie, or order, four months after the date thereof, $3,428.18, value received, and then and there delivered said note to said Grant & McGuffie; and also, on 25th February, 1820, said Matheson executed his due-bill, or promissory note, at Charleston, to wit, in district aforesaid, by which he promised to pay said Grant & McGuffie, or bearer, on demand, $344.66, with interest from the date of said note; which periods have long since elapsed; and being so liable, he, the said Matheson, in his lifetime, and his said administrators since his death, promised and assumed to pay to said plaintiff the said sums of money, to wit, the sums of $3,428.18 and $344.56, according to the tenor and effect of said notes; yet neither the said Matheson, in his lifetime, nor his said administrators since his death, have paid the said several sums of money, according tn their several promises and assumptions, and the tenor and effect of the said notes, either to said Grant & McGuffie, in their lifetime, or to said administator since their death, to the damage of said administrator $16,000.

The second count was as follows:

And whereas, also, the said Angus Stewart complains of said defendants, administrators as aforesaid, in custody, &c.; for that whereas the said William Matheson, on the 30th September, 1818, at Charleston, &c., made his certain promissory note, in writing, whereby he promised to pay, four months after date thereof, to one Grant & McGuffie, or order, $3,428.18, and then and there delivered the said note to Grant & McGuffie; and the said Grant & McGuffie, to whose order the said note was payable, then and there indorsed and delivered the same to the said plaintiffs, all of which *the said Matheson had full notice; [*266 which period has now elapsed. And the said Matheson also, on the 25th February, 1820, at Charleston aforesaid, &c., made his note, in writing, whereby he promised to pay to Grant & McGuffie, or bearer, on demand, $344.66, with interest from the date of the said note, and then and there delivered the same to said Grant & McGuffie, who then and there delivered the same to the said Angus Stewart. And the said note being due and demanded in the lifetime of the said Matheson, he was liable to pay the same; and being so liable, the said Matheson, in his lifetime, undertook and promised to pay the same, and his administrators since his death; but neither did the said Matheson, in his lifetime, nor have his administrators since his death, paid the said sums of money, according to their several promises, and the tenor and effect of the said notes, although said Matheson in his lifetime was, and his administrators have been, since his death, frequently requested to do so, to the damage of the said plaintiff $16,000; and thereof he brings suit, &c.

To this declaration the plaintiffs in error, Murphy and Darrington, put in two pleas, viz.: the general issue and the statute of limitations.

The case was tried at November Term, 1840, when the jury found for the plaintiff, and assessed his damages at $8,250.

At the same term, a motion for arrest of the judgment was made and granted, on the ground of a misjoinder of counts and causes of action in the declaration.

At March Term, 1841, nothing was done in the case; but in the November Term, 1841, on motion of the counsel for the plaintiff, the order of the November Term, 1840, arresting the judgment, was vacated, the verdict was ordered to be amended so as to apply to the first count in the declaration, the plaintiff was permitted to enter a *nolle prosequi* on the second count in the declaration, and judgment was directed *nunc pro tunc* upon the verdict, applying it to the first count in the declaration; and judgment was entered accordingly.

The ground upon which the court set aside the order arresting the judgment, &c., was the following affidavit, which was filed, accompanied by the deposition of Chapman Levy, which was the same that was read upon the trial. The deposition is too long to be inserted, but stated in substance that the notes and due-bill were handed to Levy for collection in 1821, or 1822, and that long afterwards he, Levy, had a conversation with Matheson, which was supposed to take the case out of the statute of limitations.

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and may sue in his own name on a cause of action, in respect to them, arising after the death of the decedent. Holbrook v. White, 13 Wend., 591.

An executor who makes a lease of premises belonging to the estate, may recover thereon in his individual capacity. Kingsland v. Ryckman, 5 Daly (N. Y. Super. Ct.), 13.

Two executors may sue upon a note given to one of them, in his individual name, but in settlement of a claim of the estate, without any indorsement. Leland v. Manning, 4 Hun N. Y., 7.

When an executor sues on a cause of action which accrued in the lifetime of the deceased, he must declare in his representative capacity only. But where the cause of action accrued after the death of the testator, if the money recovered will be assets, the executor may declare, either in his representative character or in his own name. Kane v. Paul, 14 Pet., 33; aff'g 5 Cranch C. C., 549.

If the plaintiff, although he names himself administrator, sues in his own right, he need not make *profert* of the letters of administration, and is not bound to give oyer of them. Biddle v. Wilkins, 1 Pet., 686; Mason v. Lawrason, 1 Cranch C. C., 190.

Executors who contract for the sale of their testator's effects, or make any other agreement in their representative character, are not bound to declare in that capacity, but may sue in their individual right; and in such case it is sufficient to join as plaintiffs such only of the executors as interfered, and were actual parties to the contract with the defendant. 1 Chitt. Pl., 23; Brassington v. Ault, 2 Bing., 177; S. C., 9 Moore, 340.

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267*] *Affidavit.

Personally appeared before me, P. Phillips, an attorney of this court, who, being duly sworn, says: that on the trial of the cause of Angus Stewart against John Murphy and John Darrington, in which a verdict was rendered for the plaintiff at the November Term, 1840, of this honorable court, the plaintiff offered the depositions of Chapman Levy, Jacob Axon, and ——— McKenzie, and the notes, all of which are now on file; that this was the only evidence offered by plaintiff, and that no evidence was offered by the defendants, and that the cause went to the jury upon the above depositions of the plaintiff alone. P. PHILLIPS.

Sworn to and subscribed in open court, 8d December, 1841.

DAVID FILES, *C. C. C. S. D. Ala.*

To review the decision of the court in setting aside the order for arresting the judgment, &c., the writ of error was brought.

Mr. Ogden for the plaintiffs in error.

Mr. Nelson, Attorney-General, for the defendants in error.

Mr. Ogden, for the plaintiffs in error, contended that the motion to amend the verdict, by making it apply to the first count in the declaration, should have been made during the same term in which the verdict was rendered, or at any rate at the next term: and that the court below should not have ordered the amendment at the second term after the verdict was rendered. He stated that he had been able to find no case where such a motion has been granted or made after the term in which the *postea* was returned to the court in bench. (See 12 Peters, 492; 1 Siderfin, 162.)

But, second, if it was competent for the court at so late a day to order the verdict to be amended, by making it applicable to the first count in the declaration, then we contend that there was not sufficient in that count to justify a judgment in favor of the plaintiff upon it; because,

1. This count of the declaration does not sufficiently allege a partnership between Grant and McGuffie, nor that Grant was the survivor of them, which allegation is necessary to entitle the plaintiff to recover.

2. It alleges a promise by Matheson in his lifetime, and by his administrators since his death, to pay the plaintiffs the money according to the promises made to Grant and McGuffie in their lifetime; and that yet neither the said Matheson in his lifetime, nor his said adminis-

268*] trators *since his death, have paid the said sums of money, either to Grant and McGuffie in their lifetime, nor to the said administrator since their death, to the damage of the said administrator $16,000.

The allegation is, that Matheson in his lifetime, and his administrators since his death, promised to pay the plaintiffs the sums of money mentioned in the declaration. Now, who is meant by the plaintiffs? Not Grant and McGuffie, for they are both dead. The only plaintiff is Angus Stewart, the administrator. There is, then, no allegation of a promise to pay Grant & McGuffie, nor the survivor of them; without such a promise no action can be brought by the administrator.

3. There is no profert of the letters of administration. This defect is, however, probably cured by the verdict.

But independent of the defects in the declaration, there was no evidence in the case justifying a verdict for the plaintiff upon this count in the declaration.

1. There is no sufficient proof of the partnership between Grant and McGuffie.

The only evidence upon this subject is found in the deposition of Chapman Levy.

He says, I was acquainted with McGuffie, of the firm of Grant & McGuffie, "who were said to have a mercantile house in Charleston, South Carolina."

And "Matheson told him, the witness, that he would not forget the kindness of Mr. McGuffie, and the assistance he had received from the firm through him."

The plea of the general issue puts all the material allegations in the declaration in issue.

If, therefore, there be not sufficient proof of a partnership between Grant and McGuffie, the plaintiff is not entitled to recover under this count.

Again, there is no proof of the death of Grant and McGuffie, or of either of them.

The only evidence upon this point is contained in the deposition of Levy; he says: "I believe I was then informed of the death of one or both Grant and McGuffie."

It is confidently believed that this is no evidence of the death of Grant and McGuffie, or of either of them, and certainly it is no proof of the fact which was the survivor of them.

*I submit, then, that there was no [*269 evidence to support the verdict upon the first count of this declaration.

But, second, if any count was supported, it was the second count:

1. The notes offered and read in evidence.

The large note payable to Grant & McGuffie, or order, is charged in this count to have been indorsed by them to the plaintiff Angus. The note is produced and read in evidence, and is indorsed by Grant and McGuffie. This indorsement is in law an assignment to the plaintiff, and after such indorsement Grant & McGuffie had no interest in the note.

This second count states that the smaller note payable to Grant or McGuffie, or bearer, was afterwards delivered by them to the plaintiff, who thereupon became the bearer thereof, and, as such, entitled to the moneys due upon the said note.

It is manifest that the evidence in the case was sufficient to maintain the second count, if either count was supported by the evidence.

If I am right here, the court below erred in ordering the verdict to be amended so as to make it applicable to the first count in this declaration—under the evidence in the case, the verdict cannot be applied to the first count in the declaration.

But it is contended that this case does not come within the rule by which a plaintiff is permitted to enter the verdict as upon one count in his declaration, and to enter a *nolle prosequi* upon the other counts.

This is a declaration stating two separate and distinct grounds of action, in two distinct and different parties. First, in the administrator of Grant, as the surviving partner of Grant & McGuffie, and second, in Angus Stewart, in his

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own right. The counts are wholly inconsistent with each other; if the administrator of Grant has a right to recover, Angus Stewart, in his individual capacity, can have no such right. This is not like the case of an action of slander, in which the declaration contains several counts upon different words spoken, the words in some of the counts being actionable, in others not; and where evidence was given only upon the counts on the actionable words.

Upon this point, I refer the court to the following cases, with only one single observation upon them: the evidence in this case being the notes upon which the suit was founded, was evidence under both counts in the declaration. (*Holt* v. *Scholefield*, 6 Term Rep., 691.)

270*] *In an action for slander, the declaration contained three counts upon the general issue being pleaded; the cause was tried, and the jury found a general verdict for the plaintiff for fifty pounds.

The first count in the declaration was for words not actionable in themselves; the words in the other counts were actionable.

A motion was made to arrest the judgment, because the damages were general upon all the counts.

The counsel for the plaintiff insisted that the judgment could not be arrested *in toto*, but there must be a *venire de novo*, or the verdict may be amended by the judge's notes, and entered upon the good counts.

The court were of opinion that there should not be a *venire de novo*, and that as the damages were entire, the judgment must be arrested *in toto*.

Lawrence, *Justice*, said "that the plaintiff ought not to be at liberty to amend by the judge's notes in the case, because the evidence applied as well to the bad as to the good counts." (*Edwards* v. *Hopkins*, Douglass' Rep., 361.)

In *assumpsit* the declaration contained several counts—some upon promises made by the testator, others on promises made by the defendants themselves. To the first set of counts *plene administravit* was pleaded, and the general issue as to the others.

The jury found for the plaintiffs with £147 damages, and a general verdict was entered.

The Solicitor-General obtained a rule to show cause why the judgment should not be arrested, on the ground that the verdict was general, and the counts inconsistent, and such as require different judgments to be entered—viz.: judgment *de bonis testatores* on those where the premises were said to be by the testator; and *de bonis propriis* on the others. *Baldwin*, for the plaintiffs, afterwards obtained a cross-rule for the defendants to show cause why the the *postea* should not be amended by the judge's minutes, and a verdict entered for the plaintiffs only on the counts to which the evidence given at the trial applied, and for the defendants on the other counts.

Buller, *Justice*, said that there was this distinction, that if there was only evidence at the trial upon such of the counts as were good and consistent, a general verdict might be altered from the notes of the judge, and entered only on these counts; but, if there was any evidence which applied to the other bad or inconsistent counts (as if, for instance, in an action for words, where some actionable words *are [*271 laid, and some not actionable, and evidence given of both sets of words, and a general verdict), then the *postea* would not be amended, because it would be impossible for the judge to say on which of the counts the jury had found the damages, or how they had apportioned them; that, in such a case, the only remedy is by awarding a *venire de novo*.

The rule to arrest the judgment was discharged, and the other rule made absolute, but upon the payment of costs, including those on the motion in arrest of judgment.

The case of *Bois* v. *Bois* (1 Levinz, 134) was an action for slander. The declaration contained two counts. The words laid in one of the counts were actionable, in the other not.

The damages being entire, judgment was stayed.

Petrei, Executor of Stuble, v. *Hannay* (3 Term Rep., 659).

This was an action for money paid by the plaintiff as executor, and also for money paid by the testator to the use of the defendant, for money had and received by the defendant to the use of the plaintiffs as executors, and for money had and received to the use of the testator in separate counts; there were two pleas, the general issue and the statute of limitations. A verdict having been found for the plaintiff generally on the first issue, and no notice taken of the last, the defendant brought a writ of error to the House of Lords on two grounds, that no verdict was given on the second plea, and that two separate demands could not be joined in one action.

The plaintiffs then obtained a rule to show cause in the King's Bench why he should not be at liberty to amend according to the judge's notes, by adding a verdict for him upon the second plea, and by entering the verdict on the counts for money paid by the executors, and for money had and received to their use.

Buller, *Justice*, in delivering the opinion of the court, said such amendments have frequently been permitted. The entering the verdict was a slip of the clerk in not entering the verdict for the plaintiffs on the second plea. As to the second objection, he said he was clearly of opinion that it was not error, for though an executor when suing for a debt due to the testator, would not join a debt due to himself in his own right, yet it was the constant practice to join in the same declaration several counts for money had and received by the defendant to the use of the testator, and to the use of the executor as made.

In the case of *Hooker* v. *Quilter* (2 Strange, 1271), there were three *counts in the [*272 declaration as executrix, and the fourth was for the use and occupation of the plaintiff's house. Judgment by default in King's Bench and reversed in error.

Per Curiam. There being no verdict, we can presume nothing, but that the fourth count is, as it appears, in her own right, which cannot be joined with the others, and the damages are entire.

This case of *Hooker* v. *Quilter* is more fully and better reported in 2 Wilson Rep., 171, *vide* this report.

Mr. Nelson, Attorney-General, for the defendants in error:

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It is objected,

1st. That the case does not fall within the rule by which a plaintiff is permitted to enter the verdict as upon one count in his declaration, and to enter a *nolle prosequi* upon the other counts.

2d. That conceding the case to be within the rule, the court below erred in vacating the order to arrest the judgment of November Term, 1840, because of the lapse of time; and,

3d. That there was no evidence in the case by which a verdict on the first count in the declaration upon which the final judgment was rendered could be supported.

As to the first objection: There are two classes of cases in which a verdict may be amended by the notes of the judge, or other evidence, so as to avoid the objection to the sufficiency of the declaration of the plaintiff. The first, where there is a general verdict, and the counts are consistent, although some be bad; the second, where the counts are inconsistent, although severally good. In the one case, all that is necessary to be shown to make the rule applicable is, that the evidence applied to the good as well as to the bad counts. In the other, it must be shown that the evidence applied exclusively to the count upon which the verdict is sought to be rendered. (19 Wendell's Rep., 628, *Lusk* v. *Hastings*.)

The present is a case falling within the second class—of inconsistent counts—in which the judgment was arrested for misjoinder. To justify the order of the court, therefore, all that is necessary to bring the case within the rule is to show that the evidence offered below was exclusively applicable to the first count of the plaintiff's declaration.

This will be be done in the discussion of the 3d objection. Assuming for the present that it is so, the following cases will make it clear that the case under review falls within the rule.

273] **Eddowes et al.* v. *Hopkins et al., Executors of Harris* (1 Douglas, 376), which establishes the principle that "where there is a general verdict on a declaration consisting of different counts, some of which are inconsistent or bad in point of law, and evidence has only been given on the good or consistent counts, the verdict may be amended by the judge's notes."

Williams v. *Breedon* (1 Bosanquet & Puller, 329), "where evidence has been given on a bad count as well as on a good count, if it appears by the judge's notes that the jury calculated the damages on evidence applicable to the good count only."

The cases of *Knightley* v. *Briel* (2 Maule & Selwyn, 533), and *Doe* v. *Perkins* (3 Term Reports, 749), maintain the same well-established doctrine.

As to the second objection: The character of the case having been thus shown to be such as to bring it within the rule for amendment, the second inquiry is, whether the lapse of time interposed any obstacle to the exercise of the power by the court.

That it did not, will be demonstrated by the following cases:

Doe v. *Perkins* (3 Term Reports, 750), in which the court use this strong language, "for that, according to the practice of amending by the judge's notes, which was of infinite utility to the suitors, and was as ancient as the time of Charles I., the amendment might be made at any time."

Addington v. *Allen* (11 Wendell, 421), and Chancellor Walworth's opinion in the case (384, 385).

(Same case, 12 Wendell, 215.)

So, also, in the case of *John Barnard* v. *John Whiting et al.* (7 Mass. Reports, 358), the same principle is directly affirmed.

And in the case of *Noah Clark* v. *Ezekiel Lamb, Executor, &c.* (8 Pickering's Reports, 415), Wilde, *Justice*, satisfactorily reviews the English and American authorities upon this question, and in a strong case maintains the existence of the power asserted by the court below in rendering the present judgment.

As to the third objection: The authority to vacate the order therefore existing, the remaining inquiry is, whether, upon the matter appearing in the record, the verdict was properly applied, and the judgment rendered upon the first count of the declaration.

The first objection taken by the plaintiffs in error on this point is to the form of the declaration. To this it is only necessary to reply, that the irregularities to which the exception is taken, if they exist, which *is by no [*274 means conceded, are cured by the verdict. There is enough apparent upon the first count of the declaration to show the nature and extent of the demand.

The partnership is expressly averred between Grant and McGuffie, the survivorship of Grant, the promise to pay Grant & McGuffie—the promise to pay the plaintiff, administrator of Grant, not plaintiffs (see amended record returned with *certiorari*), and the very instruments recited in the declaration contain the promise of Matheson to pay Grant & McGuffie, &c.

But is it said that there is no profert of the letters of administration. None such was necessary; and if it was, it is conceded that the omission is cured by the verdict.

It is likewise said that there was no evidence in the case justifying a verdict for the plaintiff upon this count in the declaration:

1st. Because there is no sufficient proof of the partnership between Grant & McGuffie; the only evidence, it is said, being that found in the deposition of Chapman Levy.

If this were so, it is submitted that it would be abundantly sufficient; at any rate, it was testimony to go to the jury, who by their verdict have affirmed its sufficiency.

But is it true that this is the only evidence? The note and due-bill executed by Matheson were given to Grant & McGuffie jointly, and whether general partners or not is a matter of not the slightest importance. Matheson himself, by the execution of the instruments, admits them to be jointly entitled to their contents, and that admission, coupled with the declaration deposed to by Levy, conclusively shows them to have been partners.

2. It is alleged that there is no proof of the death of Grant and McGuffie, or either of them, and the testimony or Chapman Levy is again referred to as being insufficient. To this objection the answer given to the last may be repeated—the evidence was for the jury, and their verdict excludes all inquiry into its sufficiency.

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But was the question in the state of the pleadings open before the jury? Or, was it incumbent upon the plaintiff below to offer any evidence to show the death of Grant and McGuffie. He sued, as the administrator of Grant, the survivor of McGuffie. To his declaration, in that character, the defendants pleaded the general issue, and they thereby admitted the character in which the plaintiff sued. (1 Peters, 450; Peake's Evidence, 342; 2 Lord Raymond, 824; 3 Day Reports, 303; 2 Dallas, 100; 4 Bibb, 391; 6 Monroe, 52, 59.)

275*] *Besides, the grant of administration to the plaintiff was evidence of the death. (Greenleaf's Evidence, 587; 10 Pickering, 515.)

It is further objected, that if any count in the declaration was supported, it was the second count, and that because of the averments of the plaintiff in the second count of his declaration. But these averments are not evidence. They are but the mode of stating the plaintiff's cause of action, and the proper subject of inquiry is, what was the state of the proof as shown by the record.

In reference to this it is said that the note produced in evidence is indorsed by Grant & McGuffie. But that indorsement is in blank, and transfers no property in the note. Until the blank is filled up, which a holder for value might at any time do, the legal title to the note remained in the payees. The motive of the indorsement, too, is apparent, having been doubtless made when it was transmitted to Mr. Levy for collection; and the possession of the due-bill payable to bearer, by the plaintiff, was in virtue of his character as administrator.

To negative the idea of a legal transfer by a blank indorsement, the counsel for the defendant in error refers to the following cases: 2 Strange, 1103; 1 Ld. Raym., 443; 1 Comyns, 3111; 2 Burr., 1227; 5 Harr. & Johns., 115; 6 Harr. & Johns., 140, 527.

But it is insisted by the defendant in error that the amendment allowed, assuming, what is supposed to be unquestionable, that the evidence supports the judgment rendered, is nothing more than the exercise of a discretion by the court, and therefore not a fit subject of review in a court of error. (*Marine Insurance Co. of Alexandria* v. *Hodgson*, 6 Cranch, 206; *Welch* v. *Mandeville*, 7 Cranch, 152; *Walden* v. *Craig*, 9 Wheat., 576; *Chirac* v. *Reinicker*, 11 Wheat., 280; *Ex parte Bradstreet*, 7 Peters, 647; *Life Insurance Company* v. *Christopher Adams*, 8 Peters, 306; the same, *Jones arguendo*, 302.)

Mr. Ogden, in reply:

It is contended on the part of the plaintiffs in error, that there was no sufficient proof of the partnership between Grant and McGuffie, and that there is no proof of the death of Grant and McGuffie, or of either of them; that this partnership and death and the survivorship of Grant are material allegations in the declaration, and are all put in issue by the plea of the general issue.

To this it is answered by *Mr. Nelson*, that **276*]** there was evidence enough *" to go to the jury, and by their verdict they have affirmed its sufficiency."

It is contended that there was no legal evidence of a partnership between Grant and McGuffie upon which the jury would be warranted to find its existence.

In page 12 of the case, Levy says: "I was acquainted with Mr. McGuffie, of the firm of Grant & McGuffie, who were said to have a mercantile house in Charleston." This is no evidence of the existence of any such house in Charleston. It is at best mere hearsay, and does not amount to a general reputation, which might have been sufficient evidence to have justified the verdict of the jury. But the Attorney-General seems to suppose that the note having been given by Matheson to Grant & McGuffie jointly is an admission of the co-partnership between those gentlemen.

The note being given to Grant & McGuffie may amount to an admission that he was indebted to such a firm, but it by no means amounts to an admission as to who were the persons composing that firm. The general issue denies that the persons who are alleged in the declaration were the persons composing the firm; it was necessary, therefore, for the plaintiff below to have proved his allegation upon that point.

But it is contended that in order to maintain the plaintiff's declaration it was incumbent upon him to prove the death of Grant and McGuffie, the survivorship of Grant, and the death of Grant.

It is said by the Attorney-General that the plea of the general issue admits all these facts.

This is a great mistake; it admits that the plaintiff is the administrator of Grant, but it admits nothing else.

The case of *Conard* v. *The Atlantic Insurance Company*, cited from 1 Peters's Reports of cases decided in this court, decides most properly that it is too late upon the trial to insist upon proof of the plaintiff being a corporation. That it should have been taken advantage of by a plea in abatement.

And Mr. Peake, in his Law of Evidence (342), in the passage cited by the Attorney-General, says: "When an action is brought by an executor or administrator on a cause of action arising in the lifetime of the deceased, and the defendant pleads only the general issue, it is sufficient for the plaintiff to prove the same facts as must have been adduced in evidence by the testator or intestate, had the action been brought by him."

*Now, suppose Mr. Grant had brought [**277** this action, must he not have proved that he had been a partner with McGuffie at the time the note was given? Must he not have proved that McGuffie was dead, and that he had survived him?

Mr. Peake lays down the law upon this subject with great accuracy, and he is supported by all the adjudged cases. The defendant cannot, under the general issue, controvert the fact that the plaintiff is the administrator of Grant, and the letters of administration may be evidence of the death of Mr. Grant. Every other material allegation in the declaration must be proved.

It is contended by the Attorney-General, in his argument, that the name of Grant & McGuffie indorsed upon this note transferred no property in it, and that, therefore, the note was no evidence under the second count of the declaration. With great deference to the Attorney-General, I contend that the indorsement in blank accompanied by a delivery of the note to

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the indorsee, is an absolute transfer of the note. The second count in this declaration states in express terms the indorsement and delivery of the note to Stewart, the indorsee. I understand the law as being now perfectly settled that a blank indorsement upon a bill of exchange or promissory note payable to A B or order transfers the note to the indorsee. (See Chitty on Bills, 173. See the case of *Linbarrow* v. *Macon*, cited in *note* in 6 East Rep., 21.)

In the case now under consideration, the plaintiff, in his declaration, states this transfer to him, and his right to recover under it; he cannot, therefore, be permitted to deny that such transfer was *bona fide*.

As I understand the law, an indorsement in blank is an absolute transfer of the note, from the original payee, who by that indorsement passes his whole interest in it. But the indorsement being in blank gives the indorsee a right to restrict its effect, by making it (the note) payable to some particular person or order.

As to the question whether this liberty to amend the verdict was not given upon an application which could not be made at so late a day, I shall not add anything to what was said in my opening argument, except to examine some of the cases which have been cited by the Attorney-General.

The case of *Doe* v. *Perkins* (3 Term. Rep., 750).

No motion had been made to arrest the judgment. It was a motion to set aside an order which had been made by a judge to amend the 278*] *postea*, and a judgment which had been entered thereon, and upon which error had been brought and for a new trial. The court said, "that according to the practice of amending by the judge's notes, which was of infinite utility to suitors, and was as ancient as the time of Charles I., the amendment might be made at any time."

Suppose, in that case, that a motion had been made by the defendant to arrest the judgment, which motion had been argued by counsel, and the judgment had been ordered to be arrested. Did the court, when they said this motion to amend may be made at any time, mean to say that after waiting two terms thereafter, and until another judge comes to hold the court, that it was time enough to call upon that judge to review what had been done in the court two terms before, for the purpose of setting aside what had been then done? I forbear to make any observations upon the contest in which such a case would have a tendency to involve the judges of the same court. If the court below were wrong in arresting the judgment, the remedy of the party was by writ of error.

In the case of *Barnard* v. *Whiting* (7 Mass. Rep., 358).

There no order had been made to arrest the judgment; a motion was made to arrest the judgment, and upon the hearing of that motion it was denied, and leave was given to amend.

In the case cited from 11 Wendell it will be found that a motion to arrest the judgment and for a new trial had been made by the defendant and denied by the court, and judgment was entered for the plaintiff.

The defendant brought a writ of error to the Court of Errors, upon the ground that the judgment ought to have been arrested, and the motion to arrest was the very question brought up on the record in that case.

However that question was disposed of, the judgment was arrested, and there was an end of it.

The question here is not what a superior court, upon a writ of error, might do; the question is, can the same court review and reverse its own decision after the term in which it is made.

Not having 8 Pickering's Reports in my library, I have not been able to examine the case cited from it; and as I am desirous of sending this argument by the mail of this afternoon, I have not time to get the book.

One word as to the rule permitting an amendment of a verdict. The cases will all be found to be cases where the counts are all laid in the *same right, and where the amounts [*279 claimed are claimed by the same person in the same right. This is not the case of goods and bad counts; the counts may be all good, but it is a case where a man brings an action in his name as administrator, and another action in his own individual right. No such action can be maintained, and no amendment was ever permitted in such a case. But we are told that the amendment is matter of discretion in the court, and that no error lies in such a case.

The motion to arrest a judgment is made upon purely legal grounds, and never is a matter of discretion in the court whether they will grant it or not.

The time when a motion to amend is to be made, in the court where the judgment has been arrested, is not matter of discretion, but of law.

But if this order to amend is a mere matter of discretion, how does it happen that, in the case cited from 11 Wendell, a writ of error was brought in a case where the Supreme Court of this State had exercised their discretion on the subject.

Mr. Justice STORY delivered the opinion of the court:

This is the case of a writ of error to the Circuit Court of the United States for the Southern District of Alabama.

The original action was *assumpsit* brought by Stewart (the defendant in error) as administrator of Alexander Grant, who was the surviving partner of the firm of Grant & McGuffie, against Murphy and Darrington as administrators of Matheson upon a certain note and due-bill made and signed by Matheson in his lifetime. The note was as follows: "Charleston, 30th Sept., 1818. Four months after date I promise to pay Grant & McGuffie, or order, three thousand four hundred and twenty-eight dollars, eighteen cents, value received." The due-bill was as follows: "Charleston, 25th February, 1820. Due to Grant & McGuffie or bearer, on demand, three hundred and forty-four dollars sixty-six cents, with interest from date." The note was indorsed in blank, "Grant & McGuffie."

The declaration contained two counts. The first count is by Stewart as administrator upon both instruments, and upon promises made by Matheson in his lifetime, and by his administrators since his decease, to pay him (Stewart) as

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administrator. The second is upon both instruments, stating the note to have been indorsed by Grant & McGuffie to him (Stewart), and the **280*]** due-bill to have been transferred *to him by delivery. So that in legal effect he claimed in the first count as administrator, and in the second in his own personal right. At the trial (for it is unnecessary to state the pleadings) the jury found a general verdict for the plaintiff upon both counts, at the November Term of the court, 1840. And at the same term a motion was made in arrest of judgment for the misjoinder of the counts, which motion was sustained, and thereupon it was ordered by the court that judgment be arrested. At the November Term of the court, 1841, a motion was made to set aside the order in arrest of judgment, and for leave to amend the verdict so that the same might be entered upon the first count, and a *nolle prosequi* entered upon the other count. In support of this motion, an affidavit was made by the plaintiff's counsel that the only evidence offered at the trial by the plaintiff was the deposition of Chapman Levy, Jacob Axon, and ——— McKenzie, and the note and due-bill which were on the files of the court; and that no evidence was offered by the defendants; and that the cause went to the jury upon the above depositions of the plaintiff alone. Upon this evidence, after notice to and hearing the counsel for the defendants, who offered no evidence in opposition to the motion, the court made an order, vacating the order in arrest of judgment, and allowing the verdict to be amended by entering the same on the first count, and that judgment be entered upon that count *nunc pro tunc* for the plaintiff. Judgment was accordingly entered thereon; and from that judgment the present writ of error has been brought.

The main question which has been argued is, whether the court had authority to make the amendment at the time and under the circumstances stated in the record. It is observable that there was no judgment in the present case originally entered, that the plaintiff takes nothing by his writ, *non obstante veredicto;* but a simple order passed arresting the judgment, which suspended all further proceedings until the court should put them again in motion, but still left the cause pending in the court. It is a case, therefore, in a far more favorable position for the exercise of the power of amendment, than it would have been if final judgment had passed against the plaintiff, or if judgment had passed for the plaintiff, and a writ of error had been brought to reverse it; for in the latter case not only is the writ of error deemed in law a new action,[1] but in contemplation of law the record itself is supposed to be removed from the court below.

281*] *And first, as to the time of making the amendment. It is said that it should have been either at the term when the order for the arrest of judgment was made, or at the farthest at the next succeeding May term of the court; and it was too late to make it a whole year afterwards. But there is no time absolutely fixed, within which such an amendment should be moved. All that the court requires is that it should be done within a reasonable time; and when no such change of circumstances shall have occurred as to render it inconvenient or inexpedient. Nothing is more common than motions to amend the record after a writ of error has been brought; nay, after a writ has been argued in the court above, and sometimes even after judgment in the court of error, pending its session. Especially in cases of misjoinder of counts, which are incompatible with each other, as well as in cases where there are several counts, some of which are bad and some good, and a general verdict given for the plaintiff such applications, when made within a reasonable time, are usually granted after error brought and the verdict allowed to be amended so as to be entered upon the good counts, or upon the counts not incompatible with each other. This is most usually done upon the judge's notes of the evidence at the trial, establishing upon what counts the evidence was in fact given or to which it was properly addressed or limited. But it may be done upon any other evidence equally clear and satisfactory, which may be submitted to the consideration of the court. In the present case we know from the most authentic sources contained in the record itself, and not disputed by anyone, the whole evidence which was given at the trial. The case, therefore, falls directly within the range of the principles above stated. The practice is a most salutary one, and is in furtherance of justice and to prevent the manifest mischiefs from mere slips of counsel at the trial, having nothing to do with the real merits of the case. The authority to allow such amendments is very broadly given to the courts of the United States by the 32d section of the Judiciary Act of 1789 (ch. 20), and quite as broadly, to say the least, as it is possessed by any other courts in England or America; and it is upheld upon principles of the soundest protective policy.

Without citing the authorities at large, which are very numerous upon this point, it will be sufficient to state a few only, which are the most full and direct to the purpose. In *Eddowes* v. *Hopkins* (1 Doug. R., 376), there was a general verdict on a declaration consisting of *different counts, some of which were [*282 inconsistent in point of law, it was held that as evidence had only been given upon the consistent counts, the verdict might be amended by the judge's notes at the trial. The same point was decided in *Harris* v. *Davis* (1 Chitty Rep. 625). In *Williams's Exec.* v. *Breedon*, (1 Bos & Pull., 329), where a general verdict was given on two counts, one of which was bad, and it appeared by the judge's notes that the jury calculated the damages in evidence applicable to the good count only, the court allowed the verdict to be amended and entered on the good count only, though evidence was given applicable to the bad count also. In *Doe* v. *Perkins* (3 Term R., 749), the court allowed the verdict to be amended after error brought and joinder in error by striking out certain words from the *postea*. An objection was on that occasion taken that the amendment could not be made after the expiration of one term after the trial. But the court said that there was no foundation for this objection; for that according to the practice of amending by the judge's notes, which was of infinite utility to suitors, and was as ancient as the time of Charles I., the amend

1.—2 Tidd's Practice, 1141, 9th edition, 1828.

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ment might be made at any time. In *Henry* v. *The Mayor, &c., of Lyme Regis* (6 Bing. R., 100), a verdict had been taken by consent on two counts, and upon application the court amended the *postea*, by entering it in one count to which the evidence applied, there being in fact but one cause of action, although the judge who presided at the trial declined to interfere. In *Richardson* v. *Mellish* (3 Bing. R., 334; S. C. in error, 7 Barn. & Cress., 819), where a general verdict was given on a declaration, some of the counts which were bad, the court allowed the *postea* to be amended, and entered up judgment upon a single count after argument in error; and the court in error sanctioned the proceeding. In *Harrison* v. *King* (3 Barn. & Ald., 161), there was a general verdict for the plaintiff, and an application was made to the court to amend the verdict on the judge's notes after the lapse of eight years, and after the judgment had been reversed upon error; but the court refused it upon the ground of the long delay. In *Clarke* v. *Lamb* (8 Pick. R., 415), the Supreme Court of Massachusetts, after a general review of the authorities, allowed the verdict to be amended upon the judge's notes.[1]

We think, then, that the objection taken at the bar to the amendment and entry of the judgment is not maintainable, and that the 283*] *court acted within its rightful authority and jurisdiction in the allowance thereof.

Another objection, rather suggested than insisted on, is, that there is no *profert* of the letters of administration. Whether that would constitute any objection whatsoever, in the State of Alabama, is a matter purely of local practice and proceedings. It is well known that in many States of the Union no *profert* of such letters is ever made, as, for example, in Massachusetts and other New England States. But the objection, if it has any foundation, is undoubtedly cured by the verdict.

Another objection is, that the first count does not sufficiently allege a partnership between Grant and McGuffie, nor that Grant was the survivor of them. We think otherwise. The first count in the amended record brought upon the *certiorari* is by Stewart as administrator of Grant, and it states in the introductory part that he was the survivor of McGuffie, late merchants trading under the firm of Grant & McGuffie; and alleges promises by Matheson to them in their lifetime, and by Matheson in his lifetime, and by his administrators to the plaintiff to pay the sums of money stated in the count, and alleges as a breach the nonpayment thereof, either to Grant & McGuffie in their lifetime or to the plaintiff since their decease. The count certainly is not drawn with entire technical precision and accuracy; but after verdict it must be taken to be sufficient for all the purposes of substantial justice.

But then it is said, that if the first count is good, still the evidence offered at the trial was not sufficient to establish any partnership between Grant & McGuffie; and if the evidence did establish any case, it was a case within the scope of the second count and not of the first. We think neither branch of the objection is maintainable. There was certainly evidence enough to go to the jury on this point, and the very instrument on which the suit was brought, *prima facie*, imported a partnership at least in these transactions; and the jury, by their verdict, must be presumed to have found the fact in the affirmative. In the next place, although the note was indorsed in blank by Grant & McGuffie, that indorsement was no proof that the interest on the same had passed to Stewart, as alleged in the second count, and the possession of the due-bill by Stewart was no necessary proof that he held it as owner in his own right. For aught that appears, he may have held them both solely in his capacity as administrator; and he had a right, and the sole right, to say in which *capacity he elected to hold, [*284 as owner, or administrator. He has elected the latter; and the evidence is sufficient to establish that right, *prima facie*. Besides, it can be of no concern to the plaintiff in error on which count the verdict is taken, for in either case it is equally a good foundation for a valid judgment against him, to the extent of the sums due thereon.

There is yet another view of this matter. The question of the amendment was a question of discretion in the court below upon its own review of the facts in evidence; and we know of no right or authority in this court upon a writ of error to examine such a question, or the conclusion to which the court below arrived upon a survey of the facts, which seem to us to have belonged appropriately and exclusively to that court.

Upon the whole, in our opinion there is no error of the court below in the amendment and proceedings complained of, and the judgment is therefore affirmed with costs.

ORDER.

This cause came on to be heard on the transcript of the record from the Circuit Court of the United States for the Southern District of Alabama, and was argued by counsel; on consideration whereof, it is now here ordered and adjudged by this court, that the judgment of the said Circuit Court in this cause be, and the same is hereby affirmed, with costs and damages at the rate of six per cent. per annum.

Cited—6 How., 37, 39, 278; 24 How., 345; 14 Wall., 22; 5 Otto, 126.

SIMEON STODDARD, CURTIS STODDARD, DANIEL STODDARD, ANTHONY STODDARD, WILLIAM STODDARD, JOSEPH BUNNELL, AND LUCY, HIS WIFE, JONAS FOSTER AND LAVINIA, HIS WIFE, LUCY HOXIE, DANIEL MORGAN, AND AVA, HIS WIFE, *Plaintiffs in Error*,

v.

HARRY W. CHAMBERS.

Ancient deed, when evidence for jury—failure to object to in court below—confirmation to original claimant estoppel in favor of assignee—location of New Madrid certificates—reservation of lands claimed under French or Spanish title—patents for land—validity.

A deed of land in Missouri, in 1804, attested by

1—See, also, 2 Tidd's Prac., 901, 9th ed. 1828.

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two witnesses, purporting to have been executed in the presence of a syndic, presented to the commissioners of United States in 1811, and again brought forward as the foundation of a claim before the commissioners in 1835, must be considered as evidence for a jury.

If it was not objected to in the court below, it cannot be in this court.

A confirmation under the Act of 1836 to the original claimant and his legal representatives, enured, by way of estoppel, to his assignee.

285*] *To bring a case within the second section of the Act of 1836, so as to avoid a confirmation, the opposing location must be shown to have been made "under a law of the United States."

The holder of a New Madrid certificate had a right to locate it only on "public lands which had been authorized to be sold." If it was located on lands which were reserved from sale at the time of issuing the patent, the patent is void.

There was no reservation from sale of the land claimed under a French or Spanish title between the 26th of May, 1829, and the 9th July, 1832. A location under a New Madrid certificate, upon any land claimed under a French or Spanish title, not otherwise reserved, made in this interval, would have been good.

If two patents be issued by the United States for the same land, and the first in date be obtained fraudulently or against law, it does not carry the legal title.

A patent is a mere ministerial act, and if it be issued for lands reserved from sale by law, it is void.

THIS case came up, by writ of error, from the Circuit Court of the United States for the District of Missouri.

It was an ejectment brought by the plaintiffs in error (who were also plaintiffs in the court below) against the defendant. The title of the plaintiffs was derived through their ancestor, Amos Stoddard, from an old Spanish concession, granted in 1800; and that of the defendant, to forty-seven acres and twenty-one hundredths of an acre, from what is called a New Madrid patent, issued to one Peltier under the Act of Congress passed on the 17th February, 1815 (ch. 198). The defendant also claimed one acre and sixty-three hundredths under a certificate granted, under the same act, to one Coontz, for which a patent had not issued. Beyond these forty-eight acres and eighty-four hundredths of an acre, the defendant set up no claim.

The historical order of the facts in the case is this:

On the 21st of January, 1800, Mordecai Bell, a resident of Louisiana, presented a petition to Don Carlos Dehault Delassuse, lieutenant-governor and commandant-in-chief of Upper Louisiana, praying for a concession of 320 arpents of land.

On the 29th of January, 1800, Delassuse made the concession and instructed the surveyor, Soulard, to put the petitioner in possession of the land conceded.

On the 29th of May, 1804, Bell conveyed the concession and order of survey to James Mackay. The original deed was in French, and purported to be executed before Richard Caulk, syndic of the district of St. Andrew. The names of two attesting witnesses are also subscribed.

286*] *On the 2d of March, 1805, Congress passed an act "for ascertaining and adjusting the titles and claims to land within the territory of Orleans and the district of Louisiana," the general purport of which was to recognize all existing grants. It further provided for the appointment of three persons, who should examine, and decide on, all claims submitted to them, and report the result to the Secretary of the Treasury, who was directed to communicate it to Congress.

On the 26th of September, 1805, James Mackay conveyed the grant and order of survey to Amos Stoddard, who was at that time civil commandant, under the government of the United States, at St. Louis. It may here be remarked that evidence was given on the trial below that as early as 1817, Stoddard was in possession under this deed, and that the facts of his death before the suit and of the plaintiffs being his heirs-at-law were also given in evidence.

In January, 1806, Soulard, the Surveyor General of the territory of Louisiana, but not so under the authority of Congress, made a plat and certificate of the survey of the above land.

On the 3d of March, 1807, Congress passed another act relating to land titles in Missouri, explanatory and corrective of the Act of 1806. It also extended the time limited for filing the claims to the 1st of July, 1808.

On the 29th of June, 1808, all the papers relating to the claim were presented to the recorder of the district, viz.: 1. The concession. 2. Deed to Mackay. 3. Deed to Stoddard. 4. Certificate of survey in favor of Stoddard.

On the 15th of February, 1811, Congress passed an act, by which the President was authorized (section 10), "whenever he shall think proper, to direct so much of the public land lying in the territory of Louisiana as shall have been surveyed in conformity with the eighth section of this act, to be offered for sale;" and further, "That all such lands, with the exception of the section number sixteen, which shall be reserved for the support of schools within the same; with the exception, also, of a tract reserved for the support of a seminary of learning, as provided for by the eighth section of this act; and with the exception, also, of the salt springs and lead mines, and lands contiguous thereto, which, by the direction of the President of the United States, may be reserved for the future disposal of the said States, shall be offered for sale to the highest bidder, under the direction of the register of the land office and the receiver of public moneys, and of the principal deputy-surveyor, and on such day or days *as shall, by public proclamation of the [*287 President of the United States, be designated for that purpose:" "Provided, however, that till after the decision of Congress thereon, no tract shall be offered for sale, the claim to which has been in due time, and according to law, presented to the recorder of land titles in the district of Louisiana, and filed in his office for the purpose of being investigated by the commissioners appointed for ascertaining the rights of persons claiming lands in the territory of Louisiana."

On the 3d of March, 1811, Congress passed another act, in which the same reservation was made as is above stated.

On the 10th of October, 1811, the board of commissioners rejected the claim.

On the 17th of February, 1815, Congress passed an act declaring that any person or persons owning lands in the County of New Madrid in the Missouri territory, with the extent the said county had on the tenth day of November, 18[illegible], and whose lands had been materially injured by earthquakes, should be, and they were the[illegible]

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by authorized to locate the like quantity of land on any of the public lands of said territory authorized to be sold.

On the 28th of November, 1815, Frederick Bates, recorder, &c., issued a certificate that a lot of one arpent, in the village of Little Prairie, in the County of New Madrid, owned by Eustache Peltier or his legal representatives, was materially injured by earthquakes, and that said Eustache Peltier, or his legal representatives, was entitled to locate any quantity of land not exceeding 160 acres, on any of the public lands in the territory of Missouri, the sale of which was authorized by law.

On the 24th of October, 1816, an entry was made of land in conformity with the above certificate. This entry covered forty-seven acres and twenty-one hundredths of the concession to Bell; and the defendant claimed under it.

In 1817, 1818, and 1819, the township in which the land in controversy lies, was surveyed under the authority of the United States, and not offered at public sale by the authority of the President until 1823.

In March, 1818, the certificate which had been issued in favor of Peltier was surveyed by Brown, the deputy-surveyor, and the location made. It may here be remarked that evidence was given upon the trial, showing the possession of Peltier's location to have been in him and his assignees from 1819 down to the occupancy of the defendant, accompanied by deeds.

288*] *On the 29th of May, 1818, Martin Coontz made an entry under a Mew Madrid certificate, which was surveyed in July, 1818. This survey clashed with Bell's concession, and included one acre and sixty-three hundredths, which the defendant (Chambers) claimed under Coontz's title. Coontz did not obtain a patent for it.

On the 26th of May, 1824, Congress passed another act, "enabling the claimants to lands within the limits of the State of Missouri and territory of Arkansas to institute proceedings to try the validity of their claims." It allowed any persons claiming lands under old grants or surveys, under certain circumstances, to present a petition to the District Court of the State of Missouri, which court was authorized to give a decree in the matter, reviewable, if need be, by the Supreme Court of the United States. The 5th section provided that a claim not before the District Court in two years, or not prosecuted to final judgment in three years, should be forever barred both at law and in equity; and the seventh section directed that where a claim, tried under the provisions of the act, should be finally decided against the claimant, or barred by virtue of any of the provisions of the act, the land specified in such claim should, forthwith, be held and taken as a part of the public lands of the United States, subject to the same disposition as any other public land in the same district.

On the 26th of May, 1826, an act was passed continuing the above act in force for two years.

On the 24th of May, 1828, another act was passed by which the Act of 1824 was continued in force for the purpose of filing petitions, until the 26th day of May, 1829, and for the purpose of adjudicating upon the claims until the 26th day of May, 1830.

On the 9th of July, 1832, Congress passed an "act for the final adjustment of private land claims in Missouri," which authorized commissioners to examine all the unconfirmed claims to land in that State, which had been filed prior to the 10th of March, 1804. The commissioners were directed to class them, and at the commencement of each session of Congress, during said term of examination, lay before the commissioner of the general land office a report of the claims so classed. The first class was to include the claims which ought, in their opinion, to be confirmed according to the laws and usages of the Spanish government; the second, those which ought not to be confirmed. The third section provided that the lands included in the first class should continue to be reserved from sale, as heretofore, until the decision of Congress should be made against *them; [*289 and those in the second class should be subject to sale as other public lands.

On the 2d of March, 1833, Congress passed another act, directing the commissioners to embrace every claim to a donation of land held in virtue of settlement and cultivation.

On the 16th of July, 1832, a patent was issued to Peltier for the land described in his survey.

On the 8th of June, 1835, the commissioners decided that 350 arpents of land ought to be confirmed to Mordecai Bell, or his legal representatives, according to the survey.

On the 4th of July, 1836, Congress passed an act confirming claims to land in the State of Missouri, by which it was declared that the decisions in favor of land claimants, made by the above commissioners, were confirmed, saving and reserving, however, to all adverse claimants, the right to assert the validity of their claims in a court or courts of justice; and the second section declared that if it should be found that any tract or tracts thus confirmed, or any part thereof, had been previously located by any other person or persons under any law of the United States, or had been surveyed or sold by the United States, the present act should confer no title to such lands in opposition to the rights acquired by such location or purchase.

The cause came on for trial at April Term, 1842, in the Circuit Court. After the evidence was closed the counsel for the defendant prayed the court to instruct the jury,

1. That the plaintiffs are not entitled to recover, in this action any land included in the patent issued to Eustache Peltier or his legal representatives.

2. That the plaintiffs are not entitled to recover in this action, any land which the jury may find, from the evidence, to be embraced in the location made in favor of Martin Coontz, or his legal representatives.

Both of which instructions the court gave. Whereupon the counsel for the plaintiff excepted.

Messrs. Lawless (in writing) and *Ewing* for the plaintiffs in error.

Mr. Jones for the defendants.

Mr. Lawless referred to the facts in the case and the acts of Congress bearing upon them, and then proceeded thus:

The plaintiffs in error respectfully contend, that the instructions *given by the Cir- [*290 cuit Court of the United States in this case are erroneous.

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The counsel for the plaintiffs in error will assume, as a proposition self-evident, that the title of the plaintiffs, under Amos Stoddard and Mordecai Bell, is good as against the United States, and would, if no antagonist private title existed, or were set up, entitle the legal representatives of Amos Stoddard, under Mordecai Bell, to the possession of 350 arpents granted to Bell, surveyed for Amos Stoddard under Bell, and confirmed by the Act of Congress of the 4th July, 1836, to Mordecai Bell and his legal representatives.

The validity of the claim of Amos Stoddard and Bell to the 350 arpents has been fully established by the decision of the commissioners, and the Act of 1836.

If the land included in the grant to Mordecai Bell, and the survey under it in favor of Amos Stoddard, had never been located by the New Madrid speculator, or entered in the United States land office, there would be, it is presumed, no doubt, after the Act of 1836, of the right of Amos Stoddard or his legal representatives to enter upon that land, and use the same as their fee-simple estate and absolute property.

The question, then, that presents itself is, whether the title of Amos Stoddard and his heirs to the land surveyed for Amos Stoddard has been devested, since the date of the survey, and between that time and the 2d July, 1836, confirming the claim under Mordecai Bell.

The defendant did not seriously, in the court below, contend that the title of the plaintiff was not good against the United States, putting out of view the defendant's patent and the location and survey which formed the basis of that patent. But it was insisted on the part of the defendant, that the plaintiffs were only entitled to a right of relocation of the quantity contained in the survey made in favor of Amos Stoddard under Bell, because, by the second section of the Act of 4th July, 1836, the first section of which confirms the grant and survey of Stoddard under Mordecai Bell, it is provided, that where the land included in the confirmed claim has been entered or located, or otherwise disposed of by any act of Congress, then the confirmee shall only be entitled to a relocation of the same quantity on any public land theretofore authorized to be sold, and which has been actually offered for sale and remains unsold in the State of Missouri.

The defendant then contends that the land [*291 in question has been *disposed of by the United States within the terms and meaning of the second section of the Act of 4th July, 1836, and concludes,

That, therefore, the plaintiffs cannot recover it in this action under the title by them shown.

Thus, as has already been submitted to this court, the question resolves itself into this, to wit:

Has the title of Amos Stoddard and his legal representatives to the land in dispute been superseded, or destroyed, or devested, previous to the 4th July, 1836.

If the title of Amos Stoddard under Bell was still in being on the 4th July, 1836, it is manifest that it must be still in being, inasmuch as no act of Congress can constitutionally deprive a citizen of his lawful estate in land by a mere enactment. The second section of the Act of 1836 pre-supposes that the sale or location, or other disposition of the land included in the grant confirmed by the first section, where such sales, locations, or other disposition as the act of Congress and the law in force at this date justified.

This position cannot be assailed, unless by assuming the unconstitutional doctrine that Congress could enact the destruction of a citizen's title to his land, and dispense with the action of a court and jury.

It would seem to be exceedingly disrespectful to the Congress of the United States to attribute to that body any such intentions; and not less disrespectful to this high court to imagine that, if Congress so enacted or so intended to enact, this court would sustain such spoliatory and unconstitutional legislation.

The counsel for the plaintiffs in error will, therefore, take his stand on his above constitutional position, and from that elevated ground examine the defendant's title.

The title, as has been seen, consists of—

1. A New Madrid certificate, issued in favor of Eustache Peltier, for 160 acres of land.

2. A location filed in the office of the Surveyor-General, at St. Louis, by a purchaser, under Peltier, of said certificate.

3. A survey of said location, made at the instance of said purchaser and locator, by the Surveyor-General.

4. A patent issued to said Eustache Peltier, and his legal representatives, for said 160 acres as located and surveyed, and by virtue of said location and survey.

The counsel for the plaintiff, for the purpose of his argument, will *assume, as *res* [*292 *adjudicata*, that, if it be shown that the United States had no title to the land described in the patent to Eustache Peltier, that patent is void as against the confirmee, under the Act of 4th July, 1836.

In the case of *Polk's Lessee* v. *Wendal et al.* (9 Cranch Rep., 99), the Supreme Court of the United States lays down the doctrine, "that there are cases in which a grant is absolutely void, as when the State has no title to the thing granted, or when the officer had no authority to issue the grant. In such cases, the validity of the grant is necessarily examinable at law."

The facts upon which the Supreme Court decided in *Polk's* case, showed that the State of North Carolina attempted to grant lands to which she had no title, or authority to grant. The court therefore pronounced her patent to be void.

If, in the case now before the court, the patent to Eustache Peltier and his legal representatives conveyed the land described in it, it must be because this land had been previously devested out of Amos Stoddard, under Mordecai Bell, and had become merged in the public domain, and part thereof.

If the land had not been so re-united to the public domain, it is contended that neither Eustache Peltier nor his assigns could have lawfully located upon it, or have caused their location to be surveyed; or, if the location and survey were to be made on their mere demand, by the instrumentality of the Surveyor-General of the United States, at St. Louis, without any discretion on his part to refuse the location and survey, then, although, strictly speaking, the

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location and survey were made according to the letter of the second section of the Law of 1815, yet it must have been at the risk of the locator, and those claiming under him.

The counsel for plaintiff in error will now, therefore, proceed to demonstrate that, at the date of the location under Eustache Peltier, the title was not devested out of Amos Stoddard, under Bell, in the land so located, but was actually reserved from sale or disposition by the United States, until the claim to it of Amos Stoddard, under Bell, was finally passed upon by the proper authority.

It is in evidence in this case, that the claim of Amos Stoddard, under Bell, to the land in Peltier's location, had been duly filed long previous to the Act of 15th February, 1811. By reference to that act (section 10, 2 Story's Laws United States, p. 1178), it will be seen that the President of the United States was authorized, 293*] whenever *he shall think proper, to direct so much of the public lands," &c. (Here the counsel quoted that part of the act which is set forth in the statement of the case by the reporter.)

By the Act of Congress of 17th February, 1818 (3 Story's Laws, p. 1659, sec. 3), it is provided, "that whenever the land office shall have been established in any of the districts aforesaid (created by the first section), and a register and receiver of public moneys appointed for the same, the President of the United States shall be, and is hereby authorized to direct so much of the public lands lying in such district as shall have been surveyed according to law, to be offered for sale, with the same reservations and exceptions, in every respect, as was provided for the sale of public lands in the territory of Louisiana, by the tenth section of an act entitled, 'An Act providing,' &c., being the same act above referred to.

As has been observed, it is in evidence in this case, that the land located and patented under Peltier was included in a claim which was in due time, and according to law, presented to the recorder, and filed in his office, and therefore was reserved specially from sale, by the Acts of 1811 and 1818.

It is also in evidence, that the claim was actually included in a list printed and published, at the instance of the recorder at St. Louis, in pursuance of instructions from the United States Land Department, of lands reserved from sale in the district of St. Louis. It was not contended by the defendant's counsel that if the land in dispute had constituted part of a lead mine tract, or included, or was adjacent to, a salt spring, or formed part of land reserved for public schools or State seminaries, the location by Peltier's vendee could have held the land, or that a patent could have cured the defect of the location.

Nor, as the counsel for the plaintiff understands their argument, do they contend that the land included in Amos Stoddard's claim was not reserved under the Acts of 1811 and 1818.

But, to get rid of the difficulty, they contend that the words in the New Madrid Act of 1815 (section 1). "Any person or persons owning lands in the County of New Madrid, in the Missouri territory, with the extent the said county had on the tenth day of November, 1812, and whose lands have been materially injured by earthquakes, shall be, and they are hereby authorized to locate the like quantity of land on any of the public lands of said territory authorized to be sold," ought to be construed to mean lands which, at any time after *the New Madrid location was [*294 made, should become public land, and as such might be authorized to be sold.

And then the counsel for defendant endeavor to show, that subsequent to the date of the location under Peltier, the land did, in fact, become public land, and might have been authorized, by the President of the United States, to be sold.

The plaintiff's counsel will now proceed to demonstrate, in refutation of the above doctrine of the defendant, that

1. The location, or the right of location, was confirmed by the Act of 1815 to the owner of the lands injured, whoever he might be at the date of the passage of the act, and not to his assignee or vendee after the date of the act, as in the case before the court.

2. That the words in the act, "the sale of which is authorized by law," mean, not land the sale of which, after the location made, might be authorized by law, but land, and that, too, public land, which, in conformity to the Acts of 1811 and 1818, before adverted to, were actually authorized by the President to be sold.

3. That the land included in the claim of Amos Stoddard, under Bell, upon which the locations under Eustache Peltier, and also under Martin Coontz, have been made, never has become, at any time, public land authorized to be sold.

In support of our first objection, namely, that the act does not authorize a location by an assignee whose assignment bears date subsequent to the passage of the act, the court is referred to the specific provision in the first section, which confines the right to locate to the owner of the land injured. The court will see, by reference to the record, that the locator under the certificate to Peltier, and also to Coontz, was not the owner of the land insured at the date of the passage of the act.

It is true, that in many, perhaps most cases, those locations have been made by persons who were not the owners, but it is submitted that this practice cannot have the effect of changing a positive law, particularly when it is considered that this practice was introduced for the benefit of mere speculators.

It is matter of record, and we may add, of authentic history, that, under this abusive practice, the New Madrid law has been perverted to the purposes of gross fraud upon the government of the United States, and to the spoliation (as in the present case is attempted) of private owners. The counsel for the plaintiffs in error respectfully submit, that when the Act of 1815 is sought to be converted into a *species of penal law operating a for- [*295 feiture as against private owners, whose titles and claims were, at the date of that act, matters of record, that act ought to be construed strictly.

If the question were now between the United States and locator, there might, perhaps, be

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some ground for a liberal construction. It might be contended, that the Surveyor-General, who filed the location and surveyed it, being an officer and agent of the United States, his act as against his principal ought, if possible, to be binding. But this sort of reasoning surely cannot be endured where the question is between a total stranger to the Surveyor-General and a tortious locator who, at his own risk, has thought proper to file a location calling for land not public, and not authorized to be sold, and availing himself, for manifestly tortious and unjust purposes, of the instrumentality of a purely ministerial officer.

In support of the position, that the words in the act, "the sale of which is authorized by law," must be taken to mean, 1st, public lands; 2d, lands authorized to be sold according to the provisions, and "with the same reservations and exceptions in every respect," contained in the 10th section of the Act of 1811, and in the Act of 1818, before referred to, the plaintiff's counsel beg to call the attention of the court to the specific terms of those two acts, and to their manifest object.

The counsel for plaintiff would also refer to the New Madrid act, in which, besides the words, "the sale of which is authorized by law," specifically provides, that "no such location shall include any lead mine or salt spring.

By those Acts of 1811 and 1818, it seems too clear for argument, that until the sectional lines were run, the President was not authorized to sell the land. The survey is directed to be made by those acts, in conformity with the established system of public surveys. The general object of that system is to designate, beyond all doubt, in all future time, the boundary lines and the quantity of land included within them. The special object in Missouri was, besides, to ascertain the location and quantity of all those lands reserved and excepted from sale in those acts.

It was impossible that the objects, therefore, in view could be attained without a survey having been previously made by the United States.

It was impossible, with any accuracy, to ascertain the location or quantity of mineral land —of salt spring land. It was also impossible **296*]** *to know where the 16th section fell, without survey. It was equally impossible to know the ground covered by claims "duly filed with the United States recorder," without such survey.

It is manifest, that the Act of 1815 (New Madrid Act) provides for all this by requiring the location to be made, not only on public land, but public land authorized to be sold.

By the terms of the Acts of 1811 and 1818 (and as to lead mines and salt springs, the New Madrid Act itself), a great extent of public land was excepted from sale. The President had no power to proclaim such lands for sale. But the Act of 1815 requires that the location be not made on those lands. How, then, was the locator, or the officer who filed the location, to know when it was made, whether it interfered with lands which, though public, were not to be sold?

While on this part of the subject before the court, the counsel for the plaintiff in error would refer the court to the opinions of a di tinguished Attorney-General of the Unit States, the late William Wirt. They are to found in the "Opinions of the Attorneys-Ge eral of the United States, from the beginni of the government to March 1st, 1831" (pu lished under the inspection of Henry D. G pin, in 1841). In his letter of the 11th Ma 1820, to the Secretary of the Treasury (pa 263), Mr. Wirt says: 1st. That "the act taches no assignable quality to the charity bestows," or "to make those charities a su ject of speculation;" 2d. That "it was not t intention of Congress, in authorizing the s ferers 'to locate the like quantity of land any of the public lands of the said territo which is authorized by law,' to change or affe in any manner that admirable system of lo tion by squares, which had been so studious adopted in relation to all the territories."

In his letter of the 19th June, 1820 (pa 273), Mr. Wirt specifically gives it as his op ion, that the sale is not authorized by law un the sectional lines are run, and consequen all locations previously made by those suffer (New Madrid) are unauthorized.

The counsel for the plaintiff in error be leave to refer to those letters of Mr. Wirt, strongly in support of the objection taken the location in this case, because of its havi been made by an assignee. It does not app that the person who signed the locations fi in this case with the surveyor, had any pow of attorney so to do. He acted for hims and for his own benefit, and not for that of "sufferer." The opinion of Mr. Wirt as the necessity *of a previous survey of [*29 the township, is clear and explicit, and, sides, has been assented to by Congress.

By the Act of 26th April, 1822, it is acted, by section 1, "that the locations here fore made, of warrants issued under the Act the 15th February, 1815, if made in pursua of that act in other respects, shall be perfec into grants in like manner as if they conform to the sectional or quarter sectional lines of public surveys;" and by section 2, "that he after holders and locators of warrants shall bound, in locating them, to conform to tional lines as nearly as the respective qua ties will admit."

The above act would not have been nec sary if Mr. Wirt's opinion was not adopted Congress, or if it had been erroneous. The was obtained, as many acts unfortunately h been, to suit the purpose of speculators, and cure defects in their locations.

This act, however, cannot operate beyo its import and terms. It cannot make a lo tion valid against a private owner, when, in origin it was void. The only effect that, acco ing to principles of sound justice and jurisp dence, ought to be given to this act, is mer to make good a location and survey, notw standing that it did not originally, or did at date of the act, coincide with sectional li But it is contended by plaintiff's counsel th whenever it shall appear that the location other respects did not conform to the terms the act, it shall not become available under above act.

Mr. Wirt, in his above opinion, only verted to one object in view of Congress,

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might also, with equal propriety, have urged the necessity of survey, in order to ascertain the location and quality of those public and private lands which were excepted or reserved from sale, and which could not be ascertained until the public surveys had been made, returned, and approved.

As has been observed, it is in evidence in this case, that the surveys of the township in which the land in dispute is situated were not returned until 1823, and that, at the date of those locations under Peltier and Coontz, respectively, no survey at all had been made by the United States.

The court is also referred to the opinion of the Attorney-General, Wirt, in his letter of the 5th October, 1825 (p. 558), which is adverse to the legality of locations on land included in a claim duly filed. Mr. Wirt, it will be seen in his letter, refers, in aid of his opinion, to an official letter, dated 10th June, 1820, of the then [*296] *Secretary of the Treasury, Mr. Crawford. The construction put by Mr. Wirt upon the words, "the sale of which is authorized by law," in the Act of 1815, has been adopted by the United States Land Department, and has been reiterated in divers letters and opinions of the solicitor of the United States land office, and by the Attorney-General of the United States.

For the opinion of Attorney-General Butler, the court is referred to ("Opinions," page 1199) the letter of the Attorney-General, of 11th August, 1838, in which he adopts the views of Mr. Wirt, and in this very case of Mordecai Bell uses these words: "In the case of Mordecai Bell, whose claim is 350 arpents is confirmed by the Act of July 4, 1836, I am of opinion that the tract of six acres and twenty-eight hundredths, included in the survey, and previously confirmed by the old board of commissioners, must be regarded as clearly held by a good title; but that Bell's claim will be valid for the residue, notwithstanding the survey includes two tracts located, and another patented, under the New Madrid law. These cases must stand on the same ground as those noticed in the case of Mackay, because the lands embraced in the Act of 1836 were equally reserved from sale."

The above opinions, though not judicial authorities, are referred to in aid of the humble argument of the plaintiff's counsel, and, in particular, are referred to as repelling any conclusion that may be drawn in favor of those locations, from what has been (very erroneously as it is conceived) denominated contemporaneous construction and practice.

Those opinions of the law officers of the United States, of the commissioner of the general land office, and of the Secretary of the Treasury, can alone be referred to, to ascertain the construction that was in fact given to the New Madrid law. The acts done under that law in Missouri were *ex-parte*, and interested acts, or purely ministerial acts done by an officer whom the law rendered a mere instrument of the locator. Acts of this sort can claim no respect as demonstrating contemporaneous construction, or as establishing a lawful custom.

The court will see, on reference to the second section of the New Madrid law, that

1. The recorder was bound to issue the certificate on the oath or affirmation of a competent witness, that any person was entitled to a tract under the provisions of the act.

2. That, upon such certificate being issued, and the location made, *on the application of the claimants, it was made the duty of the principal deputy-surveyor to cause the survey to be made thereof, and to return a plat of each location to the recorder. [*299

3. That the recorder was directed to record the location and plat in his office, and was to receive from the claimant the sum of two dollars for receiving proof, issuing the certificate, and recording the plat as aforesaid.

4. By section 3, the recorder was obliged to issue a patent certificate to the claimant.

5. The executive of the United States was bound, upon the exhibition of the patent certificate, to issue the patent.

Thus, in each of those five stages of the locator's title, the locator or claimant is "*actor reus, et judex.*"

He first designates the land by his location, which designation was filed as of course. He then demands a survey of that location, which the Surveyor-General is obliged to make. He then demands, upon the strength of the location and survey, a patent certificate; and, armed with this certificate, he proceeds to Washington city, and demands his patent, which, by the terms of the third section of the act, the executive of the United States is bound give him.

It is true, that Mr. Wirt, in his letter of the tenth of October, 1825, gives it as his opinion, that the issuing of the patent was not so purely ministerial an act as to dispense with, on the part of the President, all consideration of the location and survey on which it was founded; and therefore opposed the issuing of a patent to Mr. Bates, who demanded it under the provisions of the New Madrid act for land included in a claim duly filed, or which was then before a court of competent jurisdiction; but this opinion of Mr. Wirt, although the department was not in favor of the New Madrid location, does not appear to have prevented the issuing of the patent; doubtless, because the executive considered the act too imperative, or that, as a ministerial officer, he preferred to leave the whole question of title, as between the New Madrid locator and the claimant, to be decided by a court of justice. In this view, it would, perhaps, be difficult to establish that the executive of the United States was in error.

Having thus endeavored, it is hoped satisfactorily, to demonstrate that the whole of the proceedings on which the patent to Eustache Peltier was based were not only not in pursuance of the New Madrid law, but in direct violation of it, the counsel for the plaintiff in error *submit, as a logical and legal conclusion, that those proceedings, and a patent based on them, could not, in the least degree, weaken the claim of the plaintiff under Mordecai Bell, devest the title, whatever it was, which at the date of the New Madrid Act was in Bell and his legal representatives. [*300

It has been urged at bar in the court below, on behalf of the defendant, and may be reiterated before the Supreme Court, that, admitting, for argument's sake, that the location was not good and valid as its date, it yet has become

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so by operation of certain acts of Congress, and that therefore the claimant under Bell can at most be entitled to a re-location under the second section of the Act of 1836, under which he contends that his claim is confirmed. It has been strenuously argued, that he must take the title or the confirmation *cum onere*, or not at all; that he cannot control the mode in which Congress has thought proper to extend their charity towards him, nor escape from the conditions under which that charity has been bestowed. The counsel for the plaintiff might retort this argument on the defendant. Surely, if the claimant under a Spanish grant and survey be charged with mendicancy at the door of Congress, the New Madrid sufferer has *a fortiori*, had charity—absolute alms—bestowed upon him. Surely it is he that must be bound by the strict terms and conditions of the gift, and not seek to enlarge it at the expense either of the United States or of private proprietors. There is nothing in the position of the defendant, who rather represents a New Madrid speculator than a New Madrid "sufferer," to call for any liberality of construction in his favor, especially when that liberality is avowed to be called for in order to effect a forfeiture, as against a party whose original right to his land has been solemnly recognized, first, by a board of commissioners, and afterwards by the Congress of the United States.

This argument of the defendant's counsel assumes as proved, what we contend has no existence, namely, that the land included in the claim of Amos Stoddard, under Mordecai Bell, confirmed by the Act of 4th July, 1836, has been sold, located, or disposed of, according to law. If it has not been so "disposed of," it is manifest that the confirmation by the first section of the Act of 1836 carries the whole title, and that the second section of that act has no application, no subject matter, to operate on.

We come now to the ground above adverted to, as taken by defendant's counsel, namely, that the location, though not good when 301*] *made, has become good by operation of certain acts of Congress on the claim of the plaintiff, and the land included in it.

The counsel for defendant, in support of this position, referred to the Acts of May 26, 1824, May 26, 1826, and May 24, 1828.

They contend that, by the 5th section of the Act of 1824, "a claim to land within the purview of that act, which shall not be brought before that court, or through neglect or delay of the claimant, shall not be prosecuted to a final decision within three years, shall be forever barred, both at law and in equity; and no other action at common law, or proceeding in equity, shall ever thereafter be sustained in any court whatever in relation to said claims."

To this, the plaintiff replies, that this section of the Act of 1824 (renewed, as we admit, by the Acts of 1826 and 1828), can have no bearing whatever on the plaintiff's case or claim.

1. Because this section could not react on the proceeding, under the new Madrid law, and render legal and valid a location and survey that were void *ab initio*.

2. That the section, if it ever could operate to exclude the plaintiff in his claim from a court of justice, has been repealed by Congress, and the plaintiff remitted to all his righ title under the grant to Bell, by the A 1832 and 1833, which authorized him to his claim before a board, in the same st vitality and vigor in which it was whe filed with the recorder.

3. That the Act of 4th July, 1836, ha firmed the claim and recognized it as en to protection by the treaty, and good and to all intents and purposes.

This third reason brings us to the paran character of the plaintiff's title; and, it spectfully submitted, exhibits it as a title Congress could not violate, even if they h declared their intention to do.

The commissioners under the Acts of and 1833 accompanied their decisions o respective cases with a very full report a position of their views of the claims and which they were authorized to take unde sideration, and the principles upon which classification was made.

The principles thus laid down by those missioners have not only been sanction the Act of Congress of the 4th July, 183 have been affirmed by the Supreme Co the United States. In their report of th September, 1835, the commissioners pa larly refer to the case of *Chouteau* v. *States*, and also to *the case of *Delassus*, [* *under Deluzieres*, v. *United States*. The missioners, in their report of 1833, adopt principle, that when the grant, or the and survey, created a right of propert claim ought to be placed in the first cl entitled to confirmation. In their seco port of 1836, they reiterate this doctrin refer to the Supreme Court of the U States in support of it. They cite the words of this court in the above cases. the first case," say they, "the Supreme lays it down that 'orders of survey, made Lieutenant-Governor of Upper Louisian the foundation of title, and are capa being perfected into complete titles; tha are property capable of being alienated; a as such, to be held as sacred and inviol other property.'" They also cite the lan of the Supreme Court in the former c *Delassus* v. *United States*, as follows: right of property is protected and secur the treaty; and no principle is better s in this country, than that an inchoate t land is property: independent of treaty lations, this right would be held sacred sovereign who acquires an inhabited ter acquires full dominion over it; but th minion is never supposed to devest the rights of individuals to property. Th guage of the treaty ceding Louisiana ex every idea of interfering with private erty; of transferring lands which have severed from the royal domain."

The question of the inviolability o right of Amos Stoddard, under Mordecai is settled by the highest possible auth legislative and judicial. It follows, as a consequence, that the New Madrid law to receive such a construction as is con with the above view of Congress and Supreme Court. It has been endeavor be shown that, by a fair interpretation New Madrid Act, no collision could take

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ween it and the treaty of cession on those
ciples, which, as the Supreme Court ob-
, independent of the treaty, would have
ected the property of the plaintiffs in error:
is respectfully, and confidently also con-
d, that if the terms of the New Madrid
or any other act of Congress, specifically
ded to annul, or to violate the right of
laintiffs, those terms must be disregarded,
nconstitutional.

not supposed, by plaintiff's counsel, that
erits of the claim of Stoddard, under
can now become the subject of re-exam-
n as against the United States, and with
] reference to the *validity of that claim
it was filed with the recorder. All that
en already passed on and settled in favor
claim. The proceeding under the New
d law, passed in 1815, can have no bear
the original merits of a claim filed under
of Congress passed in 1805. It would
that the counsel for the defendant have
ed the objection to original validity of
ff's title, inasmuch as the instructions
for by the defendant, and given by the
Court, are predicated on the patent to
e Peltier, and on the location under
. The *prima facie* title of the plaintiff
t seriously disputed.

ddition to what has been already sub-
by plaintiff's counsel, on the subject of
's patent, and the grounds on which it
e successfully avoided, in an action of
ent, much more might be said, drawn
from the decisions of this court as from
ctrine in England on the subject of
grants of land. The court must be well
that in England a king's grant may be
of by showing that at the date of it the
had no title. It is contended, on behalf
plaintiff in error, that this doctrine
be, *a fortiori*, the law of the United
. The President of the United States is,
pects public land, a purely ministerial
; whereas the title to public lands in
d is vested in the king. There is no
t least the counsel for plaintiff in error
ust been able to find one, which imparts
eat for land any peculiar virtue, or any
r efficacy in operation than that of an or-
deed of quitclaim, signed, sealed, and
ed by an attorney in fact for and in
e of his principal. The counsel for
laintiff in error, while they admit that a
States land patent constitutes a *prima*
itle, and that a party cannot at law get
it, and avoid it on the ground of irreg-
in the previous formalities, do respect-
contend, that, when the proceedings on
the patent is founded are utterly void,
re it is shown that the United States had
ate in the land, or no right to grant the
the *prima facie* case made by the patent
ted.

nclusion, the counsel submit that

It appears from the record that the
s in error claim a right, title and estate,
a confirmation of a grant and survey
in them as heirs at-law of Amos Stod-

That their right and title is protected and
aranteed by treaty and by act of Congress.

That the decision of the Circuit Court of
ARD 2.

the United States *has been against [*304
their title, so derived, guarantied, and consummated.

4. That this decision of the Circuit Court of the United States is erroneous, and ought to be reversed.

Mr. Jones, for the defendants in error, said he would inquire,

First. As to the instrument by which the plaintiffs attempt to connect the title of Amos Stoddard with the original title (whatever it was) of Mordecai Bell, under the concession from the Spanish Governor of Upper Louisiana; and upon which instrument necessarily depended any sort of right, at law, or equity, in Stoddard to claim the rights vested in Bell by that concession.

This instrument purports to be executed by one Richard Caulk, styling himself syndic of the district of St. Andrews, and certifying that Mr. Bell was present before him, &c. It is produced as a record, upon its own authority. It cannot be set up as a private act; it is enough to say, that it is actually brought forward as a record. If so, it is invalid, unless it possesses the necessary requisites. Article 1132 of the Civil Code of Louisiana changes the common law in this respect, and says, that an act not authentic from defect of form, &c., may avail as a private paper, if signed by the party. In 10 Louisiana Rep., 304, there is the case of a mortgage signed by a married woman, and some of the witnesses did not see her sign. The court set it aside, because it was produced as an authentic act. (See, also, article 2233, adverted to in the case in 5 Martin, N. S., 68, 69.) The distinction between authentic acts and private writings is shown in Partidas, title 18, p. 222, 235.

All the decisions of this court in Florida cases, show that persons must prove the authenticity of the paper under which they claim, and that local laws must be proved below, as foreign laws.

The officer of syndic is explained in 6 Peters (*Strother* v. *Lucas*): he was only a subordinate police officer.

The preface to the translation of the Partidas (p. 20) shows that a proclamation of O'Reilly established syndics. There is no evidence in the case that they acted as notaries.

As to powers of comandants, see 3 Martin, 115. If this is not valid as an authentic paper, will the lapse of time make it so, as a private paper? It is true, that time is of great value in sustaining the muniments of title, where the property has been for a long time enjoyed; but in this case, the party who claims under this instrument never was in possession.

*Second. As to Mordecai Bell's [*305
claim, which was confirmed by the board of commissioners on the 8th June, 1835, the plaintiffs, in their statement, say it was that identical claim which had been filed by Soulard with the recorder of land titles, on the 29th of June, 1808, laid before the board for their action, and rejected by them on the 10th October, 1811; as if the first decision against the claim had been subject to some condition or reservation, that kept the claim alive during all the twenty-four intervening years, and still pending before the board, for their further consideration and final decision.

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This is a clear mistake. Mordecai Bell's claim was never filed with the recorder of land titles, nor was it ever laid before the board for adjudication, till March 30, 1835; near nineteen years after Peltier's location, seventeen years after this survey, and two years and eight months after his patent; sixteen years and ten months after Coontz's location, and sixteen years and eight month after his survey. It was Amos Stoddard's claim alone, as assignee of Mackay, the pretended assignee of Bell, that was filed by Soulard, on the 29th June, 1808, with the recorder of land titles, and definitively rejected by the commissioners, on the 10th October, 1811; and which, ever since that time to the commencement of the present action, a period of twenty-eight years, had lain quiet and silent under a judicial condemnation, unconditional and absolute in its terms—final in its effect

But the claims of assignees and grantees are very different. An assignee, as such, might establish his claim before the commissioners, who might, very properly, have confirmed the claim of Bell, as original grantee, without at all recognizing the chain of title by which it is alleged that the present claimants hold Bell's right. In such a case, the plaintiffs would have no title; and the facts in this case leave it entirely doubtful, whether the commissioners did not intend so to decide. (10 Peters, 334; 6 Peters, 766.)

What title did Bell acquire under the Spanish concession? He is called a grantee, but there was no land described by metes and bounds. The concession was nothing but an order of survey, but no estate vested. (12 Wheat., 599; 6 Peters, 200.)

On 10 March, 1804, Spanish authority ceased, and that all the steps to acquire title were taken after that time. On the 29th of May, 1804, Bell conveyed the concession to Mackay, but the Spanish law had then entirely ceased. A survey, made by private authority, after the change of flags, is void. (10 Peters, 284.)

306*] *Third. As to the supposed confirmation of M. Bell's claim, itself, by the Act of Congress of the 4th July, 1836, the plaintiffs produced no evidence whatever of that claim's being among "the decisions in favor of land claimants, laid before Congress by the commissioner of the general land office," prior to the passing of that act; unless they rely on presuming that fact from another fact, certified on the 27th March, 1840, by F. R. Conway, recorder of land titles in the State of Missouri; namely, that "said claim was included in the transcript of favorable decisions transmitted by the recorder of land titles, and the two commissioners associated with him, to the commissioner of the general land office."

The title alleged by the plaintiffs, as it appears on their own showing, is held utterly vicious and untenable; and if the defendant were stripped of all right and title, still the full right and title to the land in question would remain in the United States, without any sort of right in the plaintiffs to claim the land, either at law or equity. In support of this proposition the following objections to the plaintiffs' title are held demonstrative and insuperable:

1st. The pretended act of sale and exchange from Bell to Mackay was utterly inoperative and void *ab initio;* and therefore the comm sioners were fully sustained by the law and fact of the case when they decided, as they m have decided, since they rejected Stodda claim and admitted Bell's, that Stoddard failed to make out any valid claim in hims derived through Mackay from Bell; and it fair if not a necessary presumption, under the circumstances, that the specific defect, which his derivative claim was rejected by commissioners, was found in this broken li in the chain by which he attempted to c nect his claim with the original title of Bell.

This instrument, throughout its whole fra and tenor, and in the manner of its executi pursues the form and claims the authentic and effect of a "public or authentic act" ecuted under official sanction, and equival to record evidence, as contradistinguished fr a "private writing," to be proved in the ordi ry way. Like all such acts, it speaks in name and character of the officer who execu it, not of the parties. It was produced as s an act; as an act that "proves itself;" tha "full proof" in itself, without any proof of ecution in the ordinary way. It must, th fore, be shown to be the very thing it profe and is claimed to be, or nothing; failing as authentic act, it cannot, according to the kno *laws of Louisiana, be set up as a pri- [*3 vate writing, nor was it attempted to be so up.

The validity and effect of this instrum wholly depends on the legal competency of Caulke styling himself syndic of a district execute an authentic act in relation to contra and there is nothing to show, either that was such syndic as he describes himself, or, ing such, that he had any authority, in vi of that office, to execute authentic acts. the contrary, from all that is known of office of a syndic, he was merely a munic police office, of very subordinate authority functions; and is clearly excluded from ev description of officer ever recognized by laws and customs of Louisiana as ha authority to execute such acts.

2d. But whatever may be now though said of the intrinsic force and effect of the strument, if it were *res integra*, the decisio of the commissioners against Stoddard's cl (unreversed and unquestioned as it has st for so many years) is conclusive against the now set up by the plaintiffs.

3d. If there had been no decision of the c missioners against the claim, it would have equally beyond the cognizance of the co No title derived from an imperfect Spa grant, like that to Bell, could be set up, any manner recognized in any court of United States, or of any State, till it had pa the tests provided by the acts of Congress; is, till confirmed, first by the commissio then by Congress, and then regularly loc and identified by survey, and lastly carried into grant by a patent from the United St

4th. Whatever title, whether an inchoa a complete legal title, be vested by the deci of the commissioners, the confirmation of decision by Congress, and the subsequent vey locating and identifying the land to w the claim was so confirmed, that title vested in Bell exclusively.

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But it is said by the counsel on the other side, that the deed of exchange between Bell and Mackay is a mutual waranty, which is an estoppel, and that an estoppel will support an ejectment. But this is not a case of estoppel, which is binding only on the donor and his heirs. If he makes a deed when he has no title and afterwards acquires one, he is estopped; but if he acquires a lesser estate than he has conveyed, there is no estoppel. (4 Cruise's Digest, 271, tit. 38, New York edition of 1834; 4 Kent's Commentaries, 98, 260, 261; 8 Barn. & Cress., 701.)

[*306] *In 1804 the assignee stood in the place of the original grantee, and had only a right to acquire land. What, then, is the warranty in the exchange? Only that the warrantor will not claim contrary to the grant; he does not warrant that the grantee shall have the land, because he could not warrant the action of the Spanish or American government. (1 Barn. & Ad., 278.)

The act of Congress interferes with the estoppel. As to the effect of an act of Parliament upon an estoppel, see 2 T. R., 169.

5th. Even Bell's claim is in no way shown to have been included in "the decisions in favor of land claimants," which are referred to in the act of Congress of July 4, 1836, as being within the purview, and which are to be identified by reference *aliunde*.

II. The title vested in Bell himself is but inchoate and incomplete, and wholly incompetent to support the action of ejectment. The legal estate in fee, if not vested in the defendant, still remains in the United States.

As to the title of the plaintiffs, if they could set up any derivative claim under Bell; if they could establish the validity of the intermediate assignments under which they attempt to derive their claim from Bell; and if the Circuit Court could have taken original cognizance of any title so derived, and not having passed the tests aforesaid (each and every of which hypotheses we deny), still the plaintiffs show nothing more than an equitable right to call the legal estate out of Bell's hands, if such legal estate be vested in him, or otherwise to affect and appropriate such inchoate title as may be found vested in him.

III. As to the two objections taken to the defendant's title.

Objection 1. That the locations and surveys of Peltier and Coontz were on lands not then for sale.

Answer. The description of the lands on which the entries and locations of the New Madrid land warrants were allowed, was not limited to lands offered for sale, but to such lands as were not reserved from sale by the land laws of the United States.

Objection 2. That a claim for the land in dispute, under the Spanish grant or concession to Bell, was already before the commissioners for adjudication when those entries and locations were made, and so within the express exception of the act of Congress which authorized such entries and locations.

Answer 1st. The claim before the commissioners was for no particular tract of land, distinguished by metes and bounds, or otherwise, [*307] *from the mass of public lands subject to the claim, but simply for 350 arpents of land; to be afterwards duly laid off and surveyed. The survey by Stoddard, in 1808, was wholly unauthorized and void; and if he took any possession of the land so surveyed, it was but a naked and tortious possession of so much of the public lands. No special location of the land so claimed could be pretended till it came to be officially surveyed, May 26, 1837, "in conformity, as it is said, with the decision of the late board of commissioners, and in virtue of the confirmation thereof by the Act of Congress approved on 4th July, 1836."

Answer 2d. No claim for the land in dispute, or for any other land under the Spanish concession to Bell, was before the commissioners, either at the inception or consummation of the two titles vested in the defendant, and derived from Peltier and Coontz; nor till the lapse of many years thereafter, when Bell's claim was first laid before the board, in March, 1835. As to Stoddard's claim, it had been definitely rejected by the board six years before the very inception of those titles by the New Madrid land warrants, and has never been, for an instant, *sub judice*, since its final rejection by the board in October, 1811, till the commencement of this suit.

Mr. Ewing, for the plaintiffs in error, and in reply:

We contend that the plaintiffs have the better title, and ought to have recovered against both the patent of Peltier, and the survey of Coontz.

The claim of Mordecai Bell was duly filed with the recorder of land titles for the proper district on the 29th of June, 1808, pursuant to the provisions of the Act of March 2d, 1805 (ch. 86, sec. 4), and the Act of April 21st, 1806 (ch. 39, sec. 3), and the act of March 3d, 1807 (ch. 91, sec. 5).

The concession was good. It is settled that Delassus had a right to grant. (Land Laws, 542; 9 Peters, 146.)

The defendant cannot now go behind the confirmation by the commissioners and by Congress. The claim was guarantied by treaty, and although no survey had taken place, Congress indirectly required us to make it. The Act of March 2, 1805 (ch. 86), directs all grantees from the Spanish government, including orders of survey, to file a plat, &c. It is true that there was no public survey made under the authority of Congress, for there was no public officer to do it. Soulard, who calls himself Surveyor-General, was not so under the authority of the United States. This is [*310 admitted. But he was recognized by existing legal authorities. He was the most proper man to make a private survey, which he did. The Supreme Court of Missouri has held his to be semi-official acts. There are hundreds of cases in the reports of the commissioners of surveys by this same man, and the commissioners took from his records a transcript for their own government. This claim is confirmed as having been surveyed. The Act of 3d March, 1807 (ch. 101, sec. 1 to 5), saves Spanish claims. In 1808, the commissioners refused to confirm this claim, but Congress continued to pass other laws, and no claim was considered to be finally disposed of because it was refused. This one remained on file until Congress should pass upon it.

By the Act of February 15th, 1811 (ch. 81,

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sec. 10), it is enacted, "That till after the decision of Congress thereon, no tract of land shall be offered for sale, the claim to which has been in due time and according to law presented to the recorder of land titles in the district of Louisiana, and filed in his office, for the purpose of being investigated by the commissioners appointed for ascertaining the rights of persons claiming lands in the territory of Louisiana." The same provision is contained in the Act of March 3d, 1811 (ch. 113, sec. 10), and it is referred to and continued in the Act of February 17, 1818, (ch. 11, sec. 3).

The Act of March 26th, 1824 (ch. 173), which provides for the trial of Spanish claims in the district courts, and the supplementary Act of May 24th, 1828 (ch. 92), superseded and suspended this saving from the 26th day of May, 1829, until it was revived by the Act of July 9, 1832 (ch. 180, sec. 3).

As to our title before the confirmation.

The concession was in 1800, the assignment in 1804, the survey in 1806, which shows all the papers to have been in the hands of the surveyor. In 1808, Stoddard filed his claim before the commissioners. By the Spanish law the delivery of papers is equivalent to the delivery of the land itself. But the deed is formal enough. It was not the public act of a notary, but that was not necessary. One mode of conveyance is for a notary with two others to summon the parties before him and make up a record, which is itself a transfer of title; but another mode is by the party signing a deed. The Spanish laws are not accurately carried out in remote countries. Even in our distant settlements, a record is sometimes made up partly by parol. In 1769, O'Reilly says there were no lawyers in the country except [*311] *at New Orleans. In 1802, there were no notaries except at the same place. The people had been transferred often from one power to another, and must have been uncertain sometimes to whom they belonged. They executed deeds before any high officer whom they could find. Morales implied that commandants might take acknowledgments of deeds. The syndic was next in authority to commandant, with whom he acted sometimes as judge. (2 Land Laws, 204, 210, index.)

By comparing O'Reilly (2, 5, 12) with Morales (4, 5, 15) it will appear that the syndic was a judicial officer. The Partidas says that proof must be given that the officer was a public one, unless after a long lapse of time. In the preface to The Partidas, the syndic is mentioned after the alcaldes and before the Attorney-General. If, therefore, the deed from Bell was not exactly in a regular form, it was in the customary way.

The claim was prosecuted by Stoddard and not Bell until it was rejected. But this decision was not final, as the Act of 1832 (ch. 180; 4 Story, 2305) authorized the commissioners to proceed on all rejected claims standing on the records of the former commissioners, with or without a fresh presentation. The claim was confirmed to Bell or his legal representatives. Ten or twelve other cases are just in the same way. (Senate Doc. for 1835-6, Vol. II., doc. 16, pp. 7, 15, 33, 69.) In these cases the claim is made by the assignee, and the confirmation is to the original party or to his legal representatives. As to the meaning of this expression, see 12 Peters, 458, *Strother* v. *Lucas*.

Bell is estopped, or rather rebutted from saying that the confirmation is not to Stoddard, for he had conveyed to Stoddard with warranty, which amounts to an estoppel. Co. Litt., 174 *a*, 384 *b*; 12 Johnson, 201; 13 Johnson, 316; 14 Johnson, 193; 1 Miss. Rep., 217.) Title by estoppel is sufficient to maintain an ejectment. (1 Salkeld, 276; 2 Lord Raym., 1554; 6 Mod., 257, 259, same case as Salkeld, 3 P. W., 372.)

Bell's deed is sufficiently proved before this court, because it was not objected to below. No one can allege an outstanding title in Bell, because he could not do so for himself.

This case, therefore, came within the acts of Congress which have been mentioned, and this land was reserved from sale. Congress looked only to the fact that the claim was legally filed, and not to the validity of the claim itself. Between 1829 and 1832, when the *reservation was withdrawn, entries were made and [*312] have been sustained by courts in Missouri. But these defendants did nothing in this interval. It is the same case as *Bobeani* and *The Fort a Chicago*. The land was reserved and the entry was void. See opinions of the law officers of the government in the following volumes: "Opinions and Instructions," part 2, p. 12, sec. 3; p. 16, sec. 15; p. 25, sec. 23; p. 29, sec. 30; "Opinions of Attorney-General," Gilpin's Compilation, p. 1200, for the opinion of Mr. Butler, examining this very claim, dated August 8, 1838.

That a confirmation is a grant of the legal title, see 12 Peters, 454.

The defendant claims title under the Act of February 17th, 1815 (ch. 198), which authorizes a sufferer by earthquakes, in the County of New Madrid, having obtained his certificate to locate it "on any public land of the territory, the sale of which is authorized by law."

At the time of the locations of Peltier and Coontz the sale of the land which they located was not authorized by law.

1st. Because the land was not surveyed, as it must be, before the sale was authorized; but if this be cured by the Act of April 26, 1822 (ch. 40).

2d. Because it was specially reserved from sale to abide the final decision of Congress on the claim of Mordecai Bell, which was duly filed, and then not finally decided by Congress.

The law reserving this land from sale was in full force at the time of the locations and surveys of both Peltier and Coontz, and also at the time of issuing the patent to Peltier.

The Act of July 4th, 1836 (ch. 361), which confirms the claim of Bell, also enacts, "that if it shall be found that any tract or tracts confirmed as aforesaid, or any part thereof had been previously located by any other person or persons under any law of the United States, or had been surveyed and sold by the United States, this act shall confer no title to such land in opposition to the rights acquired by such location or purchase."

We contend that the location, "under any law," must be a location authorized by such law. That this location was not so authorized, but, on the contrary, forbidden; that no rights were acquired by such location; and that, therefore, the saving does not protect the de-

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fendant's claim. (*Wilcox* v. *Jackson*, 13 Peters, 510, 511, 513.)

As to the mode of proceeding, we contend:

That the Act of July 4th, 1836, is a grant, and confers a complete legal title on Bell, or his legal representatives. It is a confirmation 313*] *of a title before imperfect; that an action of ejectment may be sustained upon it on general principles. (*Rutherford* v. *Green's Heirs*, 2 Wheat., 196. 205; 12 Peters, 454.)

And especially by the laws of Missouri. (Revised Code of 1835, 13 Peters, 441, in *note*.)

That the patent to Peltier having issued against law, for land reserved from location and sale, it is void. (13 Peters, 511.)

If there was no incipient right, the patent does not vest a title. (1 Wash. C. C. Rep., 113, case of *Alton Wood*, 1 Rep., 45.)

That the plaintiffs having a valid legal title, the inception of which was prior to that of defendant, and which is the better title, it will overcome the elder patent at law. (*Ross* v. *Doe*, *ex dem Barland*, 1 Peters, 662; *Bagnell* v. *Broderick*, 13 Peters, 450, 454.)

This point does not arise in that part of the case which depends upon the location and certificate of Coontz.

Mr. Justice McLEAN delivered the opinion of the court:

This case is from the Circuit Court of Missouri, and was brought here by a writ of error.

The plaintiffs brought an action of ejectment for 350 arpents of land situated near St. Louis. Their title was founded on a concession by Delassus, Lieutenent-Governor, to Mordecai Bell, the 29th of January, 1800. Bell conveyed the same to James Mackay, the 29th of May, 1804, and on the 26th September, 1805, he conveyed to Amos Stoddard. A plat and certificate of the survey were certified and recorded by Antoine Soulard, as Surveyor-General, the 29th of January, 1806.

The above papers were presented to the recorder of the district of St. Louis, the 29th of June, 1808. And the claim was duly filed with the board of commissioners for their action thereon, who, on the the 10th of October, 1811, rejected it. But afterwards, on the 8th of June, 1835, the board decided that 350 arpents of land ought to be confirmed to the said Mordecai Bell, or his legal representatives, according to the survey. And on the 4th of July, 1836, an act of Congress was passed confirming the decision of the commissioners. The land was surveyed as confirmed. The plaintiffs proved the death of Amos Stoddard, before the suit was commenced, and that they are his heirs-at-law. The defendant was proved to be in possession of forty-eight acres and eighty-four hundredths of the land in controversy, one acre and sixty-three hundredths of 314*] which were in the *location and survey of Martin Coontz, and the residue within the patent of Peltier.

The title of the defendant was founded on an entry made by Peltier of 160 acres of land, by virtue of a New Madrid certificate, on the 24th of October, 1816. A survey of the entry was made in March, 1818, and a patent to Peltier was issued the 16th of July, 1832. Possession has been held under this title since 1819. The title was conveyed to the defendant.

On the 29th of May, 1818, an entry was made, which authorized the survey of Coontz, but no patent has been issued on it.

The township in which the above tract is situated was surveyed in 1817, 1818, and 1819, and was examined in 1822. Since 1804, a certain mound on the land has been called Stoddard's mound. In 1823 the proclamation of the President, published at St. Louis, directed the lands in the above township to be offered at public sale.

On the above evidence the court instructed the jury,

1. That the plaintiffs were not entitled to recover the land embraced in Peltier's patent.

2. That they were not entitled to recover the land embraced in Coontz's survey.

The decision of this controversy mainly depends on the construction of certain acts of Congress. By the Act of the 2d of March, 1805, all persons residing in the territory of Orleans, who had claims to land under the French or Spanish government, were required to file their claims for record with the register of the land office or recorder of land titles, and provision was made for confirming them.

The time limited in the above act was extended by the Act of the 3d of March, 1807, as regards the filing of claims with the register or recorder, until the 1st of July, 1808. By the Act of the 15th of February, 1811, the President was authorized to have the lands which had been surveyed in Louisiana offered for sale; "provided, however, that till after the decision of Congress thereon, no tract of land shall be offered for sale, the claim to which has been in due time, and according to law, presented to the recorder of land titles in the district of Louisiana, and filed in his office, for the purpose of being investigated by the commissioners appointed for ascertaining the rights of persons claiming land in the territory of Louisiana." The same reservation was repeated in the Act of the 3d of March, 1811.

The Act of the 26th of May, 1824, authorized claimants "under French or Spanish grants, concessions, warrants, or orders of surveys" *in Missouri, issued before the 10th of [*315 March, 1804, to file their petition in the District Court of the United States for the confirmation of their claims. And every claimant was declared by the same act to be barred who did not file his petition in two years." By the Act of the 24th of May, 1828, time for filing petition was extended to the 26th of May, 1829. On the 9th of July, 1832, an act was passed, "for the final adjustment of land titles in Missouri, which provided that the recorder of land titles, with two commissioners to be appointed, should examine all the unconfirmed claims to land in Missouri, which had heretofore been filed in the office of the said recorder, according to law, prior to the 10th of March, 1804. And they were required to class the claims so as to "state in the first class what claims, in their opinion, would in fact have been confirmed, according to the laws, usages, and customs of the Spanish government and the practice of the Spanish authorities under them. And second, what claims in their opinion are destitute of merit, law, or equity." And by the third section it was provided, "that from and after the final report of the recorder and com-

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missioners, the lands contained in the second class shall be subject to sale as other public lands; and the lands contained in the first class shall continue to be reserved from sale as heretofore, until the decision of Congress shall be against the claims of any of them; and the lands so decided against shall be in like manner subject to sale as other public lands."

These are the facts and statutory provisions which are material in the case. The defendant, under the entry and survey of Peltier, holds the elder legal title to the land in controversy, except the one acre and sixty-three hundreths, which is covered by the entry and survey of Coontz. Until the confirmation of the plaintiffs' title by the Act of 1836, the legal title to the land claimed was not vested in the plaintiffs.

Objections are made to the intermediate conveyances under which the plaintiffs claim. And first, it is insisted, that the deed from Bell to Mackay was not proved. It is stated on the record, that there was no proof that R. Caulk, the syndic, before whom the deed was signed and acknowledged, had authority to act as such.

The deed was executed in 1804. It was attested by two witnesses, and purports to have been acknowledged in the presence of a syndic. There was no exception to the admission of this deed in evidence; and, consequently, the objections now made to its execution are not 316*] *before the court. But if the execution of the instrument were now open to objections, they could not be sustained. Forty years have elapsed since this deed purports to have been executed. From that time to this, a claim under it seems to have been asserted. It was presented to the commissioners in 1811, having been filed with the recorder of land titles in 1808. And again, it was brought before the commissioners in 1835, it having remained on file until that time. Under these circumstances, the regular proof of the instrument might well be dispensed with. Possession, under this deed, was held by Stoddard for a time, and became so notorious that a certain elevation on the land was called Stoddard's mound.

Independently of the lapse of time, the unsettled state of the country at the time this instrument was signed, the transfers of the country from one sovereignty to another, the rude and defective organization of the government—the civil and military functions being blended, are facts which no court can disregard in acting upon transfers of property between individuals. If some degree of regularity and form were observed in regard to public grants, technical and legal forms cannot be required in the transmission of claims to land, among a people, the great mass of whom were ignorant of the forms of titles, and, indeed, of almost everything which pertained to civil government.

A syndic was not, in that country, an appointed officer, as he is in a regulated government; but the duties devolved upon the commandants of military posts, as occasion might require. There is nothing on the face of this deed to excite suspicion. It was attested by two witnesses, and contains the signature and certificate of the syndic. The genuineness of these attestations was not objected to on the admission of the deed as evidence, or on a motion to overrule it. The deed must, therefore, be considered as evidence to the jury, without exception. And, under all the circumstances, we think that full effect should have been given to it as a muniment of title. The deed from Mackay to Stoddard, the ancestor of the plaintiffs, is not objected to. Bell made the conveyance to Mackay, not having the legal title; but when, under the Act of 1836, the report of the commissioners was confirmed to Bell and his legal representatives, the legal title vested in him, and enured, by way of estoppel, to his grantee, and those who claim by deed under him. A confirmation by act of Congress vests in the confirmee the right of the United States, and a patent, if issued, could only be evidence *of this. On a [*317 title by estoppel, an action of ejectment may be maintained.

If the claim of the defendant had not been interposed, no one could doubt the validity of the plaintiffs' title. It has the highest sanction of the government, an act of legislation. But the 2d section of the Act of 1836, which gave this sanction, provided, "that if it should be found that any tract confirmed, or any part thereof, had been previously located by any other person or persons, under any law of the United States, or had been surveyed or sold by the United States, that act should confer no title to such lands, in opposition to the rights acquired by such location or purchase."

This provision, it is insisted, covers the case, and defeats the title of the plaintiffs. But, it must be observed that a location, to come within the section, must have been made "under a law of the United States." Now, an act under a law, means in conformity with it; and unless the location of the defendant shall have been made agreeably to law, or the patent were so issued, the reservation does not affect the title of the plaintiffs.

The holder of a New Madrid certificate had a right to locate it only on "public lands which had been authorized to be sold." Peltier's location was made in 1816, and his survey in 1818. The location of Coontz was made in 1818, and his survey in 1818. At these dates there can be no question that all lands claimed under a French or Spanish title, which claim had been filed with the recorder of land titles —as the plaintiffs' claim had been—were reserved from sale by the acts of Congress above stated. This reservation was continued up to the 26th of May, 1829, when it ceased, until it was revived by the Act of the 9th of July, 1832, and was continued until the final confirmation of the plaintiffs' title, by the Act of 1836. The defendant's patent was issued the 16th of July, 1832. So that it appears, that when the defendant's claim was entered, surveyed, and patented, the land covered by it, so far as the location interferes with the plaintiffs' survey, was not "a part of the public land authorized to be sold."

On the above facts, the important question arises, whether the defendant's title is not void. That this is a question as well examinable at law as in chancery will not be controverted. That the elder legal title must prevail in the action of ejectment is undoubted. But the inquiry here is, whether the defendant has any title, as against the plaintiffs. And there

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seems to be no difficulty in answering the 318*] *question, that he has not. His location was made on lands not liable to be thus appropriated, but expressly reserved; and this was the case when his patent was issued. Had the entry been made, or the patent issued, after the 26th of May, 1829, when the reservation ceased, and before it was revived by the Act of 1832, the title of the defendant could not be contested. But at no other interval of time, from the location of Bell, until its confirmation in 1836, was the land claimed by him liable to be appropriated in satisfaction of a New Madrid certificate.

No title can be held valid which has been acquired against law; and such is the character of the defendant's title, so far as it trenches on the plaintiff's. It has been argued, that the first patent appropriates the land, and extinguishes all prior claims of inferior dignity. But this view is not sustainable. The issuing of a patent is a ministerial act, which must be performed according to law. A patent is utterly void and inoperative which is issued for land that had been previously patented to another individual. The fee having been vested in the patentee by the first patent, the record could convey no right. It is true a patent possesses the highest verity. It cannot be contradicted or explained by parol, but if it has been fraudulently obtained or issued against law it is void. It would be a most dangerous principle to hold that a patent should carry the legal title, though obtained fraudulently or against law. Fraud vitiates all transactions. It makes void a judgment, which is a much more solemn act than the issuing of a patent. The patent of the defendant having been for land reserved from such appropriation, is void; and also the survey of Coontz, so far as either conflicts with the plaintiffs' title. For the foregoing reasons, we think the instructions of the court to the jury were erroneous; and, consequently, the judgment must be reversed at the defendant's cost, and a *venire de novo* is awarded.

ORDER.

This cause came on to be heard on the transcript of the record from the Circuit Court of the United States for the District of Missouri, and was argued by counsel; on consideration whereof, it is now here ordered and adjudged by this court, that the judgment of the said Circuit Court, in this cause be, and the same is hereby reversed with costs; and that this cause be, and the same is hereby remanded to the said Circuit Court, with directions to award a *venire facias de novo*.

Cited—3 How., 53; 8 How., 309, 331, 339, 340, 341, 362, 364, 366; 10 How., 374; 15 How., 538; 19 How., 232, 237; 21 How., 305, 431; 3 Wall., 423; 18 Wall., 177; 19 Wall., 620, 632, 633; 2 Otto, 713; 3 Otto, 216; 10 Otto, 563; 3 Woods, 337; McAll., 318.

319*] *LESSEE OF ROBERT GRIGNON, PETER B. GRIGNON, AND MORGAN L. MARTIN, *Plaintiffs in Error*,

v.

JOHN J. ASTOR, RAMSAY CROOKS, ROBERT STUART, AND LINNS THOMPSON.

Michigan statute—Jurisdiction of County Court defined—Power to order sale of real estate of deceased—Presumption of jurisdiction of various courts—Title to land confirmed by Congress—Evidence.

By a law of Michigan, passed in 1818, the county courts had power, under certain circumstances, to order the sale of the real estate of a deceased person for the payment of debts and legacies.

It was for that court to decide upon the existence of the facts which gave jurisdiction, and the exercise of the jurisdiction warrants the presumption that the facts which were necessary to be proved were proved.

The distinction examined between courts of limited jurisdiction, where the record must show that jurisdiction was rightfully exercised; and courts of general jurisdiction, where the record being silent upon the subject, it will be presumed that jurisdiction existed.

A title to land becomes a legal title when a claim is confirmed by Congress. Such confirmation is a higher evidence of title than a patent, because it is a direct grant of the fee, which had been previously in the United States.

THIS case was brought up by writ of error from the Supreme Court of the Territory of Wisconsin, under the 25th section of the Judiciary Act of 1789.

It was an ejectment to recover certain lands in the possession of Linns Thompson, the tenant in possession, at Green Bay, in the County of Brown and Territory of Wisconsin. The plaintiffs in error were also plaintiffs below.

Both parties derived title from Pierre Grignon, deceased, who was one eighth Indian and seven eighths French. He died in March, 1823, leaving Robert, born in 1803, and Peter, born in 1805 or 1806, his only children by an Indian woman, to whom it was alleged he had been married. They made a conveyance of one third of the lands to Morgan L. Martin, by deed, 15th November, 1834, who, together with the two sons of Pierre, were the lessors of the plaintiff below.

A patent was issued by the United States, on the 21st day of December, 1829, to Pierre Grignon and his heirs, reciting, that by the 3d section of the Act of Congress, approved on the 21st of February, 1823, Pierre Grignon was confirmed in his claim to the tract of land containing 230 acres, bounded, &c., and granting said land accordingly.

This was the case made out for the plaintiffs in the court below.

The defendants' title was this:

Pierre Grignon died intestate in March, 1823. Letters of administration *upon his es- [*320 tate were granted by the judge of probate of Brown County, on the 21st June, 1824, to Paul Grignon, who applied under the laws of Michigan, to the County Court of Brown County for power to sell the real estate of the deceased. The authority was granted and the sale made, under which the title passed through Augustine Grignon, to Astor, Crooks, and Stuart, the defendants in the court below. The case turned on the validity of these proceedings, to which sundry objections were made. Before stating them, it is proper to insert so much of the law of Michigan as bears upon the various points.

Act July 27, 1818, sec. 1. "Be it enacted, &c., that, when the goods and chattels belonging to the estate of any person deceased, or that may hereafter decease, shall not be sufficient to answer the just debts which the deceased owed,

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&c., upon representation thereof, and the same being made to appear to the Supreme Judicial Court, at any term or sitting of said court, or to the County Court in the county where the deceased person last dwelt, or in the county in which the real estate lies, the said courts are severally and respectively authorized to empower and license the executors or administrators of such estate, to make sale of all or any part of the houses, lands, or tenements, of the deceased, so far as shall be necessary to satisfy the just debts which the deceased owed at the time of his death, and legacies bequeathed in and by the last will and testament of the deceased, with the incidental charges.

"And every executor or administrator being so licensed and authorized, shall and may, by virtue of such authority, make, sign, and execute in due form of law, deeds and conveyances for such houses, &c., as they shall so sell; which instrument shall make as good a title to the purchaser, his heirs and assigns forever, as the testator or intestate, being of full age, of sane mind and memory, in his or her lifetime, might or could for a valuable consideration.

"Provided always, that the executor or administrator, before sale be made as aforesaid, give thirty days' public notice, by posting up notifications of such sale in the township where the lands lie, as well as where the deceased person last dwelt, and in the two next adjoining townships, and also in the county town of the county, &c.

"Sec. 2. Whereas, by the partial sale of real estates for the payment of debts or legacies as aforesaid, it often happens that the remainder thereof is much injured: Be it therefore enacted, &c., that whenever it shall be necessary

321*] that executors and administrators *shall be empowered to sell some part of the real estate of testators or intestates, or for guardians to sell some part of the real estate of minors or persons *non compos mentis*, for the payment of just debts, legacies, or taxes, or for the support or legal expenses of minors or persons *non compos mentis*, and by such partial sale the residue would be greatly injured, and the same shall be represented and made to appear to either of the aforesaid courts, on petition and declaration, filed and duly proved therein by the said executors, administrators, or guardians, the aforesaid courts respectively may authorize and empower such executors, administrators, or guardians, &c., to sell and convey the whole, or so much of said real estate as shall be most for the interest and benefit of the parties concerned therein, at public auction, and good and sufficient deeds of conveyance therefor to make and execute: which deed or deeds, when duly acknowledged and recorded in the registers of deeds for the county where the said real estate lies, shall make a complete and legal title in fee to the purchaser or purchasers thereof.

"Provided the said executors, administrators, &c., give thirty days' public notice of such intended sale, in manner and form hereinbefore prescribed.

"And provided, also, that they first give bonds, with sufficient sureties, to the judge of probate for the county where the deceased testator or intestate last dwelt and his estate was inventoried, that he or she will observe the rules and directi estate by execut proceeds of suc debts, legacies, support of min incidental char good securities posed of agree

"Sec. 3. T made as afores certificate fr county where inventoried, tate and of t person, and and also his that the wh sold; and if

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of the same, under the hand of the justice before whom such oath was taken."

The defendants then called Charles C. P. Arndt as a witness, who testified that he was the judge of probate for the County of Brown, and produced the record of letters of administration granted by John Lawe, judge of probate of said county, to Paul Grignon, on the 323*] 21st *day of June, A. D. 1824, on the estate of Pierre Grignon, deceased; and also the record of the bond given by the administrator, filed and approved by the said judge of probate on the 21st day of June, 1824, which were read in evidence.

The defendants then offered to read in evidence the following extract or order from a book purporting to be the book of the minutes of the proceedings of the County Court for the County of Brown, which book, Gardner Childs, the clerk of this court, testified that he had received as the record of said County Court, viz.:

"At a session of the County Court for the County of Brown, begun and held at the township of Green Bay, in the school-house, on Tuesday, the tenth day of January, one thousand eight hundred and twenty-six.

"Present: The Hon. James Porlier, *Chief Justice*, and John Lawe, Esq.; *Associate Justice*. The court was opened by George Johnston, sheriff.

"The petition of Paul Grignon, administrator on the estate of Pierre Grignon, late of the County of Brown (deceased), was filed by his attorney, H. S. Baird, praying for an order from the court to authorize him to dispose of the real estate of said Pierre.

"In consideration of the facts alleged in said petition, and for divers other good and sufficient reasons, it is ordered that he be empowered as aforesaid.

"Minutes read, corrected, and signed by order of the court.

"ROBERT IRWIN, Jun., Clerk."

The reading of which said extract or order in evidence was objected to by the lessors of plaintiff on the ground that it does not appear that there was any petition presented to the court, nor any certificate of the judge of probate certifying as to the value of the property and the necessity of the sale; nor is there anything to show the reasons by which the court could be invested with power to order the sale of the real estate of the intestate according to the statute; and that no notice was given to the parties concerned to show cause according to the requisites of the statute; nor does the order specify what lands of the intestate were to be sold; which objections were overruled by the court, and the said extract or order was read in evidence. To which decision the lessors of the plaintiff excepted.

The defendants then offered in evidence a bond and oath of said administrator to make sale of the real estate of the intestate according to the statute, dated and filed in the probate 324*] office of the 20th of *April, 1826, which were objected to by the lessors of the plaintiff. The objection overruled by the court, who decided that the same might be read in evidence. To which decision the lessors of the plaintiff excepted.

The defendants then introduced Henry S. Baird as a witness, who, being sworn, says he thinks the notice of sale by the administrator was written and printed. The printed notice is in court, contained in a newspaper called "Michigan Herald," printed at Detroit, in seven weekly numbers, commencing on the 16th of March, 1826, and ending on the 26th of April, in the same year. Defendants offered to read the notice from the papers, and to prove by parol that notice of sale was also given in writing, all which evidence was objected to by lessors of plaintiff; which objection was overruled by the court, and the testimony admitted. To which decision the lessors of the plaintiff excepted.

The witness then testified: "I cannot state that I put up any notices of sale, but that I drew the notices, I am positive. I think, I am positive, I drew five copies of the notice which has been read from the newspaper. I cannot say that they were put up in the township at this distance of time—thirteen years. I cannot recollect. There was at that time but one township in this County of Brown, and two counties in what is now the Territory of Wisconsin."

John P. Arndt was called again by the defendants, and testified that he saw a notice of sale of lands of Pierre Grignon posted up in the township, and thinks it was at his house in Green Bay, in the fore part of the season of 1826.

The foregoing testimony of the witnesses, Baird and Arndt, was objected to by lessors of the plaintiff at the time the same was offered. The objection was overruled by the court, and testimony admitted. To which decision the lessors of the plaintiff excepted.

The defendants then offered in evidence a deed from Paul Grignon, as administrator on the estate of Pierre Grignon, deceased, to Augustin Grignon, dated the 13th day of June, A. D. 1826, and recorded on the 5th of February, 1828, in the register's office of Brown County, in book B, page 34, for and covering the land in dispute, which was objected to by the lessors of the plaintiff on the following ground, viz.:

1. No title appeared to be in Pierre Grignon, at the time of his death, or at the date of the deed, to the lands in question.

2. There was no certificate of the judge of probate, as required by *the statute, to [*325 the County Court of the necessity of the sale of said lands for the payment of debts, and the order for sale, by the County Court, was void.

3. There is no evidence on record that the property was sold, or ordered to be sold, for the payment of the debts of the intestate.

4. The sale was not advertised according to law, nor is there any record that the County Court made any order how the estate should be advertised.

5. No order was made by the County Court to show cause why the sale should not be made before granting the order.

In connection with the above deed from Paul Grignon, the defendants offered in evidence the following license, the reading of which was objected to, on the ground that it could have no greater effect than the order upon which it purported to be founded, but the court overruled the objection and permitted it to be read.

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TERRITORY OF MICHIGAN, } ss.
Brown County, }

The United States of America, to Paul Grignon, administrator of Pierre Grignon, deceased.

Be it known to all whom it may concern, that at a term of the County Court of the County of Brown, continued and held at the township of Green Bay, on Tuesday, the tenth of January, A. D. 1826, before the Hon. James Porlier, *Chief Justice*, and John Lawe, Esq., *Associate Justice*, Paul Grignon, administrator of all and singular the goods, &c., &c., lands and tenements of Pierre Grignon, deceased, late of the County of Brown aforesaid, represents to this court, then and there in session, that the said Pierre died intestate at Green Bay, in said County of Brown, on the fourth day of March, A. D. 1823.

That at the time of his death the said Pierre was seized in his demesne as of fee, in and to the following tracts or lots of land, situated at Green Bay aforesaid, to wit:

(Here follows a description of the lands.)

And it has been ascertained by the petitioner that the goods and chattels belonging to the estate of the said deceased are insufficient to pay all the just debts which he owed at the time of his death, but that his estate will be insolvent; and therefore prays that leave may be granted to him to dispose of the tracts and lots of land aforesaid.

Now, therefore, for the causes aforesaid, and **326***] for divers other *good and sufficient reasons, the court thereunto moving, they do hereby authorize and empower you, the said administrator, to dispose of all the right, title, and interest of the deceased, in and to the above described tracts and lots of land, in such manner as will best serve the interest of all concerned in said estate: requiring of you a due observance of the statute in such case made and provided.

WITNESS, James Porlier, *Chief Justice* of the County Court of the County of Brown, at the township of Green Bay, on the 28th of March, A. D. 1826.

ROBERT IRWIN, Jun., *Clerk, B. C.*

The counsel for the lessors of plaintiff thereupon requested the court to give the jury the following instructions, viz.:

Instruction 1st. If the jury believe from the evidence that the lessors of the plaintiff are the heirs-at-law of Pierre Grignon, or have shown a regular conveyance from the heirs-at-law to themselves of the premises in question, before the commencement of this suit; that then the defendants can claim no title under the sale of the premises in question, made by Paul Grignon, as administrator of the estate of Pierre Grignon, by virtue of the order made by the County Court of Brown County, made on 10th day of January, 1826; unless the jury are satisfied that the representation made by the said administrator to the said court to obtain the order for license of the said court for the sale of the said premises was accompanied by a certificate of the judge of probate of the county where the said deceased person's estate was inventoried, certifying the value of the real estate, and the value of the personal estate of the said deceased person, and the amount of his just debts, and also his opinion whether it be necessary that the whole or a part of the estate should be sold, and, if a part only, what part, as directed by the third section of an act entitled "An Act directing the settlement of the estates of persons deceased, and for the conveyance of real estate in certain cases," as adopted by the governor and judges of the Territory of Michigan, on the 27th day of July, 1818.

Instruction 2d. That the said order or license of the said County Court, for the said sale, unless the said court had been furnished with the said certificate of the said judge of probate, is null and void as against the heirs-at-law of Pierre Grignon, who have not acquiesced in the said sale made by the administrator, under and by virtue of the said order.

*To the two preceding instructions [*327 the court decided and directed the jury as follows, to wit:

"The two preceding instructions are answered, as the County Court had jurisdiction of this subject, we are bound to infer that these things were shown to said court."

Instruction 3d. That the said County Court had no power or jurisdiction to make the said order for sale, without the said certificate of the said judge of probate.

To which said instruction the said court decided and directed the jury as follows, viz.:

"The court answer that the certificate of the judge of probate was not necessary to give the court jurisdiction. It was required as evidence."

Instruction 4th. It must appear affirmatively to the jury that the said County Court, at the time of the making the said order for sale of the said premises, had before them the said certificate of the said judge of probate at the time of making the said order, or granting the said license for the sale of the premises in question, or the said order for sale is void as against the heirs-at-law of Pierre Grignon, deceased, who had not acquiesced in the sale, and those claiming under them.

To which said instruction the court decided and directed the jury as follows, viz.:

"This is answered. The judgment of the County Court having jurisdiction is conclusive upon this point."

Instruction 5th. Unless it appears affirmatively to the jury that the said County Court, previous to their passing on said representation for the sale of said premises, ordered due notice to be given to all parties concerned, or their guardians, who did not signify their assent to such sale, to show cause, at such time and place as the court appoint, why such license should not be granted agreeably to the provisions of the said third section of said act in the first instruction referred to; that then the said order or license for sale was void as against the heirs of Pierre Grignon, who have not acquiesced in such sale, and the defendants can acquire no title by virtue of the sale made by the administrator, under the said order, as against the heirs-at-law of the said Pierre Grignon, deceased.

To which said instruction the court decided and directed the jury as follows, to wit:

"This is answered. We state that the County Court having jurisdiction on the subject, their judgment is conclusive."

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328*] *Instruction 6th. Unless the jury believe from the evidence that the said administrator, before the sale of the said premises, gave thirty days' public notice, by posting up notifications of such sale, in the township where the lands lie, as well as where the said deceased last dwelt, and in the two next adjoining townships, or caused the printing of such notifications for three weeks successively in such gazette or newspaper as the court who authorized the sale ordered and directed, the said sale was void as against the heirs of the deceased, and those claiming under them.

To which said instruction the court decided and directed the jury as follows, to wit:

"This is a fact for the jury, and you must find that the advertisement given substantially complied with the law, or the sale is void."

Instruction 7th. That the publishing of said notice of sale in a newspaper, without the order or direction of the court who authorized the sale, was a nullity.

To which said instruction the court decided and directed the jury as follows, to wit:

"This is answered in the affirmative."

Instruction 8th. That it must appear affirmatively that the administrator, before making sale of the said premises, did literally and strictly comply with the provisions of the said statute in relation to the posting up or publishing the said notice of sale, or the said sale was void as against the heirs of Pierre Grignon, who have not acquiesced in the same.

To which said instruction the court decided and directed the jury as follows, viz.:

"A substantial compliance with the requisites of the law on this subject is sufficient."

Instruction 9th. If the jury believe from the evidence that Peter B. Grignon, one of the lessors of plaintiff, is one of the heirs-at-law of the deceased, and was a minor at the time of the making of the said order for sale, and at the time of the said sale, a guardian should have been appointed to represent him, according to law; and if no such guardian was appointed, the said sale was void as to him and those claiming under him.

To which said instruction the court decided and directed the jury as follows, to wit:

"It was necessary and proper that, if a minor, 329*] he should be notified *by guardian, but in this issue the presumption is that he was. This is a fact that he might controvert on appeal."

Instruction 10th. Unless the defendants in this case have proven affirmatively to the jury that the administrator of the said deceased strictly complied with all the provisions of the said statute, in obtaining the order for sale, and in making the said sale, that the defendants in this suit can acquire no title to the premises in question under said sale, as against the lessors of the plaintiff, if the jury believe from the evidence that the lessors of the plaintiff are the heirs-at-law of the said Pierre Grignon, deceased, or derived title from the heirs-at-law.

To which said instruction the court decided and directed the jury as follows, to wit:

"Answer. That the court charge the jury that they are bound to consider, in this collateral issue, that the judgment or order of the County Court of Brown County, ordering the sale, was made upon sufficient and proper evidence, and that they had everything requisite before them to authorize them to make the order for the sale, and that the judgment of that court is conclusive until reversed."

To all which foregoing decisions and answers, given by the said court to each and every of the said instructions, and for refusing to give the said instructions, respectively, as the same were asked, and to the said charge to the jury, and every part thereof, the said lessors of the said plaintiff except, and tender this bill of exceptions to the court for its signature, and bill sealed.

ANDREW G. MILLER, Judge, &c. [L. S.]

October 21, 1839.

Mr. Choate for the plaintiffs in error.

Messrs. Crittenden and *Lord* for the defendants in error.

Mr. Choate, for the plaintiffs in error, made the following points:

1. The plaintiff contended first, and now contends, that the defendants did not offer competent proof, sufficient to show, even *prima facie*, that the said County Court, under whose alleged order the said administrator made the sale, ever acquired jurisdiction of the matter in relation to which it was alleged to have made the order; and that, therefore, the order was a nullity.

The jurisdiction of that court depends on a law of the territory of *Michigan, made [*330 on the 27th day of July, A. D. 1818. (Laws Michigan, Vol 1., p. 37.) By that law it is enacted, in section 1, that when the goods and chattels of a person deceased shall not be sufficient to pay his debts, then, "upon representation thereof, and the same being made to appear, to the Supreme Judicial Court, or to the County Court in the county where the deceased last dwelt, or where his real estate lies," the said courts are authorized to license the executor or administrator to sell his real estate, "so far as shall be necessary to satisfy the just debts of the deceased."

The same law enacts, in section 3, "that every representation made as aforesaid shall be accompanied by a certificate from the judge of probate." The contents of which certificate are particularly prescribed.

It also enacts in the same section, that "the said courts, previous to their passing on the said representation, shall order due notice to be given to all parties or their guardians, to show cause against the granting of the license. And in case any person concerned be not an inhabitant of this Republic, nor have any guardian, agent, or attorney therein, who may represent him or her, the said justices may cause the said petition to be continued for a reasonable time; and the petitioner shall give personal notice of the said petition to such absent person, his agent, attorney, or guardian, or cause the same to be published in some one of the newspapers in this territory three weeks successively."

And it enacts, in the first section, in these words: "Provided always, that the executor or administrator before sale made, give thirty days' public notice, by posting up notifications of such sale in the township where the lands lie, as well as where the deceased person last dwelt, and in the two next adjoining townships, and also in the county town of the county."

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To prove the jurisdiction and order of the Court of Common Pleas, the defendants offered in evidence an extract from a book purporting to be the book of the minutes of the proceedings of the said court.

To this the plaintiff objected as incompetent; and he contends that it was incompetent and inadmissible for any purpose.

1st. Because it was not such a record, nor parcel of such a record, as by the law of Michigan, passed April 21st, A. D. 1825, and by the law of evidence, is competent and admissible to prove any act of a court. The 24th and 25th sections of that law are as follows:

331*] *An act concerning the Supreme and County Courts of the territory of Michigan, defining their jurisdiction and powers, and directing the pleadings and practice therein in certain cases.*

Sec. 24. And be it further enacted, that for preventing errors in entering the judgments, orders and decrees, of the Supreme and County Courts, the judges and justices of the said courts respectively, before every adjournment, shall cause the minutes of their proceedings during the preceding day to be publicly read by the clerk, and corrected when necessary, and then the same shall be signed by the presiding judge of the said court; which minutes, so signed, shall be taken in a book, and carefully preserved among the records.

Sec. 25. And be it further enacted, that whenever any civil cause, of whatever nature it be, shall be finally determined, the clerk of any of said courts shall, during the next vacation, enter the warrants of attorney, original writ or writs, declaration, pleadings, proceedings, and judgment, in such cause, so as to make a complete record thereof, in a separate book to be kept for that purpose, with a complete alphabetical index to the same; which records, after being examined and compared with warrants of attorney, writ or writs, declaration, pleadings, proceedings, and judgment, and being found correct, shall, at the next term, be signed by the presiding judge of the court.

Sec. 70. And be it further enacted, that this act shall take effect from and after the third Monday of September next.

Approved April 21, 1825.

The said extracted passage is not signed by the presiding judge; it is not, therefore, even legally authenticated minutes of the proceedings of the court; and if it were, it is not a record, or parcel of record, nor admissible in evidence.

2d. Because, even if it were unobjectionable in point of formal authentication, it does not prove, nor tend to prove, that the court have jurisdiction, or that the order was made by a court having jurisdiction, or that it was an order relating to the lands described in the declaration. It does not record or recite the making of a representation by petition or otherwise, alleging any indebtment of the said Pierre, nor any other ground for asking or granting the license on which the court had jurisdiction to act, as was necessary in point of law. It does not record or recite any certificate of the judge of probate, nor any notice to anybody, to show cause against the grant of the license, nor does it point out which, o how much, estate is to be sold, as was neces sary in point of law.

*The District Court, however, ad- [*33 mitted this evidence, and this decision wa erroneous.

And if the said extracted passage be com petent and admissible evidence, the plaintif contends, for the reasons aforesaid, that it i wholly inoperate and ineffectual, and insuffi cient to prove that the court had any jurisdic tion to act, or that the order was the act of court having any jurisdiction, or that it wa of any legal validity or effect whatever, o communicated any authority whatever to th administrator.

The District Court decided against the prop osition, and that decision was erroneous.

3d. He contends that the paper purportin to be a license, issued by the clerk of the sai court, was incompetent and inadmissible a evidence; and that, if competent, it was in effectual, and communicated no authority t the administrator.

It is not a record, nor evidence of any fact It is not signed by the presiding justice. It i not recorded. It is the mere act of the clerk i vacation. It presupposes and requires, as condition of admissibility and validity, a vali order of a court having jurisdiction, of whic there is no evidence.

It was not issued nor made during a sessio of the court, yet the District Court admitte this evidence, and declared it to be effectua and sufficient to prove jurisdiction.

This decision was erroneous.

4th. The plaintiff contends, that even if th evidence aforesaid was competent and ad missible, and even if it were sufficient to show *prima facie*, that the court ever had or bega to have jurisdiction, yet that it was competen for him on the trial to encounter it by proo that no certificate of the judge of probate wa furnished to the said court; that no notice wa ordered by the court, previous to the makin of the alleged order of sale, to any perso to show cause against the grant of the licens or that an application for leave to sell wa pending; that no notice was given to, or ha by either of the heirs of said Pierre, or anyon acting for them, that such application wa pending; that one of the heirs was a minor the time of the sale, and had no guardian; an that proof of these facts, or of either of them would have disproved or put an end to, an ousted the jurisdiction of the court, and woul have shown in point of law that the order sale, and the alleged license, were wholly i valid, and ineffectual and inoperative.

*But the said District Court decided [*33 that the judgment or order of the Count Court was conclusive evidence of the jurisdi tion of the court, and of all proofs and thing necessary to the making of the said order sale, and is a valid and effectual order of sal

This decision, the plaintiff contends, wa erroneous.

5th. The plaintiff contends that in order give to the administrator's deed any legal vali ity and effect, it was necessary to prove th notice of the notifications described and r quired in the said 1st section of the laws Michigan, and that the evidence to prove th

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of Baird's and Arndt, was incompetent and wholly insufficient for the purpose. And he contends that the decisions of the District Court upon this matter were erroneous on several grounds.

1. In admitting incompetent proof.

2. In deciding as matter of law a mere point of evidence, to wit: that the proof aforesaid established a substantial compliance with the law, instead of declaring to the jury what the law required to have done; and then submitting the question of fact and evidence to the jury whether it had been done.

3. In refusing to instruct the jury that the administrator must literally and strictly comply with the provisions of the statute in the matter, by posting up notifications, and instructing them that a substantial compliance with the requests of the law was sufficient, without instructing them what acts would constitute a substantial compliance therewith.

4th. The plaintiff contended at the trial, and contends here, that the lands claimed in the action could not legally be sold by the administrator under any order or judgment of any court, as the real estate of Pierre Grignon, for the payment of his debts. And that the patent passes a perfect title to plaintiff's lessors.

The law of Michigan above referred to, and in part set forth, authorizes the sale of the "houses, lands or tenements, of the deceased." The estate in question was not such. The title of Pierre Grignon at his death, if any, was equitable only, resting on the pleasure or justice of government, and could not be taken in execution or sold for his debts. The patent of 31st December, 1829, vested the title directly in the heirs. But the District Court decided otherwise.

7th. The plaintiff contends that if the license has any effect, it proves that the administrator represented that the said Pierre was seized, at the time of his death, as in his demesne, as of [*334] fee of the *estate claimed in the action; that the said representation was untrue; that the order of sale was founded in part upon that representation, and affirms it; and is for that cause erroneous and invalid, and does not support the administrator's deed.

Messrs. Lord and *Crittenden*, for the defendants in error, made the following points:

1. By the Act of Michigan of July 27, 1818, the County Court of Brown County had jurisdiction to order the sale of the lands of an intestate for payment of debts, whenever the goods and chattels should not be sufficient to answer the same: and such jurisdiction was to be exercised upon representation of such insufficiency, and the same being made to appear to the County Court.

2. The court thus having jurisdiction, the want of evidence, however necessary and essential that evidence, to warrant its order, was merely error: and it cannot be shown by strangers to the order, to overturn the title of the purchaser. The order cannot be impeached collaterally.

3. The license, which is the order exemplified for the purchaser's protection, and the minutes, show every fact on which the jurisdiction of the court rests, and show such an order as the court was by law authorized to make.

4. The jurisdiction being shown, not only is the order unimpeachable collaterally for errors in making it, but every proper requisite to the act of jurisdiction is to be presumed as a conclusion of law; and it is to be presumed, in every collateral suit, that there was no error or irregularity; no want of citation, notice or evidence.

5. There is no express saving of the rights of infants. The statute authorizes the sale as a proceeding *in rem*. The lands were liable to be sold under judgments recovered against the administrator for the intestate's debt, so that the sale by the administrator was merely a conversion from real to personal estate; in reference to the sale of which, in either mode, he was accountable. There is, therefore, no ground to impeach the order, on the supposition that infants were interested, and were not notified, even if such supposition was not precluded by the presumption of law.

6. The acts *in pais*, after the order of sale, were left by the court to be found by the jury, considering all the evidence. Such acts could not be required to be established, at the distance of thirteen years, except by showing a substantial compliance with the law. *A substantial compliance is all which is at any time necessary in carrying out a sale by order of a court. [*335

7. The plaintiff did not attempt by any evidence directly to impeach the proceedings, by showing want of notice, want of evidence, want of strict conformity to law, although Paul Grignon, the administrator, and Augustine Grignon, the purchaser, had both united to defeat the sale under the order by a subsequent conveyance, and were both produced as witnesses for the plaintiff. The plaintiff must therefore fail if the order and license are evidence at all, although not conclusive: as a presumption subject to contradiction, it must be taken against the plaintiff, who might contradict it if false, and does not.

8. The interest of Pierre Grignon in these lands, at the time of his death, was an interest existing at the date of the Act of Congress of February 21, 1823, and so liable to be sold by his administrator, as goods, chattels, lands, or tenements. The purchaser, by the administrator's sale, acquired as good a title as the intestate could in his lifetime convey for a valuable consideration.

The patent issued after his death enured to the benefit of his assigns, the defendants deriving their title under him.

Numerous authorities were cited by the counsel upon each side, in support of their respective points: but the reporter was necessarily absent during the argument of the cause, and is therefore unable to cite them.

Mr. Justice BALDWIN delivered the opinion of the court:

This case comes here on a writ of error from the Supreme Court of the Territory of Wisconsin, the premises in controversy were formerly owned by one Peter Grignon, to whom they were confirmed by an Act of Congress, passed 21st February, 1823, to be found in 3 Story's Laws 1877. He died in March following, intestate, indebted, and leaving two sons who are lessors of the plaintiff, one born in 1803, the other in

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1806. They conveyed one third to Martin, the other lessor, in 1834. The lessors claim as heirs-at-law of Peter Grignon, and the conveyance from them to Martin.

In 1824, letters of administration on the estate of Peter Grigon were duly granted to Paul Grignon, the brother of the deceased, who gave bond for the performance of the trust, according to law. In January, 1826, he presented his petition to the County Court of Brown County, then in the Territory of Michigan, **336***] praying for an *order from the court to authorize him to dispose of the real estate of the said Peter, which was granted, a license issued to the administrator to sell in March, 1826. A sale was accordingly made to Augustin Grignon, to whom a deed was executed by the administrator in June, 1826, and duly recorded. The defendants claim title under this sale, by sundry mesne conveyances from the purchaser.

The law of Michigan is set forth in the statement of the case by the reporter.

In the County Court the following proceedings were had:

"At a session of the County Court for the County of Brown, begun and held at the township of Green Bay, in the school-house, on Tuesday, the tenth day of January, one thousand eight hundred and twenty-six.

"Present: The Hon. James Porlier, *Chief Justice*, and John Lawe, Esq., Associate Justice. The court was opened by George Johnston, sheriff.

"The petition of Paul Grignon, administrator on the estate of Pierre Grignon, late of the County of Brown (deceased), was filed by his attorney, H. S. Baird, praying for an order from the court to authorize him to dispose of the real estate of said Pierre.

"In consideration of the facts alleged in said petition, and for divers other good and sufficient reasons, it is ordered that he be empowered as aforesaid.

"Minutes read, corrected, and signed by order of the court.

ROBERT IRWIN, Jun., Clerk."

TERRITORY OF MICHIGAN, Brown County, } ss.

The United States of America, to Paul Grignon, administrator of Pierre Grignon, deceased.

Be it known, to all whom it may concern, that at a term of the County Court of the County of Brown, continued and held at the township of Green Bay, in said county, on Tuesday, the tenth day of January, in the year of our Lord, one thousand eight hundred and twenty-six, before the Hon. James Porlier, *Chief Justice*, and John Lawe, Esq., Associate Justice, Paul Grignon, administrator of all and singular the goods and chattels, rights and credits, lands and tenements of Pierre Grignon, deceased, late of the County of Brown aforesaid, represents to this court, then and there in session, that the said Peirre died intestate, at Green Bay, in said County of Brown, on the fourth day of March, A. D. 1823; that the time of his death, the said **337***] *Pierre was seized in his demesne as of fee in and to the following tracts or lots of land, situated at Green Bay aforesaid, to wit:

Lot number three, on the east side of Fox River, bounded north by land claimed by the estate of Dometile Longevin, south by Augustin Grignon, and four and a half arpents in front, and eighty arpents rear.

Also, lot number five, on the same side of said river, bounded north by Augustin Grignon's claim, and south by land claimed and occupied by John Lawe, Esq., being four acres and sixteen feet wide, and extending back eighty acres.

Also, lot number three, in dispute between said deceased and George Johnston, on the west side of said Fox River, lately occupied by said George Johnston, bounded north by Louis Grignon, and south by land of said deceased, being eight chains and sixty-two links wide, and eighty arpents deep.

Also, lot number four, on the same side of said river, bounded north by the last mentioned claim, and south by land claimed by John Lawe, Esq., being eight chains and fifty links wide, and extending back eighty arpents.

And that it has been ascertained by the petitioner that the goods and chattels belonging to the estate of the said deceased are insufficient to pay all the just debts which he owed at the time of his death, but that the estate will be insolvent; and therefore prays that leave may be granted him to dispose of the tracts and lots of land aforesaid.

Now, therefore, for the causes aforesaid, and for divers other good and sufficient reasons, the court thereunto moving, they do hereby authorize and empower you, the said administrator, to dispose of all the right, title, and interest of the deceased in and to the above described tracts and lots of land in such manner as will best serve the interest of all concerned in said estate, requiring of you a due observance of the statute in such case made and provided.

WITNESS, James Porlier, *Chief Justice* of the County Court of the County of Brown, at the township of Green Bay, on the 28th of March, A. D. 1826.

ROBERT IRWIN, Jun., Clerk B. C.

At the trial numerous questions of evidence arose, and many instructions were asked of the court, to whose opinion the plaintiffs excepted, but we do not deem it necessary to notice them in detail, as in our opinion the whole merits of the controversy depend on one *single [*338 question, had the County Court of Brown County jurisdiction of the subject on which they acted?

Jurisdiction has been thus defined by the court.

"The power to hear and determine a cause is jurisdiction; it is *coram judice* whenever a case is presented which brings this power into action; if the petitioner presents such a case in his petition, that on a demurrer the court would render a judgment in his favor, it is an undoubted case of jurisdiction; whether on an answer denying and putting in issue the allegations of the petition, the petitioner makes out his case, is the exercise of jurisdiction, conferred by the filing a petition containing all the requisites, and in the manner required by law (6 Peters, 709.) Any movement by a court necessarily the exercise of jurisdiction; and to exercise any judicial power over the subject matter and the parties, the question is whether on the case before a court, their action is judicial, or extrajudicial, with, or without

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authority of law, to render a judgment or decree upon the rights of the litigant parties. If the law confers the power to render a judgment or decree, then the court has jurisdiction, what shall be adjudged or decreed between the parties, and with which is the right of the case, is judicial action by hearing and determining it." (12 Peters, 718; S. P., 3 Peters, 205.) It is a case of judicial cognizance, and the proceedings are judicial. (12 Peters, 623.)

This is the line which denotes jurisdiction and its exercise, in cases *in personam*, where there are adverse parties, the court must have power over the subject matter and the parties; but on a proceeding to sell the real estate of an indebted intestate, there are no adversary parties, the proceeding is *in rem*, the administrator represents the land (11 S. & R., 432); they are analogous to proceedings in the admiralty, where the only question of jurisdiction is the power of the court over the thing, the subject matter before them, without regard to the persons who may have an interest in it; all the world are parties. In the Orphans' Court, and all courts who have power to sell the estates of intestates, their action operates on the estate, not on the heirs of the intestate, a purchaser claims not their title, but one paramount. (11 S. & R., 426.) The estate passes to him by operation of law. (11 S. & R., 428.) The sale is a proceeding *in rem*, to which all claiming under the intestate are parties (11 S. & R., 429), which directs the title of the deceased. (11 S. & R., 430.)

As the jurisdiction of such courts is irrespect-
339*] ive of the parties in *interest, our inquiry in this case is whether the County Court of Brown County had power to act in the estate of Peter Grignon, on the petition of the administrator under the law of Michigan, providing that where the goods and chattels of a decedent are not sufficient to answer his just debts, on representation thereof, and the same being made to appear to the County Court where he dwelt, or where his real estate lies, it may license the executor or administrator to make sale of so much as will satisfy the debts and legacies.

No other requisites to the jurisdiction of the County Court are prescribed than the death of Grignon, the insufficiency of his personal estate to pay his debts, and a representation thereof to the County Court where he dwelt or his real estate was situate, making these facts appear to the court. Their decision was the exercise of jurisdiction, which was conferred by the representation; for whenever that was before the court, they must hear and determine whether it was true or not; it was a subject on which there might be judicial action. The record of the County Court shows that there was a petition representing some facts by the administrator, who prayed an order of sale; that the court took those facts which were alleged in the petition into consideration; and for these and divers other good reasons ordered that he be empowered to sell. It did then appear to the court that there were facts and reasons before them which brought their power into action, and that it was exercised by granting the prayer of the petitioner, and the decree of the court does not specify the facts and reasons, or refer to the evidence on which they were made to appear to the judicial eye; they must have been, and the law presumes that they were such as to justify their action. (14 Peters, 458.) But though the order of the court sets forth no facts on which it was founded, the license to the administrator is full and explicit, showing what was considered and adjudicated on the petition and evidence, and that every requisition of the law had been complied with before the order was made, by proof of the existence of all the facts on which the power to make it depended. (3 Peters, 202; 2 Peters, 165.) We all know that even in the old States, the records of these and similar proceedings are very imperfectly kept, that where it consists of separate pieces of paper, they are often mislaid or lost by the carelessness of clerks and their frequent changes; regular entries of the proceedings are not entered on the docket as in adversary cases, nor are the facts set forth in the petition entered at large; and it is no matter of surprise that in so new and remote part of the country as *the [*340 place where these proceedings were had, this state of things should exist. Nor is it necessary that a full or perfect account should appear in the records of the contents of papers on files, or the judgment of the court on matters preliminary to a final order; it is enough that there be something of record which shows the subject matter before the court, and their action upon it, that their judicial power arose and was exercised by a definitive order, sentence, or decree. (2 Peters, 165.) The petition in the present case called for a decision of the court that the facts represented did or did not appear to them to be sufficiently proved; they decided that they did so appear, whereby their power was exercised by the authority of the law, and it became their duty to order the sale, unless in a case under the 3d section. The subsequent provisions of the act of Michigan relate exclusively to acts and proceedings in the execution of the order of sale, or are directory to the administrator to accompany the representation with a certificate of the judge of probate, and to the court, before passing on such representation, to order notice to be given to the parties concerned, to show cause why the license should not be granted; but these provisions do not affect the jurisdiction of the court; they apply only to its exercise. After the court has passed on the representation of the administrator, the law presumes that it was accompanied by the certificate of the judge of probate, as that was a requisite to the action of the court; their order of sale is evidence of that or any fact which was necessary to give them power to make it, and the same remark applies to the order to give notice to the parties. This is a familiar principle in ordinary adversary actions, in which it is presumed, after verdict, that the plaintiff has proved every fact which is indispensable to his recovery, though no evidence appears on the record to show it; and the principle is of more universal application in proceedings *in rem* after a final decree by a court of competent jurisdiction over the subject matter.

The granting the license to sell is an adjudication upon all the facts necessary to give jurisdiction, and whether they existed or not is wholly immaterial, if no appeal is taken; the rule is the same whether the law gives an appeal or not; if none is given from the final decree, it is con-

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clusive on all whom it concerns. The record is absolute verity, to contradict which there can be no averment or evidence; the court having power to make the decree, it can be impeached only by fraud in the party who obtains it. (6 Peters, 729.) A purchaser under it is not bound to look beyond the decree; if there is error in 341*] it, of the *most palpable kind, if the court which rendered it have, in the exercise of jurisdiction, disregarded, misconstrued, or disobeyed the plain provisions of the law which gave them the power to hear and determine the case before them, the title of a purchaser is as much protected as if the adjudication would stand the test of a writ of error; so where an appeal is given but not taken in the time prescribed by law. These principles are settled as to all courts of record which have an original general jurisdiction over any particular subjects; they are not courts of special or limited jurisdiction, they are not inferior courts, in the technical sense of the term, because an appeal lies from their decisions. That applies to "courts of special and limited jurisdiction, which are created on such principles that their judgments, taken alone, are entirely disregarded, and the proceedings must show their jurisdiction;" that of the courts of the United States is limited and special, and their proceedings are reversible on error, but are not nullities, which may be entirely disregarded. (3 Peters, 205.) They have power to render final judgments and decrees which bind the persons and things before them conclusively, in criminal as well as civil causes, unless revised on error or by appeal. The true line of distinction between courts whose decisions are conclusive if not removed to an appellate court, and those whose proceedings are nullities if their jurisdiction does not appear on their face, is this: a court which is competent by its constitution to decide on its own jurisdiction, and to exercise it to a final judgment, without setting forth in their proceedings the facts and evidence on which it is rendered, whose record is absolute verity, not to be impugned by averment or proof to the contrary, is of the first description; there can be no judicial inspection behind the judgment save by appellate power. A court which is so constituted that its judgment can be looked through for the facts and evidence which are necessary to sustain it, whose decision is not evidence of itself to show jurisdiction and its lawful exercise, is of the latter description; every requisite for either must appear on the face of their proceedings, or they are nullities. The Circuit Court of this district has original, exclusive, and final jurisdiction in criminal cases; its judgment is a sufficient cause on a return to a writ of *habeas corpus;* "on this writ this court cannot look behind the judgment and re-examine the charges on which it was rendered. A judgment in its nature concludes the subject in which it is rendered, and pronounces the law of the case. The judgment of a court of record, whose jurisdiction is final, is as con-342*] clusive on *all the world as the judgment of this court would be. It is as conclusive in this court as it is on other courts. It puts an end to all inquiry into the fact by deciding it." (3 Peters, 204, 205.)

"To determine whether the offense charged in the indictment be legally punishable or not is among the most unquestionable of its (the Circuit Court) powers and duties; the decision of the question is the exercise of jurisdiction, whether the judgment be for or against the prisoner, it is equally binding and remains in full force until reversed." (3 Peters, 204, 205.)

If the jurisdiction of the court in a civil case is not alleged in the "pleadings, the judgment is not a nullity, but though erroneous, is obligatory as one (3 Peters, 206), and in a proceeding *in rem*, an erroneous judgment binds the property on which it acts, it will not bind it the less because the error is apparent, and the judgment is of complete obligation." (3 Peters, 207.) The judgment of the Circuit Court, in a criminal case, "is of itself evidence of its own legality, and requires for its support no inspection of the indictments on which it is founded. The law trusts that court with the whole subject, and has not confided to this court the power of revising its decision." (3 Peters, 207.)

These principles have been applied by this court to sales made under the decrees of orphans' courts: where they have power to judge of a matter of fact, "they are not required to enter on record the evidence on which they decided that fact. And how can we now say but that the court had satisfactory evidence before it, that one of the heirs was of age? If it was so stated in terms on the face of the proceedings, and even if the jurisdiction of the court depended on that fact, it is by no means clear that it would be permitted to contradict it, on a direct proceeding to reverse any order or decree made by the court. But to permit that fact to be drawn in question in this collateral way, is certainly not warranted by any principle of law." (2 Peters, 165, *Thompson* v. *Tolmie.*)

"If the purchaser (under a decree of the Orphans' Court) was responsible for their mistakes in point of fact, after they had adjudicated upon the facts, and acted upon them, those sales would be snares for honest men." (2 Peters, 169, cited 11 S. & R., 429.)

"The purchaser is not bound to look farther back than the order of the court. He is not to see whether the court were mistaken in the facts of debts and children. The decree of an orphans' court in a case within its jurisdiction is reversible only on appeal, and not collaterally *in another suit. A title under a license [*343 to the administrator to sell real estate, "is good against the heirs of the intestate, although the license was granted upon the certificate of the judge of probate, not warranted by the circumstance of the case."

"The license was granted by a court having jurisdiction of the subject: if it was improvidently exercised, or in a manner not warranted by the evidence from the probate courts; yet it is not to be corrected at the expense of the purchaser, who had a right to rely upon the order of the court, as an authority emanating from a court of competent jurisdiction." (2 Peters, 169, and 11 Mass., 227, cited.)

In that case the jurisdiction of the court was held to attach, "when the acceptor dies intestate, and any of the persons entitled to his estate is a minor" (2 Peters, 165); so in this case it attaches on the decease of any person indebted beyond the personal estate he leaves, and when jurisdiction is once attached to a subject, or a

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ist over a person, this court has adopted as a rule applicable to all courts of record that their decisions are conclusive; "it has a right to decide every question which occurs in a cause, and whether its decision be correct or otherwise, its judgment, until reversed, is binding on every other court." (1 Peters, 340.) In *Voorhees* v. *The Bank of the United States* the same principle is applied to sales or executions under judgments on adversary process, and such must hereafter be taken to be the established law of judicial sales, as well relating to those made in proceedings *in rem*, as *in personam*. (10 Peters, 473.)

We do not deem it necessary, now or hereafter, to retrace the reasons or the authorities on which the decisions of this court in that, or the cases which preceded it, rested; they are founded on the oldest and most sacred principles of the common law. Time has consecrated them; the courts of the States have followed, and this court has never departed from them. They are rules of property, on which the repose of the country depends; titles acquired under the proceedings of courts of competent jurisdiction, must be deemed inviolable in collateral action, or none can know what is his own; and there are no judicial sales around which greater sanctity ought to be placed, than those made of the estates of decedents, by order of those courts to whom the laws of the States confide full jurisdiction over the subjects.

These sales are less expensive than when made on executions; more time is allowed to make them; the discretion of the court is exercised as to time, manner, and the terms of sale; [*344] whereas on sales *by a sheriff, all is by compulsion and no credit is allowed; he cannot offer one entire piece of property for sale in parcels; the administrator can divide and sell as best subserves the interest of the heirs, and sell only so much as the emergency of the case requires.

It has been contended by the plaintiff's counsel, that the sale in the present case is not valid, because Peter Grignon had not such an estate in the premises as could be sold under the order of the County Court, it being only an equitable one before the patent issued in 1829; but the title became a legal one by its confirmation by the Act of Congress of February, 1823, which was equivalent to a patent. It was a higher evidence of title, as it was the direct grant of the fee which had been in the United States by the government itself, whereas the patent was only the act of its ministerial officers.

These views of this case decided it, without examining the exceptions to the admission of evidence, the ruling of the court on the instruction prayed, or their charge to the jury. So far as either were unfavorable to the plaintiff, they are most fully sustained by the foregoing principles and cases; the County Court of Brown County had undoubted jurisdiction of the subject; their proceedings are irreversible; the title of the purchaser cannot be questioned.

And the judgment of the court below must be affirmed with costs.

ORDER.

This cause came on to be heard on the transcript of the record from the Supreme Court of the Territory of Wisconsin, and was argued by counsel; on consideration whereof, is now here ordered and adjudged by this court, that the judgment of the said Supreme Court of the Territory of Wisconsin in this cause be, and the same is hereby affirmed, with costs.

Aff'g 1 Pinn. (Wis.), 137.

Cited—7 How., 181; 8 How., 412; 9 How., 446; 12 How., 385; 17 How., 248; 18 How., 164, 503; 22 How., 14; 24 How., 203; 1 Wall., 634; 2 Wall., 216, 342; 3 Wall., 408; 10 Wall., 316; 11 Wall., 300; 16 Wall., 366; 3 Otto, 165; 11 Otto, 421, 424, 426; 1 Sawy., 319, 324, 325; 2 Sawy., 401, 499; 5 Sawy., 241, 242; 2 Wood. & M., 459; 4 McLean, 450; 5 McLean, 150; 6 McLean, 567; McAll., 217; 3 Wall., Jun., 304; 2 Cliff., 151; 1 Curt., 38; 2 Dill., 277; 4 Dill., 343; Abb. Adm., 467; 2 Abb. U. S., 103; 12 Bank. Reg., 101.

PIERRE CHOUTEAU, SEN., *Plaintiff in Error,*

v.

WILLIAM ECKHART.

Jurisdiction in Missouri land cause involving construction of statute—perfecting titles under Spanish concessions—conformation of titles by act of Congress—paramount titles.

This court has jurisdiction, under the twenty-fifth section of the Judiciary Act in a Missouri land cause, where the title is not to be determined by the Spanish laws alone, but where the construction of an act of Congress is involved to sustain the title.

The obligation of perfecting titles under Spanish concessions, which was assumed *by the [*345 United States in the Louisiana treaty, was a political obligation, to be carried out by the legislative department of the government. Congress, in confirming or rejecting claims, acted as the successor of the intendant-general; and both exercised, in this respect, a portion of sovereign power.

The Act of Congress, passed on the 13th of June, 1812, confirming the titles and claims of certain towns and villages to village lots and commons, gave a title which is paramount to a title held under an old Spanish concession, confirmed by Congress in 1836.

THIS case was brought up from the Supreme Court of the State of Missouri, by a writ of error issued under the 25th section of the Judiciary Act of 1789.

The facts were these:

On the 11th of January, 1797, Charles Tayon presented the following petition:

To Don Zenon Trudeau, Lieutenant Governor of the western part of Illinois, at St. Louis:

Charles Tayon, sub-lieutenant of infantry, pensioned by the king, captain of militia, commandant, under your orders, of the village of St. Charles, of Missouri, has the honor to pray you to grant him a tract of timbered land of six arpents in width, fronting on the (marcies croche de la prairie basse) Crooked Swamp, in the low prairie, and extending to the Missouri, adjoining, on one side, to Mr. Ant. Janis, and on the other side, to lands not heretofore granted; favor which he expects of your justice.

(Singed) CHARLES TAYON.

St. Louis, 11th January, 1797.

On the 23d of January, Trudeau returned the following answer:

ST. LOUIS, January 23, 1797.

Having been informed that the land asked for, in order to procure timber, is in no way fit to be improved, on account of the inundations to which it is subject every year, and that the

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timber thereon is only good to burn, and will renew itself in a short time, and thefore cannot be ruined, as the timber growing on the hills, which experience has shown will never grow up again; and the said land being in the vicinity of the village of St. Charles and of various farms, in the prairie of its dependency, which would have to go a great deal further to procure wood; said tract shall remain (as well as all others adjoining, either in ascending or descending the Missouri, and which have been asked for by sundry petitions, addressed to us, together with the present, by Mr. Tayon) to the 346*] royal domain, *and for the common use of the said village of St. Charles, and for the lands already granted in the prairies, or to be granted hereafter: all which Mr. Tayon shall make known to all the inhabitants, and especially to those who have asked for land, and whose petitions I herewith return. (Signed)

ZENON TRUDEAU.

On the 17th of November, 1800, Perre Chouteau applied for an augmentation of a previous concession, as follows:

To Don Carlos Dehault Delassus, lieutenant-colonel attached to the stationary regiment of Louisiana, and Lieutenant-Governor of the upper part of the same province:

Peter Chouteau, lieutenant of militia and commandant of the fort of Carondelet, in the Osage nation, has the honor to represent to you, that formerly he obtained of Don Manuel Perez, Lieutenant-Governor of this part of Illinois, a concession for a tract of land of ten arpents in front by as many in depth, to be taken on the left side of the Missouri, at about twenty arpents above St. Charles, upon which concession your petitioner has made all preparatory works for the construction of a water grist-mill, which was to be built on the creek comprised in his concession. The Lieutenant-Governor, Don Zenon Trudeau, was pleased to grant to your petitioner an augmentation to the said tract of thirty arpents in depth, all which is proven by the authentic documents necessary to this object. The desire of profiting of the favor which the general government granted to all those who presented their titles to obtain their ratification, caused your petitioner to address those same above mentioned documents to a friend at New Orleans, to whom, probably, they having not been remitted, since he could not effectuate their presentation; the said original documents having not been registered in the archives of this government, your petitioner would be in great perplexity had he not to offer to you the attestation of Don Carlos Tayon, captain commanding the village of St. Charles, of Missouri, who at that time had a perfect knowledge of the original documents here above mentioned, by virtue of which your petitioner was authorized to begin an establishment for which he has made considerable sacrifice.

Full of confidence in the justice and generosity of the government, he hopes that after the attestation you may be pleased to take from the commandant of St. Charles, you will have the goodness to ratify to him, and in the place, the security of a property which he has been enjoying for more than ten years by virtue of the 347*] titles to him *expedited by your predecessors, and of which he should wish that you would be pleased to order the surveyor of the Upper Louisiana to put him in possession in the following manner: to take two arpents below the creek comprised in his concession, and above said creek all the space which is between the said creek and the next plantation, by the depth of forty arpents, in order that, being possessed of the certificate of survey which shall be delivered to him, he may, if needed, have recourse to the superior authorities to obtain the ratification of the said title. The petitioner presumes to hope everything from your justice in the decision of the case which he has the honor to submit to your tribunal.

PIERRE CHOUTEAU.

St. Louis, of Illinois, 17th of November, 1800.

On the 18th of November, 1800, Delassus referred the matter to Tayon, who replied as follows:

ST. LOUIS, OF ILLINOIS, 17th of November, 1800.

Cognizance being taken of the foregoing statement, the sub-lieutenant in the royal army and captain of militia, commandant of the post of St. Charles, shall give, in continuation, information of all he knows upon what is here asked. DELASSUS.

In compliance with the foregoing order, I do inform the lieutenant-governor that the statement of Don Pierre Chouteau is in all conformable to truth, having had full knowledge of the titles mentioned by him in his petition, as well as of the considerable works he has done on said land, of which he has always been acknowledged as the proprietor.

CHARLES TAYON.

St. Louis, 25th November, 1800.

On the next day, the 26th of November, 1800, Delassus issed the following order:

ST. LOUIS, OF ILLINOIS, 26th November, 1800

Having seen the foregoing information and the just rights stated by Don Pedro Chouteau to whom an unexpected accident has deprived of his title of concession, and considering that he has been for a long time proprietor of the land in question, the surveyor of this Upper Louisiana, Don Antonio Soulard, shall put him in possession, in the manner solicited, of the tract of land he petitions for; and the survey being executed, he shall draw a plat of said survey, which he shall deliver to the interested party, to serve to the said party to obtain the title in form from the general intendency, to which tribunal alone *corresponds, by [*348 royal order, the distributing and granting all classes of lands of the royal domain.

CARLOS DEHAULT DELASSUS.

On the 18th of January, 1801, the inhabitants of the village of St. Charles had a meeting and adopted the following proceedings:

"In the year eighteen hundred and one, on the 18th of January, at the request of M. Louis Barrada, syndic for the fences of the parish, we, Charles Tayon, captain commandant of the said St. Charles, have given notice at the door of this said church, that all the inhabitants of this place should have to assemble this day in our government (house), in order to determine whether the commons at the lower end should be increased or not. The said inhabitants being then assembled, and the question being under deliberation, they all unanimously agreed, that for the interest of the

HOWARD

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parish, the inclosed of the lands shall begin (*sesta*) by the side of Mr. Antoine Lamarche, and it shall be continued in descending to the Crooked Swamp, all the way through the woods, to nearly opposite the house of the late Louis Hunault; thence it shall run in a straight line to the Missouri.

"The said inhabitants having thus determined on this head, it was agreed that the syndic on duty this year shall cause to be measured the quantity of arpents of land which are included in the new augmentation of the commons, in order (*separter*) to distribute to each inhabitant what he is to do with it, according to the usages which have always been observed without wronging anyone whosoever in the said distribution.

"It has been further agreed in the said assembly, that if hereafter the commons of the upper end should need to be enlarged, in order to procure more pasturage for the cattle, all the said inhabitants (*s'y porterons*) shall help in doing the same, as this day they bind themselves to do for the lower end, always without prejudice to anyone whosoever. And as the said inhabitants will not undertake anything without the consent of the lieutenant-governor, they have judged proper that the present deliberation should be communicated to him, and that he be supplicated to preserve to the said inhabitants of St. Charles, of Missouri, their upper and lower commons, in their whole and entire State, and they will bind themselves to inclose the same as they have done heretofore, in order to preserve their grain and other property.

349*] "*Done and agreed upon in our government (house), day and year as above. And all the said inhabitants have signed or made their customary marks."

On the 26th of February, 1801, Delassus made the following reply:

ST. LOUIS, OF ILLINOIS, February 26th, 1801.

All concessions and augmentations of property must be granted by the intendant of these provinces, on a petition which is to be presented by those persons claiming lands; but if the commons of the inhabitants of St. Charles is not sufficient for their cultivation, we do permit them, provisionally, to enlarge the same according to their wishes, without insuring to them the right of property, which they are to apply for as above mentioned. And the provisional lines of the said augmentation shall be drawn by Captain Antoine Soulard, surveyor of upper Louisiana, who is the only person authorized to survey under our orders. It being well understood that nothing shall be done to the prejudice of any person.

(Signed) CARLOS DEHAULT DELASSUS.

On the 23d of February, 1804, Delassus issued another order as follows:

C. In consequence of the representation of the inhabitants of your post, which appears to me very just and well founded, after my decree of 26th February, in the year 1801, by which the augmentation therein mentioned is granted to them, and for which they have asked a survey by their petition of 27th April of the same year—which petition you have kept to this day without making it known to me, for which I hold you responsible—I apprise you that the surveys made in the said place cannot belong to any individual, but to the commons of St. Charles. Therefore you shall notify those who have had surveys made in the said place of this disposition, and you shall take the necessary measures for the execution of the whole survey asked for by the said petition of 27th April, according to the aforesaid decree of 26th February, in the year 1801.

May God have you in his holy keeping.

(Signed in the original)

CARLOS DEHAULT DELASSUS.

Mr. Charles Tayon.

St. Louis, of Illinois, 23d February, 1804.

I certify that the above is a copy of the original (official letter), addressed to Mr. Charles Tayon by the ex-commander-in-chief of Upper *Louisiana, Don Carlos Dehault De- [*350 lassus, and presented to me by the citizens of note of the village of St. Charles, while I was commandant of the said village.

(Signed) JAMES MACKAY.

On the 2d of March, 1804, the surveyor-general, Soulard, having made a survey and plat in conformity with the above order, issued the following certificate:

I, Anthony Soulard, Surveyor-General of Upper Louisiana, do hereby certify, that a tract of land was surveyed, meted, and bounded for, and in presence of, the syndic and inhabitants of St. Charles (Missouri), with the assistance of many of the inhabitants of said village, such as is represented in the plan hereto annexed, according to their petition, therefore, dated January 18th, 1801, and the decree of the lieutenant-governor, by which I am ordered to put them in possession of a sufficient quantity of land to serve them as a common; which surveys being completed, I find the said tract of land to contain 14,000 arpents (superficial measure), the admeasurement being made with the perch of Paris, of 18 pies in length, also Paris measure according to the usages or customs of this country; which tract of land is situate on the left side of the Missouri River, at about twenty-one miles from the town of St. Louis, bounded as follows, viz.: N. E., lands of the royal domain; S. E., the river Missouri; S. W., partly by land of St. James d'Eglise; N. W., by sundries, namely, Francis Duquette, the inhabitants of Marias Croche, lands at the Mamelles, lands of various proprietors, and lastly, by lands of Frs. Duquette, Joseph Tayon, John Tayon, and royal domain. This survey and admeasurement made without noticing the variation magnetic needle, which is (now) 7 degrees 30 minutes E.; the whole as represented in the plan hereto prefixed, in which the courses, distances, metes, bounds, &c., are noted.

This survey made in conformity to the decree of the late Lieutenant-Governor, Ch. D. Delassus, dated February 26th, 1801, which is hereto annexed, the whole laid down from the field notes of my deputy, James Mackay, dated on the 27th (day following) of the month of February, of this present year, which I signed.

ANTHONY SOULARD.

St. Louis, March 2d, 1804.

Notes.—All the metes and corners are designated in the plan. All the trees in the lines are blazed, with two notches below the blaze.

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The trees on the right and left of the lines are
351*] merely blazed. A. is *a tract of land subdivided among several persons, and called the Cul de Sac lands. C. is a tract also granted to several persons, and called the Grand Prairie.

I, Anthony Soulard, Surveyor-General of Upper Louisiana, do hereby certify, that the above plan and notes of a survey agree in every part with the originals, which are filed in my office. ANTHONY SOULARD, Surv.-Gen.

St. Louis, of Illinois, March 2d, 1804.

On the 2d of March, 1805, Congress passed an act "for ascertaining and adjusting the titles and claims to land within the territory of Orleans and the District of Louisiana;" the general purport of which was to recognize all existing grants. It further provided for the appointment of three persons who should examine and decide on all claims submitted to them and report the result to the Secretary of the Treasury, who was directed to communicate it to Congress.

On the 3d of February, 1806, the inhabitants of the village of St. Charles laid such of the above papers as relate to their title before the commissioners appointed under the Act of 1805, and claimed a common for the general benefit of the inhabitants.

On the 3d of March, 1807, Congress passed another act relating to these land titles, explanatory and corrective of the preceding act.

Both claims, that of Chouteau and the inhabitants of the village, were presented to the commissioners, who rejected Chouteau's and took no notice of the claim of the inhabitants of the village.

On the 13th of June, 1812, Congress passed another act "making further provision for settling the claims to land in the territory of Missouri;" in which, amongst other things, it is enacted, "That the rights, titles, and claims to town or village lots, out-lots, common field lots, and commons, in, adjoining, and belonging to the several towns or villages of Portage des Sioux, St. Charles, &c., &c., &c., which lots have been inhabited, cultivated, or possessed prior to the 20th day of December, 1803, shall be, and the same are hereby confirmed to the inhabitants of the respective towns or villages aforesaid, according to their several right or rights in common thereto: provided, that nothing herein contained shall be construed to affect the rights of any persons claiming the same lands, or any part thereof, whose claims have been confirmed by the board of commissioners for adjusting and settling claims to land in the said territory."

In 1813 another act was passed upon the subject, which does not appear to have any material bearing upon the case.

352*] *On the 26th of May, 1824, Congress passed another act "enabling the claimants to lands within the limits of the State of Missouri and territory of Arkansas, to institute proceedings to try the validity of their claims." It allowed any persons claiming lands under old grants or surveys, under certain circumstances, to present a petition to the District Court of the State of Missouri, which court was authorized to give a decree in the matter, reviewable, if need be, by the Supreme Court of the United States. The 5th section provided that a claim not before the District Court in two years, or not prosecuted to final judgment in three years, should be forever barred, both at law and in equity; and the 7th section directed that where a claim tried under the provisions of the act should be finally decided against the claimant, or barred by virtue of any of the provisions of the act, the land specified in such claim should, forthwith, be held and taken as part of the public lands of the United States, subject to the same disposition as any other public land in the same district.

This act was continued in force by the Act of the 26th May, 1826, for two years; and by the Act of 24th May, 1828, it was continued in force for the purpose of filing petitions, until the 26th day of May, 1829, and for the purpose of adjudicating upon the claims, until the 26th day of May, 1830.

Neither the claim of Chouteau nor the inhabitants of the village of St. Charles appears to have been presented to the District Court under any of these acts.

On the 27th of January, 1831, Congress passed another act, being a supplement to the Act of 1812, in which it was declared "That the United States do hereby relinquish to the inhabitants of the several towns or villages of Portage des Sioux, St. Charles, &c., &c., &c., all the right, title, and interest of the United States, in and to the town or village lots, outlots, common field lots, and commons, in, adjoining, and belonging to the said towns or villages, confirmed to them respectively by the first section of the Act of Congress, entitled, &c., passed on the 13th day of June, 1812."

On the 9th of July, 1832, Congress passed "An Act for the final adjustment of private land claims in Missouri," which authorized commissioners to examine all the unconfirmed claims to land in that State, &c., &c., to class them, and at the commencement of each session of Congress during said term of examination, lay before the commissioner of the general land office a report of the claims so classed, *&c., to be laid before Congress for [*353 their final decision upon the claims contained in the first class.

On the 9th of November, 1832, Chouteau presented his claim to these commissioners, who, on the 2d of November, 1833, unanimously determined that the claim ought to be confirmed to the said Peter Chouteau, or to his legal representatives, according to the concession. Before this decision was made, Congress, by an act passed on the 2d of March, 1833, had directed the commissioners to embrace every claim to a donation of land, held in virtue of settlement and cultivation.

On the 4th of July, 1836, Congress passed another act confirming claims to land in the State of Missouri, by which it was declared that the decisions in favor of land claimants, made by the above commissioners were confirmed, saving and reserving, however, to all adverse claimants, the right to assert the validity of their claims in a court or courts of justice; and the second section declared that if it should be found that any tract or tracts thus confirmed, or any part thereof, had been previously located by any other person or persons under any law of the United States, or had

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been surveyed or sold by the United States, the present act should confer no title to such lands in opposition to the rights acquired by such location or purchase, &c., &c.

In January and February, 1837, Chouteau had the land surveyed, which he claimed under the above confirmation, and it was admitted upon the trial that this survey included the land in possession of Eckhart, for which the present ejectment was brought.

Chouteau having brought an ejectment, the cause came on to be tried in May, 1840. The defendant, Eckhart, endeavored to show an outstanding title in the inhabitants of the village of St. Charles, under the grant for a common.

Upon the trial, the plaintiff (Chouteau) offered in evidence such of the facts above detailed as bear upon his title, and the defendant, in addition, gave the following evidence:

He then proved, by Judge Spencer, that he (witness) came to St. Louis in the winter of 1796; that he came to St. Charles in the winter of 1798; when he came to St. Charles, the town was surrounded by a fence. The witness, looking on the plat of the survey of the commons, said that the claim of Spencer under Rybolt was granted to conform to the fence of the commons, and to have the fence of the commons as its northern line; and, looking upon the plat of survey given in evidence by the plaintiff, says the whole of the land covered 354*] *by the plaintiff's claim, as laid down on that plat, was included in the commons fence, which was standing when he came here, and remained until after 1804.

Mr. Cunningham, another witness of the defendant, said that he was a deputy-surveyor of the United States, and, as such, he has surveyed the exterior lines of the commons of the town of St. Charles; that, in making such survey, he in some places found the lines of the Spanish survey, in others the timber was cut down, and, in prairie land, no lines of courses could be found; and that the Spanish survey conformed to the plat given in evidence in this cause.

This being all the evidence, the court, on motion of the defendant, instructed the jury, that "if they believed from the evidence that the premises in controversy are included in the tract of land surveyed under the authority of the Spanish Lieutenant-Governor of Upper Louisiana, for the commons of the town of St. Charles, and held by the inhabitants of said town, and inclosed by them as their commons, under the Spanish government, the plaintiff cannot recover in this action;" to which instruction the plaintiff, by his counsel, excepts, and prays the court to sign this his bill of exceptions, which is done, and the same is made part of the record.

Both plaintiff and defendant gave in evidence sundry acts of Congress, and defendant gave in evidence a private act of the Legislature of the State of Missouri, which they agree shall not be set out in the bill of exceptions, but may be read, and considered evidence in the Supreme Court, as if here inserted.

The jury, under this instruction, found a verdict for the defendant. The case was carried to the Supreme Court of Missouri, where the judgment was affirmed, from which it was brought, by writ of error, to this court.

Messrs. Lawless and *Bogg* for the plaintiff in error.

Mr. Gamble for the defendant in error.

The counsel for the plaintiff made the following points:

1st. That his title to the land in question is protected by the Treaty of Cession of 1803 (article 3d), and confirmed by the Congress of the United States as such.

2d. That the title attempted to be shown in the town of St. Charles has not been sustained by any proof of grant by Spain or France, or by any grant or act of Congress since the treaty of cession.

3d. That the defendant having shown no title in himself, and no *outstanding [*355 legal estate, the decision of the Supreme Court of Missouri, overruling a claim, right, and title derived from the Spanish government, guarantied by the treaty of cession and confirmed by Congress, is erroneous and ought to be reversed.

In support of the first point, they cited the cases of *Delassus* and *Chouteau*, reported in 9 Peters, and *Mackay*, in 10 Pet., 40, and contrasted those cases with the present.

Assuming, then, as demonstrated, that the plaintiff's title was *prima facie* good, his counsel will proceed to analyze that set up by the defendant, which, the court will have already observed, is simply an attempt to show an outstanding legal estate, in the tract confirmed to Peter Chouteau, in the town of St. Charles or in the trustees of that town. The defendant has not shown any derivative title in him to the land in question, nor any color for his possession thereof.

The question, then, before the court is, whether the title of the town of St. Charles to their commons is paramount to that of the plaintiff, and includes the land which, as has been shown, was granted by the Spanish authorities to Peter Chouteau. If this question be resolved negatively, it must follow that the decision of the Supreme Court of Missouri has been erroneously given against the title and right of Chouteau specially set up under the treaty of cession and the acts of Congress, and the repeated decisions of the Supreme Court in analogous cases.

The court will please to observe that no specific grant has been given in evidence by the defendant, of land as commons to the village of St. Charles.

The documents which have been given in evidence by the defendant will be seen, not only not to constitute a grant of Commons, but specifically to refute the presumption of, and to negative such a grant.

In order to arrive at the conclusion that the town of St. Charles had title to a tract of land as commons, and that the land in question formed part of that tract, and that a legal estate in the whole of that common tract was outstanding against the plaintiff in ejectment, the counsel for the defendant were compelled to contend that the Act of Congress of the 13th June, 1812, entitled "An Act making further provision for settling the claims to land in the territory of Missouri," had the effect, *proprio vigore*, of confirming to the town (or village) of St. Charles the title to the whole of the 14,000 acres included in the survey given in evidence

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by the defendant as common "adjoining and belonging to" that town (village).

356*] *This interpretation of the Act of 1812 has been adopted by the Supreme Court of Missouri, and, as a corollary or consequence of this construction, it has been decided by that court that a confirmation by the Act of 1812 of commons, necessarily annuls or neutralizes, as against the inhabitants of the town or village, all grants or surveys made under the French or Spanish government, no matter of what date, which previous to the passage of the Act of 1812 had not been "confirmed by the board of commissioners for adjusting and settling claims to land" in the then territory of Missouri.

The first section of the Act of 1812 is relied on by defendant and by the Supreme Court of Missouri for the above operation. The counsel for the plaintiff in error submits that such a construction of the Act of 1812 (sec. 1st) is in opposition to the terms of the act itself, and would also be violatory of rights vested at the date of the treaty of cession, and protected by that treaty and by acts of Congress.

The first section of the act (the only part of that law which bears on the subject) enacts, "that the rights, titles, and claims to, in town or village lots, out-lots, common field lots and commons, or adjoining and belonging to the several towns or villages of Portage des Sioux, St. Charles, St. Louis, and others in the Territory of Missouri, which lots have been inhabited, cultivated, and possessed prior to the 20th day of December, 1803, shall be, and the same are hereby confirmed to the inhabitants of the respective towns or villages aforesaid, according to their several right or rights in common thereto, provided that nothing herein shall be construed to affect the rights of any persons claiming the same lands, or any part thereof, whose claims have been confirmed by the board of commissioners for adjusting and settling claims to land in said territory."

It is manifest from the terms of this section, that it was not the intention of Congress to confirm any lots or commons which did not on the 20th of December, 1803, belong to the several towns or villages mentioned respectively. The words "in, adjoining, and belonging to the several towns and villages" are surely significant and explicit terms; the words "which lots have been inhabited, cultivated, or possessed prior to the 20th December, 1803," are not more explicit and significant than the former words "in, adjoining and belonging to;" yet the Supreme Court of Missouri have solemnly decided in the case of *Jonas Newman* v. *L. E. Lawless* (Missouri Reports, 279), that the first section of the Act

357*] of 1812 could have no *confirmatory operation, in the case of a town lot in St. Louis, unless it were distinctly proved that on the 20th December, 1803, the lot existed as a St. Louis town lot. In that case the plaintiff Newman having failed to prove that essential fact, the judgment rendered against him in the Circuit Court was affirmed by the Supreme Court of Missouri. The Supreme Court of Missouri based their decision on the terms of the act which manifestly call for the existence of a town lot, and the possession of it as such on the 20th December, 1803, as essential to the confirmatory operation of the law.

It is submitted that precisely the same sound principle of construction ought to have been applied by the Supreme Court of Missouri to the case before the court, and it is contended that if it had been so applied, it would have led the Supreme Court to a decision in favor of the plaintiff. There could be no greater reason or justice for the confirmation of a title to a piece of ground as common, which did not belong as common to a village, than for the confirmation of a lot which did not exist or did not belong to anybody on the 20th December, 1803.

The Supreme Court of Missouri, in the present case, observe that there seem to be no questions arising in this case which were not involved in the case of *Byrd* v. *Montgomery* (6 Missouri Rep., 510).

With great respect for the Supreme Court of Missouri, the counsel for the plaintiff in error contended that the facts in the case of *Byrd* v. *Montgomery* are totally different from those of the present case.

In the case of *Byrd* v. *Montgomery* there was no grant of the specific tract of land to the person under whom the defendant claimed title. The defendant in that case set up (as against the title of the town under the Act of 1812), a concession to one Francis Giguiere, dated 14th May, 1800, which was what is termed a floating concession, authorizing a location and survey on any part of the royal domain. No survey was made under this concession during the Spanish government, and the confirmation was reported by the recorder in 1815, on the ground of settlement right arising out of improvement.

The Supreme Court of Missouri were of opinion that this confirmation in 1815, by the recorder, was subordinate to the confirmation of the commons of St. Charles by the Act of 13th June, 1812, section 1st.

It is by no means the intention of the counsel for the plaintiff in *error, to assent to [*358 the correctness of the doctrines laid down in the case of *Byrd* v. *Montgomery*. Quite the reverse; but the counsel for the plaintiff in error contend that the title of the plaintiff in error in this case is totally different from that of Montgomery.

In the present case the grant to Chouteau, as has been observed, was special—it required no survey to locate it or ascertain its metes and bounds; these were specially described in the grant of Chouteau. Again, in *Siguin's* case, there was no possession, no improvement, no expenditure of money, skill, or labor in compliance with, and upon the condition imposed in the grant. In *Giguiere's* case there was no severance effected in favor of the grantee, of the land granted from the public domain. The treaty of cession, therefore, did not specially guaranty the land as it clearly did in the present case. The confirmation by the recorder in 1815 was based on cultivation in or prior to 20th December, 1803, and by virtue of the donation law of 1805, and the 3d section of the Act of 1812. The report of the recorder of the 1st November, 1815, which embraced Siguin's settlement, was affirmed by the Act of 29th April, 1816. It is manifest, therefore, that Giguiere's title emanated from a donation law of Congress, and not from an ancient and paramount Spanish grant, which, as in the principal case, sev-

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ered the land from the royal domain, and as such was protected by the treaty as private property.

It certainly has not been said or decided in the Supreme Court of Missouri that a mere claim, without any shadow of right, could be enforced by Congress to the prejudice of an existing right and title—particularly such a right and title as that vested in the plaintiff in error.

The very reverse has been laid down by the Supreme Court of Missouri in the case of *The Widow and Heirs of Mackay* v. *Dillon* (7 Missouri Rep., 7). The language of that court in that case is unambiguous on this point. They say, "that only such claims as were founded on right were designed to be confirmed. A mere claim, unaccompanied by any shadow of right, is clearly not such a claim as any Act of Congress could confirm. The force of the term confirmation, of itself, implies some sort of a title in previous existence."

It is true that the Supreme Court of Missouri, in the above case, came to the conclusion that the title of the inhabitants under the 1st section of the Act of 1812, June 13th, to commons, was paramount to that of the plaintiff, who claimed 359*] under a grant and survey made *under the Spanish government to their ancestor, and a grant and survey recognized by the claimants of the commons, and laid down specially on the plot of survey, made in 1806 by Mackay himself, and submitted in support of the claim.

While the counsel for the plaintiff in error protest against the conclusion to which the Supreme Court of Missouri has arrived in the above case, as illogical, and utterly illegal and unconstitutional, they nevertheless feel justified in availing themselves of the admissions of that court, as above cited, to demonstrate that the doctrine insisted on by the defendant in this case, namely: that the Act of 1812 confirmed to the people of St. Charles 14,000 acres of land, including the tract granted to the plaintiff, cannot be sound unless he previously establish that the tract claimed by the plaintiff constituted a part of the commons of St. Charles, on the 20th December, 1803. The words of the 1st section of the Act of the 13th June, 1812, would really seem to preclude all doubt on this point. According to those words, no rights, titles, or claims to commons are confirmed but those "to commons adjoining and belonging" to the several towns and villages named, and "according to their right in common thereto." To contend that this act could confirm or grant commons which were "not" adjoining and belonging to those towns or villages, and to which the inhabitants had no "right in common," would be to make a new law, and positively repeal that of 1812.

When we examine the action of Congress on the French and Spanish unconfirmed titles at the date of the passage of the Act of 1812, it must be manifest that it could not have been the intention of Congress "to interfere with or transfer" (to use the language of *Chief Justice* Marshall in the above-cited case of *Delassus, under Delauzieres*) to the town of St. Charles, the tract claimed by Pierre Chouteau. As has been shown, the claim of the plaintiff in error under his grant, had been placed before the first board of commissioners, under the Act of 1805, was duly filed with the United States recorder, and had been, previously to the treaty of cession, actually registered among the archives of the Spanish government at St. Louis, as appears by the certificate of the Surveyor-General, Soulard, and by the book of Spanish record in St. Louis, to which he refers. This court will please to direct its attention to the Act of Congress approved February 15, 1811. (2 Story's Laws, 1178.)

It will be seen that Congress, by the 6th and 10th sections of that act, specially provided that no land should be disposed of at public or private *sale, "the claim to which has been [*360 in due time and according to law presented to the recorder of land titles and filed in his office, for the purpose of being investigated by the commissioners." The court will also see that in no case was the decision of the commissoners in Missouri final, when that decision was against the claimant. Congress uniformly, in all the acts passed from 1805 to 13th June, 1812, inclusive, reserved the power to pass finally on those claims.

It is not contended that the Act of 1812 amounted to a final disposition by Congress of the claim, right, and title, of Pierre Chouteau, Sen., to the land now in question.

The acts of Congress, since passed for the relief of claimants under French and Spanish unconfirmed titles in Missouri and Arkansas, demonstrate that Congress considered Chouteau's title as still in being, and not destroyed or even weakened by any antecedent law.

If this be not so, it must follow that the Act of Congress of May 26, 1824, the Act of 1828, continuing the Act of 1824, the Acts of 1832 and 1833, and lastly the Act of 4th July, 1836, specifically confirming the title of the plaintiff in error, must have been all of them absurd and without a subject matter to act upon. If the right, title, and claim of Chouteau to the tract now in question, had been extinguished by the confirmation to the town of St. Charles, it would seem that it, thenceforward, must have ceased to exist. It would be, it is submitted, a solecism, a contradiction in terms, to contend that Chouteau's title, though a nullity as against the title of the town of St. Charles, could have any being or validity as against the United States.

It seems, therefore, manifest that the utmost operation that can be given to the Act of 1812 in favor of the towns and villages mentioned is, that of a transfer by the United States to those towns and villages of the right, title, and claim of the United States to all such land adjoining these towns and villages as belonged to these towns or villages as commons, and had not been granted to private individuals, and were not protected by existing laws or treaties.

Having said this much on the general principles upon which the 1st section of the Act of 1812 ought to be construed and administered, and having shown, that excluding from our consideration the title set up by the defendant under the town of St. Charles, the plaintiff has established his *prima facie* case, the counsel for the plaintiff in error will now proceed, as summarily as they can, to *examine the [*361 grounds of the claim of the town of St. Charles to the tract in question as forming part of its

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common, and hope to be able to satisfy the court that the very documents given in evidence by the defendant negative, most positively, the claim of the inhabitants to the land for which this action was brought against the defendant William Eckhart.

(The counsel then examined Tayon's petition and Trudeau's answer, which are set forth in the statement of the case, and contended that the land of the plaintiff was not included, because the Marais Croche was situated below the town of St. Charles, and the grant of the plaintiff above the town; and also that the character of the land did not accord with that claimed by the plaintiff.)

Again, in the response of the lieutenant-governor there is no grant at all of common to the village of St. Charles. There is only a declaration that the wooded and low ground asked for by Tayon shall remain royal domain, and that the inhabitants of St. Charles may use it to obtain fuel. It is manifest that at the date of this answer of the lieutenant-governor to Tayon no grant had ever previously been made or even asked for of common. Tayon in his petition treats the land he asks for as land of the domain, and the lieutenant governor in his reply affirms this view of it, and at the utmost assents to the use of it, until further order, by the inhabitants. It is difficult to imagine why or how this document can be relied on or used to established the existence, in favor of the village of St. Charles on the 20th December, 1803, of any common right to the Chouteau tract, or, indeed, of any definite commons at all, upon which the 1st section of the Act of 13th June, 1812, can possibly operate.

The counsel than examined the proceedings of the inhabitants of the village, as detailed in the statement and observed.

It is manifest from the above proceedings of the inhabitants of St. Charles, that at its date they had but a small tract which they used as common, or for the purpose of fuel, and that that part must have been the same referred to by Don Zenon Trudeau, in his answer to Tayon, and therefore situated on the Marais Croche below St. Charles. It is also manifest that the inhabitants at the date of said proceedings had no grant of commons from the Spanish government of any land adjoining the village; and that the language of Zenon Trudeau, treating the woodland as royal domain, was assented to by the inhabitants of St. Charles, not only in 1797, but on the 18th of January, 1801, the date of the proceedings.

362*] *It is manifest, also, that those simple people never intended by the extension of the common to interfere with any private vested interest or right. They pledged themselves to exert themselves, but "always without prejudice to the interests of any person." They evidently never intended to deprive Pierre Chouteau of his property. They must all of them have been perfectly acquainted with Chouteau's land. The works executed by Chouteau and his ancient possession must have been notorious, and it is not to be supposed that the inhabitants of the village who were employed by Chouteau on his land, could have been ignorant of his claim to it. This view of those proceedings is submitted in order the better to understand the effect and import of the other documents, and evidence offered in support of the claim of commons in this case.

(The counsel then examined the effect of the meeting of the inhabitants which took place in January, 1801, and the order consequent upon it; and argued that no grant could be inferred from that order. They then examined the survey of Mackay, and contended,

1. This survey is totally unauthorized by the decree in obedience to which it is recited to be made.

2. This survey, admitting its exterior lines to have been correctly run, and in conformity to the order of the lieutenant-governor, does not conflict at all with the grant of the plaintiff in error, but is consistent with its existence and validity.

Which points were argued at length.)

In conclusion, the following were stated as the points which the argument was considered as establishing,

1st. That the title of the plaintiff in error to the tract granted to him on the 25th of November, 1800, by the Lieutenant-Governor of Upper Louisiana, is protected and guarantied by the Treaty of Cession (article 3), and has been specifically confirmed by the Act of the 4th July, 1836.

2d. That the United States survey (No. 2982), given in evidence by the plaintiff, identifies the land so granted.

3d. That by virtue of said grant and survey so guarantied by treaty and confirmed by act of Congress, the plaintiff in error is entitled to the possession of the whole of the land included in said grant and survey.

4th. That the Act of June 13, 1812, did not operate as a grant of the land, included in the grant and survey of the plaintiff in error, to the town of St. Charles for commons, or for any other purpose.

*5th. That neither the town of St. [***363** Charles nor the defendant has shown any title whatever to the land included in the United States survey (No. 2982), given in evidence on behalf of the plaintiff in error.

6th. That the survey and certificate offered in evidence by the defendant, are erroneous, illegal, and on the face of them void.

7th. That admitting the survey (No. 2982) to be within the exterior lines of the survey given in evidence by the defendant, of the commons of St. Charles, it does not follow that the grant and survey of the plaintiff in error are absorbed and annulled.

8th. That the town of St. Charles is estopped from denying the plaintiff's title.

9th. That the title of the plaintiff in error to the land included in survey No. 2982, is clear, definite, and specific, and clothed with all possible documentary form, coupled with a possession of upwards of twenty years.

10th. That the title set up by the town of St. Charles is, in its inception, uncertain, illegal, and even fraudulent.

11th. That the instruction given to the jury who tried the ejectment, by the Circuit Court of Missouri, on motion of the defendant, to wit: "That if the jury believed from the evidence that the premises in controversy are included in the tract of land surveyed under the authority of the Spanish Lieutenant-Governor of Upper Louisiana for the commons of the town

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of St. Charles, and held by said town, and inclosed by them as their common, under the Spanish government, the plaintiff cannot recover in this action," were illegal and unjust instructions, inasmuch as they assume facts as proved which were not proved, and leave matters of pure law to be decided by the jury, and were calculated to lead the jury into a mistake and misapprehension of fact and of law.

Mr. Gamble, for the defendant in error:

It appears that both parties claim the land under titles originating under the Spanish government in Louisiana. So far as there is a conflict between the Spanish titles, and so far as the court of Missouri have decided between these Spanish titles, and so far as the court of Missouri have decided between the parties on the relative merits of these titles, it is believed that the Supreme Court of the United States have not the jurisdiction to review the judgments of the State courts.

The courts of Missouri, in deciding upon the rights of parties, as they existed under the Spanish government, are governed by the 364*] *Spanish law, and neither the treaty of cession, nor the laws of the United States, are drawn in question in such decisions. If either party, by invoking the treaty as the guaranty of his rights, could draw his case within the cognizance of the Supreme Court of the United States, then all questions which may arise about property in Missouri, Arkansas, or Louisiana, claimed by title originating under the former governments, may be brought before this court. This question may, however, be regarded as settled, by the decision of this court in the case of *The City of New Orleans* v. *De Armas and Cucullu* (9 Peters, 224). So far, then, as the State courts have decided this case upon the comparative merits of the two Spanish titles exhibited by the parties, that decision will be regarded as conclusive by this court, unless, in making that decision, the State courts have improperly disregarded the claim of the plaintiff, as it may have been asserted under an act of Congress.

The plaintiff in this case exhibits his claim to the land in question, as commencing under the Spanish authorities, and then produces the Act of Congress of the 4th of July, 1836 (4 Story's Laws of the United States, 2515), as the confirmation of this title.

The defendant exhibits the title of the inhabitants of the town of St. Charles, under whom he claims this same land, as also commencing under the Spanish government, and as confirmed by the Act of Congress of the 13th June, 1812. (2 Story's Laws of the United States, 1257.)

The court of St. Charles decides, between these two titles, in favor of that set up by the defendant.

If the question were between the titles, only as Spanish titles, the State courts would have the exclusive right to determine it, but here are two acts of Congress under which the parties severally claim, as the completion of their respective incomplete Spanish titles, and the State courts have supported the title of the defendant, under the confirmation by the Act of 13th June, 1812.

The instruction given by the Circuit Court leaves to the jury to decide, from the evidence, "whether the land in question is included in the tract surveyed, under the authority of the Spanish Lieutenant-Governor, for the common of the town of St. Charles, and held by the inhabitants of said town, and inclosed by them as their common, under the Spanish government;" and pronounces the law, that if the land is embraced in such claim of common, then the plaintiff cannot recover in this action. The jury have found that the land is included *in the tract thus surveyed, thus held [*365 and inclosed as a common, under the Spanish government.

The instruction of the court is founded upon a comparison of the Spanish title to the commons, confirmed by the Act of 1812, with the Spanish title of the plaintiff, as confirmed by the Act of 1836; and is a decision in favor of the commons' title.

As this case fairly presents the question between two confirmations, by different acts of Congress, it becomes proper to consider the effect of such confirmations upon the legal title. It is to be borne in mind, that the Act of June, 1812, confirms the claims to commons, as the final act of the government, and contemplates no other evidence of title to be thereafter given by the government; it is not a confirmation in the future, or dependent upon any condition; its language is, "the claims to commons," &c., "shall be, and the same are hereby confirmed."

It is believed to be clear, upon principle and authority, that when an act of Congress of this character has passed, and nothing remains to be done by any officer of the government to convey the title, the title passes by the act itself, and no shadow of title remains in the government to be conveyed subsequently to another individual.

The Supreme Court of Missouri has uniformly maintained this doctrine, and although the decisions of that court are not of binding authority in this tribunal, when construing an act of Congress, yet they are entitled to much consideration in a case like the present, when we reflect that such acts of Congress operate on a class of land titles with which that court is familiar, and in which the citizens of the State are largely interested; and that acts of this description are always passed at the instance, and upon the urgent solicitation of the citizens of the State in which the lands to be affected lie. Under such circumstances, the proper meaning and effect of such acts are at once presented to the legal mind of the State, and are kept before that mind, until the acts receive a construction founded upon an acquaintance with the whole subject on which the acts operate. This construction is to be found in the decisions of the courts. While, therefore, this court, in examining a statute designed to operate throughout the United States, or through many of the States (as do all general laws in relation to the public lands), will be but little influenced by the authority of a State decision; it will be persuasively influenced by such a decision giving the interpretation of *an act of Congress which [*366 is local, and is applicable to a subject peculiarly within the acquaintance of the State tribunal.

(The counsel here commented on the decisions

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of the Supreme Court of Missouri in the cases *Vasseur* v. *Benton* (1 Mo. Rep., 296), *Bird* v. *Montgomery* (6 Mo. Rep., 510), *Mackay's Heirs* v. *Dillon* (7 Mo. Rep., 7), and also *Strother* v. *Lucas* (12 Peters, 454).

It is submitted to the court, that in whatever light a confirmation by act of Congress is to be viewed, whether as a new grant, or as connecting itself with the original title or claim of the confirmee, it must have the effect of passing the title of the United States, so that no subsequent grant or confirmation can give a legal title to the subsequent grantee.

If this conclusion be correct, the next question for consideration is, whether the confirmation of the common of the town of St. Charles, by the Act of 1812, passed the title to the land in controversy. On this question, the counsel for the plaintiff have argued that the title, or claim, of the town to this land was not such a title as Congress could have intended to confirm by the Act of 1812.

As the attempt is made, in this case, to escape from the obvious meaning of the act, by a critical examination of its language, it is proper to consider its terms with some care. The confirming section enacts, "That the rights, titles, and claims to town or village lots, out-lots, common field lots, and commons, in, adjoining and belonging to the several towns or villages of Portage des Sioux, St. Charles, St. Louis, &c., which lots have been inhabited, cultivated, or possessed prior to the 20th day of December, 1803, shall be, and the same are hereby confirmed to the inhabitants of the respective towns, or villages aforesaid, according to their several right or rights in common thereto."

(The counsel then referred, for the history of the act, to Am. State Papers, Public Lands (pp. 377, 549), and to the communication of Mr. Penrose to Mr. Gallatin; also that of Mr. Riddick to the chairman of the Committee on Public Lands; and then entered into a comparison of the titles of the plaintiff and defendant respectively.)

I proceed now to examine the plaintiff's claim, as it has been acted upon by the legislation of the United States.

In the remarks that have been made upon the confirmation of the plaintiff's title by the Act of 4th July, 1836, it has been considered as if it were a general confirmation, without any restriction, and it has been attempted to be shown, and it is believed successfully, that **367*]** *even regarded in that light, it cannot prevail in this action over the confirmation of the commons. But I will proceed to show, from the laws of the United States, that this claim of the plaintiff has at one period been extinguished, as having any color of title to the land, and that the subsequent act of confirmation, which was a mere gratuity, was not intended by the government to interfere with the titles which it had previously granted or recognized.

From the time the United States took possession of Louisiana, there has always been manifested a strong desire to adjust the claims of individuals to any land in the territory, with great promptitude, and upon the fairest principles. Tribunals have, from time to time, been established, to investigate the claims, with power, in some instances, to decide on the merits of the claims upon the most enlarged principles of equity, and in other instances, with authority to report their opinions to Congress for its final action. The desire to have all the claims promptly settled is shown in the provisions of the various laws imposing penalties on those who should fail to exhibit their claims for investigation within the times prescribed. The following is a brief statement of these enactments:

The proviso to the 4th section of the Act of 2d March, 1805 (2 Story's Laws United States, 967), declares "that any incomplete grant, warrant, or order of survey, deed of conveyance, or other written evidence, which shall not be recorded as above directed, shall never after be considered, or admitted as evidence in any court of the United States, against any grant derived from the United States."

The 5th section of the Act of 3d March, 1807 (2 Story's Laws United States, 1060), contains a similar provision.

The 7th section of the Act of 13th June, 1812, extends the time for filing notices by actual settlers on the land claimed, under a similar penalty. (2 Story, 1260.)

The 1st section of the Act of 3d March, 1813, authorizes those who have filed notices to file the evidences of title, under the same penalty.

These earlier acts are referred to, not as having any direct operation on the plaintiff's claim, but to show the uniformity of the legislation in relation to these claims, and to show that the provisions of subsequent acts, which do affect the plaintiff's claim, are not new or extraordinary provisions.

The Act of 26th May, 1824 (3 Story, 1959), which created a special jurisdiction in the courts of the United States, was designed to bring *these claims to a final close. The **[*368** 5th section of that act provides, that a claim not brought before the District Court in two years, or not prosecuted to final judgment in three years, shall be forever barred, both at law and in equity. The 7th section provides, that where a claim is barred, by being decreed against, "or by any of the provisions of the act, the lands shall forthwith be held and taken as a part of the public lands of the United States, subject to the same disposition as any other public lands."

This act was continued in force by the Act of the 26th May, 1826, for two years, and by the Act of 24th May, 1828, it was continued in force, for the purpose of filing petitions, until the 26th day of May, 1829, and for the purpose of adjudicating upon the claims, until the 26th day of May, 1830.

The record in this case shows no presentation of this claim to the District Court; and for the purpose of the question now under consideration, it is to be assumed that it was not presented, or if presented, was decided against; the effect being the same in either case. It is certain that it has not been confirmed by the courts, as the only confirmation relied on by the plaintiff is that of 1836.

Now, the right of the government to require a diligent prosecution of these claims, and to impose penalties upon the claimants for their negligence, is not to be questioned. This court, in speaking of these provisions of law, in *Strother* v. *Lucas* (12 Peters, 448), says: "These

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are laws analogous to acts of limitation, for recording deeds or giving effect to the awards of commissioners for settling claims to lands under the laws of the States; the time and manner of their operations, and the exceptions to them, depend on the sound discretion of the Legislature, according to the nature of the titles, the situation of the country, and the emergency which calls for their enactment. Reasons of sound policy have led to the general adoption of laws of both descriptions, and their validity cannot be questioned. Cases may occur where the provisions of a law may be such as to call for the interposition of the courts; but these under consideration do not."

In this case, then, the fifth and seventh sections of the Act of 1824 had full operation on this claim of the plaintiff, at least from the 26th May, 1830, until the passage of the Act establishing the last board, on the 9th July, 1832, and during that period the claim was barred, both at law and in equity; and the land, as far as this claim was concerned, was public land. During that period, while the claim of the plaintiff was thus, by his own neg- [*369 lect, extinguished, the land was *held by the town of St. Charles, as confirmed to its inhabitants by an act of Congress, with no shadow upon its title: and it is now submitted to the court, that no subsequent action of the government could operate to affect the title, thus complete and unclouded, in the town of St. Charles.

If it be said, as it has often been said, that the government can waive any such forfeiture, I am free to admit that the United States are competent to waive any advantage which they might claim under such enactments, but I deny that the claimant, having neglected to comply with the terms of a law, and being thus barred, "at law and in equity," can, as against an individual citizen, be restored to any right of action, by any act of the United States.

At this point, I will call the attention of the court to another act of Congress, which seems designed to cut off all questions between titles of the description of those now before the court.

It has been before observed, that the last day allowed for presenting petitions to the District Court was the 26th May, 1829, and a year was allowed for prosecuting them to final decision. If there was a failure to pursue the action thus offered to the claimant, the 5th and 7th sections of the Act of 1824 barred the claim. Now, between the expiration of the time thus given for presenting the claim, and the passage of the Act of 9th July, 1832, establishing the last board of commissioners, the Congress of the United States, on the 27th January, 1831, passed an Act, by which the United States relinquished to the inhabitants of St. Charles all the right, title, and interest of the United States in and to the lots and commons. (4 Story, 2,220.)

If it should be supposed, that after the Act of 13th June, 1812, the technical fee still remained in the United States, here is an act of Congress equally efficacious with a patent, to transfer that fee, and this act is passed when the claim of the plaintiff was barred, both at law and in equity, by his own negligence.

There is still another feature in the plaintiff's confirmation which requires notice, although, for the purposes of this defense, I think enough has been already said.

It will be seen, by reference to the various acts of Congress in relation to these claims, that while the government was disposed to treat the claimants with the utmost liberality, it was regarded as a duty which the government owed to those who held adverse titles to the land, that they should be protected from any disturbance which might *be at- [*370 tempted under these later confirmations. The eleventh section of the Act of 26th May, 1824 (3 Story, 1963), provides, "that if, in any case, it should so happen, that the lands, tenements, or hereditaments decreed to any claimant, under the provisions of this act, shall have been sold by the United States, or otherwise disposed of, in each and every such case it shall and may be lawful for the party interested to enter the like quantity of land," &c.

The last clause of the second section of the Act of 24th May, 1828, which continues the Act of 26th May, 1824, in force, provides, "that the confirmations had by virtue of said act, and the patents issued thereon, shall operate only as relinquishment of the title on the part of the United States, and shall in nowise affect the right or title, either in law or in equity, of adverse claimants of the same land."

These provisions, intended to apply to confirmations which should be made by the decrees of the highest tribunal in the land, show the fixed determination of the government to protect the rights of those holding the land under any title adverse to the confirmations.

In the same spirit, and with the same purpose, a like provision was inserted in the 2d section of the Act of 4th July, 1836, under which the plaintiff claims. That section enacts, "that if it shall be found that any tract or tracts, confirmed as aforesaid, or any part thereof, had been previously located by any other person or persons, under any law of the United States, or had been surveyed and sold by the United States, this act shall confer no title to such lands, in opposition to the right acquired by such location or purchase, but the individual or individuals, whose claims are hereby confirmed, shall be permitted to locate so much thereof as interferes with such location or purchase, or any unappropriated land," &c.

Although the most obvious application of the words, "previously located under any law of the United States," is, to the class of titles in Missouri which originated in the act for the relief of the inhabitants of New Madrid who suffered by the earthquake, and who were authorized to locate other lands in lieu of those injured; still it is plain that all titles which had received the sanction of government were equally deserving of protection against disturbance from these confirmations." The language used in the 11th section of the Act of 1824, "sold or otherwise disposed of," would have embraced every description of title conferred by the government, by which the land was disposed of, and would have protected the town of St. Charles against the plaintiff's claim, if it had been presented to the court *under that act, and had [*371 been confirmed. The spirit of the legislation

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is to secure these prior titles; and unless there is some absolute necessity to construe the 2d section of the Act of 1836 with the greatest strictness, and to exclude from its protection all titles which can by such construction be excluded, it is believed that the title of the town of St. Charles may receive the benefit of this section, as a complete defense against the plaintiff.

If, then, the commons of the town can with any propriety be said to "have been previously located, under any law of the United States," the Act of 1836 confers no title against the claim of the town. On this question it is not thought necessary to remark, as it is to be determined by an examination of the section referred to. The effect of the section is, to leave the claim of the plaintiff unconfirmed, so far as it interferes with the titles designed to be protected.

If I have conveyed my ideas intelligibly, I think I have maintained the following propositions:

1. That between two confirmations by different acts of Congress, where no other evidence of title is contemplated by the confirming acts, the elder confirmation passes the legal title.

2. That the confirmation of the commons of St. Charles, by the Act of 13th June, 1812, is a confirmation of the claim as it was spread on the records of the government.

3. That the claim, as evidenced by the survey and by actual possession, was adverse to the claim of the plaintiff.

4. That if the confirmations were to have effect, with relation to the merits of the original Spanish titles, then the title of the town of St. Charles to the land in question, as part of the common, is an older and better title than that of the plaintiff.

5. That the claim of the plaintiff to the land in question was extinguished by his neglect to present and prosecute it, under the Act of 26th May, 1824, as that act was continued in force by the Acts of 1826 and 1828.

6. That if the fee did not pass by the confirmation, it did pass by the Act of 27th January, 1831.

7. That the confirmation of the plaintiff's claim by the Act of the 4th July, 1836, did not operate to confer any title, as against the title of the town.

These points present, as it is believed, several distinct and complete defenses to this action.

372*] *Mr. *Justice* CATRON delivered the opinion of the court:

For the statement of the facts the report is referred to.

It is insisted this court has no jurisdiction to look into the plaintiff's concession of 1800; or to pass on it, under the 25th section of the Judiciary Act—and the case in 9 Peters, 224, of *New Orleans* v. *De Armas et al*, is referred to as settling the question. If the plaintiff relied alone on a complete Spanish title, then the argument would be sound, but each party claims by force of an act of Congress; the plaintiff under that of 1836, and the defendant under the Act of 1812, confirming to the inhabitants of St. Charles the village commons; and which is fortified by another act for the same purpose, of 1831. The decision of the Supreme Court of Missouri was opposed to the title set up under the Act of 1836 by the plaintiff. From this decision he prosecuted a writ of error to this court.

Construction is called for on the acts on which both titles are founded; and as no occasion can arise in any instance involving construction, aside from a contest, making a case, the facts giving rise to it must be ascertained before the construction can be applied. To hold otherwise, would render the 25th section a dead letter in a majority of instances. The same question arose in the case of *Pollard's Heirs* v. *Kibbie* (14 Peters, 254), and again in that of *The City of Mobile* v. *Eslava* (16 Peters, 234), both involving property at the city of Mobile; the first is not distinguishable from the present in its material features, so far as the question of jurisdiction is involved; and the latter covers the whole ground before us. In the cases cited, as in this, the record set out the titles on each side, together with the facts and charge of the court; from which it appeared the decision of the Supreme Court of Alabama was opposed to the plaintiff's title, the judgment below having been affirmed. This court did not then doubt its powers to look behind the act of Congress, into the Spanish concession of Pollard, for the purposes of construing the act, and comparing it with that under which the defendant claimed: not with the intention of setting up the concession as an antecedent title to the act, that would support an action, but for the purposes of the construction and application of the acts on which the controversy depends. And the same rules apply here.

The plaintiff's title is *prima facie* a good legal title, and will support an ejectment on the Act of 1836, standing alone, if the land can be identified, as confirmed, without resort to the patent. This court held, in *Strother* v. *Lucas* (12 Peters, 454): "That a grant may be *made by a law as well as a patent pur- [*373
suant to a law, is undoubted, and a confirmation by a law is as fully, to all intents and purposes, a grant, as if it contained, in terms, a grant *de novo*." And as, according to the laws of Missouri, an action of ejectment could be prosecuted on Chouteau's title, by force of the confirmation, the construction of the acts of Congress under which the respective parties claim, will decide the controversy.

The character and nature of the village right, in this country, is somewhat peculiar. The inhabitants of Upper Louisiana resided in villages, almost exclusively, and cultivated common fields, inclosed by only one fence; each person who cultivated the soil having assigned to him, by the syndic of the town, a certain portion of land to cultivate. In this manner the chief tillage of the soil was carried on; the other parts of the country being in the forest state.

The villages also required commons for pasturage for their horned cattle and horses, and for fuel and timber; this part not being inclosed. The quantity included in the field, for pasturage, timber and wood, was regulated by the nature of the soil and timber, and accommodated to the wants of the inhabitants, and con-

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ceded at the discretion of the government; usually to a very liberal extent.

As the principal support of the population was derived from agriculture and pasturage, the village commons were deemed of primary importance by the people and government, and as a common title more favored than individual titles in cases of conflict.

In this situation the United States found the country when they came into possession of it, in March, 1804, as the successor of France; or rather Spain, in virtue of the treaty of cession. So great has been the change by the introduction of a population with different habits, and modes of agriculture, that it is difficult to estimate at this day the former importance of the village common to the French inhabitants. It was the basis on which their society was formed to so material an extent, that the early acts of Congress could not be well understood, without a reference to this important circumstance; and especially not the sweeping Act of 1812.

The Lieutenant-Governor of Upper Louisiana (usually the military commandant), made concessions for lands founded on such considerations as to him seemed just, and according to the policy of the province; ordered it to be surveyed by the public surveyor, who put the interested party into possession, pursuant to the lieutenant-governor's order, and delivered a 374*] plat of the survey to the party, in *order that he might obtain a title in form from the general intendancy at New Orleans; to which tribunal alone appertained, by royal order, the distributing and granting all classes of lands of the royal domain. The intendant-general had the power to adjudge on the equity of the claim, and to exercise the sovereign authority, by making the grant, as the king's deputy.

After the country changed owners, this government had imposed on it, as the successor of Spain, the duties previously performed by the general intendancy, of perfecting titles to concessions made by the lieutenant-governors of St. Louis, Illinois.

Shortly after the United States came into possession, a tribunal was instituted consisting of a board of commissioners to investigate claims of this description according to the laws and usages of Spain, as they existed among the French population in Upper Louisiana, and to report to Congress, such as were by the tribunal deemed well founded, just, and equitable, and that ought to have been confirmed by the general intendancy, had no change of government taken place; and such as ought not to have been confirmed. On these reports coming before Congress, it acted directly by statute, on such titles as were by the Legislature considered well-founded and just claims. In all such instances it acted as the successor of the general intendency, and had the same discretion to confirm; and the sovereign power to perfect the incipient right; or to reject it, that the intendant-general had: Each exercising sovereign power, in regard to the claim, with full authority to award, or to refuse, a perfect title.

As the board of commissioners had no capacity to grant, but only to ascertain facts, and report their opinions; and their powers to examine, not extending to every description of claim, Congress acted in some instances independent of any recommendation; necessarily in cases where the board had no right to interfere.

Chouteau's claim had been presented to the board early in 1809. In July, 1810, the board declared the opinion that this claim ought not to be confirmed; and no action was had on it by Congress on the return of the report of 1810.

In 1812, Congress confirmed the village claims as follows:

"That the rights, titles, and claims to town or village lots, out-lots, common field lots, and commons, in, adjoining, and belonging to the several towns or villages of Portage des Sioux, St. Charles, St. Louis, &c., which lots have been inhabited, cultivated, or possessed prior to the 20th day of December, 1803, shall be, and the same are *hereby confirmed to [*375 the inhabitants of the respective towns or villages aforesaid, according to their several rights or right in common thereto."

A new board was organized according to an Act of 1832, with powers to re-examine the claims (with others) deemed unworthy of confirmation by the former board. The new board was of a different opinion from the former in regard to Chouteau's claim, and in November, 1833, recommended it for confirmation, according to his concession: and it was confirmed by the Act of the 4th of July, 1836: corresponding to a recent survey, made in conformity to the concession. The whole of the claim is included in the village common of St. Charles, as it existed on the 20th day of December, 1803; and under which the defendant protected his possession, as an outstanding title. The State Circuit Court in Missouri held the village right the better, and so charged the jury; which opinion was sustained in the Supreme Court of that State, on their former decisions: especially in the cases of *Byrd* v. *Montgomery* (6 Mo. Rep., 514), and *Mackay* v. *Dillon* (7 Mo. Rep., 10). The last involved a contest in which title was claimed by one party under the St. Louis common.

These cases maintain, in substance, that such inchoate claims (as that of Chouteau was in 1812, when the community of St. Charles took its title, previously also inchoate) were not changed in their character by the treaty by which Louisiana was acquired; that the treaty imposed on this government only a political obligation to perfect them; that this obligation, sacred as it may be, in any instance, cannot be enforced by any action of the judicial tribunals; and that the legislation of Congress, from 1804 to the present time, has proceeded upon this construction of the treaty, as is manifested by the modes adopted to investigate the claims through boards of commissioners, and then acting on them by legislation. This court held likewise in *The United States* v. *Wiggins* (14 Peters, 350).

We think this reasoning correct, and necessarily following the nature of the claim as above set forth; it not having been perfected by the general intendancy before the change of governments.

2. That court in substance also held, in the cases cited, that the federal government, being unable to confirm the same land to two adverse claimants, must then, to some extent, deter-

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mine between the conflicting titles. Each claimant depends upon the justice or comity of the present government; and when the gov-
376*] ernment exercises *its powers and confirms the land to one, it must necessarily be considered in a court of law the paramount and better title.

We think this position also sound, and that it is conclusive against the validity of the plaintiff's title; and therefore order the judgment of the Supreme Court of Missouri to be affirmed.

ORDER.

This cause came on to be heard on the transcript of the record from the Supreme Court of the State of Missouri, and was argued by counsel; on consideration whereof, it is now here ordered and adjudged by this court, that the judgment of the said Supreme Court of the State of Missouri in this cause be, and the same is hereby affirmed, with costs.

Aff'g 7 Mo., 16.
Cited—3 How., 787; 4 How., 177, 458, 464; 7 How., 592; 10 How., 370; 11 How., 549; 16 How., 508; 19 How., 336; 22 How., 208, 341; 1 Black, 189; 14 Wall., 313.

JOHN CATTS, *Plaintiff in Error,*

v.

JAMES PHALEN, AND FRANCIS MORRIS, *Defendants in Error.*

Money fraudulently drawn in an illegal lottery can be recovered back.

A person who receives the prize money, in a lottery, for a ticket which he had caused to be fraudulently drawn as a prize, is liable to the lottery contractors in an action for money had and received for their use. So far as he is concerned, the law annuls the pretended drawing of the prize; and he is in the same situation as if he had received the money of the contractors by means of any other false pretense.

THIS case was brought up by writ of error from the Circuit Court of the United States for the District of Columbia and County of Alexandria.

The facts were these:

The State of Virginia, in and prior to the year 1834, passed several acts authorizing a lottery to be drawn for the improvement of the Fauquier and Alexandria turnpike road.

In 1839, certain persons, acting as commissioners, made a contract with James Phalen and Francis Morris, of the city of New York, by which Phalen and Morris were authorized, upon the terms therein mentioned, to draw these lotteries. They proceeded to do so, and employed Catts to draw the tickets from the wheel. The following extract from the bill of exceptions sets forth the other facts in the case:
377*] *"That the plaintiffs (Phalen and Morris) before the drawing of such lottery, employed the defendant (Catts) to perform the manual operation of drawing with his own hand, out of the lottery wheel prepared for the purpose, the tickets of numbers therein deposited by them, in order to be drawn thereout by the defendant, without selection and by chance, as each ticket of numbers successively and by chance presented itself to his hand when inserted in the wheel, and which tickets of numbers, when so drawn out in a certain order, were to determine the prizes to such lottery tickets as the plaintiffs had disposed of, or still held in their own hands, according as the tickets of numbers so drawn out corresponded with the numbers on the face of such lottery tickets respectively.

"That the defendant, before the drawing of the said lottery, and after he was employed to draw out the tickets of numbers as aforesaid, fraudulently procured and employed one William Hill to purchase of the plaintiffs, at their office in Washington, with money given by defendant to said Hill for the purpose, a certain ticket in the said lottery for him, the defendant, but apparently as for the said Hill himself.

"That the said Hill did accordingly purchase such ticket of the plaintiffs at their said office, apparently as for himself, and really for defendant, and with money furnished to said Hill by defendant as aforesaid, and delivered such ticket to defendant before the drawing of said lottery.

"That defendant, being in possession of such ticket so purchased for him as aforesaid, did, on the said —— December, 1840, at the county aforesaid, undertake and proceed, in pretended pursuance and execution of his said employment in behalf of the plaintiffs, to draw out of the said lottery wheel, with his own hand, the said tickets of numbers, whilst at the same time he had fraudulently concealed in the cuff of his coat certain false and fictitious tickets of numbers fraudulently prepared by him, which exactly corresponded in numbers with the numbers on the face of the ticket so held by him as aforesaid, and fraudulently prepared in the similitude of the genuine tickets of numbers which had been deposited in the said lottery wheel for the purpose of being drawn out by defendant, without selection and by chance as aforesaid.

"That defendant, when, under pretense of drawing out such genuine tickets of numbers, he inserted his hand into the said lottery wheel, fraudulently and secretly contrived, without drawing out any *of the genuine tickets [*378 of numbers deposited in said wheel, to slip between his finger and thumb, the said false and fictitious tickets of numbers before concealed in his cuff as aforesaid, and produced and exhibited the same to the agent of the plaintiffs, and other persons then and there present and superintending the drawing of said lottery, as and for genuine tickets of numbers properly drawn from the said wheel; by reason of which fraudulent contrivance, the number of the lottery ticket so purchased for defendant, and in his possession as aforesaid, was registered in the proper books kept for that purpose by the plaintiffs, as the ticket entitled to a prize of $15,000, so as to enable the holder of such ticket to demand and receive of the plaintiffs the amount of such prize, with a deduction of fifteen per cent.

"That the defendant afterwards, in the month of February, 1841, again fraudulently procured and employed the said Hill, in consideration of

NOTE.—*As to exceptions, and requests to court to charge, what particularity in is necessary, in order to a review in appellate court,* see note to Moore v. Bank of Metropolis, 13 Pet., 302.

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some certain reward to be allowed him out of the proceeds of such pretended prize, to present the said lottery ticket as a ticket held by himself to the plaintiffs, at their office in New York, and there demand and receive of them as for himself, but for defendant's use and benefit, payment of the said pretended prize, and for that purpose the defendant delivered the said lottery ticket to said Hill, who did accordingly present the same to plaintiffs at their said office, and then and there received of them, as for himself, and really and secretly for the defendant, the amount of such prize, with such deduction of fifteen per cent. as aforesaid."

Phalen and Morris brought an action in the Circuit Court against Catts to recover back the amount which was thus paid, viz.: $12,500. The declaration contained three counts, two of which were abandoned at the trial; the one retained being for money had and received by the defendant below (Catts) to the use of the plaintiffs.

The facts above seth forth were not controverted, but the defendant relied upon a law of Virginia (to take effect from the 1st of January, 1827), passed for the suppression of lotteries; and also upon his being an infant, under the age of twenty-one years, when the lottery in question was drawn.

Whereupon the defendant prayed the court to instruct the jury as follows, to wit:

"If the jury shall believe, from the said evidence, that the said lottery was drawn under the said act of the Commonwealth of Virginia, and the said contract so given in evidence as afore-

379*] said, that then the *said lottery was illegal; and if plaintiffs paid the amount of said prize, under the belief that said ticket had been fairly drawn, the plaintiffs cannot recover. And if the jury shall further believe, from the said evidence, that in December, 1840, when the said lottery was drawn, said defendant was an infant under the age of twenty-one years, that then the plaintiffs are not entitled to recover in this action."

Which instruction the court refused; to which refusal of the court the defendant excepts, and this, his bill of exceptions, is signed, sealed, and ordered to be enrolled, this 9th day of June, 1842.

The jury returned a verdict in favor of the plaintiffs for $12,500, to bear interest from 15th March, 1841.

Upon this exception, the case came up to this court.

Messrs. Coxe and *Semmes* for the plaintiff in error.

Messrs. Jones and *Brent* for the defendants in error.

The counsel for the plaintiff in error made the following points:

1. That the plaintiffs below made out no case establishing their right to recover—in other words, that they did not show any interest or property to be in them in the prize drawn on the said — day of December, 1840, which is in substance one of the prayers refused by the court, viz.: "if plaintiffs paid the amount of said prize, under the belief that said ticket had been fairly drawn, the plaintiffs cannot recover."

2. That the court erred in refusing to instruct the jury that, under the act of Virginia referred to, said lottery was illegal. Plaintiff in error will contend that the lottery was illegal, and if so, that the plaintiffs below were not entitled to a verdict.

3. That the court erred in refusing to instruct the jury that the infancy of the defendant (the same being in evidence) was a bar to the plaintiffs' right to recover.

Mr. Coxe, for the plaintiff in error, said:

That if the lottery was prohibited by law, no contract under it could be sanctioned by law. The question whether the Prohibitory Act of Virginia was constitutional, was decided in the highest court of that State, and brought up to this court, where it is now pending. The court of Virginia decided that it did not impair the obligation of contracts. (1 Robinson, 718, *Phalen* v. *Commonwealth*.)

*In support of the general position [*380 above taken, he cited, 11 Wheat., 258, 265, 268; 10 Bingh., 107; 5 T. R., 242; 2 Hen. Bla., 379; Carth., 252; 1 Maule & Selw., 596.

Mr. Brent, for the defendants in error:

As to the plea of infancy, although the action is *assumpsit*, yet the record shows fraud. (1 Esp. Rep., 172, 173; 2 Kent. Com., 240.)

Infancy was shown at the time of drawing, but not when the money was received.

As to the illegality of the lottery:

This ticket was in fact never drawn, and therefore illegality cannot be affirmed.

This ticket was sold out of Virginia.

A contract is not void on account of the imposition of a penalty. (8 Wheat., 353; 1 Bayley, 315; 2 Hawes, 526.)

[The counsel then examined the question of the illegality of lottery, and the constitutionality of the Prohibitory Act, and cited, 12 Wheat., 70; Angell & Ames, 89; 4 Gill & Johns., 198, 144, 152; 9 Gill & Johns., 405; 3 Wash. C. C. R., 319; 6 Cranch, *Fletcher* v. *Peck*.]

Mr. Jones was proceeding to argue on the same side, but the court expressed a desire to waive further argument, for the present, upon that side.

Mr. Coxe, in reply and conclusion, relied upon the illegality of the lottery, and the right of the Legislature of Virginia to revoke its grant before any interests had become vested under it. The circumstance that the ticket was sold in Washington, made no difference, because lotteries were prohibited there also; and he cited 4 Wash. C. C. R., 129.

Mr. Justice BALDWIN delivered the opinion of the court:

Phalen and Morris brought an action in the court below, to recover from Catts the sum of $12,500, which they alleged he had received for their use, and being so indebted, promised and assumed to pay, to which the plaintiff pleaded the general issue.

It appeared in evidence on the trial, that the Legislature of Virginia had authorized lotteries, to raise money for improving a turnpike road in that State, which were placed under the superintendence of commissioners appointed under those laws, who, by articles of agreement, contracted with the plaintiffs to manage and conduct the drawing *of the lotteries [*381 authorized by the laws, on certain terms therein stipulated, one of which took place in Virginia, under the circumstances set forth in the statement of the case by the reporter.

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In the argument for the plaintiff in error here, it has been contended that this lottery was illegal by the Suppressing Act of 1834, which precluded a recovery of the money he received; but as, in our opinion, this cause can be decided without an examination of that question, we shall proceed to the other points of the case, assuming for present purposes the illegality of the lottery.

Taking, as we must, the evidence adduced by the plaintiffs below, to be in all respects true after verdict, the facts of the case present a scene of a deeply concocted, deliberate, gross, and most wicked fraud, which the defendant neither attempted to disprove or mitigate at the trial, the consequence of which is, that he has not, and cannot have any better standing in court than if he had never owned a ticket in the lottery, or it had never been drawn. So far as he is concerned, the law annuls the pretended drawing of the prize he claimed; and in point of law, he did not draw the lottery; his fraud avoids not only his acts, but places him in the same position as if there had been no drawing in fact; and he had claimed and received the money of the plaintiffs, by means of any other false pretense, and he is estopped from avowing that the lottery was in fact drawn.

Such being the legal position of Catts, the case before us is simply this: Phalen and Morris had in their possession $12,500, either in their own right, or as trustees for others interested in the lottery, no matter which, the legal right to this sum was in them; the defendant claimed and received it by false and fraudulent pretenses, as morally criminal as by larceny, forgery, or perjury; and the only question before us is, whether he can retain it by any principle or rule of law.

The transaction between the parties did not originate in the drawing of an illegal lottery; the money was not paid on a ticket which was entitled to, or drew the prize; it was paid and received on the false assertion of that fact: the contract which the law raises between them, is not founded on the drawing of the lottery, but on the obligation to refund the money which has been received by falsehood and fraud, by the assertion of a drawing which never took place. To state is to decide such a case, even if the instructions prayed by the defendant had been broader than they were. The instructions prayed were, 1. That if the jury believed from the evidence that the lottery was drawn under the law of Virginia, and the **382*]** contract referred to, then *the lottery was illegal; and that if plaintiffs paid the amount of the said prize, under the belief that said ticket had been fairly drawn, the plaintiff cannot recover. 2. That if the jury shall believe from the evidence that in December, 1840, when the lottery was drawn, the defendant was an infant, the plaintiffs are not entitled to recover in this action.

A party cannot assign for error, the refusal of an instruction to which he has not a right to the full extent as stated, and in its precise terms; the court is not bound to give a modified instruction varying from the one prayed: here they were asked to instruct the jury, that the belief of the plaintiff that the ticket had been fairly drawn, and the consequent payment, prevented a recovery, without referring to t fact in evidence, that that belief was caused the false and fraudulent assertions of the d fendant.

The second instruction asked was, that t plaintiffs could not recover if the defend was a minor in December, 1840, which t court properly refused, because they were n asked to decide on the effect of his minorit when the money was received in Februar 1841; and because, if he had then been minor, it would have been no defense to an ac tion founded on his fraud and falsehood.

The first instruction, if granted, would hav excluded from the consideration of the jury al reference to the fraud which produced suc belief in the plaintiff, and they must have give it the same effect, whether it was founded i fact, or caused by the false asseveration of th fact by the defendant, knowing it was a false hood, and thus depriving the jury of the righ to decide on the whole evidence.

The second instruction asked would, i granted, have also taken from the jury th right of finding for the plaintiff, if the defend ant had been of full age when the fraud wa successfully consummated by the receipt of th money, which was the only fact on which th law could raise a promise to repay, for certainl none could be raised at any previous time; so tha had these instructions been given, the verdic must have been rendered for the defendan without taking into view the only evidence o which the plaintiff relied, whether it was avai able in law or not.

For these reasons, the judgment of the Circu Court is affirmed, with costs.

ORDER.

This cause came on to be heard on the tra script of the record from the Circuit Court the United States for the District of Columbi holden in and for the County of Alexandri and was argued *by counsel; on consid- [*38 eration whereof, it is now here ordered an adjudged by this court, that the judgment the said Circuit Court in this cause be, and th same is hereby affirmed, with costs and dan ages at the rate of six per cent. per annum.

Cited—15 Wall., 674.

JANE DADE, *Complainant,*

v.

THOMAS IRWIN, JUN., Executor of THOM IRWIN, Deceased, AND WILLIAM HODGSON, *Defendants.*

Court of equity—refusal to interfere—set-off stale and suspicious claim.

The Court of Equity will not interfere, where t complainant has a proper remedy at law, or whe the complainant claims a set-off of a debt arisi under a distinct transaction, unles there is so peculiar equity calling for relief.

Nor will it interfere where the set-off claimed

NOTE.—*As to lapse of time, and statute of limi tions, as affecting the remedy, or as a defence, equity cases,* see note to Thomas v. Harvie, 10 Whe 146; and note to Pratt v. Carroll, 8 Cranch, 471; a note to Prevost v. Gratz, 6 Wheat., 481.

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old and stale, with regard to which the complainant has observed a long silence, and where the correctness of the set-off is a matter of grave doubt.

THIS was an appeal from the Circuit Court of the United States for the District of Columbia, in and for the County of Alexandria, sitting as a court of equity.

The case was this:

In the years 1824 and 1828 Jane Dade executed two deeds of trust to one William Herbert, for the purpose of securing a debt which she owed to Thomas Irwin, the deceased.

In 1830, Thomas Irwin, Junior, the executor of Thomas Irwin (who had died in the mean time), filed a bill against Jane Dade for the sale of the property. Herbert, the trustee, was alleged to be a lunatic, and the bill therefore prayed that a commissioner might be appointed to make the sale.

Jane Dade in her answer admitted the justice of the claim as stated in the bill. A decree was entered in conformity with the bill, and William L. Hodgson appointed commissioner to carry the same into effect.

On the 21st of November, 1834, Jane Dade filed another bill on the equity side of the court, stating that the sale was to take place in a few days, and praying that it might be suspended. She alleged that she was entitled to a credit under the following circumstances: That in 1718 she had loaned to one James Ir-[*384] win $680; that in 1821 *he executed his promissory note to her for $826.63, which was the amount of the above sum with interest; that, to secure the payment of the note, he assigned a debt due to him from Henderson & Company, which debt was guarantied by Thomas Irwin, who had become liable for the same; and that the amount of this debt, with interest, should be deducted from the sum for which Thomas Irwin's executor was about to sell her property. The bill further alleged that Thomas Irwin, the deceased, had become personally liable from having sold some cordage to Henderson & Company, contrary to his instructions. The assignment of the debt from James Irwin to Jane Dade (through her agent, John Adam), and the admission of a personal liability by Thomas Irwin, were alleged to be in the following terms:

I do hereby assign to John Adam, the debt due me by Alexander Henderson for cordage sold him by Thomas Irwin, as my agent, for which debt said Irwin is himself liable, having received said Henderson's note without my consent. This assignment is made to secure to Jane Dade the payment of six hundred and eighty dollars, with interest thereon from the 16th of October, one thousand eight hundred and seventeen, money borrowed from her by said Adam for my use, for which I have given him my note, payable in eighteen months, with interest.

Given under my hand and seal, this 20th day of May, one thousand eight hundred and twenty-one. JAMES IRWIN. [Seal.]

(Indorsed) JOHN ADAM.

Test: LEWIS COLE.

Indorsed. If the within debt cannot be recovered from Alexander Henderson, I am liable for the same: provided full time be allowed for the prosecution of the suit.

THOMAS IRWIN.

The bill further alleges that full time had been allowed for the prosecution of the suit against Henderson, and that there was no prospect of anything being recovered.

Upon filing this bill, an injunction was granted to stay the sale.

In February, 1835, Thomas Irwin, Jun., the executor, filed his answer, denying all knowledge of the note said to have been given by James Irwin, and denying the assignment above recited. The answer admitted that Thomas Irwin had sold some cordage to Henderson & Company, for which he had taken their note; that the *note had been put [*385 in suit, judgment rendered upon it, and execution issued; that Henderson was discharged under the Insolvent Act; that the recovery of the money due on the said note being considered as desperate, his testator had charged the amount to his principals, James Irwin & Company. The answer denied altogether the signature of Thomas Irwin, guarantying the debt; and alleged sundry other matters to show the absence of equity in the claim of the complainant.

In November, 1835, the court refused to dissolve the injunction, and suggested that an issue should be made up to be tried at the bar of the court sitting as a court of law, to try the question of the genuineness of the signature of Thomas Irwin.

This was done, but the jury were not able to agree, and were discharged.

Numerous depositions were then taken and filed, and the case came on to be heard, when the court decreed that the injunction should be dissolved and the bill dismissed with costs.

The complainant, Jane Dade, prayed an appeal to this court.

Messrs. Neale (in a printed argument) and *Brent* for the appellant.

Mr. Jones for the defendant in error.

Mr. Neale, for the appellant:

This cause, which comes up by appeal from the Circuit Court of Alexandria County, was, upon the final hearing in the court aforesaid, dismissed by a majority of the court, for the following reasons:

1. Because, in the opinion of a majority of the court, the court had not jurisdiction of the case, sitting as a court of chancery.

2. Because, there was no consideration from which the defendant's testator could be made liable, either on account of the *assumpsit* in writing indorsed on exhibit B, or for blending his principal's goods with his own—taking a note therefor, and suing and obtaining a judgment thereon in his own name for the two amounts so blended, as the record proves.

.3 Because, the complainant (now appellant) forbore to press this claim sooner, by way of set-off to the claim of the defendant's testator. For these reasons a majority of the court dismissed the bill at the complainant's cost. Dissentient—His Honor the Chief Judge.

These objections, coming as they do from the very fountain of justice, are justly entitled to high respect and grave consideration. But however high and pure the source from whence they proceed, still it is an open question whether or not they are sustained by the *facts [*386 of the case—the principles of equity jurisdiction, and the legal liabilities of an agent to his

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principal. According to the regular order of pleading, the first inquiry to be instituted is as to the jurisdiction of the court, and upon that point we cite and rely upon the following authorities and accompanying remarks, to wit:

Johns. Digest, 102; 1 Wash. Rep., 145; Barbour & Harrington's Digest, 2, 4, 6, 11, 13, 15, 31, 46; 5 Term Rep., 603; 4 Bing., 459; 1 P. Wms., 325, 326; 2 P. Wms., 128; 4 P. Wms., 611; 5 Peters, 278; 2 Robinson's Practice, 1, 4; Tucker's Commentary, bk. 3, p. 404; 1 Story's Equity, 82, and 442–446, secs. 462, 463, 464. In the case of *Grandin and Leroy* (2 Paige, 509), it is said, "that after a defendant has answered a bill in chancery, and submitted himself to the jurisdiction of the court without objection, it is too late to insist that complainant has a perfect remedy at law; unless the court is wholly incompetent (as a court of chancery) to grant the relief sought by the bill."

Again it is said, "that whenever the remedy at law is doubtful or difficult, a court of chancery has jurisdiction." (*American Insurance Company* v. *Fisk*, 1 Paige, 90; *Teague* v. *Russel*, 2 Stew. Rep., 420.)

In the case of *Ward* v. *Arredondo* (Hopkins, 203), the court say, "the principle is that the jurisdiction may be upheld whenever the parties, or the subject, or such portion of the subject as is within the jurisdiction, are such that an effectual decree can be made and enforced so as to do justice."

Mr. Neale then entered at great length upon the consideration of the other two points. His argument is omitted, because the decision of the court was placed upon other grounds.

Mr. Jones, for the defendant in error:

This case might appear, at the first blush, somewhat extraordinary, as being a bill of injunction and an original bill to stay the regular execution of a decree in equity, and to obtain relief against it four years after it had been obtained by the now defendant (Irwin) against the complainant (Jane Dade), with her full and unqualified consent for the sale of real property to pay a debt which she had collaterally secured by a conveyance of the same property in trust, for the specific purpose of being sold to raise the money for the payment of such debt, if not paid in a given time. It may not, perhaps, seem less extraordinary that, as an original bill it seeks not to set aside the decree for fraud, and that it is not, in any one sense or shape, or in any **387*]** *aspect whatever, a bill of review; that no error either of law or fact on the face of the decree, or in any part of the procedure, nor any new matter discovered since the decree, is at all within the scope or object of the bill; but on the contrary, it is admitted that the debt remains precisely as when the decree was obtained, except a small payment since on account of the interest, and about which there is not, nor ever was, the slightest dispute or difference between the parties; and that the decree stands wholly unexceptionable in itself, and in every part of the procedure, precedent and subsequent. The whole scope and object of the bill is to get the benefit of a pretended set-off, not discovered since the decree, but just as well known to the complainant before the decree, and in fact for many years before the commencement of the suit in which the decree was rendered, as at the present time. The pretended set-off consisted of a stale demand of more than thirty ye standing, wholly unconnected with any tra action involved in that suit. The complain had no original interest or concern in it. T only interest claimed by her in it was from pretended assignment of it by a third per made seventeen years after the demand h accrued, more than nine years before the d cree, and more than thirteen years before was for the very first time brought out and serted in this bill of injunction. The dema itself consisted in a liability pretended to ha been incurred so long ago as 1804, by the no defendant's testator, Thomas Irwin, for m conduct as agent of one James Irwin (fro whom complainant derives her claim as assign of the cause of action), in having unduly i dulged a debtor to whom he sold goods trusted with him by James Irwin to sell commission; and for which misconduct, if sat factorily made out, James Irwin might ha recovered damages in a special action on t case: a cause of action, therefore, purely a strictly legal in its nature. The only misc duct imputed to the agent is that of havi taken a negotiable note, at 60 days, of the m cantile firm to whom he had sold the goo Complainant pretends that seventeen years af this transaction, when the assignment was ma Thomas Irwin indorsed on the assignment conditional acknowledgment of his liability, the debt cannot de recovered of the princi debtor, provided a reasonable time be allow for the prosecution of the suit.

Now, supposing the complete establishm of this set-off in every point of law and fa setting aside all consideration of the extraor nary length of time it had been kept back silence and inaction; *and waiving all [*38 objection to equity jurisdiction of a demand exclusively legal; and in fact *strictissimi ju* in its nature; the appellee might be content rely solely upon the well known principles rules of equity law and practice, which est lish, first, that a final decree enrolled (or wh with us, is equivalent to enrollment in Engla after the term at which the decree was rende has passed over), it cannot be set aside, can any relief whatever be obtained against by any sort of original bill, unless fraud the decree be distinctly and circumstantia charged. Second, that even in the case o bill of review, either demonstrative error matter of law must be shown on the face of decree, or the fresh discovery of new ma since the decree; the materiality of which, the positive inability of the complainant to h come at a previous knowledge of it by us reasonable and active diligence, must all clearly shown by affidavit. Third, that a case for a bill of review has been thus m out, it cannot be filed without the special le of the court; one of the ordinary and stand conditions of which leave is, that the dec shall first be performed. So utterly foreign all received notions of equity law or practic a bill of injunction to stay the execution c decree, and so utterly inadmissible is any of relief by means of one decree in equ against another decree in equity, but for on other of the special causes, and in one or ot of the special modes of procedure aforesaid

Where there is newly discovered evidenc

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must be shown to be material and relevant, and to have been out of the power of the party to have produced before. (Milford on Pleading, 4 ed., pp. 84, 85; 16 Vesey, 354; 2 Ball. & Beatty, 463; Ambler, 295; 5 Russell, 195, where the cases are all examined.)

No bill of review can be filed until the decree is performed.

In this case the ground of the bill is deserted. The court had no right to go back to an original claim in equity; and the claim is too stale and doubtful in its nature to be admitted. (1 Howard, 108.)

[*Mr. Jones* was proceeding in his argument, when the court expressed a desire to hear the counsel on the other side.]

Mr. Brent, in reply and conclusion:

This is not merely a bill for an injunction, but also for a discovery as to the time of the origin of the set-off. The suit against Henderson was prosecuted until 1835, and the complainant did not think she had a right to file an original bill until the suit was decided.

389*] *Mr. Justice* STORY delivered the opinion of the court:

This is an appeal from the Circuit Court of the District of Columbia, sitting in Alexandria.

In the year 1824, the appellant, Jane Dade, became indebted to Thomas Irwin, the testator, and executed two deeds of trust for the security of the debt. At the November Term of the Circuit Court of Alexandria County, 1830, Irwin, the executor, filed his bill to obtain a decree of the sale of the estate so conveyed in trust; and a decree was made without objection for the sale, the appellant admitting the justice of the claim; and the original trustee having become insane, William L. Hodgson was appointed trustee to make the sale. After sundry delays, the trustee advertised the estate for sale on the 28th of November, 1834; and on the day preceding the intended sale the present bill was filed by the appellant for an injunction against the sale. The bill made no objection to the original debt or decree, but simply set up a claim, by way of set-off or discount, of a totally distinct nature, and unconnected with the original debt, as due by the testator to her, and for which she alleged in her bill that she ought to receive a credit, to which in equity and strict justice she was entitled. The claim thus set up had its origin in this manner. In May, 1821, James Irwin gave his note for $826.63 to John Adam or order, for Mrs. Dade, for money borrowed of her, which note was indorsed by Adam, and on the same day James Irwin, as collateral security therefor, assigned to Adam a debt due to him by Alexander Henderson for cordage sold him by Thomas Irwin (the testator) as his agent, and for which the assignment alleged Thomas Irwin was liable, having received Henderson's note without the consent of James Irwin. Upon the back of this assignment there now purports to be the following indorsement: "If the within debt cannot be recovered from Alexander Henderson, I am liable for the same, provided full time be allowed for the prosecution of the suit." The supposed note referred to in the assignment was dated in January, 1804, and was for the payment of $901.83 to the order of Thomas Irwin, and was signed by Alexander Henderson & Co. This note the bill alleged to include the debt due to James Irwin. Judgment was obtained upon this note in 1805. Afterwards Henderson, in 1806, became insolvent, and in 1816 a bill in equity was filed for the satisfaction of the judgment out of supposed effects in the hands of certain garnishees, which suit was not finally disposed of until October, 1835, and was then abated by Henderson's death.

*The answer to the present bill by [*390 Thomas Irwin, the executor, denied the whole equity thereof. It denied that James Irwin ever executed the supposed assignment. But he admitted the origin of the debt due by Henderson & Co., and that the note taken by the testator included it; but that Henderson having become insolvent he was not liable for that amount, and charged it in his accounts against James Irwin & Co. He also denied the supposed indorsement on the assignment to be genuine, but alleged the same to be a sheer fabrication.

The injunction prayed for by the bill was granted, and afterwards the court directed an issue to be tried by a jury, to ascertain whether the testator's signature to the indorsement was genuine or not. That issue was tried by a jury who were unable to agree upon a verdict. The order for an issue was then rescinded, and the cause came on for a final hearing in 1839, when the bill was dismissed with costs. There is a great deal of evidence on both sides as to the genuineness of the signature of the testator, and also as to the appearance of the ink of the indorsement being that of recent writing. It is also remarkable that in the long interval between the time when the deed of trust was given in 1824, and the time when the sale was advertised and the bill filed, no demand was ever suggested by or on behalf of Mrs. Dade for the present supposed debt due her as a set-off or otherwise. On the contrary, although repeated and earnest applications were made for delay of the sale, from the time of the decree in 1830 until the advertisement in 1834, and some correspondence took place on the subject, no allusion whatsoever was made to any such supposed claim or set-off; but an entire silence existed on the subject. It is also somewhat singular, that when the bill upon the trust deed was filed and the decree therein obtained, no suggestion was made by Mrs. Dade in answer thereto of this supposed claim, nor any postponement of the decree of sale asked upon this account.

Now, upon this posture of the case, several objections arise as to the maintenance of the suit. In the first place, the present bill is of an entirely novel character. It is not a bill of review, or in the nature of a bill of review, founded upon any mistake of facts, or the discovery of any new evidence. It admits in the most unambiguous terms that the decree was right. Then, it sets up merely a cross-claim or set-off of a debt arising under wholly independent and unconnected transactions. Now, it is clear that courts of equity do not act upon the subject of set-off in respect to distinct and unconnected *debts, unless some other pe- [*391 culiar equity has intervened, calling for relief; as, for example, in cases where there has been a mutual credit given by each upon the footing of the debt of the other, so that a just presump-

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tion arises that the one is understood by the parties to go in liquidation or set-off of the other.[1] In the next place, the remedy for Mrs. Dade, if any such debt as she has alleged exists, is at law against the executor; and there is no suggestion that the estate of the testator is insolvent, and that his assets cannot be reached at law. So that the bill steers aside of the assertion of any equity upon the foundation of which it can rest for its support.

In the next place, the nature and character of the claim itself, now for the first time made, long after the decease of both the Irwins, and thirteen years at least after its supposed origin. To put the case in the least unfavorable light, it is a matter of grave doubt whether the indorsement of the testator's name on the assignment is genuine or not. That very doubt would be sufficient to justify this court in affirming the decree of the court below, and leaving Mrs. Dade to her remedy at law, if any she have. But connecting this with such a protracted silence for thirteen years, without presenting or making any application for the recognition or allowance of the claim to the testator or his executor, it is impossible not to feel that the merits of the claim at such a distance of time can scarcely be made out in favor of the appellant. It is stale, and clouded with presumptions unfavorable to its original foundation, or present validity. Besides, in cases of this sort, in the examination and weighing of matters of fact, a court of equity performs the like functions as a jury; and we should not incline, as an appellate court, to review the decision to which the court below arrived, unless under circumstances of a peculiar and urgent nature.

The decree of the Circuit Court is therefore affirmed, with costs.

ORDER.

This cause came on to be heard on the transcript of the record from the Circuit Court of the United States for the District of Columbia, holden in and for the County of Alexandria, and was argued by counsel; on consideration whereof, it is now here ordered and decreed by this court, that the decree of the said Circuit Court in this cause be, and the same is hereby affirmed, with costs.

Cited—19 How., 278; 2 Black, 551; 7 Wall., 618; 15 Wall., 228; 3 Story, 346; 2 Wood. & M., 29, 30; 3 McAr., 3.

392*] *WILLIAM J. MINOR ET AL., *Plaintiffs in Error,*
v.
SHUBAL TILLOTSON.

Court cannot revise judgment in writ of error where no points of law were raised—agreement of counsel—evidence considered—statement of facts.

The distinction between writs of error and appeals cannot be overthrown by an agreement of counsel in the court below, that all the evidence in the cause shall be introduced and considered as a statement of facts.

THIS case was brought before the court at the last term, on a motion to dismiss, and is reported in 1 Howard, 287.

1.—See 2 Story Eq. Jurisp., secs. 1435, 1436.

The position of the case is sufficiently set forth in that report. It now came up on a final hearing.

Mr. Walker, for the plaintiffs in error, examined the title of the plaintiffs as set forth in the papers in the cause, and contended for its superiority over that of the defendant.

Mr. Webster, for the defendant, referred to the decision in 1 Howard, and said that it was quite evident that there was no error of law apparent on the face of the record. There is no ruling of evidence, no demurrer, no bill of exceptions, no agreed state of facts, no special verdict. Nor is it like any of those cases in which the court has acted on undisputed evidence, in cases from Louisiana, as if such undisputed evidence were equivalent to an agreed state of facts.

The whole case, law and fact, was submitted to the judge, as a referee or arbitrator. The law was disputed, and the facts were disputed, and whether judgment was rendered on the facts or on the law does not appear. The judgment is general, for the defendant. It is plain that this court cannot revise this judgment, without examining all the evidence, plan, depositions, surveys, &c., just as they would be examined by a jury.

For anything which the record discloses, every point of law may have been decided in the plaintiff's favor.

Mr. Justice McLEAN delivered the opinion of the court:

This case is brought here by a writ of error to the Circuit Court for the Eastern District of Louisiana.

The action was commenced in the Circuit Court, to recover possession of certain tracts of land specified in the petition, and for damages, &c.

The defendant set up a title to the premises and pleaded prescription, under the various laws of Louisiana.

*This cause was before this court at [*393 January Term, 1833, on a writ of error, and was reversed and sent down for further proceedings. In the court below, the death of the plaintiff was suggested, and a supplemental petition was filed, making his heirs and representatives parties to the suit. The pleadings were amended, and a jury being called and sworn, evidence was heard by them, and certain exceptions taken to its admissibility by the defendant. But afterwards, by consent of parties, the jury, before they rendered their verdict, were discharged. The case was then submitted to the court, under an agreement between the counsel, that "the documents filed in the cause, the plans and written depositions, contain all evidence and exhibits on which this cause was tried by the court; the whole was read, subject to all legal exceptions except as to the form of taking the verbal testimony; and all other objection to the testimony, accounts, and plans are to be argued as though the bills of exceptions were drawn out in form, signed and filed. The agreement is made for a statement of the facts in the case."

A large mass of evidence was received from both parties, consisting of concessions and grants under the Spanish government, intermediate conveyances, documents showing pro-

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ceedings in regard to the title under the laws of the United States, and parol testimony, involving a great variety of facts, on a consideration of all of which a judgment was rendered by the Circuit Court for the defendant.

From the record it is impossible for this court to say on what grounds of law or fact the Circuit Court gave judgment. No point as to the admissibility or effect of the evidence was raised on the record by the plaintiffs in error in the Circuit Court. It seems to have been supposed that the above agreement of the counsel, that the evidence in the cause should be considered as a statement of facts, subject to all legal objections, though no objections were stated, was sufficient ground for a writ of error on which a revision of the legal questions in the case might be made in this court.

In this view, the writ of error must be considered as bringing all the facts before this court, as they stood before the Circuit Court. And this court, exercising a revisory jurisdiction, would be required to try the cause on its merits. This is never done on a writ of error, which issues according to the course of the common law. Under the Louisiana system a different practice may prevail. But, we had supposed, that since the decisions of the case of *Parsons* v. *Bedford et al.* (3 Peters, 445), there could be no misapprehension in regard to the 394*] *proceedings of this court on a writ of error. In that case the court say, "it was competent for the original defendant to have raised any points of law growing out of the evidence at the trial, by a proper application to the court; and to have brought any error of the court in its instruction or refusal, by a bill of exceptions, before this court for revision. Nothing of this kind was done or proposed. No bill of exceptions was tendered to the court, and no points of law are brought under review." And the court go on to consider the effect of the Act of 1824, in regard to the Louisiana practice, and hold that that law does not change the exercise of the appellate power of this court.

The case referred to had been tried by a jury, but in regard to the revisory power of this court, on a writ of error, there is no material difference between that case and the one under consideration. In both cases the facts were upon the record, and this court were called upon to determine the questions of law arising upon the facts.

In the case of *Parsons* the court do say, "that if the evidence were before them it would not be competent for the court to reverse the judgment for any error in the verdict of the jury." And they say, the refusal of the court, to direct the evidence to be entered on the record as required under the Louisiana practice, was not matter of error.

Whatever opinion, therefore, may have been entertained in regard to the effect of the Act of 1824, on the practice of the Circuit Court of the United States, in Louisiana, before the above decision; after it, there would seem to be no ground for doubt. The practice of the Circuit Court in Louisiana, since the above case was decided, has conformed to the rule laid down in that case. But in the present cause, there is no statement of agreed facts. If the case be revised on a writ of error, the evidence on both sides must be considered and weighed by the court, as a jury would consider and weigh it; and after adjusting the balance, the principles of law, not as they were presented in the Circuit Court, but as the may arise on the evidence, must be determined. This is not the province of a court of error, but a court of chancery on an appeal from the decree of an inferior court. On such a review, not only the competency of the evidence must be decided, but also the credibility of the witnesses.

The case under consideration was a proceeding at law, and, as the legal points have not raised by a bill of exceptions, in the Circuit Court, it is not a case for revision in this court.

*A judgment of *affirmance is therefore* [*395 *entered, at the costs of the plaintiff in error.*

ORDER.

This cause came on to be heard on the transcript of the record from the Circuit Court of the United States for the Eastern District of Louisiana, and was argued by counsel; on consideration whereof, it is now here ordered and adjudged by this court, that the judgment of the said Circuit Court in this cause be, and the same is hereby affirmed, with costs.

S. C., 1 How., 237.
Cited—5 How., 290; 8 How., 486; 20 How., 439; 1 Wall., 604; 12 Wall., 442; 20 Wall., 622; 7 Blatchf., 57.

WILLIAM TAYLOR ET AL., *Appellants*,
v.
GEORGE M. SAVAGE, Executor of SAMUEL SAVAGE, Deceased, *Defendant.*

The case of Taylor et al. v. Savage (1 Howard, 282), examined and confirmed.

THIS case came before the court at the last term, and is reported in 1 Howard, 282.

It was brought up again on a motion to dismiss the appeal.

Mr. Morehead, who made the motion, referred to the decision at the last term, and said that notwithstanding that decision, the case was still here. He considered the opinion of the court as covering the whole ground.

Mr. Crittenden, contra.

Both parties appealed from the decision of the court below; but Savage did not perfect his appeal. There is a difficulty in making proper parties, if the case is sent back. The law of Alabama says that administration of the estate shall be attached to the office of sheriff, but his official term will soon expire, and we shall have to litigate with temporary administrators.

Mr. Berrien, on the same side, thought there was still a case before the court upon which it could act. It is true that the decree below was rendered on the same day that the administrator was removed; but notwithstanding this, it was well rendered. If a party dies, the court will direct a judgment to be entered as on the first day of the term. (2 Peters, 481.)

*There is no difference between a [*396 party dying and one in a representative character being removed. This must have been the view of the court; the validity of the decree must have been recognized when they said that

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the voluntary appearance of Benham would cure all defects. The decree could not have been considered null. If the decree was well rendered, the appeal was well taken, because it was taken at the same term whilst the proceedings where within the power of the court. The appeal was prayed and allowed in open court. This court can now proceed either—

1. By Benham's voluntary appearance, or
2. By issuing process to bring him in.

1. This was decided at the last term.

2. Benham's will cannot give the court jurisdiction. The 28th rule provides for the death of a party and summoning another to take his place. The same power that adopted this rule can modify it and say that the successor to an executor can be summoned. The power to establish a general rule involves the power to make a special one to suit a particular case; general rules are made only to prevent specific orders.

Mr. Sergeant, in reply and conclusion, argued at some length that the decision at the last term covered the case is it now stood. The party on the other side must go into the court below and have the record put into a correct form.

Mr. Justice STORY delivered the opinion of the court:

The court have had this case under consideration and are of opinion that it is completely governed by the decision made in the same case at the last term of this court, which is reported in 1 Howard's Rep., 282. An attempt has been made at the bar to distinguish the former decision from that now sought, by suggesting that the former proceeded mainly upon the ground that the appeal was irregularly made, and did not directly involve the question now argued. We think otherwise; and that the ground of that decision completely covers all that has been urged upon the present occasion; not as mere incidental suggestions, but as the very hinge on which the case turned. Notwithstanding the opinion of this court then expressed, that the case might be remanded to the District Court, for the purpose of making the proper parties, the appellants have neglected, during a whole year, to take a single **397*** step for the remanding of the *case, or instituting any proceedings in the court below; which laches certainly ought not to produce any result in their favor.

The appeal is therefore dismissed, and the cause is remanded to the District Court of the Northern District of Alabama, with leave to the appellants to make the proper parties, and to the new administrator, Benham, to become a party to the suit; and that such other proceedings be had as to law and justice shall appertain.

ORDER.

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Northern District of Alabama, and was argued by counsel; on consideration whereof, it is ordered and decreed by this court, that this appeal be, and the same is hereby dismissed, and that this cause be, and the same is hereby remanded to the said District Court, with leave to the appellants to make the proper parties, and to the new administrator, Benham, to become a party to the suit; and that such other proceedings be had therein as to law and justice shall appertain.

Aff'g S. C., 1 How., 282.
Cited—5 How., 261.

JAMES RHODES, *Plaintiff in Error*,

v.

MOSES BELL.

District of Columbia—purchase of slave in one county and sale in another entitles him to freedom.

The District of Columbia being still governed by the laws of Virginia and Maryland, which were in force anterior to the cession, it is not lawful for an inhabitant of Washington County to purchase a slave in Alexandria County, and bring him into Washington County for sale. If he does, the slave will become entitled to his freedom.

THIS case was brought up by writ of error from the Circuit Court of the United States for the District of Columbia, in and for the County of Washington.

It was a petition for freedom filed by Bell. The facts are set forth in the special verdict, which is as follows:

"We of the jury find that previous to the year 1837, the petitioner was the slave of a certain Lawrence Hoff, a resident of Alexandria County, in the District of Columbia; that in the year 1837 the said Hoff, then owning and possessing the petitioner as his slave, in the County of Alexandria aforesaid, whereof he continued to be a resident, did sell and deliver the petitioner to one Little, then *being [***398** a resident of Washington County, in the district aforesaid, and that the delivery of the petitioner was made to the said Little in Alexandria County aforesaid, and the petitioner was immediately removed by said Little to Washington County aforesaid, to reside, and also for sale, whereof said Little was resident; that the said Little shortly afterwards, to wit: about one year or a little more, sold the petitioner to one Keeting, in Washington County, who sold and delivered him to the defendant; that since said sale to said Little, the petitioner has always been kept and held in slavery in the County of Washington aforesaid; that at the time of the sale and delivery of the petitioner as aforesaid by Hoff to Little, the petitioner was more than forty-five years of age, to wit: he was fifty-four or fifty-five years old, and is now fifty nine or sixty years old. And if upon the facts aforesaid the law is for the petitioner, then we find for the petitioner on the issue joined; if upon the facts aforesaid the law is for the defendant then we find for the defendant on the issue joined." Whereupon all and singular the premises being by the court here seen, heard and fully understood, and mature deliberation being thereupon had, the court is of opinion from the statement of facts aforesaid, that the law is for the petitioner.

The writ of error was sued out for the purpose of reviewing this opinion.

Messrs. Brent and *Brent* for the plaintiff in error.

Messrs. Bradley and *Hoban* for the defendan

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The counsel for the plaintiff in error made the following points:

1st. That the removal of said Moses Bell from the County of Alexandria to Washington County, both in the District of Columbia, and under the same jurisdiction, as stated in the "special verdict," did not entitle him to freedom under any law in force in said district.

2d. That the said removal was not an importation of said Moses Bell, according to the true intent and meaning of the laws in force in the County of Washington aforesaid.

3d. That such removal, even if it had been illegal previous to the year 1812, was legalized by Act of Congress on the 24th of June, 1812; and,

4th. That said Moses Bell, being over forty-five years of age at the time of such removal, was incapable (by the laws in force in said County of Washington) of receiving his freedom by or through any act or acts of his master or owner.

399*] *Mr. Brent, Sen.*, referred to the law of Maryland (2 Maxcy's Laws, ch. 67, p. 361), which prohibited the importation of a slave into the State, but argued that it did not apply to this case, because Alexandria and Washington were only parts of the same sovereignty. He referred also to the Act of Congress of June, 1812 (Davis's Laws, 265), which permits the people of the district to remove their slaves from one county to another; and to 8 Peters (44, 46, 48, 49, 50), where the question came up incidentally.

In 14 Peters, 142, 145, the court decided that the counties of the district do not stand to each other in the attitude of separate States.

Mr. Hoban, for appellee:

In matters of a local character, unless imperative necessity require a contrary course, this court will always adopt and follow the decisions of the local tribunals. Since the Act of 1812, in every instance in which the question involved in this case has arisen, the Circuit Court of the District of Columbia has invariably decided that, in order to import a slave from one county into the other in this district, the party importing must reside in the county, and there own the slave, from which the importation is made. (See Maxcy's Cases, *Dunbar* v. *Bell*, October, 1821; *Foster* v. *Simmons*, Nepo Williams, November, 1835.)

The case in 14 Peters was upon the statute of limitations; it is now cited to reverse our opinions as to importation of slaves between the two counties. That case asserts no principle with which we are not familiar; it affirms the judgment of the Circuit Court. It merely asserts that as to the limitation of suits, Alexandria and Washington counties, as to each other, are not beyond seas. As to all local law, the counties have always been entirely distinct—the Act of February 27, 1801 (Davis, 123), declares that the laws of Maryland, as then existing, shall be the laws of that part of the district taken from Maryland, and the laws of Virginia of that part taken from Virginia.

Even from Maryland to import into that part of the district formerly belonging to Maryland, an Act of Congress was necessary; namely, of May, 1803. (Davis, 135.)

If it be true that by virtue of the unity of sovereignty, the right of free importation, from county to county, exists, then all the adjudication from the cession down is wrong, and the Act of 1812 was unnecessary.

If the right of importation, as claimed on the other side, exists, it *operates a repeal [*400 of the settled policy of Virginia and Maryland, prohibiting the domestic slave trade between them.

Maryland and Virginia both prohibit the introduction of slaves into their territory, except by persons coming to reside. The part of the district formerly belonging to Maryland is still considered as part of it, as to the introduction of slaves from that State, and the part of the district formerly belonging to Virginia is still considered as a part of that State as to the introduction of slaves from that State, by the Act of May, 1803. If by the Act of 1812, a person residing in either county may import slaves into the other, by the Act of 1803 he may immediately remove them into the State adjoining, and thus all the policy and the letter of the laws of Virginia and Maryland prohibiting importation are immediately repealed.

Before the Act of 1812, a resident of one county could only introduce a slave into the other, bringing the slave with him when he came to reside, and then could only sell him in three years. (See the Act of 1796 of Maryland, Maxcy's Laws, p. 361, ch. 67.)

By the Act of 1812, a resident of either county can introduce his slave into the other without coming to reside; provided he reside in the county from which the importation is intended—and sell him when he pleases.

As to the prohibition of freedom on account of age, it applies only to cases of voluntary emancipation—where freedom is claimed under the act of the master—and not in a case of forfeiture (like this), where the claim is adverse to that of the master.

Mr. Bradley, on the same side, commented on the Act of 1812, and said that the permission therein granted was only to remove a slave from one county to another, under certain restrictions; but it did not authorize fresh purchases to be made, and importations for the purpose of sale. He referred, also, to the difference which still existed between the two counties with regard to the issue of a female slave, as showing that the old law still prevailed in each county.

Mr. Brent, in reply and conclusion, said that the construction of the law, as stated by *Mr. Hoban*, had not been acquiesced in by the bar or the people of the district. Many thought the decisions wrong in the cases referred to by him; and, at all events, the opinion of the court below was not the law here. When a slave is brought from Alexandria to Washington, he is not removed from one sovereignty *to [*401 another; and so the court decided in the case of *The Bank of Potomac*.

Before the Act of 1803, negroes could be carried from Alexandria to Washington for the purpose of being hired out. The Act of Maryland of 1796 allowed it.

Mr. Justice McLEAN delivered the opinion of the court:

A writ of error brings this case before us from the Circuit Court of the District of Columbia.

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Moses Bell, the defendant in error, filed a petition in the Circuit Court representing that he was held in slavery by one James Rhodes, of the said county, and prayed that his rights might be inquired into by the court. The defendant pleaded that the said Moses was not free, &c. The jury returned a special verdict, and found "that previous to the year 1837, the petitioner was the slave of a certain Lawrence Hoff, a resident of Alexandria County, in the District of Columbia; that in the year 1837, the said Hoff, then owning and possessing the petitioner as his slave, in the County of Alexandria aforesaid, whereof he continued to be a resident, did sell and deliver the petitioner to one Little, then being a resident of Washington County, in the district aforesaid, and that the delivery of the petitioner was made to the said Little in Alexandria County aforesaid, and the petitioner was immediately removed by said Little to Washington County aforesaid, to reside, and also for sale, whereof said Little was resident; that the said Little shortly afterwards, to wit, about one year or a little more, sold the petitioner to one Keeting, in Washington County, who sold and delivered him to the defendant; that since said sale to said Little, the petitioner has always been kept and held in slavery in the County of Washington aforesaid; that at the time of the sale and delivery of the petitioner as aforesaid by Hoff to Little, the petitioner was more than forty-five years of age, to wit, fifty-four or five years."

Upon the above facts the Circuit Court held that the petitioner was entitled to his liberty. To revise this judgment, the writ of error has been prosecuted.

In the second section of the Act of the 19th of December, 1791, the State of Maryland declared, "that all that part of the territory called Columbia, which lies within the limits of this State, shall be, and the same is hereby acknowledged to be forever ceded and relinquished to the Congress and government of the United States, in full and absolute right and exclusive jurisdiction, as well of soil as of **402***] *persons residing, or to reside thereon pursuant to the tenor and effect of the eighth section of the first article of the Constitution of government of the United States—provided that the jurisdiction of the laws of this State, over the persons and property of individuals residing within the limits of the cession aforesaid, shall not cease or determine until Congress shall, by law, provide for the government thereof, under their jurisdiction, in manner provided by the article in the Constitution before recited."

Previously to the above cession, in 1789, Virginia ceded to the United States "ten miles square, or any lesser quantity, for the purposes aforesaid, as Congress might direct," with the reservation "that the jurisdiction of the laws of Virginia over the persons and property of individuals residing within the limits of the cession aforesaid, shall not cease or determine until Congress having accepted the said cession, shall, by law, provide for the government thereof, under their jurisdiction, in manner provided by the article of the Constitution before recited." This cession was accepted.

By the first section of the Act of the 17th of February, 1801, Congress provided, "that the laws of the State of Virginia, as they now exist, shall be and continue in force in that part of the District of Columbia which was ceded by the said State to the United States, and by them accepted," &c., "and that the laws of the State of Maryland as they now exist, shall be and continue in force in that part of the said district which was ceded by it," &c. The part of the district ceded by Virginia constitutes Alexandria County, and the part ceded by Maryland constitutes Washington County.

As the laws of Maryland and Virginia have been adopted by the above act of Congress, within the counties respectively ceded, it will be necessary to refer to those laws, so far as they have a bearing in the present case.

By the Maryland statute of November, 1796 (2 Maxcy's Laws, 351), it is declared, "that it shall not be lawful from and after the passing of this act, to import or bring into this State, by land or water, any negro, mulatto, or other slave, for sale, or to reside within this State; and any person brought into this State as a slave contrary to this act, if a slave before, shall thereupon immediately cease to be the property of the person or persons so importing or bringing such slave within this State and shall be free."

The exceptions to the above provisions are:

1. Any citizen of the United States who removes to Maryland, *with a *bona fide* [***403** intention of becoming a citizen, may bring his slaves with him, or bring them within one year afterwards, provided such slaves have been in the United States three years preceding the time of their removal.

2. By the Act of 1797, the above privilege is extended to the executors of such persons, dying within one year after removal, &c.

3. Any citizen of Maryland who being seized and possessed of an estate of inheritance in land in any one of the adjoining States, who employed slaves in the cultivation of said land, is at liberty to bring such slaves into the State for his own benefit, but not for sale, provided such slaves had been in one of the adjoining States before the 21st of April, 1783.

4. Slaves acquired by descent, by a citizen of Maryland, may be brought into the State to be employed by the owner, but not for sale.

5. Travelers or sojourners may bring their slaves into the State.

By a law of Virginia passed the 17th of December, 1792, it is declared, "that no person shall henceforth be slaves within this Commonwealth, except such as were so on the 17th of October, 1785, and the descendants of the females of them." And the second section declares that all "slaves which shall be brought into this Commonwealth and kept therein one whole year together, or so long at different times as shall amount to one year, shall be free." The third section imposes a penalty on any person who shall import slaves into the Commonwealth, and also upon anyone who shall sell or purchase such slaves. Exception is made of a person who, with a *bona fide* intention of becoming a citizen of Virginia, removes into the State, and exceptions extend to some other specified cases.

By the seventh section of the Act of Congress of the 3d of May, 1802, it is provided,

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that no part of the laws of Virginia or Maryland, declared by an Act of Congress, passed the 27th of February, 1801, concerning the District of Columbia, to be in force within the said district, shall ever be construed so as to prohibit the owners of slaves to hire them within, or remove them to the said district, in the same way as was practiced prior to the passage of the above-recited act."

Again, by the ninth section of the Act of the 24th of June, 1812, Congress provides, "that it shall be lawful for any inhabitants in either of the said counties (of the district) owning and possessing any slave or slaves therein, to remove the same from one county into the other, and to exercise freely and fully all the rights of property in and over the said slave or slaves [*404 therein, which would be exercised *over him, her, or them, in the county from whence the removal was made, anything in any legislative act in force at this time in either of the said counties to the contrary notwithstanding."

From the foregoing legislative action it will be seen that the counties of Washington and Alexandria are governed by the laws of the States to which the territories composing them were respectively attached before the cession. This is especially true in regard to the importation and sale of slaves. Neither the Act of Congress of 1801, adopting the laws of the respective States, nor the Act of 1802 above cited, made any modification of the Virginia or Maryland law in regard to slaves. It was, undoubtedly, the policy of Congress, until the passage of the Act of 1812, to preserve the same relation between the counties of the district, on this subject, that existed between the two States.

A slave imported from Virginia to Maryland, not within one of the exceptions named, was free by the Maryland law. And it is not pretended that Bell can be brought within any one of the exceptions. The jury found that Little purchased Bell in Alexandria County, and brought him into Washington to reside and for sale, the purchaser being a resident of Washington County. Now, independently of the Act of 1812, no one can doubt that this act of the purchaser entitled the petitioner to his freedom. Indeed, he is entitled to it, under the express provision of the Maryland law.

The Act of 1812 was designed to enable the owner of slaves in either of the two counties, within the district, to hire or employ them in the other. And this is the full purport of its provision on this subject. It clearly does not authorize a citizen of Washington to go to the County of Alexandria, purchase a slave and bring him to Washington County for any purpose, much less for the purpose of sale, as found by the jury in this case. If this could be done, it would subvert the whole policy of the Maryland law, which was to prevent, except in specified cases, the importation of slaves into the State. And Congress, by adopting the Maryland law, sanctioned its policy.

It is true that the two counties of this district are under the same political organization, and, in a certain sense, constitute one sovereignty. But this can have no effect upon the question under consideration. It depends exclusively upon the laws referred to. No views of policy or of supposed convenience can enter into the decision.

*The case of *The Bank of Alexandria* [*405 v. *Dyer* (14 Peters. 141) has been relied on by the plaintiff in error, as showing that the counties of Washington and Alexandria, being united under the same government, cannot be considered as foreign to each other.

That was a case where the statute of limitation was pleaded to a suit in Washington County. The plaintiffs replied that they were citizens of Alexandria, &c., to which the defendant demurred. And on this state of the pleading the question was, whether the plaintiffs were beyond seas, within the meaning of the Maryland statute. The court held that they were not; "that the counties of Washington and Alexandria resemble different counties in the same State; and do not stand towards one another in the relations of distinct and separate governments."

The words "beyond seas," in the Maryland statute, were borrowed from the statute of James I. (ch. 21), and have generally been construed in this country not literally, but as meaning, "without the jurisdiction of the State." Now, in reference to this construction, the decision of the court was correct, but it can have no direct bearing upon the question under consideration. That the District of Columbia must be considered as exercising the same general jurisdiction in both counties is undoubted; but the rights of its citizens are not governed by the same laws. The counties of Washington and Alexandria, excepting the modification made by the Act of 1812, are as foreign to each other, as regards the importation of slaves, as are the States of Virginia and Maryland. Such we understand to be the settled doctrine of the Circuit Court of this district. And this is no unsatisfactory evidence of what the law is. An acquiesence of many years in a course of decision involving private rights, should not be changed except upon the clearest ground of error.

There is a provision in the Maryland law prohibiting the owner of a slave from manumitting him, if he be over forty-five years of age; and this is urged by counsel as a reason why the petitioner in this case should not receive his liberty. He is now near sixty years of age; but how his rights are to be affected by a law which restrains the master is not perceived. He claims to be wrongfully held in servitude, and the court think his claim is founded in law. Now, shall he be kept in servitude because his master, if he were disposed, could not manumit him? The law makes him free without the concurrence of his master. Slaves brought into the State of Maryland, in violation of the law, are declared to be free without reference to *their age. And the court [*406 cannot affix a condition to this right of freedom which the law does not authorize.

Upon the whole, we are unanimously of opinion, that the judgment of the Circuit Court should be affirmed with costs.

ORDER.

This cause came on to be heard on the transcript of the record from the Circuit Court of the United States for the District of Columbia, holden in and for the County of Washington, and was argued by counsel; on consideration

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whereof, it is now here ordered and adjudged by this court, that the judgment of the said Circuit Court in this cause be, and the same is hereby affirmed, with costs.

Cited—19 How., 562.

JOHN RANDEL, JUN., *Appellant*,

v.

WILLIAM LINN BROWN.

WILLIAM LINN BROWN, *Appellant*.

v.

JOHN RANDEL, JUN.

Deposit bill in equity to recover—answer claiming as security or payment—no lien can arise from breach of trust.

John Randel, Jun., placed in the hands of Brown two certificates of stock, which Brown afterwards refused to restore.

Randel filed a bill in chancery against Brown, alleging that the deposit had been made for an especial purpose, which had failed. The answer denied this, and claimed a lien on the certificates, or that they were given as a payment.

Held, from the bill, answer, and evidence, that they were not delivered to Brown, either as a payment of a debt to himself, or to secure him from responsibility to another.

Held, also, that Brown had no legal or equitable interest in them at the time of the rendition of the decree.

The rights of the parties as they stand when the decree is rendered, are to govern, and not as they stood at any preceding time.

The retention of property, after the extinguishment of a lien, becomes a fraudulent possession.

"A lien cannot arise, where, from the nature of the contract between the parties, it would be inconsistent with the express terms or the clear intent of the contract."

THESE two cases were argued together, being cross appeals from the Circuit Court of the United States for the Eastern District of Pennsylvania, sitting as a court of equity.

The facts admitted or proved were few.

Prior to, and during the year 1831, Randel **407*]** was engaged in a remarkably *troublesome litigation with the Cheasapeake & Delaware Canal Company. In that year Brown was a student of law in the office of John Sergeant, Esq., of Philadelphia, who was one of Randel's counsel. Through his visits to the office, Randel became acquainted with Brown, who was then twenty-five years of age.

In the latter part of 1831, Randel removed to the State of New York, and engaged the services of John M. Clayton, Esq., of Delaware, who became the principal counsel in the cause.

During the years 1832 and 1833, the suit was prosecuted in Delaware against the canal company, Brown absenting himself from the office of Mr. Sergeant, at first partially, and then almost wholly. The troublesome nature of the controversy may be inferred from the facts, that the counsel for the canal company filed sixty-two pleas, to each of which there was a replication or answer. The whole of these were afterwards withdrawn; the record broken up; new counts added to the declaration; twenty-nine new pleas and demurrers filed, to each of which there was a replication or a rejoinder in demurrer, as the case might require; all of which were drawn out at full length. In the preparation of these papers Brown rendered such aid as he was able to do. The demurrers were argued at May Term and November Term, 1833, and overruled. On the 9th of December, 1833, the cause came on to be tried, and on the 25th of January, 1834, the jury found a verdict in favor of Randel for $226,885.

On the 18th of September, 1834, the sum of $2,000, with the interest due, and to become due thereon, was entered upon the record, as being assigned for the use of Brown.

On the 22d of September, 1834, Brown caused attachments to be issued against the captains of vessels passing through the canal as garnishees of the tolls.

On the 26th of September, 1834, Brown accepted an order drawn by Randel in favor of William M. Camac for $2,000, payable out of the first moneys he might obtain from said company on said account, or from tolls attached. If more than one year should elapse before the whole of the $2,000 was obtained, then he was to pay to Camac an interest of 6 per cent. on whatever balance might remain unpaid after the expiration of one year.

During the years 1834, 1835, and 1836, the attachments became the subject of much litigation, but were ultimately confirmed.

In March, 1836, an arrangement was made between Randel and the canal company, by which the latter issued certificates of stock, *the interest upon which and principal [***408** were to be paid in preference to all other debts, the tolls being pledged for that purpose. This arrangement, however, was not consummated until April, nor were the certificates issued until July. They were then issued in manuscript for $5,000 each. In October they were issued in a printed form.

On the 18th of April, 1836, Randel gave Brown his promissory note at ninety days for $300, which was not paid.

On the 22d of October, 1836, Randel gave Brown a power of attorney, authorizing him to sell, assign, and transfer unto himself or to any other person or persons, $10,000 of the funded debt of the Cheasapeake and Delaware Canal Company, entitled to priority of payment and transferable according to certificates thereof, numbered 84 and 85, each for $5,000.

On the same day Brown re-assigned to Randel the $2,000 worth of the judgment which had been assigned to Brown on the 18th of September, 1834.

Under the power of attorney, Brown transferred $10,000 to himself, and took out new certificates in his own name.

On the 29th of October, 1836, Randel filed his bill in the Circuit Court for the Eastern District of Pennsylvania, in which he alleged that he was desirous of negotiating a loan from one of the banks in the city of Philadelphia, and hoped to do so by depositing as collateral security such of the certificates of debt, issued by the canal company, as might be sufficient to protect the lender from loss, giving at the same time his promissory note in the customary form; that he stated this desire to Brown, who replied that he had transacted business with the Schuylkill Bank, of which his cousin, Frederich Brown,

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was a director, and that he would do what he could for him; that Brown soon afterwards informed him that he feared he could not succeed; that the complainant then informed Brown that he would give $500 for a loan for a twelve-month; that the complainant and Brown agreed that, as a premium was offered, it would be better that the name of the complainant should not appear in the transaction; that Brown then said he would negotiate it in his own name upon the hypothecation of the certificates, to which the complainant agreed; that the complainant afterwards understood from Brown that he had drawn a note for $10,000, payable in twelve months, and placed at the foot of it a memorandum, showing that it was to be secured by certificates of the debt of the Chesapeake and Delaware Canal Com-[*409 pany; that the complainant then observed that it would be well to add that a power of attorney would be given to sell or transfer the certificates which would enable the bank, at once, to draw the interest to meet the note.

The bill further stated that Brown came to the house of the complainant in Wilmington on the 22d of October, and stated that he had prepared a new note, according to the form above stated, which had been presented to the bank and thrown out; but that it would be presented again, and it would be proper for him to have the certificates and a power of attorney authorizing a transfer, in order to give it its best chance: that the complainant assented and gave Brown two certificates of the character above described, of $5,000 each and the power of attorney; that the complainant handed to Brown a blank form of a power of attorney similar to the one which had been filled, requesting him to fill it up as a copy, and write upon it a receipt for the power and certificates, stating in such receipt an engagement to return the certificates on the punctual payment of the note and interest, and also an engagement to account to the complainant for the dividends which he might have received whilst the certificates were in his possession; that Brown promised to make out a fair copy of such receipt and give it to the complainant, which, however, he wholly omitted to do.

The bill further stated that at the next interview between them, Brown said that the Bank would not lend the money, and upon the complainants requesting that the certificates might be restored to him. Brown refused, and said, "I mean to hold the certificates and power of attorney until you settle with me; I have now got you in my power;" that the complainant denied owing him anything, but that he had always intended to make him (Brown) a handsome present.

The bill further stated that the complainant went immediately to the office of the canal company for the purpose of stopping the transfer, but found that Brown had effected it on Monday, the 24th of October (the power having been given to him on Saturday, the 22d), and had, on Tuesday morning, received fresh certificates in his own name.

The bill then charged that these proceedings of Brown were fraudulent proceedings, and a direct breach of trust; that the deposit of the certificates was made in the hands of Brown merely as a trustee, in the full trust and reliance that no use whatever would be made of it but for the purpose of procuring a loan from the Schuylkill Bank. *It then called upon [*410 Brown to answer whether he did not receive the certificates and power of attorney in trust and confidence, in the manner and under the circumstances aforesaid, and to answer the several charges in the bill, concluding with a prayer that Brown might be ordered to restore the certificates, and in the meantime an injunction might issue.

In March, 1837, Brown filed his answer, in which he set forth that as early as the spring of 1831, at the instance and request of the complainant, he engaged in the service of the said complainant, and particularly in the suit with the canal company; that he had various duties to perform, and assisted in the preparation of papers of great extent and importance; that he attended diligently to these services; that his whole time from 1831 to 1836 was entirely at the command of the complainant; that soon after the engagement the complainant informed him that he would pay the respondent a reasonable compensation for the time actually bestowed in his service in any event; that he would bear his traveling and other expenses; and that in the event of success, he, the complainant, would pay to the respondent two and a half per cent. on the sum received in the said suit with the canal company.

The answer further set forth that the assignment of $2,000 of the judgment was made to the respondment in payment, up to that period, of the time expended by the respondent in the service of the complainant.

The answer further set forth that the complainant desired him to accept an order in favor of Camac for $2,000, promising to place funds in the hands of the respondent to pay and take up the said order, which order the respondent accepted.

The answer further stated that in April, 1836, the complainant gave to the respondent his promissory note for $300 as a payment for the time expended since the assignment of the judgment, which note was never paid by the complainant.

The answer further set forth that on the 20th of October, 1836, after a conversation between the parties respecting a settlement between themselves, the complainant took from his pocket two certificates of the funded debt, each for $5,000, and handed them to the respondent, and upon the respondent asking what they were for, the complainant replied, "they are to pay you and Mr. Camac," adding that he wished the respondent to go to New Castle and re-assign the judgment for $2,000. In consequence of this, the respondent did go to New Castle and re-assign the judgment, on which same day the *complainant executed to the respond-[*411 ent the power of attorney spoken of in the bill.

The answer then averred that the transfer of stock had been made by the respondent to himself, and that the certificates had been given to him, not in trust, but absolutely as a payment to himself for a debt due and ascertained from the said complainant, and to place him in funds for the payment of the order in favor of Camac. An account was also alleged against the complainant, the particulars of which were stated.

The answer admitted that the respondent had

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applied to his cousin, Frederick Brown, to procure a loan of money for the complainant, amounting to $10,000; that he drew his note for that sum, stating at the foot of it that the same amount of the funded debt of the canal company would be offered as collateral security, but denied that Frederick Brown was to receive $500, or that the note was offered at the Schuylkill Bank, or any other bank. It denied also that the matter of the loan had any connection with the two certificates handed to the respondent by the complainant. On the contrary, it averred that the loan was to be secured by other certificates.

The answer further averred that no allusion was made, directly or indirectly, by the complainant, to the certificates or power of attorney, until a conversation in which the respondent declined to act as agent for the complainant in the purchase of a piece of ground, unless the complainant would pay all his debts; and that the complainant then, for the first time, with great asperity, asked why the respondent had not given him a receipt for the certificates. The conversation proceeded with much warmth, and terminated with a demand from the complainant for a restoration of the certificates and a refusal to surrender them on the part of the respondent. The answer then replied particularly to the interrogatories of the complainant, and concluded by saying that the certificates were surrendered to the court upon the presentation of the complainant's bill.

Under commissions to take testimony, a vast mass of evidence was collected, consisting chiefly of the declarations of the parties respectively as to the compensation which Brown was to receive for his services, and the value of those services.

In May, 1839, the case was referred to John M. Scott, Thomas I. Wharton, and Peter McCall, Esquires, who were authorized to act as masters therein, with power to take depositions, &c., and directed to report the evidence to the court, together with a statement by the said [*412] *masters, or a majority of them, of such facts as in their opinion were established by the evidence, together with their opinion touching any matters on questions which they may deem material for consideration; and especially, first, to report the terms, consideration, and conditions of the transfer of the two certificates of debt referred to in the bill and answer, in the consideration of which, the answer of the defendant, so far as it is responsive to the averments of the bill or interrogatories, or a denial of the former, is to be taken as evidence of the cause, according to the rules of equity. Second, to report what sums of money have been paid by the plaintiff to defendant, for or on account of disbursements made by defendant—time, labor expended, services rendered, for or to the plaintiff, for his use or at his request; whether any sum is yet due to defendant therefor, and to what amount.

Two of the masters united in a report; the third filed a separate one.

The two masters in their report recapitulated the principle part of the evidence which led them to their conclusion, and found:

1. That the delivery of the certificates by the complainant to the respondent was not absolute, but upon a trust.

2. That the trust was to raise money.

3. That of the money so to be raised, part was to be paid to Mr. Camac; and that, as to this part, the respondent had a direct interest in the execution of the trust, in consequence of his acceptance of the draft in favor of Mr. Camac, referred to in the answer, and of his re-transfer of the interest in the judgment upon which the draft was drawn.

4. That another portion of the money so to be raised was to be paid to Mr. C. Ingersoll.

5. That no express appropriation of the balance, or any part thereof, was made at the time by the complainant in favor of the respondent.

6. But that an intention had been declared previously, by the complainant, to pay or present to the respondent, through the medium of such certificates, a sum of money, the amount of which was not stated or specified, as a compensation or remuneration for his services during the pendency of the suit with the Chesapeake and Delaware Canal Company; but we do not find that any express reference to such declared intention was made at the time of the transaction.

7. That, in point of fact, no money was raised upon the certificates.

*8. That, on Monday, the twenty- [*413 fourth of October, 1836, the certificates were transferred by the respondent (under the power of attorney) to himself, and so remain; and,

9. That, since the filing of the bill in this case, the complainant has parted with all the remaining certificates of debt due to him by the said Chesapeake and Delaware Canal Company.

The two masters further reported that the weight of testimony was against the allegation that the transfer of the $2,000 was in payment for time expended.

They further reported that such a promise was made by the complainant, as the respondent has set forth; but that nothing was due to the respondent for his time expended.

They further reported that for labor and services rendered by the respondent to the complaintant, for his use and at his request, there was due a sum equal to two and one half per cent. on the amount of the judgment recovered against the canal company, viz., the sum of $5,659.64. And that the debt due to Mr. Camac had been paid by Randel since the cause commenced.

On the subject of payments, the two masters reported that there was a balance of $10, which was to be applied to Mr. Randel's credit on the general account.

The third master concurred with the other two as to the contract for two and one half per cent., and that the transfer of the certificates was in trust; but was of opinion that Brown's own claim was to be paid out of the proceeds, and that the $2,000 contract was not disproved by evidence sufficiently strong to deprive the answer of the weight given to it by the rules of equity.

Numerous exceptions to this report were filed by both the complainant and respondent; on the part of the complainant it was objected that the report was erroneous, because,

1. The part of the answer which stated the contract for two and one half per cent. was not responsive to the bill.

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2. The respondent furnished no account of disbursements made or services rendered.

3. The payments alleged to have been made were not proved.

4. The sum of $80 was a payment and not a loan.

5. That nothing was due to the respondent from the complainant.

On the part of the respondent it was objected,

1. That the sums charged to the respondent in the account were not sustained by the evidence.

414*] *2. That the masters had not allowed the respondent sufficient credits.

In October, 1841, the cause came on to be heard upon bill, answer, replication, master's report, exhibits, depositions, and exceptions to report, and the court decreed that the exceptions to the master's report be disallowed; that there was due by the complainant to the respondent the sum of $5,649.64, with interest thereon from the fifth day of May, 1840, making together the sum of $6,136, which said sum should be paid and satisfied by and out of certain certificates of debt or the proceeds thereof given to the complainant by the Chesapeake and Delaware Canal Company, and then under the control of the court. And, it is further ordered that the costs of the suit, including the fees of the masters, be divided between, and equally paid by the complainant and respondent.

From this decree both parties appealed to this court.

Messrs. J. R. Ingersoll and *C. Ingersoll, Jun.*, for Randel.

Messrs. J. R. Tyson and *Cadwallader* for Brown.

The argument consisted chiefly, upon both sides, in an examination and comparison of the evidence; and it is therefore thought advisable to omit it. Some legal positions were taken and authorities adduced to support them, which will be mentioned.

Mr. J. R. Ingersoll.

Where an answer is discredited in one particular, it is weakened in the remainder. (5 Monroe, 23.)

A claim existing will not justify the retention of trust funds. (9 Wheat., *Palmer* v. *Gracie; Thompson* v. *Eyre*, Supreme Court of Pennsylvania, 3 De Saussure's Chan. Rep., 268; 11 Wheat., 125.)

The answer, setting up a contract, is not responsive to any part of the bill, and a defendant is only a witness as to what he is asked. (2 Stew., 302; 2 Johns. Chan. Ca., 88, 90; 1 Bibb, 195; 8 Cowen, 887; 1 Wash., Va., 224; 1 Mumf., 395.)

Mr. J. R. Tyson.

The confessions of a party form the weakest of all evidence deemed admissible in law. (*Bernard* v. *Flournoy*, 4 J. J. Marsh., 101; *Harding* v. *Brooks*, 5 Pick., 244; *Snelling* v. *Utterbach*, 1 Bibb, 609; *Linch* v. *Linch*, 10 Ves., 517, 518; *Thomas* v. *Thomas*, 2 J. J. Marsh., 65; *Morris* v. *Morris*, 2 Bibb, 311; *Logan* v. *McChord's*
415*] *Heirs*, *2 A. K. Marsh., 225; 2 Johns. Chan. Rep., 412; *Robertson* v. *Robertson*, 9 Watt's Rep., 43.)

A power of attorney, if coupled with an interest in the thing, is irrevocable. (*Hunt* v. *Rousmaniere*, 8 Wheat., 175; also 1 Peters, 1.)

The assignment of the judgment and the power of attorney here are under seal. Every deed imports consideration. (Plowd., 308; Burr. Rep., 1637.)

In a case of fraud, if parties be *in pari delicto*, a court of equity may interpose for a complainant upon terms, or, owing to his demerit, may abstain from the slightest interference. (1 Fonbl. Eq., bk. 1, sec. 3, *note h*, and cases cited; 2 Story's Eq. Juris., 6, 7, and cases cited.)

Parties to a bill are held to as strict account in proof of the case stated as parties to an answer, for the court pronounces its decree *secundum allegata et probata*. (*Boone* v. *Chiles*, 10 Peters, 209, also 4 Mod. Rep., 21, 29; 3 Wheat., 527; 6 Wheat., 468; 2 Wheat., 380; 2 Peters, 612; 11 Wheat., 103; 7 Peters, 274; 2 Ves., 243; 1 Marsh., 325; 3 Bibb, 530.)

He who asks the aid of a court of equity must offer to do equity. (*St. John* v. *Halford*, Bart. 1 Chan. Ca., part 97; *Lord Dacres* v. *Crompe*, 2 Chan. Ca., part 87; *Stanley* v. *Gadsby*, 10 Peters, 521; *Brown* v. *Swann*, 10 Peters, 497; see 501.)

Mr. Cadwallader cited the following authorities in addition to those cited by *Mr. Tyson*, respecting the declarations of parties: 7 Modern, 49; Foster, 243; Hardin, 549; 4 Serg. & Rawle, 331, 332; 14 Howell's State Trials, case of *Duke of Richmond*.

Because a man does what is wrong, a court should not take away what belongs to him and give it to another, to whom it does not belong.

A party may justify on a good ground, although there is also a bad ground in the case. (12 Modern, 387; Comyn, 78; Fitzherbert, Avowry, 232; 3 Coke, 26 *a*; 2 Leonard, 196; 7 T. R., 654, 658, 4 Bingham's New Cases, 638; 2 Dowl. & Ryl., 755, 756; 1 Eq. Ca. Abr., 354; 2 Chan. Ca., 23; 1 Vernon, 49, 51; 2 Vernon, 159; 14 Journal House of Lords, 601, reversing case in 2 Vernon; 2 Ball & Biggar, 271; 11 Wheat., 125, 126; 12 Peters, 297; 1 Chan. Ca., 97; 2 Chan. Ca., 87; 1 Peters, 382, 383.)

Mr. C. Ingersoll, Jun., in addition to arguing upon the evidence, commented *upon [*416 many of the above authorities, to show that they were not applicable to the case.

Mr. Justice McKINLEY delivered the opinion of the court:

Randel filed his bill against Brown, on the chancery side of the Circuit Court of the United States for the Eastern District of Pennsylvania; in which he states that, wishing to negotiate a loan of $10,000, to be secured on certificates of the funded debt of the Chesapeake and Delaware Canal Company, he applied to Brown to aid him in the negotiation with one of the banks in Philadelphia. And that it was agreed between them that Randel should deliver to Brown two certificates of the funded debt of the canal company, for $5,000 each, and execute to him a power of attorney, authorizing him to transfer the certificates to himself, or to any other person; and that Brown should, upon his own note, and the pledge of the certificates, if practicable, obtain a loan for Randel.

And in pursuance of this agreement, he executed the power and delivered it and the certificates to Brown. That instead of obtaining a loan of money, as he had promised, Brown transferred the certificates to himself, and delivered them up to the canal company, and ob-

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tained new ones in his own name. That when Randel applied to Brown to know whether he had obtained the loan of $10,000 for him, Brown replied that he had bad news for him—"I have not succeeded at the bank;" that the bank had a disposition to lend, but had not the means. That Randel then requested him to return the certificates of debt, which Brown refused to do; saying, he intended "to hold on to them," till Randel settled with him, or made him the present he had promised him.

Randel then put the following interrogatories to Brown: "Whether he did not receive the certificates and power of attorney in trust and confidence, in the manner and under the circumstances aforesaid; and whether he had any interest in the same, and was not, in holding the same, a mere trustee for the complainant, and did not refuse to deliver them to him; and whether he did not transfer said certificates to himself, on Monday, the 24th of October; and what circumstances occurred before the board of directors, or were communicated to him; and whether he did not inform the complainant that he had not succeeded at the bank, and give the complainant to believe that he had made application on that, or the preceding day; and whether the certificates were not transferred by said Brown to his own use, 417*] *and not for the use of the complainant; and what use or disposition, if any, he had made thereof, and to whom, and for what consideration."

The answer denies all the material allegations of the bill, except it admits the receipt of the power of attorney and the certificates of debt. Brown then sets up, in his answer, a claim for services rendered to Randel, from the early part of the year 1831 till the 24th day of October, 1836, of various kinds, but particularly, in attending to, and preparing for trial, a suit brought by Randel against the said canal company. And he alleges that Randel agreed to give him a reasonable compensation for time to be expended in his service, in any event, and to pay his traveling and other expenses; and in the event of success in the suit, the additional compensation of two and a half per cent. on the amount that might be received thereon; and that Randall finally recovered judgment, and received from the company the sum of $230,000 in payment thereof.

But before the payment, and while it was uncertain whether anything would be realized from the judgment, Brown states that, from exposure in the service of Randel, he was taken sick, and it being uncertain whether he would recover or not he applied to Randel for payment for the time then expended in his service, whereupon Randel caused to be transferred to the use of Brown $2,000, part of said judgment. And a short time thereafter, about the month of September, 1834, Randel requested him to accept an order, drawn on him by Randel, in favor of a certain William H. Camac, for $2,000, promising, at the same time, to place funds in his hands to meet its payment; which induced him to accept it. Brown refers to the order, in his answer, and which is as follows:

"Sir: Out of the sum of $2,000 with interest due, and to become due thereon, which was assigned, at my request, by Samuel H. Hodson, to you, being one fifth part of the sum assigned by me to him, on trust, the 27th of January last, out of the judgment obtained by me against the Chesapeake and Delaware Canal Company, please to pay to William H. Camac, or order, the sum of $2,000, out of the first moneys you obtain from said company on said account, or on account of tolls attached. If more than one year elapse before you obtain the whole of said sum of $2,000, then pay to said Camac an interest of six per cent. on whatever balance may remain unpaid, after the expiration of said term of one year." Brown accepted this order on the 26th of September, 1834.

*It is further charged in the answer, [*418 that on the 18th day of April, 1836, for time expended in his service, from the date of the assignment of the said sum of $2,000, down to that time, Randel gave to Brown a promissory note for $300, payable ninety day after date. He then charges, that the two certificates of debt were delivered to him by Randel on the 20th of October, 1836, for the purpose of paying himself and the debt of $2,000 to Camac. And at the same time Randel requested him to go to New Castle and re-assign the part of said judgment which had been assigned to him as aforesaid and that he, Randel, would then execute the power to Brown to enable him to transfer said two certificates of debt to himself. And accordingly, on the 22d of the same month, he at New Castle re-assigned to Randel said sum of $2,000, part of said judgment, and received from him the power of attorney, authorizing him to transfer said two certificates of debt numbered 34 and 35, to himself, or any other person.

And in answer to the interrogatories in the bill, Brown says, "that he did not receive said certificates and power of attorney, in trust and confidence, in the manner and under the circumstances therein set forth, but absolutely, as an unqualified transfer, in payment of a debt due to him by the complainant, and distinctly admitted by him, and to enable him, the respondent, to pay William H. Camac the amount of his, the respondent's, acceptance, as before stated; and that said respondent has an absolute and unqualified interest in the certificates, to the whole amount of their principal and interest and that he does not hold them as trustee for the complainant, nor any other person, but in his own right, and for his own use.

"And that he did refuse to deliver said certificates to the complainant, and did actually transfer said certificates to himself, on Monday the 24th day of October last; and that he did not place said certificates before the directors of the Schuylkill Bank on Monday, the 24th, or Tuesday, the 25th of October last. That touching the disposition your respondent has made of the said certificates, he says, that they still stand in the name of your respondent, and were surrendered to this honorable court, on the presentation of the complainant's bill of complaint. To the answer the complainant filed a general replication. And, after time had been allowed the parties to take depositions, the court referred the case to three masters, with special instructions.

The masters, after a very thorough examination of the evidence in *the cause, re- [*419 ported against the claim of Brown for separate

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compensation for time; but allowed him the two and a half per cent. commissions, claimed in his answer, amounting to $5,659.64, as compensation for all services rendered. Both parties excepted to the report. Brown to that part of it which disallowed his claim for separate compensation for time; and Randel excepted to that part which allowed to Brown two and a half per cent. on the amount of the judgment against the canal company.

The court overruled these and all other exceptions, confirmed the report of the masters, and rendered a decree in favor of Brown for the amount allowed by the masters, with interest from the fifth day of May, 1840, amounting together to the sum of $6,186, to be paid out of these two certificates. From this decree both parties have appealed to this court.

The right of Brown to compensation for time, and his right to commissions on the amount of the judgment, are both involved in his assertion of the more general right, to be compensated for all his services out of these certificates. The principal questions, therefore, which we deem it necessary to examine are, 1st. Were the certificates delivered to Brown in payment of a debt to himself, and to pay the debt to Camac? And if they were not so delivered, then, 2d. Had Brown such a legal or equitable interest in the certificates as authorized the decree of the court below? A just solution of these questions depends upon a proper examination of the evidence applicable to them, and the particular circumstances under which the witnesses acquired a knowledge of the facts they have deposed to.

Shortly after the bill was filed, and before Brown had filed his answer, he went to Delaware to ascertain what evidence he could obtain from persons having a knowledge of the services he had rendered to Randel. And from the inquiries he made of several of the witnesses, and the disclosures made to them of the nature of his controversy with Randel, it is reasonable to suppose that he intended, at that time, to rest his defense upon the amount and value of his services only, and that he had not then thought of claiming the certificates as having been delivered to him in payment of a debt due for those services. The depositions of four of those persons are found in the record; T. B. Roberts states, in his deposition, that Brown asked him what evidence he could give as to the value of his services while with Randel, stating that the witness was aware of his having been for years doing business for him.

420*] *The witness then says that Brown stated to him, "that the certificates had been put into his hands by Mr. Randel; to raise money upon them, to pay certain debts of Randel's in Philadelphia; one of which he mentioned was to Mr. Camac; I think, he stated himself, under some obligation to have paid by Mr. Randel; and another debt to Mr. Charles Ingersoll; he did not state that the balance was for himself. He said he had exerted himself to negotiate the certificates to several persons, but had not succeeded;" "that Mr. Randel wished him to return the certificates to him, but he had refused to do so until Mr. Randel settled certain debts he owed."

A. C. Gray, to whom Brown applied for the purpose of getting his services as commissioner to take depositions for him in this suit, says, Brown stated "that he had received a transfer of $10,000 from Randel of the canal's debt for the purpose of raising money, with which Mr. Randel wished to pay his debts; he stated, also, that Mr. Randel owed him money for services which he had rendered him during the long litigation which had taken place between Randel and the canal company. In consequence of these things, he had determined to hold on to these certificates as the only means to enforce the settlement of his claims."

Thomas Janvier, another of these witnesses, states that when Brown applied to him to ascertain what testimony he could give in this case, Brown stated that Randel had promised to pay him two and a half per cent. on the judgment against the canal company. The witness replied that his testimony might operate against him, as the only claim he had ever heard him assert was, that he intended to make Randel pay him $2,000 for his services. Janvier then says, "that in the course of the conversation he gave me a history of the transaction upon which this suit is founded; and told me that Randel had given him these certificates, which are now in controversy, for the purpose of negotiating a loan to pay certain debts he had contracted — debts due to Mr. Camac, Mr. Charles Ingersoll, and himself; so far I recollect positively. I am certain from the information of Mr. Brown, that the certificates were given for the purpose of negotiating a loan, to enable Randel to pay certain creditors. I am certain he named Mr. Camac, Mr. C. Ingersoll, and himself as creditors."

Cornelius D. Blaney, the fourth witness, says he does not recollect that Brown stated how the certificates came into his hands; in other respects his testimony is, substantially, the same as that of the other *three witnesses; and it ap- [*421 pears that he was present at the conversation between Brown and the witness Roberts.

After collating this evidence with clearness and ability, the masters proceed to say: "It is remarkable that to none of these persons did the respondent state the fact that he had transferred these certificates into his own name; it is remarkable also, that if, at that time, he did entertain the same clear and positive conceptions of his rights, which is set forth in the answer, he did not simply and plainly state that right, and say, "they (the certificates) were given in payment, or part payment of my own claim, and of my liability to Mr. Camac." We cannot close our minds to the force of the testimony of these four persons. It has been ably urged that evidence gathered from the declarations of a party is unsafe, peculiarly liable to the effects of misapprehension, of inattention, of defect of recollection—that a word omitted, or displaced, may change the whole character of the declaration. We have felt the force of the argument, but it does not prevail against the influence of the concurring testimony of four intelligent and respectable men, giving a very uniform account of the respondent's representation of his own case; and, in relation to the question of trust, giving such a narration as to lead to one and the same result. We have observed, too, that it is the same species of evidence upon which the respondent asserts his alleged contract with the complainant, which

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contract he states in his answer, in the words or declarations of the complainant, alleged to have been uttered to himself, at a time much less recent than his own declarations to the witnesses."

"The testimony of these witnesses, then, establishes, in our opinion, and accordingly we find, and so report—

"1. That the delivery of the certificates by the complainant to the respondent was not absolute, but upon a trust.

"2. That the trust was to raise money.

"3. That of the money so to be raised, part was to be paid to Mr. Camac; and that as to this part, the respondent had a direct interest in the execution of the trust, in consequence of his acceptance of the draft drawn in favor of Mr. Camac, referred to in the answer, and of his re-transfer of the interest in the judgment upon which the draft was drawn.

"4. That another portion of the money so to be raised was to be paid to Mr. C. Ingersoll.

"5. That no express appropriation of the [*422 balance, or any part thereof, was made at the time by the complainant in favor of the respondent."

We concur entirely with the masters in their reasoning, and in the conclusions they have arrived at, upon this testimony, except as to the supposed interest of Brown in the execution of the trust, mentioned in the third specification. Upon that we shall have occasion to comment in another part of this opinion. This evidence sustains the allegations of the bill fully, and contradicts the answers, as to the objects and purposes for which the two certificates were delivered by Randel to Brown. There is, therefore, no further pretense to say that Brown received the certificates in payment of a debt to himself, and for the purpose of paying the debt to Camac. And this evidence establishes another material fact in this case; and that is, that Brown had no interest or property in the certificates before they were delivered to him by Randel; and whether he acquired any in them afterwards, leads us to the consideration of the second question. Had Brown such an equitable interest in the certificates as authorized the decree of the court below?

In the third specification before referred to, the masters reported that Brown had a direct interest in the certificates, on account of his acceptance of Randel's order in favor of Camac, and his having relinquished to Randel his interest in the judgment. It is difficult to ascertain upon what ground it was assumed, at the date of the report, that Brown had an interest in these certificates. The order was drawn upon a special and contingent fund, which might never be received; and until received, Brown was not liable to pay. There is no proof in the cause that can be relied upon to show on what consideration the re-assignment was made, unless the statements in Brown's answer are to be received as evidence. When the answers of the defendant are directly responsive to the allegations of the bill, they amount to positive proof. But in this case there is no allegation in the bill in relation to this assignment or re-assignment. Brown, in giving a history of the transactions between him and Randel, sets up in his answer this sum of $2,000 as having been assigned to him in part payment of his services; and in another part of his answer, he states, that upon receiving the certificates and power of attorney, at the request of Randel, he re-assigned his interest in the judgment to him.

This being clearly matter in avoidance, it is entitled to no more consideration, as evidence, than are the allegations of the bill. There is no evidence, therefore, that the re- [*423 assignment was made in consideration of the delivery of the certificates by Randel to Brown. But there is strong presumptive evidence that it was made in consideration of the payment of the order to Camac by Randel, or of his promise to Brown that he would pay it; for it appears by the report of the masters that it was admitted by the parties; and the counsel on both sides, that the amount of the order had been paid by Randel to Camac after the commencement of this suit.

But if Brown had even acquired a valid lien on the certificates, on account of the acceptance of the order, and the re-assignment of his interest in the judgment, the payment of the order by Randel, pending the suit, extinguished the lien, and no decree ought, on account of this supposed lien, to have been rendered in favor of Brown; for it is the rights of the parties, at the time the decree is rendered, that ought to govern the court in rendering the decree. In either aspect of the case, however, Brown's right to these certificates is reduced to naked possession; and, since his refusal to restore them to Randel, his possession has been fraudulent.

It has been contended, by Brown's counsel, that, as the masters have reported that a large amount was due from Randel to Brown, and that Randel had parted with all the rest of his certificates of funded debt, that, therefore, Brown had a right to payment out of the certificates in controversy in this case. In support of this proposition, they relied on the case of *Handy and Harding* (11 Wheat., 108).

The bill, in that case, stated that Wheaton, under whom the complainants claimed, as heirs at-law, about the year 1802, began to exhibit symptoms indicating loss of intellect, and soon became incompetent to the management of his estate. Under these circumstances, it was agreed among his children, that Hardy, who had married his daughter, should endeavor to take his estate out of his hands, and preserve it for the benefit of his heirs-at-law. That it was agreed that Wheaton should be prevailed on to convey the real property to Handy, for a nominal consideration, who should forthwith execute an instrument of writing declaring that he took and held the same in trust. 1st. To provide a decent support for the grantor during his life; and after a full remuneration for his expenses and trouble, in that respect, to hold the residue of the estate for the benefit of the heirs-at-law. Handy procured the conveyance from Wheaton, and entered upon and possessed the property till his death, but refused to execute the declaration of trust.

*The bill then prayed for an account; [*424 and that a decree might be rendered, exonerating the estate from the deed to Handy, after satisfying his just claims, &c.

The answer denied that Wheaton was incapable of conveying when the deed was made

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It denied also that the defendant purchased as a trustee, and averred that he was a purchaser for a full and valuable consideration.

The Circuit Court decreed that the deed should be set aside; and that an account should be taken of the receipts and disbursements of Handy, and that he should be credited for all advances made, and charges incurred for the maintenance of Wheaton during his life, and for repairs and improvements made on the estate. This part of the decree was affirmed by the Supreme Court. Handy's possession of the estate was consistent with the intention of the parties; the advances made and charges incurred for the maintenance of Wheaton, were according to their agreement; and the repairs and improvements made, preserved the estate, and enhanced its value. Thus far Handy executed the trust fairly, and thereby acquired a lien on the funds in his hands, arising from the rents and profits; nor were these acts tainted by his subsequent fraud, in refusing to execute other parts of the trust; and besides the complainants in their prayer for relief authorized the court to allow Handy his just claims against the estate. This case does not, therefore, give any support to the proposition assumed by the council of Brown.

There is no parallel between these cases, as a brief comparison will show. Brown's possession of the certificates, after refusing to restore them to Randel, was not only fraudulent, but wholly inconsistent with the contract with Randel; and in violation of the trust upon which he received them. And Randel, so far from authorizing the court to allow Brown's claim out of the certificates, stated positively in his bill that he owed him nothing. The proof shows conclusively that Brown had neither property nor interest in the certificates before they were delivered to him by Randel. Unless he can show, therefore, that he has a lien on them, he can neither hold them as security for the payment of the claims set up in his answer, nor is he entitled to payment out of them, at law or in equity. To create a lien on a chattel, the party claiming it must show the just possession of the thing claimed; and no person can acquire a lien, founded upon his own illegal or fraudulent act, or breach of duty; nor can a lien arise, where, from the nature of the contract between the parties, it 425*] *would be inconsistent with the express terms, or the clear intent of the contract. For example, if the goods were deposited in the possession of the party for a particular purpose, inconsistent with the notion of a lien, as to hold them or the proceeds for the owner, or a third person. (Story on Agency, 73, 74, 75; *Lamprier* v. *Pasley*, 2 Term R., 485; *Cranston* v. *The Philadelphia Insurance Company*, 5 Bin., 338: *Turno* v. *Bethune*, 2 Desaus, 285; *Jarvis* v. *Rogers*, 15 Mass., R., 389. 395; *Weymouth* v. *Bowyer*, 1 Vesey, Jun., 416; *Taylor* v. *Robinson*, 8 Taunt. R., 648; *Gray* v. *Wilson*, 9 Watts, 312; *Madden* v. *Kempster*, 1 Camp., 12; *Crockford* v. *Winter*, 2 Camp., 124.)

In the case of *Madden* v. *Kempster*, Lord Ellenborough said: "The defendant being under an acceptance for Captain Hart, whose agent he had been, might have retained a sum of money to answer that acceptance. But the plaintiff is entitled to recover this sum of money, the defendant having obtained it by misrepresentation. He mentioned nothing of the acceptance; he obtained it as a balance when no balance was due to him. He cannot, therefore, set up the lien to which he might otherwise have been entitled." Lord Ellenborough held the same doctrine in the case of *Crockford* v. *Winter;* and the same doctrine was held in *Taylor* v. *Robinson* (8 Taunt.)

In this case of *Madden* v. *Kempster*, it is admitted that Kempster would have had a good lien on the £60 if he had obtained the money honestly, and in the course of business. But having obtained it by misrepresentation he was not permitted to set up the lien, to which he might otherwise have been entitled. How, then, can Brown set up a lien on these certificates, holding possession of them as he does, by just as gross a fraud? There is no aspect in which the question can be placed, consistently with the evidence and the authorities above cited, that will justify the decree in his favor. To permit this decree to stand would be to sanctify fraud, and to allow Brown, by taking advantage of his own wrong, to obtain compensation for his services in a court of chancery, upon a case purely cognizable in a court of law; the decree of the Circuit Court is therefore reversed, and the cause is remanded to the Circuit Court with directions to enter a decree for the plaintiff, conformably to this opinion, and that the defendant pay costs in both courts.

ORDER.

Randel
v.
Brown.

This cause came on to be heard on the transcript of the record *from the Circuit [*426 Court of the United States for the Eastern District of Pennsylvania, and was argued by counsel; on consideration whereof, it is now here ordered and decreed by this court, that the decree of the said Circuit Court be, and the same is hereby reversed, with costs; and that this cause be, and the same is hereby remanded to the said Circuit Court, with directions to that court to enter a decree for the complainant conformably to the opinion of this court, and that the defendants pay the costs in both courts.

ORDER.

Brown
v.
Randel.

This cause came on to be heard on the transcript of the record from the Circuit Court of the United States for the Eastern District of Pennsylvania, and was argued by counsel; on consideration whereof, it is now here ordered, adjudged and decreed by this court, that this appeal be, and the same is hereby dismissed, with costs; and that this cause be, and the same is hereby remanded to the said Circuit Court, with directions to that court to proceed therein conformably to the opinion of this court in this case on the appeal of the complainant.

Cited—9 Wall., 382.

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SUSAN LAWRENCE, *Plaintiff in Error*,

v.

ROBERT McCALMONT, HUGH McCALMONT, AND WILLIAM JOHNSON NEWELL, *Defendants*.

Guaranty construed—consideration sufficient to support action on parol contract—notes deposited for collection as security—only ordinary diligence required.

The following guarantee, viz.:

"In consideration of Messrs. J. and A. Lawrence having a credit with your house, and in further consideration of $1 paid me by yourselves, receipt of which I hereby acknowledge, I engage to you that they shall fulfil the engagements they have made and shall make with you, for meeting and re-imbursing the payments which you may assume under such credit at their request, together with your charges; and I garanty you from all payments and damages by reason of their default.

"You are to consider this as a standing and continuing guarantee, without the necessity of your apprising me, from time to time of your engagements and advances for their house; and in case of a change of partners in your firm or theirs, the guarantee is to apply and continue to transactions afterwards, between the firms as changed, until notified by me to the contrary."

Is a continuing guarantee, and includes not only transactions under a letter of credit existing at the date of the guarantee, but also transactions which arose under a second letter granted at the expiration of the first; although the second credit contained a proviso "that the bills be drawn by, or in 427*] favor *of parties permanently resident in Europe; and if made from the continent, they be made at the customary date, say three months."

The principles laid down in the case of Bell v. Bruen (1 Howard, 169, 186), which should govern the construction of commercial guaranties, reviewed and confirmed.

A valuable consideration, however small or nominal, if given or stipulated for in good faith, is, in the absence of fraud, sufficient to support an action on any parol contract, and this is equally true as to contracts of guaranty as to others.

The consideration in this case was not past.

The question, whether or not the guarantor had sufficient notice of the failure of the principals to pay the debt, was a question of fact for the jury.

Where notes are deposited for collection by way of collateral security for an existing debt, the case does not fall within the strict rules of commercial law, applicable to negotiable paper. It falls under the general law of agency; and the agents are only bound to use due diligence to collect the debts.

THIS case was brought up by writ of error from the Circuit Court of the United States for the Southern District of New York.

The facts were these:

Robert McCalmont and the other defendants in error were co-partners in trade, in London, trading under the name of McCalmont Brothers & Company.

In the year 1838, J. & A. Lawrence were merchants who resided at Brooklyn, near New York, in the same house with their mother, Susan Lawrence, the plaintiff in error. Their counting-house was in the city. McCalmont Brothers & Co. had agents, J. Gihon & Co., also residing in New York.

On the 21st of November, 1838, J. & A. Lawrence obtained from the agents at New York the following letter:

"NEW YORK, 21st Nov., 1838.

Messrs. McCalmont Brothers & Co., London:

Gent.: We have granted to Messrs. J. & A. Lawrence, of this city, a credit with you of £10,000, say ten thousand pounds sterling, to be availed of within six months from this time, in such drafts as they may direct, at four months' date, against actual shipments of goods for their account, and coming to their address; said goods to be forwarded through you or your agents.

The above credit is granted under their engagement to cover your acceptances before maturity, by direct remittances from this country of approved sixty day bills—seconds of exchange to be handed to us for transmission to you. You are to charge one per cent. commission *on the amount accepted, and to [*428 keep the account at five per cent. interest per annum. We are, gents, your ob. st.,

JOHN GIHON & Co."

In the course of the trial, William Davidson being under examination, the plaintiff's counsel asked the witness whether the letter of credit of 21st November, 1838, was delivered on an agreement for the guaranty. To this evidence the defendant's counsel objected, as irrelevant and inadmissible. The judge decided that it was admissible for the purpose of showing the nature and character of the plaintiff's claim on J. & A. Lawrence, but not to vary the construction of the guaranty, and admitted the evidence; to which the defendant's counsel excepted.

The witness then testified that the said letter of 21st November, 1838, was delivered on Mr. Lawrence's proposal of his mother's security for the credit, which will be presently mentioned.

On the 22d of November, 1838, this letter was transmitted to England with the following indorsement:

"NEW YORK, Nov. 22, 1838.

Messrs. McCalmont Bros. & Co.

Gent.: You will please accept our Mr. A. T. Lawrence's dfts. for amount of within credit, in such amounts, and at such times, as he may draw. Your ob. st.,

J. & A. LAWRENCE."

On the 10th of December, 1838, Mr. A. T. Lawrence, being then in England, received the above letter, and forwarded it to London, accompanied by the following letter from himself:

"NOTTINGHAM, Dec'r 10th, 1838.

Messrs. McCalmont, Bros. & Co., London:

Gent.: I now hand you inclosed, Messrs. J. Gihon & Co.'s letter of credit on you, in favor of my house, J. & A. Lawrence, indorsed over to me for £10,000 sterling, and will you please write me, giving authority to draw for the amount? I observe that one of the conditions of the credit is, that goods to the amount of the same shall be shipped through your agents. Will you please inform me the names of the houses in Liverpool and London through which you would wish the shipments made? Please address me at this place.

Respectfully, your obt. serv'ts.,

A. T. LAWRENCE."

On the 11th of December, 1838, McCalmont Brothers & Co. acknowledged the receipt of the above letter as follows:

HOWARD

NOTE.—*As to the construction and effect of continuing and other guaranties*, see note to Drummond v. Preston, 12 Wheat., 516; also note to Edmondston v. Drake, 5 Pet., 624; also note to Mauran v. Bullus, 16 Pet., 528.

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429*] *"LONDON, 11th Dec., 1838.

A. T. Lawrence, Esq., Nottingham:

Sir: We have to acknowledge receipt of yours of yesterday's date, covering the letter of credit in your house's favor, opened by our mutual friends, Messrs. John Gihon & Co., say to the extent of ten thousand pounds sterling, to be availed of by drafts on us at four months against actual shipments of goods for their account, and going to their address; said goods, if shipped from Liverpool, to be forwarded through our agent there, Nathan Cairns, Esq., India Buildings, or from hence through us, or such shipping agent as you may appoint; but in that case, a copy of the bill of lading to be lodged with us prior to presentation of your drafts, and such drafts to appear within thirty days from date of shipment. This credit to be availed of within six months from the 21st inst., and your house undertaking to comply with the other stipulations stated in it by Messrs. J. Gihon & Co., viz.: that they engage to cover our acceptances before maturity, by direct remittances from United States by approved bills of sixty days, the seconds to be forwarded to us through our agents, Messrs. John Gihon & Co., your house to pay us one per cent. commission on the amount of our acceptances and disbursements; the account to be kept at five per cent. interest per annum, which credit we hereby confirm to you, trusting that in opening an account with your respectable firm it will lead to a mutually agreeable and profitable correspondence.

We remain, sir, your most obedt. servt.,

MCCALMONT BROS. & CO.

It is to be understood that the above credit is the only one you have in Europe.

McC. BROS. & CO."

On the 17th of December, 1838, Susan Lawrence, the plaintiff in error, wrote the following letter:

"Messrs. McCalmont Brothers & Co., London:

Gent.: In consideration of Messrs. J. & A. Lawrence having a credit with your house, and in further consideration of one dollar paid me by yourselves, receipt of which I hereby acknowledge, I engage to you that they shall fulfil the engagements they have made and shall make with you, for meeting and re-imbursing the payments which you may assume under such credit at their request; together with your charges, and I guaranty you from all payments and damages by reason of their default.

430*] *You are to consider this a standing and continuing guarantee without the necessity of your apprising me, from time to time, of your engagements and advances for their house; and in case of a change of partners in your firm or theirs, the guarantee is to apply and continue to transactions afterwards between the firms as changed, until notified by me to the contrary. Yours, respectfully,

SUSAN LAWRENCE."

Under these documents advances were made and settled; and for the transactions within six months, from November 21, 1838, nothing was claimed.

At the expiration of the six months the credit was renewed by the following letter:

"NEW YORK, June 12th, 1839.

Messrs. McCalmont Brothers & Co., London:

Gent.: With reference to our letter of 21st November last, opening a credit on your good selves, favor Messrs. J. & A. Lawrence for £10,000, to be drawn within six months from that date, and which expired by limitation last month. We hereby renew the same for a like period from the date hereof, and under the same stipulations, with this proviso, that the bills be drawn by, or in favor of parties permanently resident in Europe; and if made from the continent, they be made at the customary date, say three months.

We remain, &c.,

JOHN GIHON & CO."

In the course of the trial William Davidson, again called by the plaintiff's counsel, was asked, whether at the time of the renewal of the credit in June, 1839, a conversation took place with Mr. Lawrence respecting the application of the guaranty to it; to which the defendant's counsel objected; but the judge admitted the same, to show the nature and character of the plaintiff's claim on J. & A. Lawrence, but not to affect the construction of the guaranty; to which the defendant's counsel excepted. The witness then testified that Mr. Lawrence, on that occasion, called on him, and asked if it was agreeable for witness' firm to continue the credit for £10,000. Witness replied that he had no objection to continue it on the same terms as before; stating that it was to be on his mother's guaranty attached to the previous credit; he answered that he did not expect it on any other terms, or without the guaranty. Witness was in a hurry, and said that he should refer to it, to find out whether the guaranty was for a particular credit, or was a continuing guaranty. *Witness [*431 afterwards referred to the letter of guaranty, and subsequently drew up the letter continuing the credit, and delivered it to Mr. J. D. Lawrence, and exhibited to him his mother's letter; he read it.

The plaintiffs' counsel then offered to prove that both the house of J. Gihon & Co., and J. & A. Lawrence acted upon the guaranty as a continuing guaranty. To this the defendant's counsel objected; but the judge admitted the evidence, for the purpose of showing that both acted upon it as a continuing guaranty, but not to vary the construction of the guaranty itself; to which the defendant's counsel excepted. The witness then testified that Mr. Lawrence and he both agreed that it was a continuing guaranty, and as such no new letter was needed.

Witness testified that their house received sundry bills receivable, understood and represented to be business paper, not at maturity when received, to be collected and realized, as far as they could do it, and the proceeds to be remitted to the plaintiffs for the credit. It was a distinct understanding between witness' firm and J. & A. Lawrence, that they received this paper subject to its encashment, on being paid at maturity. Witness has had a statement made of the proceeds of the paper thus deposited. Witness' firm had realized from it, and remitted £1,309 16*s.* 6*d.* The amount due on the plaintiffs' said account with J. & A. Lawrence, crediting those remittances, and charging interest to the third day of May, instant, is £9,712 11*s.* 4*d.*—amounting in dollars, at $4.85 to the pound sterling, to $47,105.95.

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On the 28th June, 1839, this letter was received by Mr. A. T. Lawrence, being still in England, and forwarded with the following letter from himself:

"NOTTINGHAM, June 28, 1839.

Messrs. McCalmont Bros. & Co.

Dear Sirs: By the Steamer "Great Western," I have received a letter of credit for £10,000, granted to our house by your friends Messrs. J. Gihon & Co., on your house, which I now hand you inclosed. £5,000 of the same I wish you to hold subject to the drafts of Messrs. Jones, Gibson & Ord, of Manchester, drawn at such times and for such amounts as they may deem proper. The balance you will hold subject to my draft, or the drafts of such parties as I may advise at the time of their drawing. I am, gent., your ob't. serv't.

A. T. LAWRENCE."

It is understood, of course, in case of your 432*] confirming the above *named credit, that the remittances to meet the drafts drawn against it shall be in such bills as are approved of by your friends in New York.

On the 5th of July, 1839, the receipt of the above was acknowledged by the following letter addressed to the house in New York:

"LONDON, 5th July, 1839.

Messrs. J. & A. Lawrence, New York:

Gent: Your favors of 6th and 24th May were duly received with their inclosed remittances, which you will find at your credit in the annexed statement of your account current to 30th ulto.

This account we hope you will find correct, and the bills about coming due will, we doubt not, have your usual attention.

The further credit for £10,000 on your account opened by Messrs. J. Gihon & Co., we have confirmed to your Mr. A. Lawrence, on the understanding that it is to be met by remittances from New York, satisfactory to J. Gihon & Co.

We are gent., your most obd't serv't,

McCALMONT BROS. & Co."

Upon this credit J. & A. Lawrence drew several drafts in the months of July and August, 1839.

On the 31st of October, 1839, J. & A. Lawrence addressed the following letter to the London bankers:

"NEW YORK, 31st Oct., 1839.

Messrs. McCalmont Bros. & Co., London:

Gent: We were in hopes that we should have been enabled, ere this, to have made you a remittance to meet your acceptances for our account, due 13th and 19th Nov., but such is the state of our money market that it is almost impossible to get money at any rate. The best of our commercial paper is offered freely at three and four per cent. per month discount; and owing to the deranged state of our internal exchanges, it is impossible to collect amounts due us in other cities, except at a ruinous rate. Exchange on Philadelphia, only 96 miles from this, is 15 per cent. discount to-day. Under all these circumstances, we have to beg a little indulgence on your part. We shall remit you the moment it is in our power. We have offered your friends, Messrs. John Gihon & Co., to place our business paper in their hands in settlement, but they have declined at present. Browns and other bankers are settling in this way. We are gent'n, resp'y, &c.,

J. & A. LAWRENCE."

*On the 24th of January, 1840, Mc- [*433 Calmont Brothers & Co. transmitted their account current to the Messrs. Lawrence, the receipt of which was acknowledged in the following letter:

"NEW YORK, May 30, 1840.

Messrs. McCalmont Bros. & Co., London:

Gent: Your favor of 24th January came duly to hand, inclosing your account current with us to 31st December last, showing balance due you on that day of £10,349 8*s.* 5*d.*—say ten thousand three hundred and forty-nine pounds 8*s.* 5*d.* which we find correct. On 18th March last, we made a payment on your account to Messrs. J. Gihon & Co., of $11,822.26—say eleven thousand eight hundred and twenty-two 26-100 dollars, for which we have their acknowledgment as your agents.

Respectfully, your obd't serv't,

J. & A. LAWRENCE."

On the 29th of May, 1840, John Gihon & Co. addressed the following letter to Susan Lawrence:

"NEW YORK, May 29th, 1840.

Mrs. Susan Lawrence:

Madam: We inclose on behalf of Messrs. McCalmont, Bros. & Co., a copy of the account of Messrs. J. & A. Lawrence with them, showing a balance due of £10,349 8*s.* 5*d.*—say ten thousand three hundred and forty-nine pounds eight shillings and five pence sterling, on first January last, with interest. These gentlemen not having fulfilled their engagements to re-imburse this account, we claim payment of you under your guarantee to Messrs. McCalmont, Bros. & Co.

Respectfully, yours, J. GIHON & Co.,

Agents of McCalmont Bros. & Co., of London."

In July, 1840, an action of trespass on the case was brought in the Circuit Court by McCalmont Brothers & Co., against Susan Lawrence upon the guaranty; who pleaded the general issue.

Evidence was given by the plaintiff, upon the trial, to sustain the above facts. The defendant offered evidence that sundry notes were deposited in the hands of John Gihon & Co. by J. &. A. Lawrence for collection, and that due notice of their not being paid was not given to them and to Susan Lawrence.

The counsel for the defendant then asked the court to charge the jury upon the points of law arising in the case, as follows, viz.:

1st. That the said credit of 21st November, 1838, is a standing and continuing credit during the six months.

*2d. That defendant's guaranty of [*434 17th December, 1838, is confined to the said credit, both as to time and amount.

3d. That the acceptances and claims of the plaintiffs demanded in their declaration in this suit, are not covered by the guaranty of the defendant aforesaid.

4. That the new credit aforesaid of the 12th of June, 1839, is not a continuance or repetition of the first credit, but a departure from it, and is not covered by or embraced in the defendant's said guaranty.

5th. That the nominal consideration of no

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dollar, and the past consideration stated in defendant's said guaranty, or not, nor is either of them, sufficient to sustain the said guaranty.

6th. That the evidence that the said J. & A. Lawrence agreed to give a guaranty at the time said credit of 21st November, 1838, was given, is not sufficient in law to render valid the consideration expressed in defendant's said guaranty, or to sustain the said guaranty.

7th. The facts being ascertained, the question whether the notice given to the defendant by the plaintiffs of the failure of the said J. & A. Lawrence to remit to cover the plaintiff's acceptances was reasonable, is a question of law, and no notice, sufficient in law, was given of such failure to the defendant.

8th. If the sufficiency of such notice be a question exclusively of fact, a reasonable and sufficient notice was not given to her of such failure of J. & A. Lawrence to remit as aforesaid.

9th. The notes received by the plaintiffs, through their agents to collect, ought, when there was a failure of payment, to have been regularly protested, and due notice thereof served on the defendant and J. & A. Lawrence; and, on failure thereof, a credit should be allowed for the same.

The judge thereupon charged the jury, that the plaintiffs were not precluded from recovering under the guaranty in evidence by reason of any supposed want of consideration therefor; and the same was not without sufficient consideration.

That the said guaranty of the 17th December, 1838, was not limited to the credit of November 21, 1838, but was a standing and continuing guaranty, and did apply to, and was sufficient to embrace, transactions arising after the said credit of November, 1838, was expired.

That the new credit of June 12, 1839, and 435*] the advances and *transactions under it, were not in law without the scope of the guaranty of December 17, 1838, and that the plaintiffs were, under the evidence, entitled to recover for the same under the said guaranty.

That the defendant was entitled to a reasonable notice of the default of the principal debtors, to enable her to take measures for her indemnity; that it was for the jury to consider, whether under all the circumstances in evidence, the defendant had not had such notice.

That as to the notes turned over by the principal debtors to J. Gihon & Co., as the same were merely lodged with the latter, on their engagement that the proceeds of them, when received, were to be passed to their credit, the want of protest of any such notes as were dishonored, or of notice thereof to the said J. & A. Lawrence would not entitle the defendant to charge the plaintiffs with the amount of such notes, or to claim a deduction for that amount.

And with that charge left the said cause to the jury: unto which charge, and to the refusal of the judge to charge otherwise, and as requested by defendant as aforesaid, the defendant's counsel then and there excepted.

The jury found a verdict for the plaintiffs for $47,105.97.

The cause was argued by *Mr. Wood* for the plaintiff in error (Susan Lawrence), and was to have been argued by *Messrs. Lord* and *Sergeant* for the defendants in error; but after *Mr. Lord* had finished his argument, the court declined hearing further counsel on that side. *Mr. Wood* replied; and his two arguments are consolidated.

Mr. Wood made the following points:

1. Supposing the defendants' guaranty might extend to a new continuing credit, it did not cover the credit of June 12, 1839, there being a variance from the first, in requiring a permanent resident in Europe to draw or indorse the bills to be accepted, and in requiring the bills, if drawn from the continent, to be drawn at three months.

2. These variances might have impaired the means of J. & A. Lawrence to meet their payments, and thus increased the risk of the defendant.

3. But whether the variances were detrimental or not, they so changed the terms of the credit as to put it without the scope of the guarantee, and to warrant the defendant in saying *non hac in fœdera veni*, and the charge was in this particular erroneous.

4. The credit, or letter of credit of the 21st November, 1838, is *the exclusive sub- [*436 ject matter of the guaranty of the defendant below, declared upon, and said guaranty does not extend to any future or other credit. Because,

1st. It recites such credit as the subject matter to be covered by it.

2d. It guaranties the fulfillment by J. & A. Lawrence of their agreements made and to be made for re-imbursing the payments assumed by the plaintiffs below, under that and no other credit.

3d. Said credit being a continuing credit for six months, and extending to renewals within that period, the guaranty is satisfied, as a standing and continuing one, by confining it to that credit alone.

4th. The provision in the guaranty that it is to stand and continue without notice of engagements and advances, and notwithstanding a change of partners in the plaintiff's firm, was designed, not to extend the guaranty beyond the first credit, but to modify it as a continuing guaranty, by dispensing with some of the qualities of such a guaranty.

5th. This satisfies the language of the guaranty without extending by a forced construction the credit beyond the original six months.

6th. The judge erred, therefore, in inferring and charging that said guaranty was not confined to the first credit, because it was a standing and continuing guaranty.

5. There is no valid consideration to support this guaranty. Because.

1st. By the law of New York the consideration must be substantial, and be set forth in the written instrument of guaranty.

2d. Of the considerations expressed in this instrument, one is nominal and the other past, and without any previous request on the part of the defendant, either proved or set forth in the instrument.

3d. If the evidence to show the consideration nominal was not conclusive, it should have been left to the jury to pass upon.

6. There was a total failure to prove a reasonable notice by the plaintiffs to the defendant of the failure of J. & A. Lawrence to remit,

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and the justice erred in leaving it to the jury to infer such notice. Because,

1st. The reasonableness of the notice when the facts are ascertained, is a question of law and the court should have charged the jury that the notice shown was, in point of law, unreasonable.

2d. Supposing it a question of fact, the verdict was, in this particular, without evidence to support it.

7. The justice erred in charging the jury that **437*** J. & A. Lawrence *were not entitled to notice of the dishonor of the notes lodged with the plaintiffs or their agents, and by them received for collection.

8. The judgment being erroneous in the above and other particulars, ought to be reversed.

Mr. Wood then stated that the first and main ground relied upon for reversing the judgment below, was the variance between the first and second credit, which took the second out of the scope of the guaranty. This ground assumes that the first credit is confined to one transaction of £10,000, and covers assumptions only to that amount.

This guaranty consists of two parts. The first part is clearly confined to the first credit, and does not authorize any change in the mode of credit. It recites that credit, and guaranties the re-imbursement of the plaintiffs below under such credit, meaning that credit.

The second part of the guaranty provides that it shall be standing and continuing. This, of course, upon the above assumption, extends it to future and other credits. But the general rule is, that where a party guaranties a dealing and then provides for the guaranty to continue, it extends to other dealings only of the same kind and character. Any variance is fatal. (*Russel* v. *Perkins*, 1 Mason, 368; *Ludlow* v. *Simond*, 2 Caines' Cases in Error, 1; *Walsh* v. *Baillie*, 10 Johns. Rep., 189; 1 B. & P., 84; *Hunt* v. *Smith*, 17 Wend., 179.)

The following cases are more particularly in point, as they show a variance in paper and credit. (*Dobbins* v. *Bradley*, 17 Wend., 422; *Edmondston* v. *Drake*, 5 Peters, 637,639; *Hoff* v. *Hadley*, 5 Bing., 54; *Campbell* v. *French*, 6 Term Rep., 200; *Barstow* v. *Bennet*, 3 Campb. *N. P.* R., 221.)

These cases fully show that the variance, even when supposed to be beneficial, takes the case out of the guaranty.

The requirements in the second credit of a permanent drawer or indorser in Europe was material. It subjected J. & A. Lawrence to the necessity of giving a premium or reciprocating the favor. If the person of whom they bought should draw or indorse, he must guaranty to the bank out of which the money should be raised the solvency of the plaintiffs below.

The extension of the credit on bills from the continent to four months instead of three, to which they were restricted in the second credit straightened their operations. It is no answer to say that no such paper was made under the second credit. It was a part of that contract of **438*** *credit and varied from the first, and, as such, it took the case out of the guaranty. This very variance may have caused J. & A. Lawrence to withdraw their operations from the continent and confined them to England, and this may have caused their failure.

But it is maintained that the peculiar language of this guaranty takes it out of this general rule and sanctions the variance.

In the first part of the guaranty, she stipulates that J. & A. Lawrence shall fulfill the agreements they have made and shall make, &c. This is relied upon as sanctioning the variance. Assuming that this authorizes not only future but different agreements, it is manifest it can have no such result. The agreements there spoken of are not the assumptions of the plaintiffs below which are guarantied, but the arrangements of J. & A. Lawrence for re-imbursing the plaintiffs. And this shows the whole fallacy of the argument. The credit of 21st November has two important objects. 1st. The acceptances, assumptions, and advances on the part of the plaintiffs. 2d. The arrangements on the part of J. & A. Lawrence for re-imbursing them on account of such advances. The above clause in the guaranty refers to the latter and not the former. Of course it does not authorize a change in the former.

In the next place, much reliance is placed on the qualifying language in the second part of the guaranty. Here it dispenses with a notice to her from the plaintiffs below of their engagements and advances to J. & A. Lawrence. Hence it is inferred that there may be not only new but different engagements and advances by these plaintiffs from those embraced in the first credit. But this conclusion is entirely too broad. The whole object of the provision is not to vary the kind of engagements and advances, but to dispense with notice. It has been a moot point whether there ought to be notice to the guarantor of new transactions, though now settled otherwise in this court. The character of the engagements and advances is not affected at all by this qualifying clause, but is left subjected to the general rule applicable to a guaranty continuing.

Lastly, the clause authorizing a change in the firms is relied upon. It is difficult to conceive how this provision for a change in the firms can authorize a change in the guaranty in other particulars. The guaranty is to continue and apply to transactions between the firms as changed. The words "to continue and apply" would seem to convey the idea that the guaranty is to continue the "same," except *so far as modified by applying it to the [**439** firms as changed. A vague and loose construction of a guaranty under the pretense of liberalizing it, can only serve to involve the whole subject in uncertainty. A change in a firm, where the business and good will continues, leaves it substantially the same firm. The rule that a continuing guarantee does not extend where there is a change in the firm, shows the strength of the principle, which can be impaired only with the prospect of increasing litigation.

General words in an instrument, even where they purport to confer a power, are confined to the particular subject. (*Hogg* v. *Smith*, 1 Taunt., 347; 8 Wend., 494; 6 East, 507.)

The second ground relied on for reversal is, that the guaranty extended only to the credit of the 21st of November, 1838. This depends upon the previous question, whether that credit was continuing, or was confined to one transaction of £10,000. The following cases are relied upon to show that it was a continuing credit

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for the period of six months, and if so, the language of the guaranty is fully satisfied by confining it to that one credit. There was ample time to have repeated the transactions under that credit so as to cover a second sum of £10,000. (*Mason* v. *Pritchard*, 12 East, 227; *Merle* v. *Wells*, 2 Campb., 413; *Douglass* v. *Reynolds*, 7 Peters, 113.)

In the third place, it was contended that the consideration was insufficient to support the guaranty. It was admitted that the court would not make new bargains for the parties, however unequal the contracts may be. But the rule requiring a consideration to support a parol contract means a substantial and not a nominal consideration. Two shillings and sixpence may be a consideration, provided it was really intended as such; but if designed to be merely nominal, it would not suffice. One dollar according to a well known usage, is generally inserted for a nominal consideration, it being customary to insert it in cases where a nominal consideration will suffice, and therefore a party is not estopped from showing it was nominal. There was evidence in the case to satisfy the jury that the consideration was nominal, and it ought to have been left to the jury to pass upon. The credit recited in the guaranty as a consideration was clearly meant to be the credit of the 21st November, which was a fixed credit for a definite period already established by contract, and no other credit existed between the parties. It was therefore a part consideration, and not sufficient to support the guaranty. (Chitty's Contracts, p. 12.)

440*] *The plaintiffs below failed to give to the defendants a reasonable notice of the failure of J. & A. Lawrence to remit, which failure occurred in October, 1839; notice was given on the 29th of May following—she living within a few minutes' walk of their agents, through whom the whole arrangements of the plaintiff were effected.

The reasonableness of the time when the facts are ascertained, as in this case, is a question of law. There was nothing to be left to the jury. The facts were clear, and the notice given was manifestly unreasonable. The notes lodged with the plaintiff by J. & A. Lawrence as collateral security, when protested, should have been subjected to the like notice. The "strict" notice required to affect an indorser was not necessary; but a reasonable notice ought to have been given. (*Philip* v. *Adling*, 2 Taunt., 212.)

There was nothing in the relationship between the defendant below and J. & A. Lawrence that should dispense with the ordinary requirements of the law in regard to guaranties. On the contrary, that relationship subjected her the more fully to that species of influence which is brought to bear upon those who ordinarily go surety for friends.

This court has heretofore been deeply impressed with this consideration. (5 Peters, 637; 9 Wheat., 680.)

In 7 Cranch, 90, the court, with *Chief Justice* Marshall as their organ, say: "It is the duty of the individual who contracts with one man on the credit of another, not to trust to ambiguous phrases."

Mr. Lord then addressed the court in an argument, of which the following is a brief:

The Lawrences were purchasers in English market (not on continent) and wanted credit there to pay. Their mother guarantied; guaranty in 1838; postage; preferences; credit it induced; intended to induce; terms very broad and liberal. Principle of construction; original liability, as inducing party to enter into the transaction.

Law. Decisions of this court complete.

Construction. *Bell* v. *Bruen* (1 Howard, 186), *Mauran* v. *Bullus* (16 Peters, 528), *Douglass* v. *Reynolds* (12 Peters, 499; 7 Peters, 122), *Mayer* v. *Isaac* (6 Mees. & Wels., 612), as to construction, to be according to fair, full import of terms, without forcing a construction.

Notice, not requisite; successive advances under a general engagement. (12 Peters, 504.)

Explanatory circumstances may be shown. (1 Howard, 186; *Lee* *v. *Dick*, 10 Peters, [*441 493; *Brooks* v. *Haigh*, 10 Adol. & Ellis, 309, 37 E. C. L. R.)

Consideration. (10 Adol. & El., 309; 2 C. & H. Ph. Ev., 216; 5 Bing. New Cases, 577, *Dutchman* v. *Troth*.)

Notice of default. (12 Peters.)

Construction of papers. Guaranty.

"Having a credit with your house." Words capable of embracing past, present, and future.

"And in further consideration of $1;" receipt acknowledged; refers to legality, and to make effectual.

"I engage they shall fulfill the engagements." Plural words, referring to engagements of J. & A. Lawrence.

"They have made and shall make with you." "Have," refers to past; "shall," to future.

"For meeting and re-imbursing the payments." Guaranty for payments.

"Which you may assume." "May," both past and future assumptions—not "shall," future, but "may," indefinite.

"Under such credit." Credit with your house; whatever credit will embrace "such" refers to.

"At their request." That refers both to past and future; least decisive circumstance.

"You are to consider this a standing and continuing guaranty." Evidently decisive of its character; vitally decisive.

"Without necessity of your apprising me, from time to time, of your engagements and advances for their house." Not a limitation; for notice of successive advances under the same credit not necessary; an amplification or confirmation, for context is of amplitude, and notice of renewals might be needful.

"From time to time," could not refer to drafts under the one credit, all of which were to be used in a period of six months.

"Of your engagements;" plaintiffs'; only one engagement under the letter of 21st of November, viz., to honor bills to be drawn, but the word is plural.

"Advances." By letter 21st of November, no advance was to be, but acceptances covered.

"And in case of a change of partners." "And" connects with "without."

"Standing guaranty," with two explanations, waiving notice, and with permanency of corporation.

*"Change of partners in your firm [*442 or theirs;" not shown change of firm contemplated in either; such double change not to

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happen within the short six months; evidently contemplated renewal; the guaranty is to apply to "transactions afterwards;" clearly, future contemplation; not only change of firms, but transactions afterwards.

"Until notified by me to the contrary." Not only ordinary continuance until notice, but such continuance notwithstanding change of firm.

If no previous letter of credit, undoubtedly this guaranty would have covered more than one credit.

Is there anything to limit? Said letter of November limits. Not a question of possible construction of that letter, but probable. If she never saw the letter or knew of it; then construction of guaranty as if no letter. If she saw the letter or knew it.

"A credit of £10,000—to be availed in six months—in such drafts, &c.—against actual shipments;" a credit for goods to be purchased; not repeated purchases in six months of £10,000; the amount a strong circumstance to qualify.

"In such drafts," &c., imports amount of all drafts to £10,000; this is the natural and fair import.

"In six months." Drafts at four months; takes one month to buy and ship—in practice, took the whole six months; on notice of shipment, see account, time to sell to procure bills to cover. Not a natural construction to have this credit a continuing credit. Suppose this letter of 21st November lodged with a Nottingham house.

Not a continuing credit; no contemplation of continuous dealing expressed on this letter. (*Melville* v. *Hayden*, 3 Barn. & Ald., 593; *Rogers* v. *Warner*, 8 Johns. R., 119; *Whitney* v. *Givot*, 24 Wendell, 84.) The action of the parties under it; the Lawrences did not attempt to eke it out by drawing anew, although they showed that they wanted a new credit.

If not a continuing credit, then clearly guaranty cannot be a standing and continuing guaranty unless it contemplates new letters of credit.

If asked, Why letter to six months if guaranty continuing? Answer, It might well become inconvenient for McCalmont Bros. & Co. to renew so large engagements at such a period.

If letter of 21st of November is a continuing credit for six months, still the guaranty contemplates no such termination.

1. No limitation of time in guaranty. If intended, it would have been expressed—so much expressed, this would also have been expressed.

443*] *2. Notice of engagements and advances waived—only one engagement of McCalmont—no advances here contemplated; the acceptances were to be covered.

"At their request," contemplates a future request not in this letter of 21st November.

3. "Engagements they have made and shall make," cannot be satisfied if confined to the previous letter, for one engagement already made—no plural, no future.

4. "Payments you may assume," contemplates rather future than present—a word indefinite, to embrace both.

5. "From time to time," cannot reasonably be cut down to six months; or rather to the short time for the new drawing of bills, *i. e.*, sixty days after the first drafts were drawn and covered.

6. "Change of partners"—this obviously contemplated a continuance beyond one set of drafts.

On the whole, a fair reading of the paper called for a continuance and renewal of the credit.

If "continuing and standing guaranty" no objection, that credit not renewed until after first one terminated.

The reference to the guaranty did not imply a doubt of its meaning, but the contrary—it only implied carefulness as to its terms.

II. No want of consideration. On face of paper, clear consideration of value. Opening the paper, is there want of consideration. Can they open the paper for this purpose at law, it is valid on its face. It is like a sealed bond, as to validity on its face. They may open the paper as a receipt to recover the consideration if not paid, but that supposes stipulation valid on our part so as to give them title to the consideration. Suppose consideration, instead of $1 to be $500, would nonpayment vitiate the guaranty? (*Dutchman* v. *Troth*, 5 Bing. N. C., 577; 2 Ph. Ev., C. & H., 216, *note* 194.) Like bargan and sale of lands; why not identical? The consideration there and here only to give form of law to intent of parties. But the letter of 20th November, delivered on the promise of this guaranty, was consideration. Adoption of previous promise. (*Andrews* v. *Poutrac*, 24 Wendell R., 288.)

Again, Suppose paper opened: defendant must show actual want of consideration, so as not to intend to bind. Real consideration; the promise by her sons, on which defendants acted, she informed and confirmed it. Again, if she had refused, defendants' agents could have countermanded and have protested against part of the drafts. Having a credit would have ceased.

3. *Guaranty supposed continuing, [*444 or no need of this question. If continuing, having a credit renewed was full consideration.

III. No variance in new credit. The guaranty, in terms of amplest kind; allowed of any future agreements with J. & A. Lawrence as to re-imbursements, either for shorter or longer credit of re-imbursement; either for re-imbursement by cash or bills; for smaller amounts, for narrower terms.

Again, the subject guarantied was the engagement of McCalmont Bros. & Co., and their payments. Now, if credit were broader or not, but bills were drawn exactly within the first credit, those engagements guarantied.

But, the letter 21st November contemplated no drawing from the continent. Not presumed to draw except at customary rate, that three months (letter Jan. 12), but bills under old credit four months; showing no bills for continent. New credit allowed bills for continent and so broader: but guaranty not broader: only ask to cover bills within old terms. If we had given two new letters, one for continent, one for England, no ground to contend latter not covered; the guaranty is not that we shall give the wider credit, but that the Lawrences shall pay the bills within the contemplation of the parties.

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No additional security called for. Again, the stipulation as to parties permanently residing, &c. This declaratory only; just as the bills under the credit of November 21; it was optional with us, and not insisted on; it was evidently to guard against an abuse of the credit in this country; it was merely expressing the previous understanding of the parties as it had been acted on. It did not and could not prejudice the Lawrences or defendants; they were to draw, to pay for goods to be bought in England; the new letter fully allows this.

IV. Notice of default. J. D. Lawrence in court, son of defendant, living with her, united interests to large amount. If any damage actually, they knew, we did not. If examined, I have shown ability to provide. Notice, first merely to give surety notice before suit; subsequently applied for purpose of giving him opportunity to get indemnity. Look to substance, not like notice on a draft. The court told jury object of this notice; left them to say if notice was there. Actual notice of demand was proved; knowledge in season for indemnity was clearly submitted to jury and found by them.

V. Want of protest. The notes turned over, were turned over not as negotiated, but deposited; like notes in a bank for collection. 445*] *Not a conditional payment. No liability sought against J. & A. Lawrence as indorsers. We hold subject to encashment, to be collected and realized as far as they could do it, and the proceeds to be remitted to plaintiffs for the credit. Distinct understanding that they received this paper subject to its encashment, on being paid at maturity. Here merely a question of *onus;* were plaintiffs under the technical obligation to notify J. & A. Lawrence, who had already failed? Evidently a mere deposit for collection, not a negotiation in way of business.

Mr. Justice STORY delivered the opinion of the court:

This is a writ of error to the Circuit Court for the Southern District of New York.

On the 21st of November, 1838, J. & A. Lawrence obtained from the agents (Messrs. Gihon & Co.), at New York, of McCalmont Brothers & Co., of London, the following letter of credit:

"NEW YORK, 21st Nov., 1838.

Messrs. McCalmont Brothers & Co., London.

Gents.: We have granted to Messrs. J. & A. Lawrence, of this city, a credit with you of £10,000, say ten thousand pounds sterling, to be availed of within six months from this time, in such drafts as they may direct, at four months' date, against actual shipments of goods for their account, and coming to their address; said goods to be forwarded through you or your agents.

The above credit is granted under their engagement to cover your acceptances before maturity, by direct remittances from this country of approved sixty day bills—seconds of exchange to be handed to us for transmission to you. You are to charge one per cent. commission on the amount accepted, and to keep the account at five per cent. interest per annum. We are, gents., your obt. st.,

JOHN GIHON & Co."

The letter of credit was delivered on Mr. Lawrence's proposal of his mother's (the plaintiff in error's) security for the credit. On the 17th of December, 1838, Mrs. Lawrence gave the following guaranty:

"Messrs. McCalmont Brothers & Co., London:

Gent.: In consideration of Messrs. J. & A. Lawrence having a credit with your house, and in further consideration of one dollar *paid me by yourselves, receipt of [*446 which I hereby acknowledge, I engage to you that they shall fulfill the engagements they have made and shall make with you, for meeting and re-imbursing the payments which you may assume under such credit at their request; together with your charges, and I guaranty you from all payments and damages by reason of their default.

You are to consider this a standing and continuing guaranty without the necessity of your apprising me, from time to time, of your engagements and advances for their house; and in case of a change of partners in your firm or theirs, the guaranty is to apply and continue to transactions afterwards between the firms as changed, until notified by me to the contrary. Yours, respectfully,

SUSAN LAWRENCE."

Under these documents, McCalmont Brothers & Co., made the stipulated advances, which were repaid; and on the transactions included within the six months from 21st of November, 1838, nothing has been claimed by the London house. About the expiration of the six months, Mr. Lawrence (one of the firm of J. & A. Lawrence) at New York called on the agents of McCalmont Brothers & Co., and asked if it was agreeable for the agents to continue the credit for £10,000. The reply of one of the agents was, that there was no objection to continue it on the same terms as before, stating that it was to be on the mother's guaranty attached to the previous credit. Mr. Lawrence then answered that he did not expect it on any other terms, or without the guaranty. The agent then wished time to examine whether the guaranty was for a particular credit, or was a continuing guaranty; and having referred to the letter of guaranty, they drew up and delivered to Mr. Lawrence a second letter of credit (Mr. Lawrence and the agents both agreeing that it was a continuing guaranty, and as such no new letter was needed from the mother). The second letter of credit, dated on 12th of June, 1839, was as follows:

"NEW YORK, June 12th, 1839.

Messrs. McCalmont Brothers & Co., London:

Gent.: With reference to our letter of 21st November last, opening a credit on your good selves, favor Messrs. J. & A. Lawrence for £10,000, to be drawn within six months from that date, and which expired by limitation last month. We hereby renew the same for a like period from the date hereof, and under the same stipulations, *with this pro- [*447 viso, that the bills be drawn by, or in favor of parties permanently resident in Europe; and if made from the continent, they be made at the customary date, say three months.

We remain, &c., JOHN GIHON & Co."

Under this second letter of credit bills were drawn and paid by McCalmont Brothers &

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Co., to an amount exceeding in the whole the £10,000 stipulated for. The bills being all drawn at four months. The firm of J. & A. Lawrence not having made any remittances to pay the new advances, and firm having failed, the agents of the London house on the 29th day of May, 1840, addressed the following letter to Mrs. Susan Lawrence, giving her notice of the nonpayment of the advances.

"NEW YORK, May 29th, 1840.

Mrs. Susan Lawrence:

Madam: We inclose on behalf of Messrs. McCalmont Bros. & Co., a copy of the account of Messrs. J. & A. Lawrence with them, showing a balance due of £10,349 8*s.* 5*d.*—say ten thousand three hundred and forty-nine pounds, eight shillings and five pence sterling, on first January last, with interest. These gentlemen not having fulfilled their engagements to reimburse this account, we claim payment of you under your guaranty to Messrs. McCalmont Bros. & Company.

Respectfully, yours, J. GIHON & Co."

Agents of McCalmont Bros. & Co., of London.

She declining to pay the deficit, the present action of *assumpsit* was brought against her to enforce the payment. At the trial upon the general issue, in addition to the facts already stated, it was in evidence that during the whole period of these transactions, Mrs. Lawrence resided at Brooklyn (New York), in the same house with her sons, J. and A. Lawrence. There was also evidence in the cause to show that McCalmont Brothers & Co. had, by their agents, certain notes belonging to the firm of J. & A. Lawrence, and indorsed by the firm for collection, and the proceeds when received were to be applied towards the liquidation of the debt due to the London house, subject to their encashment on being paid at maturity, under which the sum of £1,309 16*s.* 6*d.* had been realized. The notes thus deposited for collection, which were dishonored at maturity, were protested accordingly, and the original plaintiffs offered the protests and notices to J. & A. Lawrence of the dishonor in evidence, but the evidence as to some of the notices was

448*] *not full. Much other evidence was given at the trial, which, however, it is not necessary to state.

The counsel for Mrs. Lawrence then asked the court to charge the jury as follows:

1st. That the said credit of 21st November, 1838, is a standing and continuing credit during the six months.

2d. That defendant's guaranty of 17th December, 1838, is confined to the said credit, both as to time and amount.

3d. That the acceptances and claims of the plaintiffs demanded in their declaration in this suit are not covered by the guaranty of the defendant aforesaid.

4th. That the new credit aforesaid of the 12th of June, 1839, is not a continuance or repetition of the first credit, but a departure from it, and is not covered by or embraced in the defendant's said guaranty.

5th. That the nominal consideration of one dollar, and the past consideration stated in defendant's said guaranty, are not, nor is either of them, sufficient to sustain the said guaranty.

6th. That the evidence that the said J. & A. Lawrence agreed to give a guaranty at the time said credit of 21st November, 1838, was given, is not sufficient in law to render valid the consideration expressed in defendant's said guaranty, or to sustain the said guaranty.

7th. The facts being ascertained, the question whether the notice given to the defendant by the plaintiffs of the failure of the said J. & A. Lawrence to remit to cover the plaintiffs' acceptances was reasonable, is a question of law, and no notice, sufficient in law, was given of such failure to the defandant.

8th. If the sufficiency of such notice be a question exclusively of fact, a reasonable and sufficient notice was not given to her of such failure of J. & A. Lawrence to remit as aforesaid.

9th. The notes received by the plaintiffs, through their agents to collect, ought, when there was a failure of payment, to have been regularly protested, and due notice thereof served on the defendant and J. & A. Lawrence; and, on failure thereof, a credit should be allowed for the same.

The judge thereupon charged the jury, that the plaintiffs were not precluded from recovering under the guaranty in evidence by reason of any supposed want of consideration therefor; and the same was not without sufficient consideration.

*That the said guaranty of the 17th [*449 December, 1838, was not limited to the credit of November 21, 1838, but was a standing and continuing guaranty, and did apply to, and was sufficient to embrace, transactions arising after the said credit of November, 1838, was expired.

That the new credit of June 12, 1839, and the advances and transactions under it, were not in law without the scope of the guaranty of December 17, 1838, and that the plaintiffs were, under the evidence, entitled to recover for the same under the said guaranty.

That the defendant was entitled to a reasonable notice of the default of the principal debtors, to enable her to take measures for her indemnity; that it was for the jury to consider, whether under all the circumstances in evidence, the defendant had not had such notice.

That as to the notes turned over by the principal debtors to J. Gihon & Co., as the same were merely lodged with the latter, on their engagement that the proceeds of them, when received, were to be passed to their credit, the want of protest of any such notes as were dishonored, or of notice thereof to the said J. & A. Lawrence would not entitle the defendant to charge the plaintiffs with the amount of such notes, or to claim a deduction for that amount.

And with that charge left the said cause to the jury; unto which charge, and to the refusal of the judge to charge otherwise, and as requested by defendant as aforesaid, the defendant's counsel then and there excepted.

The jury found a verdict for the plaintiffs for $47,105.97; upon which judgment was rendered for the plaintiffs; and upon that judgment and the exceptions taken at the trial the present writ of error has been brought.

Some remarks have been made on the argument here upon the point in what manner letters

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of guaranty are to be construed; whether they are to receive a strict or a liberal interpretation. We have no difficulty whatsoever in saying that instruments of this sort ought to receive a liberal interpretation. By a liberal interpretation we do not mean that the words should be forced out of their natural meaning, but simply that the words should receive a fair and reasonable interpretation, so as to attain the objects for which the instrument is designed and the purposes to which it is applied. We should never forget that letters of guaranty are commercial instruments—generally drawn up by merchants, in brief language—sometimes inartificial, and often loose in their structure and 450*] form; and to construe the words *of such instruments with a nice and technical care would not only defeat the intentions of the parties, but render them too unsafe a basis to rely on for extensive credits so often sought in the present active business of commerce throughout the world. The remarks made by this court in the case of *Bell* v. *Bruen* (1 How. R., 169, 186), meet our entire approbation. The same doctrine was asserted in *Mason* v. *Pritchard* (12 East R., 227), where a guaranty was given for any goods he hath or may supply W. P. with, to the amount of £100; and it was held by the court to be a continuing guaranty for goods supplied at any time to W. P. until the credit was recalled, although goods to more than £100 had been first supplied and paid for; and the court on that occasion distinctly stated that the words were to be taken as strongly against the guarantor as the sense of them would admit of. The same doctrine was fully recognized in *Haigh* v. *Brooks* (10 Adol. and El., 309), and in *Mayer* v. *Isaac* (6 Mees. & Wels., 605), and especially expounded in the opinion of Mr. Baron Alderson. It was the very ground, in connection with the accompanying circumstances, upon which this court acted in *Lee* v. *Dick* (10 Peters, 482), and in *Mauran* v. *Bullus* (16 Peters, 528). Indeed, if the language used be ambiguous and admits of two fair interpretations, and the guarantee has advanced his money upon the faith of the interpretation most favorable to his rights, that interpretation will prevail in his favor: for it does not lie in the mouth of the guarantor to say that he may, without peril, scatter ambiguous words, by which the other party is misled to his injury.

Passing from these general considerations, let us now address ourselves to the points made at the argument. The first point is, that the second advance was made upon terms and under an agreement materially variant from that on which the guaranty was given, without any communication with the guarantor or her consent thereto. The variances insisted on are two; first, in requiring the bills to be drawn by or in favor of parties permanently resident in Europe; second, that if the bills were drawn from the continent of Europe, they should be made at the customary date, say three months. We think that there is no variance whatsoever, which is not fairly within the scope of the original guaranty, and was so contemplated by J. & A. Lawrence, as well as the agents of the London house. This is explicitly proved by the evidence; for, upon the question arising both the Lawrences and the agents agreed that it was a continuing guaranty, and as such no new letter of guaranty was needed. It is true *that Mrs. Lawrence was no party to [*451 this interpretation of the instrument; but then it is strong evidence to establish that it was neither a forced nor unnatural interpretation of the words. And the agents of the London house agreed to make the second advance upon the faith of it.

Now, looking to the very words of the guaranty, we see that it contemplated, not a single advance and then it was to end, but a continuing guaranty, and the very words are found in it. It also contemplated not only agreements which had been already made between J. & A. Lawrence and the agents, but also future agreements. The guarantor says: "I engage that they shall fulfill the agreements they have made, and shall make with you for meeting and reimbursing the payments which you may assume." And again: "You are to consider this a standing and continuing guaranty without the necessity of apprising me from time to time of your engagements and advances for the house." "So that new engagements and new advances were contemplated to be made to which the guarantee should attach without notice thereof." And this is not all—for the guaranty goes on to provide for its continuance in case of a change in the partners of either firm (a change which would ordinarily be fatal to a guaranty); and that the guaranty should apply to and continue upon transactions afterwards between the firms so changed, until notified by her to the contrary. It seems plain from all this language, that a series of new transactions, new agreements, and new engagements were within the contemplation of the parties; not advances for six months alone, but advances from time to time, for an indefinite period, until notice to the contrary should be given by the guarantor. It is difficult to conceive of any language more definite and more full to express the real intention of the parties. The original advance was, indeed, agreed to be made in the manner stated in the first letter of credit; and if there be any variance between the terms of the first and the second letter of credit, that was left solely and exclusively for the immediate parties, J. & A. Lawrence and the agents, to adjust and consider. They might enter into any new engagements as to the mode of drawing the bill, and the time which they were to run at their pleasure, without breaking in upon the true intention of the guaranty. All the stipulations of the first letter of credit were retained in the second, and an additional provision made, that if bills were drawn from the continent of Europe they should be made at the customary date and by a permanent resident. But this *left J. & A. Lawrence [*452 at full liberty to draw direct on London at four months, if they chose; and in point of fact no bills were ever drawn by them except direct on London, and not from the continent. The additional liberty given, or condition imposed, was not availed of; and, if it had been, it would not have in any manner exonerated the guarantor from her responsibility. Without, therefore, looking to the question whether these variances might or might not have been material, if new arrangements and engagements had not been within the scope of the guaranty,

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we are of opinion that the objection is, in the present case, not maintainable.

This view of the matter disposes also of the second, third, and fourth points made at the argument.

The fifth point is, that there is no valid consideration to support the guaranty. This is pressed under two aspects; the first is, that the consideration was past and not present; for the letter of credit had been already delivered to J. & A. Lawrence by the agents of the London house. The second is, that the payment of the one dollar is merely nominal and not sufficient to sustain the guaranty, if it had been received; and it is urged that it was not received. As to this last point, we feel no difficulty. The guarantor acknowledged the receipt of the one dollar, and is now estopped to deny it. If she has not received it, she would now be entitled to recover it. A valuable consideration, however small or nominal, if given or stipulated for in good faith, is, in the absense of fraud, sufficient to support an action on any parol contract; and this is equally true as to contracts of guaranty as to other contracts. A stipulation in consideration of one dollar is just as effectual and valuable a consideration as a larger sum stipulated for or paid. The very point arose in *Dutchman* v. *Tooth* (5 Bingham's New Cases, 577), where the guarantor gave a guaranty for the payment of the proceeds of the goods the guaranty had consigned to his brother, and also all future shipments the guarantee might make in consideration of two shillings and sixpence paid him, the guarantor. And the court held the guaranty good and the consideration sufficient. In *Brooks* v. *Haigh* (10 Adol. & El., 309, 323), the court held that a surrender by the guarantee of a former guaranty, even if it was not of itself binding upon the guarantor, was a sufficient consideration to take the case out of the statute of fraud and to sustain a promise made on the footing thereof. But, independently of all authority, we should arrive at the same conclusion. The receipt of the one dollar **453*]** is acknowledged; no *fraud is pretended or shown; and the consideration, if standing alone in a *bona fide* transaction would sustain the present suit.

As to the other point, that the consideration was past, it admits of several answers, each of which is equally decisive. In the first place, although the Messrs. Lawrence had received the letter of credit before the guaranty was given, yet it was a part of the original agreement contemporaneous with the letter of credit, that it should be given; and if the guaranty had not been given, the whole advance might have been recalled as a fraud upon the London house. In the next place, it does not appear that all the bills for the £10,000, under the first letter of credit, were drawn before the guaranty was actually given; and if they were not, certainly it would attach upon the bills drawn under the first credit after it was actually given. The contract was then a continuing contract on both, and partially performed only by one. In the next place, the guaranty itself uses language susceptible of being treated as a present continuing consideration *in fieri*. It is "in consideration of Messrs. J. & A. Lawrence having a credit with your house;" now, the word "having" imports a present or future advance, just as much as a past. The word "having" is in the present tense; and if the parties then understood the letter of credit to be *in fieri*, and to be absolute only upon a condition subsequent, viz.: the giving of the guaranty, the word is the most appropriate which could be used. The case of *Haigh* v. *Brooks* (10 Adol. & El., 309) approaches very near to the present. There the guaranty was "in consideration of being in advance to L. &c., I guaranty, &c." The Court of King's Bench thought that the words "being in advance" did not necessarily import a past advance, but might be applied to a present or future advance.

But that which puts the whole matter in the clearest light and beyond the reach of legal controversy, is that the advances now sued for were all made after the second letter of credit was given; and if the guaranty applied (as we hold it did) to those subsequent advances under the new engagements, then the consideration was complete as upon a present and not as upon a past consideration. In every view, therefore, in which we can contemplate the objection, it has no just foundation in law.

As to the sixth point on the question, whether due notice of the failure of Messrs. J. & A. Lawrence to repay the advances had been given; it was a mere question of fact for the consideration of the jury, as to whether the guarantor had reasonable notice or not. They *have found a verdict for the plaintiffs, [*454 and we are not at liberty to disturb it in a court of error.

As to the seventh point, the notes having been left for collection only with the agents of the London house, although indorsed by the Messrs. Lawrence, they do not fall within the strict rules of commercial law applicable to negotiable paper. Admitting, for the sake of the argument, that notice was not punctiliously given by the agents, still it resolves itself into a mere question of due diligence on the part of the agents to collect the notes, and falls under the general law of agency. No evidence was shown at the trial to establish any loss or damage on the part of Mrs. Lawrence for want of due protest and notice (if they were not made); and in the absence of such proof we are not at liberty to presume that the agents did not do their duty.

The case of *Swift* v. *Tyson* (16 Peters, 1) is entirely distinguishable from the present in its leading circumstances. There the question was, not whether a person receiving a note as collateral security or for an antecedent debt was not bound to due diligence in its collection, otherwise he made it his own, which was not doubted; but, whether taking it as collateral security or in payment of an antecedent debt, he was not to be treated as a *bona fide* holder for a valuable consideration, unaffected by any unknown equities between the original parties. This court held that he was.

Upon the whole, we are all of opinion that there was no error in the rulings of the court, and the judgment is therefore affirmed, with costs.

ORDER.

This cause came on to be heard on the transcript of the record from the Circuit Court of the United States, for the Southern District of New York, and was argued by counsel; on

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consideration whereof, it is now here ordered and adjudged by this court, that the judgment of the said Circuit Court in this cause be, and the same is hereby affirmed, with costs and damages at the rate of six per cent. per annum.

Cited—10 How., 474.

455*]

Ex-parte IN THE MATTER OF CHARLES F. SIBBALD, *Appellant*

v.

THE UNITED STATES.

Petition to alter former mandate of court.

Upon a petition so to alter a former mandate of this court as to direct lands in Florida, which had not been offered for sale under the President's proclamation, to be included within a survey, as well as those lands which had been so offered.

Held, That this court has no power to grant the relief prayed.

THIS case was brought up by appeal from the Superior Court for the District of East Florida. It was a petition, the nature of which can be best explained by referring to the petition itself, which was as follows:

To the Honorable, the Supreme Court of the United States, the petition of Charles F. Sibbald, respectfully represents:

That, at January Term, 1836, of the Supreme Court of the United States, that the case of The United States, appellants, against your petitioner, the subject matter being on a grant of land derived from the Spanish government, and situated in Florida, its extent 16,000 acres, your honorable court confirmed the entire grant of your petitioner.

That the grant stipulated, and your honorable court decided the right, as exercised by your petitioner of making surveys anywhere in Florida; at which decision three several surveys, as made, were accordingly confirmed to your petitioner. (*Vide* 10 Peters, 321.)

That it being ascertained that divers interfering surveys under valid titles from the British and Spanish, as also some donations from the government of the United States, would deprive your petitioner of a large portion of the 16,000 acres as decided to belong to him at the January Term of your honorable court of 1838, he found it necessary to apply to have the former mandate of the court so strengthened, or altered, that the surveyor of the public lands in Florida, and the judge of the United States Court there, would be directed to make surveys for such a quantity of land as that of which he was deprived by these conflicting claims within his former surveys.

That your honorable court (12 Peters, 488 to 496) heard his petition, representing "that, by the opinion of this honorable court, he considered two points clearly settled, to wit: the first, that he was entitled to 16,000 acres, according to the original grant; second, that he had an inherent privilege to direct, or point out, where other locations should be made, in case the other surveys made for him were interfered with by older and good claims."

456*] *That your honorable court (12 Peters, 494) have directed the application of the Missouri law of 1824, which, you say, "will meet the prayer of your petition, which you feel bound to grant, for the reasons set forth;" and, in accordance with which, a supplemental petition was added by the counsel of your petitioner, at the suggestion of your honorable court, referring to the Missouri law.

That upon receiving the mandate of the court and examining this law, your petitioner ascertained that while the decree of your honorable court confirmed and decided his rights to select lands anywhere in Florida, he ascertained that this act only authorized the entry of such refuse lands as had been offered at public sale under the President's proclamation; and thus depriving him of the very spots he might wish to select.

That, also, while this act would limit and confine him to such lands as (are) surveyed, the fact exists, that only a small portion of the public land in East Florida has been surveyed.

That your petitioner, therefore, is obviously debarred in the exercise of his right to select the lands decreed to him; and prays your honorable court to order the mandate (to be) so amended as to meet his case.

Your petitioner respectfully refers to the case of *Smith* v. *The United States* (10 Peters, 334), where your honorable court says: "Should this grant be confirmed, it must follow its tenor and purport; the decree must affirm its validity, not merely to the quantity of land, but with the right of location, according to its express terms, which gives St. Vrain the unlimited choice of the most valuable portions of the public lands. It would be in direct violation of those rights, which constitute the great value of the claim (which were not of the quantity of land), to make a decree that they were secured to him by the law of nations, the treaty, and acts of Congress, as inviolable, and in the same decree to limit him in the selection of such lands in Missouri as should have been offered at public sale, without a bid beyond the minimum price of the public lands. This would necessarily deprived him of the very spots to which he would be entitled under our decree, wherever he might choose to apportion them by a lawful survey."

Your petitioner further represents that, in *Arredondo* v. *The United States* (6 Peters, 710), your honorable court said: "In conformity with the principles of justice and rules of equity, the court is directed to decide all questions arising in the cause, and by a final decree to *settle and determine the validity of [*457 title according to the law of nations, the stipulations of any treaty, and the proceedings under the same, the several acts of Congress in relation thereto, and the law and ordinances of the government from which it is alleged to be derived, and all other questions which may properly arise between the claimants and the United States; which decree shall, in all cases, refer to the treaty, law, or ordinance under which it is confirmed or decreed against."

Filed 5th March, 1842. CHAS. F. SIBBALD.

Mr. Justice STORY delivered the opinion of the court:

On consideration of the petition filed in the above cause, it is the opinion of this court that it has no power to grant the relief prayed.

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Whereupon, it is now here ordered and adjudged by this court, that the petition be, and the same is hereby dismissed.

Cited—17 Wall., 283.

ROBERT BARNWELL RHETT, *Plaintiff in Error.*

v.

ROBERT F. POE, Cashier of the Bank of Augusta, *Defendant.*[1]

Bill of exchange—when drawer not entitled to notice of nonpayment—diligence a question of law—drawer and acceptor partners—rule requiring notice relaxed in cases of collateral security.

Where the drawer of a bill has no right to expect the payment of it by the acceptor: where, for instance, the drawer has withdrawn, or intercepted, funds which were destined to meet the bill, or its payment was dependent upon conditions which he must have known he had not performed, such drawer cannot claim to be entitled to notice of the nonpayment of the bill.

It becomes a question of law, whether due diligence has or has not been used, whenever the facts are ascertained; and therefore there is no error in the direction of a court to the jury that they should infer due diligence from certain facts, where those facts, if found by the jury, amounted in the opinion of the court to due diligence.

If the drawer and acceptor are either general partners or special partners in the adventure of which the bill constitutes a part, notice of the dishonor of the bill need not be given to the drawer.

458*] *A court is not bound to grant an instruction prayed for, where it is merely a recital of general or abstract principles, and not accompanied by, or founded upon, a statement of the testimony.

The strictness of the rule requiring notice between parties to a bill, is much relaxed in cases of collateral security, or of guaranty in a separate contract; the omission of such strict notice does not imply injury as a matter of course. The guarantor must prove that he has suffered damage by the neglect to make the demand on the maker and to give notice, and then he is discharged only to the extent of the damage sustained.

THIS case came up by writ of error to the Circuit Court of the United States for the District of South Carolina.

The suit was brought in the court below by Poe, the cashier of the bank, against Rhett as the indorser upon a note for $8,000 under the following circumstances:

Dixon Timberlake was a merchant who, it appeared from the evidence, had been for several years prior to 1837 in the habit of going from New York to the south, during the cotton buying season, and then returning to New York. In the winter of 1836–37 he was at Augusta, in Georgia, with large letters of credit from various houses in New York, and also one from Benjamin R. Smith, then a merchant in Charleston, South Carolina. By the aid of these letters he acquired a credit at the Bank of Augusta, and purchased considerable quantities of cotton and some bank and other stock in the course of the season. Some of the purchases were upon the joint account of Smith and himself, but the evidence was contradictory as to the particular purchases thus made.

In February and March, 1837, Timberlake being in Auguata, drew several bills upon Smith in Charleston, which all became due in May. The whole amount of the bills thus due in May was $21,500. A separate bill for $14,000 not included amongst these, because it was paid.

This sum of $21,500 was divided into two classes; one class consisting of $8,000 and the other of $13,500.

It appeared by the evidence that Smith was to provide for the first class of $8.000, and Timberlake for the remaining $13,500.

In order to carry out the arrangement respecting the first class, a bill was discounted drawn by Timberlake upon Smith for $8,000 and the note which was the subject of the present suit offered and accepted as collateral security. The note was as follows:

*$8,000. CHARLESTON, May 9th, 1837. [*459

Sixty days after date, I promise to pay to W. E. Haskell, or order, eight thousand dollars, for value received.

BENJAMIN R. SMITH.

Indorsed,

W. E. HASKELL, per attorney B. R. SMITH.

R. BARNWELL SMITH, per attorney B. R. SMITH.

R. Barnwell Smith, whose name it was permitted was placed upon the note by proper authority, was the same person as R. Barnwell Rhett, his name having been changed after the time of the indorsement.

Timberlake having made no provision for the other class of bills, amounting to $13,500, Smith was unable to take them up, and they were protested.

On the 2d of June, Smith made an assignment of his property for the benefit of his creditors, in a certain order which it is unnecessary to state; and it was further proved that at a time before the maturity of the note on which the action was brought, Benjamin R. Smith was insolvent.

On the 11th of July both the bill drawn by Timberlake upon Smith for $8,000, and the note in question for $8,000, became due; both neither being paid, the note was regularly protested and certain proceedings had upon the bill which constitute the defense in this case where suit is brought upon the note.

It was given in evidence on the part of the plaintiff, in order to establish the regularity of the proceedings with regard to the bill, that a notary demanded payment at the store of Smith, the acceptor, and his clerk (Smith being absent) replied, "there were no funds for payment of the same;" that the notary thereupon protested the bill for nonpayment, and inclosed notice thereof for Timberlake, the drawer.

1.—This case, although subsequent in this volume to that of Lawrence v. McCalmont, was in fact decided before it; having been argued at the preceding term and held under a *curia advisare vult;* and the manuscript opinion in the present case was sent for and referred to, during the progress of the argument in that of Lawrence v. McCalmont. The reason for stating this may be easily seen by referring to the report of that case.

NOTE.—*As to when drawer of bill, or indorser, is not entitled to notice,* see note to Fenwick v. Sears, 1 Cranch, 259.

As to questions of law and fact, for court or jury, as to notice of dishonor, or due diligence in giving same, see note to King v. Delaware Ins. Co., 6 Cranch, 71.

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letter sent by mail, addressed to Robert F. Poe, the cashier of the Bank of Augusta, as was the custom in similar cases; that the notary, at the time he protested the draft, did not know where Timberlake was to be found; that he had heard that he had resided and done business at Augusta, but was told that he had left that place. That he had made inquiries for Timberlake, and was then told that he had left Augusta, and it was not known where he had gone to. That the discount clerk of the Bank of Augusta had it in charge, as a part of his business, to make diligent search for the parties upon whom notices were to be served; that such notices were served upon them, personally, by said clerk if they were in Augusta, [460*] *and transmitted to them through the postoffice if they were at a distance; that said clerk was in Augusta on the 11th of July, 1837, and believes the notice would have been served on Timberlake if he had been in Augusta; that said clerk has searched for the notice to Timberlake and cannot find it; that Timberlake lived in a boarding-house whilst in Augusta; that he was insolvent when said bill became due. It was further testified by the postmaster and his assistant, that two or more letters were received at the postoffice for Timberlake during the summer after he had left Augusta, which were not advertised; that he rented a box at the postoffice, for a time which did not expire until the 1st of October, 1837, into which his letters were placed; that such letters could not have been forwarded to the general postffice, because they were not advertised; that Timberlake left Augusta on the 30th June, 1837, in the public stage; and that he left no agent in Augusta.

On the other hand, it was given in evidence on the part of the defendant, upon the cross-examination of Timberlake himself in this case, that Timberlake left Augusta on the 30th June, having requested the postmaster to forward his letters after him, and that he received several letters, forwarded from Augusta, agreeably to his directions, but never received any letter or notice of the nonpayment of the bill.

The defense rested chiefly on the ground that proper diligence had not been used to give notice to the drawer of the dishonor of the bill, and that, consequently, the securities upon the table which was given collaterally were exonerated from its payment.

In the trial of the cause in the court below, two separate sets of instructions were prayed for, on behalf of Rhett the defendant. The first set consisted of two prayers, which were refused by the court and were as follows:

1st. That by omission to inquire for the residence of Timberlake, or to send notice after him, the plaintiff has lost his right of action against him as drawer of the bill for $8,000.

2d. That if the jury find that the note was given as collateral security for the bill drawn by Timberlake, and that Timberlake is discharged, then the plaintiff cannot recover against the defendant on the note sued upon.

The second set of instructions consisted of five prayers which the court were asked to grant, but the court refused to do so, with the exception of the fourth, and gave its own instructions to the jury. The prayers and instructions given are as follows:

*And the defendant, by his counsel, [*461 before the jury retired from the bar, further prayed the court to instruct the jury as follows:

1st. The parties having shown that Timberlake had drawn upon Smith four bills, amounting in all to $21,500, which Smith had accepted, and had, at the time of the acceptance of the said bills, $10,000 in hand, received of Timberlake, to meet those bills, the defendant prayed the court to instruct the jury, that if the evidence was believed, then Timberlake had funds in the hands of Smith, and was entitled to notice.

2d. The defendant having shown that Timberlake resided in New York, and came habitually, between the months of October and January, to Augusta, and resided in Augusta during the winter and spring, and that Timberlake left Augusta on the 30th June, 1837, and that the notice of nonpayment of the draft was forwarded by the notary in Charleston to the plaintiff, on the 11th July, 1837, and nothing was shown to prove that the plaintiff had made any inquiry after Timberlake, or endeavored to give him notice.

The defendant prayed the court to instruct the jury that the plaintiff had not used due diligence to give the drawer notice.

3d. And inasmuch as evidence had been given that the bills drawn by Timberlake on Smith were drawn for purchases of cotton or stock, on the joint account of Smith and Timberlake, and Timberlake had diverted the property purchased on joint account to his own use, and was therefore bound to provide for the bills which fell due in May, to the amount of $13,500, and had not done so; the defendant prayed the court to instruct the jury, that the default of Timberlake to take up the bills for $13,500, did not excuse the want of notice to make him liable on the bill for $8,000.

4th. And the defendant prayed the court to instruct the jury, that if Timberlake had effects at any time between the drawing and the maturity of the said bill in the hands of Smith, he was entitled to notice.

5th. The defendant prayed the court to instruct the jury, that the insolvency of the acceptor and drawer, before the maturity of the bill, did not excuse the holder from giving notice of nonpayment to the drawer.

And the court instructed the jury as follows: On the first instruction asked, the court instructed the jury, that if they believed from the evidence that Timberlake had in the hands of Smith, when Smith accepted the bill for $8,000, $10,000, that Timberlake was entitled to notice of *the dishonor of the bill from the holder. [*462 But if the jury also believe from the evidence that the $10,000, in the hands of Smith, was a fund raised upon Smith's letter of credit to Timberlake, and was to be applied to the payment of purchases on joint account, and had been so applied, and that there was an arrangement afterwards between Timberlake and Smith in respect to all the bills drawn by Timberlake, amounting to $21,500; that Timberlake was to put Smith in funds to pay bills to the amount of $13,500, of the $21,500, which were to become due before the bill of $8,000 became due, and that on Timberlake doing so Smith was to pay the $8,000 bill; and that Timberlake did not put Smith in funds to pay the

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$13,500, and that the same were protested, of which Timberlake had notice; then, that Timberlake had no right to notice of the nonpayment of the $8,000 bill from the holder.

On the second instruction asked, the court instructed the jury, that if they believe from the evidence that Timberlake resided in New York, and was a sojourner in Augusta, from time to time, as stated in the instruction asked, that then, as drawer of the bill, he was entitled to notice of its dishonor; but if the jury believe from the evidence, though he may have resided in New York, that he had made Augusta his residence since the fall of 1834 or 1835, and that he had removed from Augusta, and out of the State of Georgia, after the bill for $8,000 was drawn, and before its maturity, that then due diligence had been used to give him notice of the dishonor of the bill.

On the third instruction asked, the court instructed the jury, that if they believe from the evidence that the bills drawn by Timberlake upon Smith were drawn for purchases of cotton or stock on the joint account of Smith and Timberlake, and that Timberlake had diverted the property and purchased on joint account to his own use, and that after promising Smith, the acceptor, to take up the bills to the amount of $13,500, he had failed to do so, and had not supplied Smith with money to take up the bills for $13,500, after the same were dishonored, up to the time when the $8,000 draft became due, and that there was an arrangement between Timberlake and Smith, after the $8,000 bill was accepted, that Timberlake was to put Smith in funds to take up the drafts for $13,500, which had been dishonored, and did not do so, that Timberlake was not entitled to notice of the dishonor of the bill for $8,000.

To the fourth instruction asked, the court
463*] instructed the jury, if *they believe from the evidence that Timberlake had effects in the hands of Smith at any time between the drawing of the bill, and the maturity of the said bill, that he was, as drawer, entitled to notice.

To the fifth instruction asked, the court instructed the jury, that the insolvency of the drawer and the acceptor, before the maturity of the bill, did not excuse the holder of the bill from giving notice of nonpayment to the drawer. But the court further instructed the jury, that if the insolvency of the drawer and acceptor were known to each other, and that this bill was drawn to pay for a purchase on joint account, or a transaction in which they were partners, and that the property so purchased had been diverted by the drawer to his own use, and that the payment of all the bills had been the subject of private arrangement between the acceptor and the drawer, that then the holder was excused from giving notice of the nonpayment of the bill for $8,000.

Whereupon, the said counsel, on behalf of the said defendant, before the jury retired from the bar, excepted to the aforesaid opinion and charge of the court, on the first, second, third, and fifth instructions moved for, and now excepts, and prays the court to sign and seal this bill of exceptions, which is done accordingly, this nineteenth day of April, in the year eighteen hundred and forty-one.

JAMES M. WAYNE, [L. S.]
R. B. GILCHRIST, [L. S.]

The jury found a verdict for the plaint for $8,000, with interest from the 11th Ju 1837.

To review all these prayers and instructio the writ of error was brought.

Messrs. Coxe and *Legaré*, Attorney-Gener for the plaintiff in error.

Messrs. Wilde and *Hunt* for the defendant.

Mr. Coxe, for the plaintiff in error, said t questions naturally arose in the case.

1. Is Timberlake discharged?

2. If he is, what is the effect upon Rhe

Mr. Coxe reviewed the evidence in order show that Timberlake had provided sufficien for the draft of $8,000, as he thought; a that it was charged to Smith and not to Ti berlake in his account with the bank. He th argued that Rhett, being a collateral securi was entitled to all the rights of a party; t Timberlake's obligation to pay arose only case the acceptor did not, and he, Timberla *was duly notified of such failure; that [*46 he was not notified for a year; that the ba never served the notice, which it was bound do. (Chitty on Bills, ed. of 1839, p. 465, c 10, sec. 1, where the cases are collected. S *note*.) The holder must give notice to all p ties. (3 Taunt., 130.)

It is true that the cases recognize a distinct between an indorsement upon the bill its and an engagement in a separate contra But no case justifies the extent of the doctri which must be contended for by the otl side.

As to the second instruction, there was evidence that Timberlake had made Augu his residence; and even if there was, the not should have been sent after him to New Yo Another State is not a foreign country. did not abscond; he went away in compa with one of the officers of the bank, and w with another of them at the Sulphur Spring There is no evidence that it was a partnersl debt. The books say it is dangerous not give notice. Our remedy must not be i paired; separate notices ought to be given all the parties. (Chitty, 466.) Our reme against Timberlake has been impaired by t course pursued.

The first instruction of the court modifi the prayer by adding, "if the fund was rais by Smith's letter of credit to Timberlake;" b these funds do not appear to have been rais in this way. The evidence is to the contra It said also, that if Timberlake failed to ta up his share, viz., $13,000, then Smith w exonerated from his agreement as made betwe them. But suppose this so, does this excu the bank? A suit would have been necessar which the bank had no right to anticipate. is always inferred that a drawer has funds the hands of a drawee, and had a right draw. (1 Term Rep., 416; 20 Johns., 485, 48

If there is a reasonable expectation that bill will be paid, the drawer is entitled to notic (2 Campb., 461; 12 East, 433, S. C.; Chitt 487.)

The holder must use reasonable diligence discover the residence of the indorser; but he there was no effort at all. They might ha learned at the postoffice where Timberlak letters were sent to. (2 Peters, 96; Chitt 488, *A*; 3 Greenleaf, 83; 8 Pick., 251.)

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Mr. Wilde, for defendant in error:

The plaintiff in error contends—

1. That due notice of the nonpayment of the ll was not given to Timberlake, the drawer, d therefore Timberlake was discharged.

65*] *2. That his undertaking being only llateral to that of Timberlake, the discharge Timberlake releases him.

And to this effect he prayed the first and rd instructions.

To this it is replied on the part of the dendant in error:

1st. That there was actual notice to Timberke, or due diligence to give such notice. *Mr. lde* here entered into a critical review of testimony, and inferred that there were fore the jury sufficient facts to warrant them finding actual notice. If the evidence falls rt of establishing actual notice, still due igence is abundantly proved. When the ts are ascertained and undisputed, what shall nstitute due diligence is a question of law. Peters, 583; Chitty on Bills, ed. 1817, page 9, where it is said (quoting the words of rd Ellenborough in *Walwyn* v. *St. Quentin*) hen the holder of a bill does not know here the indorser is to be found, it would be ry hard if he lost his remedy for want of mediate notice.

English Cases: 12 East, 433; Cowen, 81; ightwick, 76.

American Cases: 1 Johns. Rep., 294; 3 Johns. p., 376; 5 Binney, 541; 4 Serg. & Rawle, 9. Other American cases collected in Bayon Bills, 176, 183, *notes;* also, 5 Wendell, 5; 21 Wendell, 643; 24 Wendell, 230; 4 Mcad, 508; 3 McCord, 394; 2 Wash. C. C. R., 1. The decision in the last case was susined in 10 Peters, 572; 6 Wheat., 104; 8 heat., 326, 330; 9 Wheat., 598; 1 Peters, 9; 2 Peters, 96.

[*Mr. Wilde* gave an abstract of each of these ses, and dwelt particularly upon the last, here the court say: "The holder of a bill or omissory note in order to entitle himself to ll upon the drawer or indorser, must give tice of its dishonor to the party whom he eans to charge. But if, when the notice ould be given, the party entitled to it should bsent from the State, and has left no known ent to receive it; if he absconds, or has no ce of residence, which reasonable diligence, ed by the holder, can enable him to discover, e law dispenses with the necessity of ving regular notice." He then examined the idence to show how the case at bar was covd by the authority quoted, and that due igence had been used.]

It is clearly shown moreover by the evidence, at when the bill fell due, both drawer and ceptor were insolvent.

Here, then, is the full justification of the secnd instruction, and so much of the fifth as ffers from the instruction prayed.

But if the facts clearly proved do not conitute due diligence, we say:

66*] *2. That Timberlake was not entitled notice. In regard to this transaction, we ust be is to be considered either as a partner awing on a partner, or the drawer of a bill r his own accommodation; and in either branch f the alternative he is not entitled to notice.

1st. As a partner; notice to one partner is notice to all. (Gow on Partnership, 214, 215; 1 Campb., 82, 404; 1 Maule & Selw., 259; 20 Johns. Rep., 176.)

[*Mr. Wilde* here examined the evidence to show that this was a partnership transaction, or if not so, that it was for the accommodatian of the drawer.) Where the drawer has no effects in the hands of the acceptor, he is not entitled to notice. (1 Term Rep., 405; Chitty on Bills, ed. 1834, p. 39; 4 Maule & Selw., 226, 230, 231, 232; 3 Barn. & Ald., 619, 623; Chitty, 57; 3 Camp., 281; 4 Moore & Payne, 463.]

The case of *The Bank of Columbia* v. *French* (4 Cranch, 141) does not impugn the authority of *Bickerdike* v. *Bollman* (1 Term Rep., 405), but merely overrules the case of *Walwyn* v. *St. Quentin*, and *De Berst* v. *Atkinson*, which are no longer law, even in England. (See 15 East, 216; 3 Barn. & Ald., 619, 623.) The case in 4 Cranch, 141, is commented on and sustained, as to the point, in 10 Peters, 578.)

This branch of the argument may therefore be summed up as follows:

That Timberlake must be regarded either as a partner drawing on a partner, or as the drawer of a bill for his own accommodation. In the first instance, notice to Smith was notice to him; in the second, he was clearly not entitled to notice.

There is no error, therefore, in the first or third instruction.

3. In seeking to determine the extent of Rhett's responsibility, he may be considered either as if his name were on the bill as indorser, or as if he were a mere guarantor.

1st. As if his name were on the bill.

In order to perfect the claim of the holder of a bill against the indorsers, it is not necessary for the holder to give notice to the drawer. It is for the indorsers to give notice to the drawer, if they wish to preserve a remedy against him. (Chitty on Bills, ed. 1834, pp. 68, 69; 1 Strange, 441; Burr., 669; 2 Campb., 589.)

Let it be remarked that the note sued on was collateral security for Timberlake's bill; if the bill were paid, the note was paid. Now, the note being duly protested for nonpayment, and notice *thereof sent on the same day [*467 to Rhett and Haskell, Rhett and Haskell must have been thereby apprised that the bill was not paid, and it was for them, according to the authorities just quoted, to give notice to Timberlake if they desired to hold him responsible.

Let it be remarked further, that the very note given as collateral security and sued on in this case is indorsed by procuration. Smith indorses both for Rhett and Haskell, under powers of attorney from both. Smith, therefore, the attorney in fact of Rhett, had express notice of the dishonor of the bill, for the collateral security of which the note sued on was taken.

Notice to him was notice to Rhett, and if Rhett (considering him in the light of an indorser) desired to hold Timberlake responsible, it was for him to give Timberlake notice. The plaintiff was not bound to do it.

This court, in delivering its opinion in *Williams* v. *Bank of The United States* (2 Peters, 96), already cited, evidently had the limitation of the holder's obligations in view. They say, "it is incumbent on him to give notice to the

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party whom he means to charge. He is not obliged to notify any others; if they desire to have recourse over on other parties, it is for them to give such parties notice."

Considering the rights and liabilities of Rhett, therefore, as if his name were on the bill, the situation of the parties would be this:

Smith, acceptor, as partner, or for the accommodation of Timberlake.

Rhett, indorser, for the accommodation of Smith.

Now, to whom had Rhett to look?

To Smith and Timberlake.

Both are liable:

Smith as acceptor.

Timberlake as the drawer of an accommodation bill or as a partner.

All Smith's effects are assigned to Rhett; and, whatever is due from Timberlake to Smith, on their joint account, can be received by Rhett from Timberlake. Timberlake continues liable to Smith for whatever may be paid for him by Smith as acceptor for his accommodation; or, considering them as partners, for the balance of partnership accounts, and this balance, whatever it may be, is assigned by Smith's assignment for Rhett's benefit as a protested indorser.

Rhett, therefore, has sustained and can sus-
468* tain no injury by the *want of notice to Timberlake. He has lost no security which he would have kept had such notice been given.

Timberlake was not entitled to notice. He is not discharged of his obligations to Smith or Rhett by want of notice.

If notice had been given to Timberlake, Rhett would have gained no advantage, and by its omission he has sustained no injury.

Considering Rhett as a guarantor.

"Persons whose names are not upon the instrument, or who are not parties thereto, but have transferred the instrument by delivery, when payable to bearer, are not within the custom of merchants. Therefore, a party who by an independent memorandum guaranties the payment of a bill, is not as a matter of absolute right entitled to notice. It is not in general essential to give him notice: but as a surety (upon general principles) he may be discharged if he can show that a particular loss or prejudice has accrued to him from the omission to give him notice; but even then the discharge will only be, it seems, to the extent of the detriment."

The cases cited are: *Warrington* v. *Furber* (8 East, 242), *Swinyeard* v. *Bowes* (5 Maule & Selw., 62), *Holbron* v. *Wilkins* (1 Barn. & Cress., 10), *Van Wort* v. *Woolley* (3 Barn. & Cress., 439).

In the case of *Warrington* v. *Furber*, which was an action against the guarantor of a bill of exchange, on which no demand had been made against the acceptor, he having become bankrupt before the bill was due, it was held the guarantor was liable.

Lord Ellenborough, in delivering the opinion of the court, says: "The same strictness of proof is not necessary to charge the guarantors as would have been necessary to support an action on the bill itself, where by the law merchant a demand upon and refusal by the acceptors must have been proved in order to charge any other party upon the bill; and this notwithstanding the bankruptcy of the acceptors. But this is not necessary to charge guarantors, who insure, as it were, the solvency of their principals; and, therefore, if the latter become bankrupt and notoriously insolvent, it is the same as if they were dead, and it is nugatory to go through the ceremony of making a demand on them."

Gross, *J.*, says: "The necessity of a demand notwithstanding the bankruptcy of the acceptor, in order to charge the drawer or indorser, is founded solely on the custom of merchants." (8 East, 246.)

"The rule in the case of a guarantor," says Chancellor Kent in *his Commentaries [*469 (Vol. III., pp. 123, 124), "is not so strict as in that of mere negotiable paper. The neglect to give notice must have produced some prejudice to the gurantor; and in the case of absolute guarantee of the payment of a note, no demand or notice is requisite to fix the guarantor."

"And persons who are not parties to the instrument, but are responsible if it be not paid as having guarantied the payment or delivered it without indorsement on account of a debt are not, it seems by the custom of merchants entitled to the strict observance of the rule as to presentment. As to such persons a formal presentment may be excused, by showing that the acceptor became insolvent before the bill fell due; that it would not have been paid if presented; that the defendants were aware of the fact, and that no injury resulted from the omission." Chitty on Bills, 48 *a*, ed. 183 refers to the cases already cited.

In the case of *Reynolds et al.* v. *Douglass et al.* (13 Peters, 503), this court say: "The rule is well settled that the guaranty of a promissory note, whose name does not appear on the note, is bound without notice where the maker of the note was insolvent at its maturity. The his liability continues unless he can show has sustained some prejudice by want of notice of a demand on the maker of the note and non payment."

In the present case the proof is full that both drawer and indorser were insolvent before the bill fell due; notice, therefore, would have been nugatory; and regarding Rhett as a guarantor, Poe was not bound to give him notice. Considering Rhett, therefore, either as if his name was on the bill, or as if he be a guarantor by a separate instrument, he is not released by the want of notice to Timberlake.

4. This brings me to consider our adversaries' view of their case. They insist that Timberlake is to be regarded as the drawer of a bill in the fair course of trade, having funds in Smith's hands at the time, and being entirely unconnected with him in any contract of partnership. I will not weary the court by going over the evidence, but I ask leave to remark, that this pretense is set up for the first time after the suit.

[*Mr. Wilde* here referred to particular parts of the evidence stated in the record].

I desire the court to note in the next place that this attempt to give to this bill the color of one drawn in the usual course of trade, against funds in Smith's hands, rests solely on the testimony of Timberlake *and Smith. [*470 Now, assuredly it is not my purpose to impeach the testimony of these gentlemen, who are entirely unknown to me; but I should be false

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my trust if I did not remark that their view of this subject seems to have changed with their change of position. The illusions of interest are at least as great as those of optics.

I ask the court to remark that Timberlake's effort to make out that this was a bill drawn upon funds in Smith's hands, is exceedingly lame. He says the bill was not drawn for my accommodation, it being for the purpose of renewing my two bills, &c.; as if being in renewal, it was necessarily not an accommodation.

[*Mr. Wilde* here again commented on the evidence.]

Let it be remarked, also, that Timberlake, in his evidence, does not allude to the agreement between himself and Smith, to which Smith testifies that if Timberlake paid the drafts for $13,500, he (Smith) was to pay the draft for $8,000. Remark, also, that Timberlake is never shown to have had any capital or funds.

With respect to Smith's evidence to make this business paper drawn on funds in his hands. It is in contradiction with his previous acts and declarations; with his letter to the bank; his declaration to Adger; with all the earlier proceedings, in which both parties regard and declare these bills accommodation paper; the only difference being that Smith says they were drawn for the accommodation of Timberlake, and Timberlake that they were drawn for the accommodation of Smith. Taking Smith's evidence with all these drawbacks, and what does it amount to? He states that these drafts were originally drawn on joint account for joint speculations in cotton and stocks; that it was subsequently agreed between them that he, the witness, would pay the draft for $8,000, and that Timberlake would pay the three drafts amounting to $13,500. That if Timberlake was now to pay the three drafts amounting to $13,500, he, the witness, would owe him the amount of the draft of $8,000. Thus we see the same paper assumes, according as the interest of the parties varies, the character of partnership paper, accommodation paper, or business paper drawn on actual funds.

But assuming for the sake of argument that Timberlake drew this bill, having funds in Smith's hands.

The court will remark, by the testimony of Smith, "that he did not assign any particular fund to meet the draft for $8,000. That the proceeds of the cotton sent to Bayard and Hunter were realized in June or July, after he had executed his deed of assignment, and that 471*] *he never applied those funds to the payment of Timberlake's drafts on him."

He further testifies that the proceeds of the cotton sent to Bayard and Hunter in Savannah, were passed by him to the credit of R. B. Rhett (the present defendant), "and went to pay a note with Mr. Rhett's indorsement discounted at the Bank of Charleston."

Now, if Smith had funds of Timberlake's in his hands, he has sustained no injury by want of notice to Timberlake. And if these very funds have been passed over to Rhett, he has clearly no right to be discharged from his liability as guarantor for Smith, on the ground that injury has been sustained by want of notice to Timberlake.

The ground assumed for insisting on notice to Timberlake, is, that he has funds in Smith's hands. If he had no funds he is bound without notice. If he had funds, then Smith, the acceptor, as the original debtor, was bound to pay the bill, and Rhett is bound to Poe as the guarantor of Smith.

The court will observe that as to the drafts for $13,500, drawn by Timberlake and discounted by the bank, Rhett became in no manner liable. He became guarantor to the bank for Smith, by a collateral security only to the limited amount of the draft for $8,000. Is it not to be taken, then, that he gave this collateral security, relying on the cotton in the hands of Bayard and Hunter for his indemnity? And now, how does this matter stand upon the very footing claimed for it by the plaintiff in error? What is the justice, equity, and good conscience of the defense, according to our learned adversaries' own statement of it?

Smith obtains the proceeds of the cotton from Bayard and Hunter, and passes them over to Rhett by his general assignment. They go to pay a note of Smith's in bank, with Rhett's indorsement. Rhett having thus received the very fund upon which, as he alleges, the bill was drawn, insists on being released from his guarantee, because no notice was given to the drawer, Timberlake. But if Timberlake has funds in Smith's hands, the only ground for entitling him to notice, then Smith was the principal debtor, both in fact and in form; and Rhett, having received the very fund, cannot evade his responsibility for Smith.

On the one hand, then, considering this as a bill drawn for Timberlake's accommodation. Could Timberlake recover against Smith on his acceptance? Evidently he could not. The case of *Sparrow et al.*, v. *Chisman* (4 Mann & Ryl., 206, 207) is conclusive on that *point. [*472 If not, what injury has Timberlake sustained by want of notice? And if he has sustained no injury, he is not discharged. If he is not discharged, neither can Rhett be discharged, because the only claim of Rhett to be released is founded on the alleged release of Timberlake.

On the other hand, regarding this as a bill drawn by Timberlake on funds in Smith's hands, accepted by Smith, and the payment of that acceptance guarantied by Rhett, can Rhett, after receiving under Smith's assignment the funds on which the bill was drawn, object that the drawer is discharged by want of notice?

Whatever room for cavil or dispute there may be on the other points of this case, there are two, in my humble judgment, decisive.

First. The unquestioned facts show due diligence.

Next. These drafts were clearly on joint account; and in a partnership transaction notice to one partner is notice to the other.

Where, then, is the error in granting the instructions given, or in refusing those refused?

The fourth and fifth instructions the court gave as prayed. They are out of the question.

The second the court gave with the necessary and lawful limitations, that if the jury believed the facts there stated, there was due diligence.

The first, it was no error to refuse, for the court merely laid down the rule with its legal limitations.

Mr. Hunt, on the same side, for the defendants in error, said:

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The acceptance and note bore date the same day, and became due the same day; and the whole case turns upon the steps taken to demand payment, and give notice of nonpayment of this draft.

Mr. Rhett contends that the note on which he was indorser was only a collateral security; and if the holder, by any laches, has made the draft his own by discharging any of the parties, he is paid, and the collateral note is discharged; and he charges that D. Timberlake was discharged, as drawer of the bill, by neglect to give him notice of its nonpayment. That, as sureties, the parties to the note are entitled to their remedy over against Timberlake, the drawer; and it was the duty of the holder to give him due notice, in order to fix his liabitity; and having neglected to do so, the note is not obligatory.

To this defense, the defendant in error answers:

1. That the note and draft were contempora-
473*] neous securities for *the payment of one sum of $8,000 on the 11th July, and that the failure of the acceptor of the bill to pay it at maturity, instantly rendered all the parties to the note liable; and having received due notice of the nonpayment of the draft, by being notified as indorsers of the note, they are bound as of 11th July, 1837; and if they desired to make use of the bill. they were bound to pursue their remedy by paying the note and receiving the draft. No obligation attached to the holder to do more than demand payment, and on its refusal, to resort to his other security for the debt.

The note was not an ultimate security dependent upon exhausting the remedies upon the bill, but a concurrent one, and was perfected by the mere dishonor of the draft by the acceptor.

2. That as far as relates to the plaintiff in error, even if it had a right to require the holder to give notice to Timberlake, and had a right to the draft, he has sustained no damage, as the said Timberlake was wholly insolvent at the time it became due; and even as surety he can only claim to the extent of the loss proved.

3. That, in fact, the holder did use due diligence to fix the drawer, by using the ordinary means to give him notice.

That the drawer left the State where he transacted business, and had his domicile when the draft was negotiated, and without giving any notice to the holder where notice would reach him; and so, being out of the realm, he was not entitled to notice.

4. That said Timberlake and Benjamin R. Smith were copartners in relation to the said draft, and were equally bound to have provided funds for its payment; and a notice and demand upon one copartner was a notice to both, and so said Timberlake is responsible, being a copartner, as acceptor of the bill as well as drawer.

5. The said Timberlake was not entitled to notice, and was liable on said draft without notice, because he had intercepted and used the copartnership funds, which ought to have been applied to the payment of that draft.

6. The defendent in error also contends, that Mr. Rhett cannot complain of any want of notice, inasmuch as he has received, as a preferred creditor of the acceptor, the identical copartnership funds which ought to have been applied to the payment of this draft. He got $8,000 in first class, and full indemnity in the next, and no account of the proceeds of the cotton.

7. That Timberlake knew that the acceptor had assigned all the funds of the copartnership prior to the maturity of the draft, and so *knew it could not be paid; and Mr. [*474 Rhett was the assignee, and has received the fund.

And so the defendants in error will contend that R. Barnwell Rhett was bound, as indorser, to pay the said note of $8,000, and that the instructions by the court contain the true legal positions arising out of the cause; and they deny that the plaintiff in error was authorized to require the court to state the law on any supposed case, or any imperfect statement of this case. It is enough if the court state the rules of law correctly, and leave the jury to apply them.

That if the court think that there was no other connection between the note sued upon and the draft of $8,000 than this; that the holder was to demand payment of the draft at maturity, and in default of payment, was authorized to resort to the note immediately—and did so—and gave due notice to the parties on the note—and was not bound to do more—then the instructions were immaterial, and the necessity of any notice, and the fact of due diligence as to the bill did not arise in the case.

1st Point. The note, even if collateral, was a security that the bill was good and would be paid at maturity, and the moment it was dishonored the note became absolute and the right of action accrued, and there is no dispute that the parties to the note were duly notified.

The holder of the bill was not obliged to notify the drawer; the notice to the indorser of the note was sufficient, and they were bound to look to the parties to the bill and fix them.

The note was a security that the bill would be paid at maturity. (See *Trimble* v. *Thorne*, 16 Johns. Rep., 152.) The parties to the note were bound to pay it at maturity in the order of notice.

If so, then has Poe lost his claim; the neglect to notify is by way of discount. It is a demand independent of the note. Rhett was no party to the bill.

Suppose Rhett had paid the note, could he then recover against Poe for neglect? What sort of contract? Was he agent? The delivery of the note with no condition was absolute; the memorandum in pencil does not alter the contract.

The party who receives a guaranty is not bound to give notice; the guarantor must look out for his own safety. (2 H. Black., 616.)

The guarantor is bound without notice where the drawer is insolvent, unless he proves that some special damage accrued from the *failure to give notice. A distinction [*475 is recognized between parties to a bill and guarantors. (2 Peters, 497.)

The same strictness of proof is not necessary to charge the guarantor as in an action on the bill itself. (8 East, 245.)

In 6 Vesey, 734, Lord Ellenborough says, there is no obligation of active diligence on the part of the creditor, as far as the surety is concerned. The law merchant is confined to

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papers where all are parties to the bill. (2 Johns. Chan. Cas., 559, 560, 662.)

3d Point. Rhett has sustained no damage, as Timberlake was insolvent.

[*Mr. Hunt* here referred to several parts of the evidence to show that he was insolvent.]

The guarantor is only entitled to complain of want of notice where he has sustained injury, and there only to the extent of the injury. He guarantees the solvency of the parties to the bill, and if they are insolvent, he is liable. (12 Peters, 503.)

Insolvency is an excuse for no demand being made, where the claim is prosecuted against a guarantor not on the bill. (9 Serg. & Rawle, 302; 8 East, 242, confirmed by 2 Taunt., 212.)

3d Point. The holder did use due diligence.

[*Mr. Hunt* here examined the evidence.]

A letter put into the the postoffice is sufficient. (6 Taunt., 305; 2 H. Black., 509; 17 East, 385.)

If a party has absconded, no notice is necessary. (4 Mass., 45–53.)

It is not necessary to prove that a letter was actually mailed; only that it was put in the proper way of being so. (4 Campb., 194; 4 Bing., 715; 15 E. C. L. R., 125; 1 Term Rep., 167; 3 Adol. & El., 193; 30 E. C. L. R., 69; 1 Term Rep., 294; 5 Johns., 375; 2 Espinasse Rep., 516.)

The law considers the place were the bill is drawn as the residence of the drawer. (2 Caines, 127.)

In the court below the judge only decided what constitutes due diligence in law. The facts were left to the jury.

4th Point. That Timberlake and Smith were partners, &c.

[*Mr. Hunt* referred to the evidence to show that they were partners.]

To constitute a partnership, both names need not be used; it is enough if the money went to a joint account. (8 Barn. & Cress., 427, 15 E. C. L. R., 257; 3 Campb., 493; 2 Barn. & Adol., 23; 22 E. C. L. R., 18, 19; 2 Peters, 197; 20 476*] Johns., 126; 17 Ves., *412; 7 East, 210; 1 Campb., 82; 18 E. C. L. R., 436; 4 Maule & Selw., 226.)

The case in 2 Campb., 309, cited on the other side, only decides that the note of one partner could not be declared upon as a joint note; but here the drawer and acceptor were copartners, and it was one paper, by both partners, for a joint debt. (See 3 Campb., 496.)

5th Point. Timberlake was not entitled to notice, because he had intercepted the funds, &c. 1 Wash. C. C. R., 461; 4 Mason C. C. R., 113; 2 Nott & McCord, 257, 438.)

[The argument upon the remaining points was entirely a comment upon the evidence.]

Mr. Legaré, Attorney-General, for the plaintiff in error, and in conclusion:

The doctrine contended for upon the other side puts all the cotton buyers out of the protection of the law merchant, if Timberlake was not entitled to notice. The mistake of the other side is in supposing that Rhett considered himself entitled to notice. But he did not.

In 12 Peters the court said that a guarantor was only entitled to a notice in a different manner from the acceptor. This is admitted. In 8 Pick., 426, *Chief Justice* Parker says, that the contract of guaranty is not clearly settled in the books.

The first and second instructions prayed for in the court below, by the counsel of Mr. Rhett, involve the following propositions:

1. That the note was collateral security.
2. That the parties to it were guarantors.
3. That as such they would be entitled to the bill and all the rights of the bank.
4. Whatever extinguishes the right of the principle destroys the guaranty.
5. That by the omission to find Timberlake he was as much released as if he had a written receipt.
6. That therefore the guarantor (Rhett) was discharged.

1st and 2d points. It was marked on the note itself that it was collateral security for the bill, by the agent of the party himself. If the principal is more bound than the rest, then it is a case of guarantee.

The case in 14 Ves., 159, is a case of distinct collateral security and not co-suretyship. The situation of the parties in that case was very analogous to this, and yet they were not all held principals.

*Notice must be given to the guar- [*477 antor unless both parties are bankrupt. This was a guaranty of the bill, and not that the acceptor only should pay it. (2 Taunt., 206.) The case in 8 East, 245, is examined in the above.

3d and 4th Points. The guarantor has a right to be subrogated to the rights of the creditor; and if the principal is released through negligence, the guarantor is also. (1 Pothier on Obligations, 365; 1 Bell's Commentaries, 347, 377, 5th ed.)

Bankruptcy in the books means something positive, and not loose talk of insolvency. (4 Johns. Chan. Rep., 123, 140; 11 Ves., 22; 9 Wheat., 680.)

5th Point. Was Timberlake discharged? This is the only difficult point in the case.

The burden of proof that due diligence was used, is on the other side. (Doug., 179; 7 East, 231; 3 Barn. & Rob., 619; Chitty on Bills, 511, 512.)

The least doubt of notice is fatai to the claim. Chitty, as above.

[*Mr. Legaré* here examined the evidence as to the degree of diligence that was used.]

But it is said that Timberlake was not entitled to notice because he had no funds in the hands of the drawee. The counsel on the other side attempted to prove that Rhett had got possession of this fund under the assignment, after proving that there was no fund there. But there was a fund. Smith drew for $5,000 in February 1837, and in April for $5,000 more, making $10,000; it remained in his hands. If he dishonored the previous bills, his funds were not paid away. Lord Kenyon, in the case cited from Term Reports, allowed a plaintiff to show that there were no funds, and by this decision produced great difficulty. Half of Chitty's book is filled with cases resulting from this doctrine.

The drawer is entitled to notice, although the bill is for the acceptor. (Chitty, 481.)

Where there is drawing and re-drawing, there must be notice. (2 Vesey & Beames, 240; Chitty, 480, *note*, where the rule of Lord Kenyon is regretted.)

It is said that Timberlake has absconded.

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But this court have said that absconding means quitting his house in a secret manner. The case quoted from 2 Peters decides this. But the northern merchants come to the south to buy cotton and go away when the season is over. These men cannot be outlawed. The evidence **478*]** shows *that Timberlake resided in New York. [*Mr. Legaré* referred to the evidence.] The case in 2 Peters, 96, only says that where parties live in the same town, notice must be left at the residence; but if he absconds, due diligence only need be used.

As to absconding, see 9 Wheat., 598; 3 Taunt., 130; Chitty on Bills, 401; 1 Lord Raymond, 743, a leading case, where a house was shut up, which is an act of bankruptcy in England. (9 Serg. & Rawle, 201; Chitty, 486.) Chitty says (486) if there is no residence, due diligence must be used. Has it been used in this case?

[*Mr. Legaré* remarked upon the evidence.]

It is said that there was a partnership.

If Timberlake and Smith were partners, all who draw and redraw are so. They agreed to purchase stocks, but did not buy them; and took back the money. Afterwards Timberlake bought stocks on his own account, and permitted Smith to come in.

Mr. Justice DANIEL delivered the opinion of the court:

The instrument upon which this suit was instituted in the Circuit Court was, as the aforegoing statement evinces, in form simply a common promissory note, signed by Benjamin R. Smith, made payable to William E. Haskell, indorsed by Haskell to Robert Barnwell Smith, *alias* Robert Barnwell Rhett, and by this last individual to Robert F. Poe, cashier of the Bank of Augusta, the plaintiff in the action. Such being the nature of the instrument, and it appearing that the formalities of demand at its maturity, and notice to the indorsers have been regularly fulfilled by the holder, a question as to the justice of a recovery by the latter could scarcely be suggested, if the rights and obligations of the several parties shall be viewed as dependent upon their relation to the note itself considered as a distinct and separate transaction. Such, however, is not precisely the attitude of the parties to this controversy. It is in proof that there was held by the plaintiff below, beside this note, a draft for $8,000 drawn by Timberlake on the 6th of May, 1837, at sixty days, in favor of the plaintiff, on Benjamin R. Smith, and accepted by Smith; and further, that upon the note was written by the plaintiff's agent, a memorandum in the following words: "This note is collateral security for the payment of the annexed draft of D. Timberlake on B. R. Smith of $8,000." Upon the effect of both these instruments, as constituting parts of one transaction, the questions propounded to the Circuit Court and brought hith- **479*]** er for review have *arisen. The further proofs contained in this record will be adverted to in the progress of this opinion, as notice of them shall become necessary to explain the instructions prayed for, and those given by the Circuit Court on the trial of this cause. The second series of instructions, embracing a more extended and varied survey of the evidence than is contained in that preceding it, will be first considered. It is to the first, second, third, and fifth instructions of this second series that exceptions are taken. To the first proposition affirmed by the court in this first instruction, it is difficult to imagine any just ground of objection on the part of the defendant below, as that proposition concedes almost in terms the prayer of that defendant. To the second branch of this instruction, it is not perceived that any valid objection can be sustained; for, although it might have been true that at the date of acceptance of Timberlake's draft on Smith for $8,000, the latter had been in possession of $10,000 placed in his hands by Timberlake, it would not follow under the circumstances proved, or under those assumed in the instruction, that Timberlake as the drawer of that draft was entitled to notice. If, as the instruction supposes, the acceptances for $21,500, which Smith had come under for Timberlake, were drawn for the accommodation of the latter, upon the faith of funds to be furnished by him for their payment; that the $10,000 had been furnished by Timberlake in part for that purpose, but had been withdrawn by him for his own uses prior to the maturity of the draft for $8,000—that he should have intercepted before the maturity of the draft all the funds against which he knew the acceptances of Smith were drawn, and that he, the drawer, and Smith, the acceptor, had, before such maturity, become notoriously insolvent, under such a predicament the law would not impose the requirement of notice to the drawer upon the holder. No useful or reasonable end could be answered by such a requisition. Where a drawer has no right to expect the payment of a bill by the acceptor, he has no claim to notice of nonpayment. This is ruled in the following cases: *Sharp* v. *Baily* (9 Barn. & Cress., 44), 4 Mann. & Ryl., 18; *Bickerdike* v. *Bollman* (1 T. Rep., 405). *Brown* v. *Meffey* (15 East, 221), *Goodall* v. *Dolly* (1 T. Rep., 712), *Legge* v. *Thorpe* (12 East, 171). If the $1,000 said to have been in the hands of Smith were by the agreement or understanding between Smith and Timberlake to be applied in payment of joint claims against them, and falling due before the draft for $8,000, and had been so applied, it had answered the sole object for which it had been raised, and could not in the apprehension of *these parties constitute a fund against [***480** which the draft of $8,000 subsequently to become due was drawn. Those $10,000 were gone, were appropriated by these parties themselves. Then if, after this appropriation, there was, as this instruction assumes, an arrangement between Timberlake and Smith in respect to the bills drawn by Timberlake to the amount of $21,500, that he was to put Smith in funds sufficient to pay $13,500 of the amount just mentioned, which were to become payable before the $8,000 draft, and that on Timberlake's supplying those funds Smith was to pay the $8,000 draft, and Timberlake failed to put Smith in funds to take up the $13,500, and that the drafts for the same were protested, of which Timberlake had notice, he, Timberlake, could have no claim to notice of nonpayment of the draft for $8,000. There could be no reason for such a notice from the holder of the draft. Timberlake could have had no right to calculate on the payment of this draft: on the contrary, he was bound to infer its dishonor. He knew

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that payment of the draft for $8,000 was dependent upon a condition to be performed by himself, and he was obliged to know from the notice of the dishonor of all his bills, that he had not performed that condition, and had thereby intercepted the very funds from which the acceptances by Smith were to be met. He therefore *quoad* this draft had never any funds in the hands of Smith, and consequently, never had any claim to notice of nonpayment from the holder.

The case of *Claridge* v. *Dalton*, in 4 Maule & Selw., is strongly illustrative of the principle here laid down. That was a case in which the drawer had supplied the drawee with goods which were still not paid for. To this extent, then, the former unquestionably had funds in the hands of the latter; but on the day of payment of the bill the credit upon which the goods were sold had not expired, and the court thereupon unanimously ruled that *quoad* the obligations of the parties arising upon these transactions, the drawer must be understood as having no effects in the hands of the drawee, and therefore not entitled to notice. The second instruction affirms in the first place, what must be admitted by all, and what is not understood to be matter of contest here, viz.: that whenever a party to a bill or note is entitled to notice, such notice, if not given him in person, must be by a timely effort to convey it through the regular or usual and recognized channels of communication with the party or his agent, or with his known residence or place of business. It is to so much of this instruction as is 481*] applicable to what may amount to *a dispensation from the regular or ordinary modes of affecting parties with notice, that objection is made; to that portion in which the court charged the jury that if they believed from the evidence that although Timberlake may have resided in New York, that he had since the autumn of 1834 or 1835 made Augusta his residence, and that he had removed from Augusta, and out of the State of Georgia after the bill for $8,000 was drawn and before its maturity, that then due diligence had been used to give him notice of the dishonor of the bill. It is not considered by this court that this charge in any correct acceptation of it trenches upon the legitimate province of the jury, or transcends the just limits of the authority of the court, or contravenes any established doctrine of the law. 'Tis a doctrine generally received, one which is recognized by this court in the case of *The Bank of Columbia* v. *Lawrence* (1 Peters, 578), that whenever the facts upon which the question of due diligence arises are ascertained and undisputed, due diligence becomes a question of law; see, also, *The Bank of Utica* v. *Bender* (21 Wendell, 643). In the case before us every fact and circumstance in the evidence which was to determine the residence of the drawer in Augusta, or his abandonment of that residence, or his removal from the State of Georgia; the unsettled and vagrant character of his after-life, the fruitless inquiries by the notary to find out his residence, the notoriety of his having neither domicile nor place of business in Georgia, the effort to follow him with notice of dishonor of his draft, were all submitted to the jury to be weighed by them. The charge of the court should be interpreted with reference to the testimony which is shown to have preceded it, upon which, in truth, it was prayed; with reference, also, to the reasonable conclusions which that testimony tended obviously to establish. Interpreted by this rule, it amounts to this, and this only, a declaration to the jury that if the evidence satisfied them of the residence of Timberlake in Augusta at the time of drawing the draft, of the certainty and notoriety of his having abandoned that residence and the entire State before its maturity, leaving behind him no knowledge of any place, either of his residence or for the transaction of his business, satisfied them also of the real but unavailing effort of the notary who protested the draft to discover his whereabouts, they ought to infer that due diligence had been practiced by the holder of the draft. In the case of an indorser, with respect to whom greatest strictness is always exacted, it has been ruled that the holder of a bill is excused for not giving regular notice of dishonor *to [*482 the indorser, of whose place of residence he is ignorant, if he use reasonable diligence to discover where the indorser may be found. Thus, Lord Ellenborough, in *Bateman* v. *Joseph* (2 Campb., 462) remarks: "When the holder of a bill of exchange does not know where the indorser is to be found, it would be very hard if he lost his remedy by not communicating immediate notice of the dishonor of the bill; and I think the law lays down no such rigid rule. The holder must not allow himself to remain in a state of passive ignorance, but if he uses reasonable diligence to discover the residence of the indorser, I conceive that notice given as soon as this is discovered is due notice within the custom of merchants." See to the same effect 12 East, 433; *Baldwin* v. *Richardson et al.* (1 Barn. & Cress., 245), *Beveridge* v. *Burgis* (3 Campb., 262). It has been held in Massachusetts that where the maker of a promissory note had absconded before the day of payment, presentment and demand could not be required of the holder in order to charge the indorser, (Opinion of Parsons, *Chief Justice*, in *Putnam* v. *Sullivan*, 4 Mass. Rep., 53). In *Duncan* v. *McCullough* (4 Serg. & Rawle, 480), it was ruled that if the maker of a promissory note is not to be found when the note becomes due, demand on him for payment is not necessary to charge the indorser, if due diligence is shown in endeavoring to make a demand. *Hartford Bank* v. *Stedman* (3 Conn. Rep., 487), where the holder of a bill who was ignorant of the indorser's residence, sent the notice to A, who was acquainted with it, requesting him to add to the direction the indorser's residence, it was held that reasonable diligence had been used. The measures adopted in this case by the holder of Timberlake's draft, when viewed in connection with the condition and conduct of the drawer himself, appear to come fully up to the requirement of the authorities above cited; and, therefore, in the judgment of this court, affect him with all the consequences of notice, supposing this now to be a substantial proceeding upon the draft itself.

Next and last in the order of exception is the fifth instruction. The first position in this is given almost literally in the terms of the prayer. The court proceeds further to charge, that if the insolvency of the drawer and ac-

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ceptor were known to each other, and that this bill was drawn to pay for purchases on joint account, or a transaction in which they were partners, and the property so purchased had been diverted by the drawer to his own use, and that the payment of the bills had been the subject of private arrangement between the acceptor and drawer, that then the holder was **483*]** excused from giving notice of the *non-payment of the bill for $8,000. With respect to the exception taken to this instruction, all that seems requisite to dispose of it, is the remark that if the drawer of the bill was in truth the partner of the acceptor, either generally, or in the single adventure in which the bill made a part, in that event notice of dishonor of the bill by the holder to the drawer need not have been given. The knowledge of the one partner was the knowledge of the other, and notice to the one notice to the other. Authorities upon this point need not be accumulated; we cite upon it *Porthouse* v. *Parker* (1 Campb., 82), where Lord Ellenborough remarks, speaking of the dishonor of the bill in that case, "as this must necessarily have been known to one of them, the knowledge of one was the knowledge of all:" also, *Bignold* v. *Waterhouse* (1 Maule & Selw., 259), *Whitney* v. *Sterling* (14 Johns. Rep., 215), *Gowan* v. *Jackson* (20 Johns., 176). Recurring now to the first series of instructions prayed for, we will consider how far the two propositions presented by them were warranted by the correct principles upon which the opinion of the courts may be invoked; and how far the court was justifiable in rejecting the propositions in question, upon the ground either of want of connection with any particular state or progress of the evidence, or of support and justification as derived from the entire testimony in the cause. It is a settled rule of judicial procedure that the courts will never lay down as instructions to a jury general or abstract positions, such as are not immediately connected with and applicable to the facts of a cause, but require that every prayer for an instruction should be preceded by and based upon a statement of facts upon which the questions of law naturally and properly arise. It is equally certain that the courts will not, upon a view of the testimony which is partial or imperfect, give an instruction which the entire evidence in a cause when developed would forbid. Tested by these rules, the two instructions prayed for in the first series are deemed to be improper; they are accompanied with no statement of the testimony as their proper and immediate foundation; they are bottomed exclusively upon assumption, and such assumption, too, as the testimony taken altogether is believed to contradict. The court, therefore, properly refused these instructions; for this refusal it was by no means necessary that the causes should be assigned, by the court, *in extenso*—these are to be seen in the character of the instructions themselves, and in the testimony upon the record. This court has thus considered and disposed of the several prayers for instruction in this cause, and of the rulings of the Circuit Court thereupon. **484*]** *Whilst this procedure has been proper with the view of ascertaining how far the rights of the parties have been affected by the several questions presented and adjudged in the Circuit Court, it is our opinion that the true merits of this controversy are to be found within a much more limited and obvious range of inquiry than that which has been opened by these questions. The note on which the action below was instituted was given as a guarantee for the solvency of the parties to the bill for $8,000, drawn in favor of the plaintiff, and for its punctual payment at maturity. Such being the character and purposes of the note, was it necessary, in order to authorize a recovery upon it, that every formality, all that strictness should have been observed in reference to the bill intended to be guarantied, which it is conceded are indispensable to maintain an action upon a mercantile paper against a party upon that paper? It is contended that a gauranty is an insurance of the punctual payment of the paper guarantied; is a condition and a material consideration on which this paper is received, and therefore that a failure in punctual payment at maturity is a forfeiture of such insurance on condition, rendering the obligation of the guarantor absolute from the period of the failure. Whether this proposition can or cannot be maintained to the extent here stated, the authorities concur in making a distinction between actions upon a bill or note, and actions against a party who has guarantied such bill or note by a separate contract. In the former instances notice in order to charge the drawer or indorser is with very few established exceptions uniformly required; in the latter the obligation to give notice is much more relaxed, and its omission does not imply injury as a matter of course. In *Warrington* v. *Furbor* (8 East, 242), where the guaranty was not by indorsement of the paper sued upon, and the action was upon the contract, Lord Ellenborough said "that the same strictness of proof is not necessary to charge the guarantees as would have been necessary to support an action on the bill itself, where by the law merchant a demand and a refusal by the acceptor ought to be proved to charge any other party on the bill, and this notwithstanding his bankruptcy. But this is not necessary to charge guarantees who insure, as it were, the solvency of the principal, and if he becomes bankrupt and notoriously insolvent, it is the same thing as if he were dead, and it is nugatory to go through the ceremony of making a demand upon him." Le Blanc, *Justice*, says, in the same case, "there is no need of the same proof to charge a guaranty as there is a party whose name is on a bill of exchange; for *it is sufficient as [*485 against the former to show that the holder could not have obtained the money by making demand of it." The same doctrine may be found in *Philips* v. *Astling et al.* (2 Taunt., 205). So, too, Lord Eldon, in the case of *Wright* v. *Simpson* (6 Ves., 732), expresses himself in terms which show his clear understanding of the position of a collateral guaranty or surety, his language is "as to the case of principal and surety, in general cases, I never understood that as between the obligee and the surety there was an obligation to active diligence against the principal, but the surety is a guaranty, and it is his business to see whether the principal pays, and not that of the creditor." The case of *Gibbs* v. *Cannon* (9 Serg. & Rawle, 198) was an action against a guarantor who was not a

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party on the note, upon his separate contract. The Supreme Court of Pennsylvania decided in this case that, provided the drawer and indorser of the note were solvent at the maturity of the note, notice of nonpayment should be given to the guarantor, and that the latter under such circumstances may avail himself of the want of notice of nonpayment, but it places the burden of proving solvency, and of injury flowing from want of notice, upon the guarantor. The last case mentioned on this point, and one which seems to be conclusive upon it, is that of *Reynolds* v. *Douglass et al.* (12 Peters, 497), in which the court establish these propositions:

1st. That the guarantor of a promissory note, whose name does not appear upon the note, is bound without notice, where the maker of the note was insolvent at its maturity, unless he can show that he has sustained some prejudice by want of notice of a demand on the maker, and of notice of nonpayment.

2d. If the guarantor can prove he has suffered damage by the neglect to make the demand on the maker, and to give notice, he can be discharged only to the extent of the damage sustained. Tried by the principles ruled in the authorities above cited, and especially by that from this court in 12 Peters, it would seem that this case should admit of neither doubt nor hesitancy. The note on which the action was brought was given as a guaranty for the payment of the bill for $8,000, as is proved, and indeed admitted on all hands. It is the distinct and substantive agreement by which the guaranty of the bill was undertaken. It is established by various and uncontradicted facts and circumstanees in the cause, and finally by the solemn admissions of Timberlake, the drawer, and Smith, the acceptor of the bill, both of whom have testified in the cause, that 486*] at the maturity of the *bill they were both utterly insolvent; that Timberlake was probably so before the commencement of these transactions, and that Smith before the maturity of the bill had made an assignment of everything he had claim to, for the benefit of others, and, amongst the creditors named in that assignment, providing for the plaintiff in error as ranking high amongst the preferred class.

Under such circumstances to have required notice of the dishonor of the bill would have been a vain and unreasonable act, such as the law cannot be presumed to exact of any person.

Upon a review of the whole case, we think that the judgment of the Circuit Court should be affirmed.

ORDER.

This cause came on to be heard on the transcript of the record from the Circuit Court of the United States for the District of South Carolina, and was argued by counsel; on consideration whereof, it is now here ordered and adjudged by this court, that the judgment of the said Circuit Court in this cause be, and the same is hereby affirmed, with costs and damages at the rate of six per centum per annum.

Cited—18 How., 512.

AUSTIN L. ADAMS AND ANN C. HARDING, *Plaintiffs in Error*,

v.

JULIA ROBERTS.

Ancient manumission deed evidence on trial of petition for freedom of child—date of petitioner's birth question for jury.

On the trial of a petition for freedom, a paper was produced, which was a copy of a deed of manumission, executed in December, 1801, by the owner of certain slaves in Virginia (and amongst them, the mother of the petitioner, to become free on the 1st of January, 1814), to which paper the names of two persons were attached as witnesses. In January, 1802, the grantor went into court in Fairfax County, Virginia, and ordered it to be recorded; but it did not appear whether the two witnesses were then with him or not. The grantor resided in the District of Columbia.

Under these circumstances, and under the statute of Virginia, passed December 17, 1792, a prayer to the court to instruct the jury that the petitioner was not entitled to freedom was properly refused.

The mother of the petitioner becoming free on the 1st of January, 1814, the exact time of the birth of the petitioner, whether before or after that day, was a fact for the jury; and a prayer to the court which would have excluded the consideration of that fact was properly refused.

*THIS case was brought up by writ [*487 of error from the United States Circuit Court of the District of Columbia, for the County of Alexandria.

Julia Roberts, a colored woman, sued in the Circuit Court for her freedom under the following circumstances:

Anterior to the cession to the United States of that portion of Virginia which is now comprehended within the District of Columbia, Simon Summers resided in it, and was the owner of a female slave named Sarah, who, it was admitted, was the mother of Julia, the petitioner in the court below.

On the 30th of December, 1801, Summers executed a deed of manumission of several negroes, and amongst them, Sarah, then about eighteen years old, to be free on the 1st day of January, 1814; and the deed further provided that the children of Sarah should be free at the age of twenty-five years.

Before the execution of this deed of manumission, Summers had been transferred, by virtue of the cession from Virginia, to the District of Columbia. The deed concludes as follows:

As witness my hand and seal, this 30th day of December, 1801.

SIMON SUMMERS, [L. S.]

Test. CHARLES LITTLE,
HARRISON CLEVELAND.

At a court held for Fairfax County, 18th day of January, 1802, Simon Summers acknowledged this deed of manumission, to the several negroes therein mentioned, to be his act and deed, which is ordered to be recorded.

Test. WILLIAM MOSS, Clerk.

A copy. Test. S. M. BALL.

This deed was acknowledged before, and recorded in, the court of Fairfax County, Virginia, in which county Summers had lived, prior to the cession to the United States. After the cession he became thereby a resident of Alexandria County, in the District of Columbia, without changing his domicile.

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The Statute of Virginia in force in Alexandria County, is the 30th section of the Act of the General Assembly of Virginia, passed the 17th December, 1792, entitled "An Act to reduce into one the several acts concerning slaves, free negroes, and mulattoes." Sec. 36, will be found at p. 191 of Pleasant's edition of the Laws of Virginia, published in 1803, and is in the following words:

"It shall be lawful for any person by his or her last will and testament, or by any other instrument in writing under his or her hand **488*]** *and seal, attested and proved in the County or Corporation Court by two witnesses, or acknowledged by the party in the court of the county where he or she resides, to emancipate and set free his or her slaves, or any of them, who shall thereupon be entirely and fully discharged from the performance of any contract entered into during servitude, and enjoy as full freedom as if they had been particularly named and freed by this act."

The original deed of manumission, after being recorded, was mislaid or lost, but a paper, admitted to be a true copy, was produced upon the trial. It was admitted that the petitioner, Julia, was the daughter of Sarah, and was, at the time the suit was brought, over twenty-five years of age.

The trial took place at May Term, 1842. Much evidence was given which is imbodied in the following bill of exceptions, and which is set forth at large, because the prayer in the second bill of exceptions refers to, and is based upon it.

1st Bill of Exceptions.

At the trial of this cause, the petitioner having given evidence tending to show that, previous to the year 1801, Sarah, the mother of the petitioner, was the property of Simon Summers, and remained in his possession until about the year 1799, when she was placed by said Summers in the possession of Wesley Adams, who about that time married the daughter of said Summers, and who lived then, and continued to live for many years thereafter, in Fairfax County, Virginia; then gave evidence that diligent search had been made among the records of Fairfax County, Virginia, for an original deed of manumission of said petitioner's mother by said Summers, but no such original deed could be found, and that the same is lost; but that there was among said records the enrollment of a deed, whereof the annexed paper, marked A, is admitted to be a true copy, and of the certificates of acknowledgment and the recording of the same. And further offered evidence that said deed was personally acknowledged by the said Simon Summers, in the County Court of the said County of Fairfax—the said slave Sarah being then there in the said county, and having always before resided in the said county. And the petitioner then read in evidence the said paper marked A, purporting to be the copy of a deed of manumission from said Summers, of the negro woman named Sarah, named therein; and then gave evidence tending to show that the petitioner **489*]** was the child of said *named Sarah, and is now about 38 [28] years of age; and further gave evidence tending to show that the defendant Harding makes no claim to the petitioner in her own right, but solely by the direction of her co-defendant Adams, who is the son of the Wesley Adams above named, and his said wife the daughter of said Summers. And the petitioner further gave evidence tending to show that, about the year 1820, the said Wesley Adams brought Sarah, the petitioner's mother, to the public poorhouse in Fairfax County, State of Virginia, and applied to the overseers of the poor for said county for alimony for said Sarah as a free woman of color, and her two small children; and that a levy was made upon said county for their support, and they were supported until the year 1826, when a levy was made for the support of said Sarah and the three children which she then had with her, but among whom the petioner was not included; and that said levy, when raised, was placed in the hands of said Wesley Adams for their support as aforesaid. And further gave evidence tending to show that Sarah passed as free for a number of years, and that Wesley Adams, about the year 1826, said that Sarah and her children were free, and that the said Adams wanted to sell the petitioner to a witness, to serve him until she should reach twenty-five years of age, when she was to go free; and that Simon Summers had given slaves to him in such a way as to be of no service to him, as they became free as soon as they became valuable. And the petitioner further gave evidence tending to prove, that at the division of the estate of Simon Summers, who died in 1836, the defendant Adams was present, and that in said division the said Sarah was brought into hotchpot—that is, Wesley Adams was charged, as distributee of Simon Summers' estate, with the value of the services of said Sarah, up to the year 1814, when she went free, and up to which time the said Summers had allowed her to serve Wesley Adams. And the plaintiff further offered evidence to prove that the said Simon Summers resided in the County of Fairfax before and until the 27th of February, 1801, when the County of Alexandria was erected, consisting of a part of the said County of Fairfax; and the then residence of the said Simon Summers fell within the said County of Alexandria, in the District of Columbia, without any change of his actual residence; that the slaves mentioned in the deed of emancipation had always resided in the said County of Fairfax up to the date of the said deed, and to the time of its acknowledgment as aforesaid.

The defendants then offered evidence tending to prove, that an *order was made by [**490** the overseers of the poor of the said County of Fairfax, in 1825, to demand of the said Wesley Adams the $20 advanced him for the support of Sarah's infant children.

The defendants then gave evidence tending to show that said Sarah died some years ago, on the land of John Adams, and after remaining two days there, was buried at the expense of the defendant, Austin L. Adams.

The defendants then gave evidence tending to show that at the date of the paper, marked A, viz.: 30th December, 1801, the said Simon Summers was a resident of the County of Alexandria, District of Columbia, and did not reside in Fairfax County, Virginia. But the witnesses who proved the same residence of said Summers, proved, on cross-examination, that at said last-mentioned date, the said Sarah

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was in the possession of Wesley Adams, in Fairfax County, Virginia; and that at said date Simon Summers owned 200 acres of woodland in said Fairfax County, and was interested in another tract of land in said Fairfax County, on which there was a house, and which was cultivated land, but which was tenanted by one Ferguson; and that said Simon Summers resided before 1800 in Fairfax County, in Virginia, and never removed from the place where he then resided; but that the place of his residence was included within the lines of the District of Columbia, and that he continued to reside in the same place until his death.

Whereupon the defendants, by their counsel, prayed the court to instruct the jury, that if they shall believe, from the above evidence, that the said Simon Summers did reside in the County of Alexandria, District of Columbia, at the time of the executing and acknowledging the deed aforesaid, and continued so to reside until his death, in 1836, then that the deed of emancipation so as aforesaid made, executed, acknowledged, and recorded in the County Court of Fairfax County, Virginia, does not entitle the petitioner to freedom under the statute of Virginia in such cases made and provided, entitled "An Act reducing into one the several acts concerning slaves, free negroes, and mulattoes," passed the 17th December, 1792.

But the court refused to give the instruction as prayed, and to which refusal the defendants except, and pray that this their bill of exception may be signed, sealed, and enrolled, and which is accordingly done, this the 18th of May, 1842.

W. CRANCH. [L. S.]
JAMES S. MORSELL. [L. S.]

491*] *2d Bill of Exceptions.

Be it remembered, that on the trial of this cause, the petitioner and defendant having offered the evidence contained in the first bill of exceptions, and this being all the evidence adduced on the part of the petitioner and defendant aforesaid, the defendants, by their counsel, prayed the court to instruct the jury, that the testimony aforesaid, although believed by the jury, is not sufficient in law to maintain the issue joined; and therefore the law is for the defendants.

But the court refused to give the instruction so prayed, not being willing to certify that the evidence so stated as aforesaid is all the evidence adduced by the parties in the said cause, and because such an instruction would take the cause from the consideration of the jury, without giving the petitioner the benefit of the presumption which the jury might draw from the facts so given in evidence. To which refusal the defendants except, and this their bill of exceptions is signed, sealed, and ordered to be enrolled, this 18th of May, 1842.

W. CRANCH, [L. S.]
JAMES S. MORSELL. [L. S.]

Upon the refusal of the court below to grant the prayers contained in the first and second bills of exceptions, the case came up before this court.

Messrs. Neale and *Bradley* for the plaintiffs in error.

Mr. Brent, Sen., for the defendant.

Mr. Neale made the following points:

1. That the court erred in allowing the deed of manumission to be given in evidence on the part of the petitioner for the purpose of establishing her right to freedom; that said deed was, and is, wholly inoperative to establish or vest in the petitioner any such right.

2. That the court erred in allowing evidence to go to the jury tending to establish a reputation of freedom in Sarah, the petitioner's mother, as competent evidence to establish the petitioner's right of freedom, the latter basing her right on the said deed of manumission.

3. That the court erred in refusing to give the instruction prayed for in the second bill of exceptions.

4. That the court erred in accompanying their refusal to grant the prayer, in the second bill, with a refusal to certify that the evidence contained in the first bill of exceptions was all the evidence adduced in the cause, without at the same time stating that there was other evidence *adduced and not inserted in the [*492 first bill, and also showing what that evidence was, and what it tended to prove.

5. That the court erred in the further reason they gave for refusing the prayer of second bill, viz.: "because such an instruction would take the cause from the consideration of the jury, without giving the petitioner the benefit of the presumption which the jury might draw from the facts so given in evidence."

6. That the verdict of the jury is wholly irregular and void, in not responding to the issue submitted for them to try, and in not finding damages for the petitioner, even though they might have been nominal: And was such a verdict on the issue tried, that the court were not competent to award a judgment thereon "that the petitioner recover her freedom"—and that the court erred in entering such a judgment thereon.

He contended that the deed of manumission was not valid, because it was not acknowledged in the place where the grantor resided. His residence was in the District of Columbia, and the deed was acknowledged in Fairfax County, Virginia. The law of Virginia requires it to be acknowledged in the county where the grantor himself resides. (Old Revised Code, Act of 1792, p. 191, sec. 36; 2 Leigh, 312.)

A nuncupative will cannot emancipate. (1 Robinson's Practice, 428.)

All negroes are presumed to be slaves. (1 Hening & Munford, 141; Wheeler on Slavery, 31, 395.)

Mr. Brent, for defendant in error, said:

The case in Hening & Munford does not bear out the last position of the opposite counsel. He then argued the following points:

1. That there is no error in the judgment of the court below, as rendered; and if there be, it cannot be corrected or reversed here, in the form presented by the record.

2. That there is no error in the refusal of the court below to give the first intruction asked by the plaintiffs in error.

3. That the court below was right in refusing the second instruction.

4. That by the law of Virginia of 1782, in force in the County of Alexandria, in the District of Columbia, all negroes are, *prima facie*, free, unless they come within the exceptions of

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493*] that law; and that *the *onus probandi*, as to the exceptions, rests upon those who claim them as slaves.

5. That the defendant here, if not entitled to her freedom under the law named in the last reason assigned, is entitled to it by birth, being the child of a free woman at her birth.

6. That the mother of the defendant in this court was a free woman, and passed as such, and was so recognized from the 1st of January, 1814, to her death in 1836—a period of twenty-two years; and in the absence of positive proof of emancipation, the law presumes a deed of emancipation to have been made, after so long a lapse of time.

7. That by the law of Virginia a deed of manumission may be made by an instrument of writing under seal, attested by two witnesses, and proved in any court, &c.; and that there is no time limited for its proof, and no form or manner pointed out in which it is to be proved; and that it may be done on the trial of the suit for freedom, or at any other time, or in any other form.

8. That a deed of manumission, acknowledged by a non-resident in the court of the county where the slave resides, is good and binding in law. And,

9. That if the defendant, Julia Roberts, was entitled to her freedom in any way whatever, and the same appears by the evidence in the record, she is free, and the instruction asked for in the first bill of exceptions, if it had been given by the court, could not benefit the plaintiffs in error, and its refusal is no ground for a reversal of the judgment.

In support of the 5th point, he said that Sarah, the mother of Julia, was free on the 1st day of January, 1814, and that Julia must have been born after that day: because she was twenty-eight years old when the trial took place, in May, 1842. Besides, the lapse of twenty years authorizes a presumption of a deed of manumission. (1 Hill's S. C. Rep., 222; 2 Hill's S. C. Rep., 593; 7 Leigh, 702.)

There is no form prescribed for the instrument itself, the acknowledgment, or the proof. (2 Leigh, 311, 312, 318.)

The original deed of manumission was not produced at the trial; but there was what was admitted to be a true copy. It was permitted to be read in evidence, and it is too late to object to it now. The bill of exceptions does not object to its admissibility as evidence.

The law of Virginia ought to be liberally con-

494*] strued. (6 Randolph, *652, 657; 7 Leigh, 701, 714; 4 Leigh, 260, 264; 2 Leigh, 320; 2 Call, 270; 1 Robinson's Practice, 431.)

As to Summers' right to emancipate, see 8 Peters, 238; 6 Gill & Johns., 143.)

Mr. Bradley, for plaintiffs in error, in reply: Virginia has taken away from non-residents the power of manumitting slaves within the State. There is no one to support them or provide for them.

If the deed was not acknowledged in the court of the county or corporation, it cannot be evidence. (2 Leigh, 314; 6 Mumford, 201; 7 Leigh, 689.)

Mr. Justice WAYNE delivered the opinion of the court:

We think the court below did not err in refusing to give the instructions asked for by the defendants in either the first or second bill of exceptions.

By the statute of Virginia two modes are pointed out in which manumission by deed can be accomplished.

1. The instrument in writing under the hand and seal of the party must be attested and proved in the County or Corporation Court by two witnesses; or

2. It must be acknowledged by the party in the court of the county where he or she resides.

Either of these modes is effectual. It is stated in the bill of exceptions, and is not contradicted, that the County of Alexandria was made on the 27th of February, 1801, being composed of what had been a part of the County of Fairfax, in Virginia, and that Summers owned 200 acres of woodland in Fairfax County, and was interested in another tract of land also in said county, upon which there was a house. But it does not appear how far within the line of the district the actual residence of Summers was thrown, whether the dividing line ran through his farm, separating the house from the great body of the land, or whether the land upon which his slaves resided was a separate estate, detached from his residence. But it sufficiently appears that up to February, 1801, Summers had been accustomed to resort to the Court of Fairfax County for the transaction of business of every description, and that the jurisdiction under which he lived then became changed, without its having been done by his removal from where he had lived before.

*The claimant in support of her free- [*495

dom alleges that Summers executed an instrument under his hand and seal on the 30th December, 1801, to which the names of Charles Little and Harrison Cleaveland are attached as witnesses. Upon the 18th of January, 1802, by a copy admitted to be a copy of that instrument, and not objected to when offered as evidence, it appears that Summers went into court in Fairfax County and acknowledged it to be a deed of manumission. The court ordered it to be recorded, and it was done. There is nothing in the record to show whether or not the two witnesses were present with him in court when he made this acknowledgment If they were, the case would clearly fall within the first mode pointed by the statute, being an instrument in writing, under the hand and seal of the party, attested and proved in the County Court by two witnesses. It is not said in what court the attestation and proof must be made, in the case of a non-resident owning slaves resident in Virginia, but we presume that in such a case the attestation and proof ought to be made in the County Court where the slave resides.

It is not necessary, however, to decide that question in this case, because the proof to substantiate and give validity to the instrument does not exist, but we have recited the preceding facts, because they are evidence in the case, and are connected with the paper purporting to be a copy of a deed of manumission, which was introduced to sustain the claimant's demand for freedom. This, then, is the copy of an original paper not denied to be such by the plaintiffs in error, and the question occurring is, how ought it to have been considered in the court below as a part of the evidence in the cause with reference to

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the instructions asked? In the first instruction the court is asked to put the case, that the deed of emancipation so as aforesaid made, executed, and acknowledged and recorded, did not entitle the petitioner to freedom under the statute in such cases made and provided by an act entitled, "An Act reducing into one the several acts concerning slaves, free negroes, and mulattoes," passed December 17, 1792.

The paper in evidence was the copy of an original, the execution of which by the grantor was not denied. It was received as evidence upon proof of the loss of the original. It was forty years old. No proof of its execution was necessary; its antiquity proved it. But, it is said, the proof and attestation before the court in Virginia, to give it validity, was wanting, and that it appeared to be so upon the face of the paper given in evidence. That might, or might not be so. But it was a fact in controversy between the parties, as much so as any 496*] *other fact in the case, and the court could not be asked to instruct the jury upon their belief of another single fact, namely, the residence of Simon Summers in the County of Alexandria, that the party was not entitled to freedom under the statute of Virginia. The instruction as asked excludes all the other evidence, and puts the legal issue proposed on it upon a single fact. It excludes, also, all presumptions which the jury might make from the other evidence in connection with the antiquity of the paper which was before them. The court did not err in refusing to give the first instruction.

The second instruction asked for by the defendants in the court below was, that the testimony, although believed by the jury, was not sufficient in law to entitle the petitioner to her freedom.

If the jury believed all the evidence offered, the case would have stood thus: Susan, the mother of Julia, was to become free on the first of January, 1814. If they believed that fact, and also believed that Julia was born after that day, she was the child of a free woman, and of course free herself. The trial took place at May Term, 1842. Evidence was offered to show that Julia was then about twenty-eight years old. If she was twenty-eight years of age at any period between the first of January and May, 1842, of course she was born after her mother had become free. The instruction asked the court to deprive the jury of the power of saying she was born in that interval. This was a fact especially proper for the consideration of the jury, and the court could not have given the instruction asked by the defendant; that the testimony was not sufficient in law to entitle the petitioner to her freedom, without assuming the fact that Julia was not born in the interval already mentioned. We think the court did not err in refusing the instruction.

The judgment of the court below is affirmed.

ORDER.

This cause came on to be heard on the transcript of the record from the Circuit Court of the United States for the District of Columbia, holden in and for the County of Alexander, and was argued by counsel; on consideration whereof, it is now here ordered and adjudged by this court, that the judgment of the said Circuit Court in this cause be, and the same is hereby affirmed, with costs.

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*THE LOUISVILLE, CINCINNATI AND CHARLESTON RAILROAD COMPANY, *Plaintiffs in Error*, [*497

v.

THOMAS W. LETSON, *Defendant.*

Corporation, domicil of—sued by citizen of another State—sufficiency of averments to give Circuit Court jurisdiction.

A citizen of one State can sue a corporation which has been created by, and transacts its business in another State (the suit being brought in the latter State) although some of the members of the corporation are not citizens of the State in which the suit is brought, and although the State itself may be a member of the corporation.

The cases of Curtis v. Strawbridge (3 Cranch, 267), Bank of the United States v. Deveaux et al. (5 Cranch, 84), Commercial and Railroad Bank of Vicksburg v. Slocomb et al. (14 Peters, 60), reviewed and controlled.

The Act of Congress passed on the 28th of February 1839, making it "lawful for a court to entertain jurisdiction and proceed to the trial and adjudication of a suit between parties who may be properly before it, although there may be other defendants, any one or more of whom are not inhabitants of or found within the district where the suit is brought, or do not voluntarily appear thereto," is an enlargement of jurisdiction as to the character of the parties. The clause, exempting absent defendants from the operation of the judgment or decree, is an exception to this enlargement of jurisdiction, and must be strictly applied.

A corporation created by, and transacting business in a State, is to be deemed an inhabitant of the State, capable of being treated as a citizen, for all purposes of suing and being sued, and an averment of the facts of its creation and the place of transacting business, is sufficient to give the Circuit courts jurisdiction.

THIS case was brought up, by writ of error, from the Circuit Court of the United States for the District of South Carolina.

Letson, a citizen of New York, brought an action of covenant against the Louisville, Cincinnati and Charleston Railroad Company, alleging that they had not fulfilled a contract with him relating to the construction of the road.

The suit was brought in November, 1841.

In April, 1842, the defendants filed a plea to the jurisdiction, which was afterwards amended to read as follows:

"And the said the Louisville, Cincinnati and Charleston Railroad Company come and say, that this court ought not to have or take further cognizance of the action aforesaid, because they say that the said the Louisville, Cincinnati and Charleston Railroad Company is not a corporation whose members are citizens of South Carolina, but that some of the members of the said corporation are citizens of South Carolina, and some of them, namely, John Rutherford

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* NOTE.—*As to when corporations are deemed citizens*, see note to United States v. Amedy, 11 Wheat., 392.

As to jurisdiction of United States Circuit Court depending on parties and residence, see note to Emory v. Greenough, 3 Dall., 369; and note to Strawbridge v. Curtis, 3 Cranch, 267.

As to jurisdiction of United States courts, by reason of citizenship of corporation, and its stockholders, see note to Hope Ins. Co. v. Boardman, 5 Cranch, 57.

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and Charles Baring, are, and were at the time **498*]** of commencing the said *action, citizens of North Carolina; and the State of South Carolina is, and was at the time of commencing the said action, a member of the said corporation, and the Bank of Charleston, South Carolina, is also, and was at the time of commencing the said action, a member of the said corporation, which said the Bank of Charleston, South Carolina, is a corporation, some of whose members, namely, Thomas Parish and Edmund Lafau, are, and were at the time of commencing the said action, citizens of New York. And the Charleston Insurance and Trust Company is now, and was at the time of commencing the said action, a member of the said Louisville, Cincinnati and Charleston Railroad Company; which said the Charleston Insurance and Trust Company, is a corporation, some of whose members, namely, Samuel D. Dickson, Henry R. Dickson, Henry Parish, and Daniel Parish, are now, and were at the time of commencing the said action, citizens of the State of New York.

"And this the said Louisville, Cincinnati and Charleston Railroad Company are ready to verify. Wherefore they pray judgment whether this court can or will take further cognizance of the action aforesaid."

To this plea there was a general demurrer, which, upon argument, was sustained by the court.

The railroad company then pleaded the general issue, and the cause went on to trial. The jury found a verdict for the plaintiff, and assessed his damages at $18,140.23.

The writ of error was brought to review the opinion of the court upon the demurrer.

Mr. Mazyck for the plaintiffs in error.

Messrs. Pettigru, Lesesne and *Legaré*, then Attorney-General, for the defendant in error.

The case was submitted upon printed arguments; and, on account of its great importance, the reporter has thought it proper to insert these arguments *in extenso*.

Mr. Mazyck, for the plaintiffs in error:

An action is brought by a citizen of New York, in the Circuit Court in South Carolina, against a corporation whose members are alleged to be citizens of South Carolina. A plea to the jurisdiction is set up, in which it is averred: 1st. That two of the members of the corporation sued are citizens of North Carolina. 2d. **499*]** That the State of *South Carolina is also a member. 3d. That two other corporations are also members, and that some of the members of each of them are citizens of the State of New York.

The objections to the jurisdiction of the court arising out of these facts (the facts themselves being admitted by demurrer), are embraced in the following propositions:

1. That a citizen of one State cannot sue a corporation in the Circuit Court of the United States in another State, unless all the members of the corporation sued are citizens of the State in which the suit is brought.

2. That a citizen of one State cannot sue a corporation in the Circuit Court of the United States in another State, if the State be a member of the corporation, though all the other members of the corporation may be citizens of the State.

3. That a citizen of one State cannot sue a corporation in the Circuit Court of the United States in another State, where one of the members of the corporation sued is another corporation, any of whose members are citizens of the same State with the plaintiff.

1. A citizen of one State cannot sue a corporation in the Circuit Court of the United States in another State, unless all the members of the corporation are citizens of the State in which the suit is brought.

Sec. 2, art. 3, of the Constitution of the United States, provides that the judicial power shall extend to controversies "between citizens of different States." In the case of *The Bank of the United States* v. *Deveaux et al.* (5 Cranch 84), it was determined that "the artificial being, the mere legal entity, a corporation aggregate, is not a citizen, and cannot sue or be sued in the courts of the United States, unless the rights of the members in this respect can be exercised in their corporate name. If the corporation be considered as a mere faculty, and not as a company of individuals, who in transacting their joint concerns may use a legal name, they must be excluded from the courts of the Union. The corporate name cannot be a citizen, but the persons whom it represents may be citizens, and the controversy is in fact, and in law, between those persons suing in their corporate character, by their corporate name, for a corporate right, and the individual against whom the suit may be instituted. Substantially and essentially, the parties in such a case, where the members of the corporation are citizens of a different State from the opposite party, come within the spirit and terms of the jurisdiction conferred by the Constitution on the federal courts. The controversy *is substan- [*500 tially between citizens of one State suing by a corporate name and those of another State."

In other words, when a suit is brought in a circuit court of the United States, by or against a corporation, the court with reference to the question of jurisdiction, depending on the character of the parties, overlooks the artificial person, the mere legal entity, which cannot be either citizen or alien, and regards only the natural persons of whom it is composed. These are the substance, the real parties; the corporate character and style are only the form and name under which they are presented.

As far as this question is concerned, the members of the corporation are regarded as individuals jointly suing or being sued.

If they have the requisite character, if they are citizens of a different State or States from the other party to the suit, the case falls within the constitutional provision.

In *Strawbridge* v. *Curtis* (3 Cranch, 267), it was held that where the interest was joint, and two or more persons were concerned in that interest as joint plaintiffs, or joint defendants, each of them must be competent to sue, or liable to be sued in the federal courts, and the suit was dismissed because some of the plaintiffs and defendants were citizens of the same State.

And accordingly, the members of a corporation being regarded with reference to the question of jurisdiction, as joint plaintiffs or joint defendants in the same interest, it has been determined that if any of them are citizens of the same State with the other party to the suit, the

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federal courts have no jurisdiction. (*Ward* v. *Arredondo*, 1 Paine, 410; *Commercial and Railroad Bank of Vicksburg* v. *Slocomb et al.*, 14 Peters, 60.)

But in order to give jurisdiction to the circuit courts, founded on the character of the parties in a suit between citizens of different States, not only is it necessary that none of the parties on one side should be citizens of the same State with any of the parties on the other side, but the suit must be between a citizen or citizens of the State in which the suit is brought, and a citizen or citizens of some other State or States. In other words, all the parties on one side must be citizens of the State in which the suit is brought, and all the parties on the other side must be citizens of some other State or States.

It is not denied that under the constitutional provision as to the judicial power, Congress might, if they had thought proper, have given to the circuit courts jurisdiction of all cases [*501] between citizens of one or more States on one side, and citizens of one or more other States on the other side, as, for example, a case in which some of the plaintiffs should be citizens of New York, and some of them citizens of New Jersey, and some of the defendants citizens of South Carolina, and some citizens of North Carolina. But though Congress might constitutionally have given to the circuit courts jurisdiction of such a case, they have not done so. The 11th sec. of the Judicial Act of 1789 provides that the circuit courts shall have cognizance of all suits, &c., where "the United States are plaintiffs or petitioners, or an alien is a party, or the suit is between a citizen of the State where the suit is brought and a citizen of another State." If the parties on one side are citizens of a different State from that in which the suit is brought, and some of the parties on the other side are citizens of the State in which the suit is brought, and some of them are citizens of a third State, the suit is clearly not a suit between a citizen or citizens of the State in which it is brought, and a citizen or citizens of another State.

This suit, for example, being brought in South Carolina, by a citizen of New York, against citizens of South Carolina and North Carolina, is not a suit between citizens of the State in which the suit is brought and a citizen of another State. It is true that if you regard only the citizens of South Carolina who are defendants, it is a suit between citizens of the State in which it is brought and a citizen of another State. But, if you regard only the citizens of North Carolina who are defendants (which is just as reasonable), it is not a suit between citizens of the State in which it is brought and a citizen of another State. In truth, the suit is between the plaintiff and all the defendants, and as all the defendants are not citizens of South Carolina, it is not a suit between citizens of the State in which the suit is brought and a citizen of another State. The same rule of construction which would make this "a suit between citizens of the State where the suit is brought and a citizen of another State," within the provision of the Act of 1789, would, if applied to the constitutional provision, make it a case "between citizens of different States," even though some of the defendants were citizens of New York; for if you regarded only those who are citizens of South Carolina, it would be a case between citizens of different States, yet it has been repeatedly determined, that to bring a case between citizens within the jurisdiction of the federal courts, on account of the character of the parties, all the parties on both sides must be citizens of different States. (*Strawbridge* v. *Curtis*, 3 Cranch, 267; [*502] *The Cumberland Bank* v. *Willis*, 3 Sumner, 472; *Ward* v. *Arredondo*, 1 Paine, 410; *Commercial and Railroad Bank of Vicksburg* v. *Slocomb et al.*, 14 Peters, 60.)

The case of *Gracie* v. *Palmer* (8 Wheat., 699) was an action against citizens of New York, brought in the State of Pennsylvania, but that was not a case between citizens of different States, but a case "to which an alien was a party," the plaintiffs being subjects of Great Britain, and the defendants, though citizens of New York, being found in Pennsylvania, or voluntarily appearing there, which the court deemed equivalent to an acknowledgment of process served there.

But it will be said that the Act of 1839 (9 Laws of United States, 962) has enlarged the jurisdiction of the federal courts so as to embrace this case. That act provides that, "where in any suit at law, or in equity, commenced in any court of the United States, there shall be several defendants, any one or more of whom shall not be inhabitants of, or found within the district where the suit is brought, or shall not voluntarily appear thereto, it shall be lawful for the court to entertain jurisdiction, and proceed to the trial and adjudication of such suit between the parties who may be properly before it, but the judgment or decree rendered therein shall not conclude or prejudice other parties not regularly served with process, or not voluntarily appearing to answer." In the case of *The Commercial and Railroad Bank of Vicksburg* v. *Slocomb et al.* (14 Peters, 60) the court gave the following construction to that act: "The 11th section of the Judicial Act declares that no civil suit shall be brought before either of the (circuit) courts against an inhabitant of the United States by original process, in any other district than that whereof he is an inhabitant, or in which he shall be found at the time of serving the writ. Many difficulties occurred in practice in cases in which it was necessary to join several defendants, some of whom were not inhabitants of the district in which the suit was brought. The Act of 1839 was intended to remove these difficulties, by providing that persons not inhabitants, or not found in the district, may either not be joined at all, or if joined, and did not waive their personal exemption by voluntary appearance, the court may go on to judgment against the parties before it, as if the others had not been joined. But it did not contemplate a change in the jurisdiction of the courts, as regards the character of the parties, as prescribed by the Judical Act, and expounded by this court."

*Before the Act of 1839, a creditor, [*503] citizen of one State, having two joint debtors citizens of two other States, could only proceed against them jointly. If a citizen of South Carolina and a citizen of North Carolina were jointly indebted to a citizen of New York, he could not proceed against one of them without

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joining the other. If he could find them both in the State of New York, he might have sued them there in the Circuit Court of the United States, because his suit would then have been a "suit between a citizen of the State in which it was brought and citizens of other States, but he could not have sued them in the Circuit Court, either in North Carolina or South Carolina, because in neither case would the suit have been "a suit between citizens of the State in which it was brought and the citizen of another State." But the Act of 1839, by enabling him to proceed against them separately, enables him to sue each of them in the Circuit Court of the United States in the State of which he is a citizen, for then each suit is "a suit between a citizen of the State in which it is brought and a citizen of another State."

This is the whole effect of the Act of 1839. But such as it is, it is entirely inapplicable to a suit against a corporation. It provides that the judgment or decree shall not conclude or prejudice other parties not regularly served with process or voluntarily appearing. Now, of two or more individuals, joint debtors, each is liable for the whole amount of the debt; and there is, therefore, no reason in the nature of the obligation why separate judgments should not be awarded against them. But the members of a corporation are not individually liable for its obligation at all, and therefore from the nature of the obligation there can be no judgment against them individually, nor against a part of them; the judgment must be against the body corporate, which includes all the members. And, accordingly, in the case last cited, *The Commercial and Railroad Bank of Vicksburg* v. *Slocomb et al.*, the court say: "There is another reason why this act cannot apply to this case. It expressly declares that the judgment, or decree, shall not conclude or prejudice other parties not regularly served with process, or not voluntarily appearing. Now, defendants being a corporation aggregate, any judgment against them must be in their corporate character, and the judgment must be paid out of their corporate funds, in which is included the interest of the two Louisiana stockholders, consequently such judgment must prejudice those parties."

2. A citizen of one State cannot sue a corpo-
504* ration in the Circuit *Court of the United States in another State if the State be a member of the corporation, though all the other members of the corporation may be citizens of the State in which the suit is brought.

A corporation is not a citizen of any State, and therefore an action brought by a citizen of one State against a corporation in another State, is not within the jurisdiction of the federal courts, as a suit "between citizens of different States," unless each member of the corporation is a citizen of a different State from the plaintiff, as prescribed by the Constitution, and as it is still further restricted by the Judicial Act of 1789, "a citizen of the State in which the suit is brought." As far as the question of jurisdiction is concerned, the members of the corporation are regarded as the real defendants, sued by the name of the corporation, and each and all of them must have the requisite character. (*The Cumberland Bank* v. *Willis*, 3 Sumner, 472; *Ward* v. *Arredondo*, 1 Paine, 410; *The Commercial and Railroad Bank* v. *Slocomb et al.*, 14 Peters, 60.)

Now, the State is certainly not a citizen, and therefore the State being a member of the corporation, one of its members has not, and can not have the requisite character to give jurisdiction to the court.

But it will be said that the case of *The Bank of the United States* v. *The Planters' Bank of Georgia* (9 Wheat., 904) has settled this point in favor of the jurisdiction. It is not so. There is a very wide distinction between that case and this. That case, so far from having decided this question, did not involve it, nor depend upon it at all. It was not a case in which the jurisdiction was founded on the character of the parties. It was not a case between citizens of different States, for some of the corporators of the Bank of the United States were citizens of Georgia, as appeared by the pleadings, and therefore if the jurisdiction had depended on the citizenship of the parties, it could not have been sustained. It was a case in which the jurisdiction of the federal court depended altogether upon the nature of the case and not at all on the character of the parties. The Act of Congress, incorporating the Bank of the United States, authorized it to sue in the circuit courts of the United States, and it was held in the case of *Osborn et al.* v. *The Bank of the United States* (9 Wheat., 738) that, therefore every suit brought by the bank was a case arising under a law of the United States, and as such fell within the jurisdiction of the federal courts, without respect to the character of the parties.

Chief Justice Marshall, delivering the judgment of the court in *the case of *The* [*505
Bank of the United States v. *The Planters' Bank* says: "This is not a case in which the character of the defendant gives jurisdiction to the court. The suit is not to be sustained, because the Planters' Bank is suable in the federal courts, but because the plaintiff has a right to sue any defendant in that court who is not withdrawn from its jurisdiction by the Constitution or by law. The suit is against the corporation, and the judgment is to be satisfied by the property of the corporation, not by that of the individual corporators. The State does not by becoming a corporator, identify itself with the corporation. The Planters' Bank of Georgia is not the State of Georgia, although the State holds an interest in it." And again: "The bank does not sue because the defendant is a citizen of a different State from any of its members, but because its charter confers upon it the right of suing its debtors in a circuit court of the United States."

In that case the court having jurisdiction on another ground, it was not necessary to look beyond the corporation to find a ground of jurisdiction in the character of its members. The suit could be entertained against the corporation as a mere artificial being, and it was not material that the corporators should be citizens of Georgia, or who or what they were. The objection that the State was a corporator, would have been as strong in a State court having general jurisdiction as in the federal courts whose jurisdiction is limited, the case being from its nature, within the jurisdiction; for no State can no more be sued in a State court than

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in the federal courts, and as it could not have prevailed in a State court, so neither could it in the federal courts. The answer is, the action and the judgment are against the corporation, and the corporation is not the State, though the State may be a member of it. But in this case, in order to give jurisdiction to the federal court, it is necessary that all the members of the corporation should be citizens of the State, and the objection is, not that one member of the corporation is the State, which cannot be sued, but that one member of the corporation being the State is not a citizen of the State, and therefore it is not a case in which all the members of the corporation are citizens of the State in which the suit is brought, or citizens of a different State from the plaintiff. There is nothing in the character of the defendants to deprive the court of jurisdiction, if the court possessed jurisdiction independently of that character; but then there is nothing in their character to give jurisdiction, and there is not, as in *The Bank of the United States* v. *The* 506*] *Planters' *Bank of Georgia*, a ground of jurisdiction independent of the character of the defendants.

3. A citizen of one State cannot sue a corporation in the Circuit Court of the United States in another State, where one of the members of the corporation sued is another corporation, any of whose members are citizens of the same State with the plaintiff.

It has been sufficiently shown that a corporation is not a citizen, and that a suit brought by a citizen of one State against a corporation in another State, is not within the jurisdiction of the federal courts, unless all the members of the corporation are citizens of the State in which the suit is brought, or at least citizens of a different State from the plaintiff. If one of the members of the corporation sued is another corporation, and you regard the latter only as an artificial being, then one of the members of the corporation sued is not a citizen, and the suit is not a suit "between citizens of different States." But if you follow up the process which was adopted in the first instance, and looking beyond the stockholder corporation to the individuals of whom it is composed, with reference to the question of jurisdiction, regard them as the real stockholders, and the corporation only as the mode and name in which they hold their shares, then if they are citizens of a different State from the plaintiffs, it is a suit between citizens of different States, but otherwise it is not. If the same individuals without being incorporated were joint owners of the same shares, and some of them were citizens of the same State with the plaintiff, the suit would certainly not be a suit "between citizens of different States." And if for the purpose of determining the jurisdiction, the corporate character is overlooked, and only the individuals are considered, the case must be the same as if they were not incorporated at all. If the court will not look beyond the surface of the constituent corporation to the character of its members, the jurisdiction cannot be sustained. If it will, and should find them to be all citizens of the State in which the suit is brought, would they not be regarded as the real parties for the purpose of sustaining the jurisdiction? Then if any of them are found to be citizens of the same State with the plaintiff, must they not be equally regarded as the real parties, and so defeat the jurisdiction?

Suppose that the corporation against which the action was brought was found to be composed entirely of corporations (which is a very possible case), and that all the members of the several constituent corporations were citizens of the State in which the suit was brought, *would the court refuse to entertain [*507 jurisdiction? Would it not in such a case, with reference to the jurisdiction, regard the members of the constituent corporations as the real defendants, and assume the jurisdiction? They would be as truly the real parties as the individual members of a corporation consisting of individuals, and being the immediate defendant; the corporation being only the modes in which they are associated, affecting very materially the nature and extent of their rights and obligations, the forms of proceeding, and the nature and extent of the remedies for or against them, but not at all affecting their liability to the jurisdiction of the federal courts. For if they did, then all the men might be withdrawn from the jurisdiction of the federal courts by charters of incorporation. But if in the case of a corporation, consisting entirely of several corporations, the court would look beyond the constituent corporations to the character of their members, it must also in the case of a corporation, consisting in part of individuals, and in part of another corporation, and if any of the members of the constituent corporations are citizens of the same State with the plaintiff, the jurisdiction cannot be sustained.

Messrs. Pettigru and *Lesesne*, for the defendant in error:

This was an action of covenant by T. W. Letson, a citizen of New York, against the defendants, described as a corporation consisting of citizens of South Carolina.

After a summons and distringas, the defendants appeared, and pleaded to the jurisdiction. 1. That Mr. Baring and Mr. Rutherford are members of the company, and citizens of North Carolina. 2. That the State of South Carolina is a member of the company. 3. That the Bank of Charleston, South Carolina, is a member of the company; and that Edmund Laffan, a shareholder in said bank, is a citizen of New York. 4. That the South Carolina Insurance and Trust Company is a member of the company that is sued; and that Samuel Dickson, a shareholder in the South Carolina Insurance and Trust Company, is a citizen of New York.

The plaintiff below demurred to the plea, and the court sustained the demurrer. The defendants then pleaded to the action, and a verdict was had against them, judgment entered upon the demurrer and verdict. To reverse the judgment, this writ of error is prosecuted.

1. The first objection assumes that all the defendants must belong to one State. But there is no such rule. According to the authorities, *it is sufficient that all the members of [*508 the corporation that is sued are citizens of some State, other than that of which the plaintiff is a citizen. (*The Cumberland Bank* v. *Willis*, 3 Sum., 373.) It may, perhaps, be questionable, whether the citizenship of any but the persons who have the government of the corporation should

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be inquired into. In *Curtis* v. *Strawbridge* (3 Cro., 267) it was settled, that each distinct interest must be represented by persons, all of whom are entitled to sue or be sued in the federal courts. But this leaves open the question, whether all the private members of a corporation are properly the persons by whom a distinct interest is represented, when the corporation sues, or is sued. The interest of the corporation is, in fact, represented by the official members of the company. The real plaintiffs are those who have the right to sue, and the defendants those who may be compelled to plead. But a private member of the company has no power to sue, nor to prevent a suit in the name of the company; nor can his admissions be given in evidence, as in the case of a plaintiff. (Greenleaf on Ev., 383.) And when the corporation is sued, there is the same want of privity between a private member and the party to the record. He cannot be summoned or distrained to answer to a demand against the corporation, or to any rule or order connected with the cause. "Where a corporation is impleaded, the sheriff cannot distrain a private man." (Bro. Ab. Trespass, 135.) For a duty or charge on a corporation, every particular member is not liable, but process ought to go in their public capacity." (Vent., 351.) In practice, a summons goes in the first instance, and is served on the head of the company, and in case of refusal, a distress issues against the company's goods, &c., to compel an appearance (Tidd. Prac., 115), but no appearance could be enforced by any proceedings against a particular member. Now, it is difficult to conceive of a defendant, without some process to compel him to appear; but if that be essential to the character of a defendant, the private member of a corporation is excluded. If every member of the corporation has a right to be heard as a party objecting to the jurisdiction, it must be competent to the plaintiff to treat any member of the company as a defendant throughout. But a corporation in South Carolina cannot be sued in North Carolina by proceeding against a private member domiciled there. It seems a solecism to hold that the plaintiff cannot proceed in the federal court against the corporation, because A is a defendant; and yet that A cannot be sued for the same cause of action **509*]** anywhere, or in any court. It is *as much as to say that A is a defendant, and no defendant—a party, and not a party—at one and the same time. The result of these considerations is, that in suits by or against a corporation the relation of the official members to the rest of the company is not that of partners, but of trustee and *cestui que trust*. If this be admitted, there is an end of the matter, for nothing is more familiar than the difference between an interest in the suit, and the character of a party to the record. There is no rule of pleading, or of evidence, that will apply to a particular member of a corporation as a party to the record; he cannot be called on to answer, or to accept notice; his release would not affect the action; his admissions are not evidence; and, in fact, he never was taken notice of as a party, except to defeat the jurisdiction in this court. It may well be questioned whether such an anomaly can be reconciled with legal principles.

Nor does this reasoning militate against the decision of *The Bank* v. *Deveaux* (5 Cranch, 61), which is admitted to be the leading case. It was necessary in that case to look beyond the corporate character to see who were the persons that were suing in the corporate name. The court decided that they would take notice of the individuals who composed the corporation. But this rule is satisfied if the court ascertains that the individuals who effectually represent the company are amenable to the jurisdiction. There are other instances in which it has been necessary to look beyond the corporate name for the real actors; but in such cases, the official members only have been considered. We have the benefit of precedents here. The residence of a corporation can only be ascertained by reference to the natural persons composing it. Just as the court will inquire who sue in the corporate name, to ascertain whether they are citizens; the same question is sometimes asked to ascertain where they live. (*Rex* v. *Garden*, Cow., 85.) But it is to the official, not to the private members, that the court refers in such a case, to determine the occupancy or residence of the corporation. It is held to reside where its principal office is. (*Bank* v. *Mackenzie*, 2 Brock., 393.) And so in the grant of administration where the question of *bona notabilia* occurs; a share in a company that extends to both provinces, is considered assets in that province where the office of the company is situated. (*Smith* v. *Stafford*, 2 Wil. Chan. Rep., 166.) There can be no reason for making a difference between residence and citizenship. If the condition of the official members is decisive of the question of domicil, it is equally so of citizenship.

*A corporation is but a State in min- [***510**
iature; but in political societies, the persons in whom the powers of government are vested, are everywhere considered trustees for the rest of the community. Public acts are done in the name of the whole community, and all are bound by them; but the real authors of them are the persons who have the administration, nor are such acts referred personally to anybody else. In public questions, the demand is made on the government; and in private causes, the same course is pursued, when the injured party has any judicial redress. The Supreme Court has jurisdiction between the States of the confederacy, and before the 11th amendment the States were liable to be sued as corporations. But though the corporate interests of the whole community are at stake in such a controversy agreeably to the principles of legal procedure, no notice is taken of any person as defendant, but those who have the right to exercise the powers of government. In the English courts, when a foreign State is the suitor, the head of the State is the only person that is recognized as the plaintiff. (*The Columbian Government* v. *Rothschild*, 1 Sim., 94.) Every analogy confirms the conclusion that the parties who are invested with the corporate powers, as governors of the company are trustees; and in legal procedure should be treated so throughout.

The case of *London* v. *Wood* (12 Mod., 669) is the authority which the court followed, in *The Bank* v. *Deveaux*, taking notice of the natural persons who sue in the corporate name. But that case is a striking illustration of the distinction contended for, between the officia

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and the private members of the corporation, as parties before the court in their natural persons. Wood was sued in the Mayor's Court by the mayor and commonalty of London; and the judgment was reversed for error, because the mayor was both judge and plaintiff. It was not an answer to the objection, that he was plaintiff in his corporate character, and judge in his natural person, for it was the same individual. But if the cause had been tried in the Common Pleas, before a judge who was a freeman, and therefore one of the commonalty of London, the objection would not have applied. The argument for reversing the judgment against Wood is confined to the incongruity of the mayor being plaintiff in the same case in which he was judge. But no objection is made to the aldermen who were a constituent part of his court, although they must have been included in the general designation of the commonalty. Suits in the name of the people of the State are tried before a judge who is one of the same 511*] *people, and no one imagines that he is both party and judge. And so suits in which the city is a party are without any incongruity tried before a citizen.

The distinction between the official and the private members of the corporation corresponding exactly with that of trustee and *cestui que trust*, is founded on the plainest principles; and has never been overlooked in any case, but in that of the jurisdiction of this court. Yet there is no reason why this case should be an exception. On the contrary, every reason in favor of the jurisdiction applies with great force to a controversy between a stranger and a large corporation. In legal reason, the president and directors are trustees for the company; and in point of fact, the contest is between the plaintiff and the persons who have the government of the company; and so falls within the letter as well as the spirit of the Judiciary Act; as a suit between citizens of the State in which the action is brought and a citizen of another State.

A corporation has not the qualities of a person. But it acts by the agency of natural persons, and the acts which they do in the execution of the corporate powers are strictly their personal acts. The bringing or defending of a suit in the corporate name is the act of the official members in their natural persons; but is not the personal act of their constituents. The private members of the company are concerned in the suit in their corporate character merely, and the only persons having any personal relation to the suit are the official members. The private members cannot be called parties to the suit of a corporation without confounding the distinction between the natural and corporate character. In their corporate character they are parties; but as persons or citizens they have nothing more to do with the suit than a private man with a State prosecution. When, therefore, to defeat the jurisdiction, it is alleged that such or such a person, a private member of the corporation, is a party to the suit, the allegation is neither accurate in reason nor true in fact. The private persons are represented by the corporate name, not as persons, but as a faculty. The only persons who have any individuality in the corporate name, or can be called persons suing, are the official members.

Waiving, however, this discussion, which is not essential to the case, the objection that two of the members of the corporation are citizens of North Carolina, cannot avail. There is nothing in the constitution or in the act of Congress which requires that all the defendants must *be citizens of the State in which the [*512 action is brought. The Act of 1838 (9 Laws United States, 699) seems to be only declaratory. By the Constitution, the jurisdiction of the federal courts extends to cases generally between citizens of different States. The Judiciary Act confers jurisdiction on the Circuit Court in narrower terms, between a citizen of the State where the suit is brought and a citizen of another State. But when the parties to the contract reside in different States, the party who is sued cannot plead the nonjoinder of the party who is out of the jurisdiction. The proviso in the 11th section exempts persons from being arrested in one district for trial in another, and from any process to compel appearance in any other than that in which the party is found. But the defendant may waive this exemption, and if he voluntarily appears to a suit properly brought against his co-defendant, and which might have been properly brought against him in his district, it is no error. (*Gracie* v. *Palmer*, 8 Wheat., 699.)

No attempt has been made to arrest Mr. Baring or Mr. Rutherford, in the district of North Carolina, for trial in this district. Nor has any attempt been made to bring a suit against either of the defendants in any district in which they were not found. The original process was directed to the Marshal of South Carolina, and executed in his district. If the members who are alleged to be citizens of North Carolina are before the court, they have either appeared voluntarily or they have been found in South Carolina. If the plea is considered the plea of the absentees, it contradicts itself; they cannot appear and object to appear. If they have been found in South Carolina, they are rightly suable there with co-defendants who are citizens of that State, by the plaintiff, a citizen of New York. If they have not been found in South Carolina, how can they allege that they are parties? But if the plea to the jurisdiction be considered as the plea of the other members objecting that they cannot be sued without joining persons who are inhabitants of North Carolina, the answer is that they are joined. All the members of the company in their corporate character are residents at Charleston; and for any cause of action which concerns the corporation, they cannot be sued anywhere else. A defendant who is arrested in one district for trial in another, may waive his privilege; and if he appear to the suit he cannot object to the jurisdiction. But in a suit against a corporation, the defendants are not liable to be sued anywhere except in the district in which the corporation can be compelled to appear. By becoming members of the company they have submitted generally to the jurisdiction; by *appearing to the writ they have sub- [*513 mitted to the jurisdiction in this particular case; and the plea to the jurisdiction is doubly irregular.

2. The second objection is conclusively answered by *The Bank of the United States* v. *The Planters' Bank* (9 Wheat., 904). It is, however, argued that the decision in that case de-

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pended on the charter of the bank authorizing the said bank to sue in the federal court. But the Judiciary Act authorizes the plaintiff to sue the citizens of South Carolina in the federal court. The bank charter did not authorize the bank to sue a State, nor does the law authorize the plaintiff to sue a State; but the State, by becoming a party to a company, whether corporate or not, does not exempt the company from suit; and so the cases of the plaintiff, and of *The Bank of the United States* v. *The Planters' Bank*, are identical in principle.

3. The third objection resolves itself into the question whether Mr. Laffan is a defendant in this suit; or, in other words, a member of the Louisville, Cincinnati and Charleston Railroad Company. The negative is so evident that it is difficult to illustrate what is so clear. If he was a member he would be entitled to the same privileges with other members; but he is in fact incapable of doing any act which it requires a member of the company to do. He may vote in the choice of an agent or proxy to represent the Bank of Charleston in the charter meetings of the company. But to call him a member of the company is to overlook the distinction between the representative and the constituent. It is not the charter of the company but that of the bank, under which he acts when he votes for an agent of the bank. If his right to vote for an agent or proxy were contested, it is to the charter of the bank, and to that alone, that he must refer for his authority.

Again, if he was a member of the company he would be liable to the same burdens as the rest of the company; but he is entirely exempt from their obligations and bound by none of their by-laws. They could not expel him or forfeit his stock. It is true that he has an interest, though a remote one, in the company. It is an interest of the same kind as that which creditors or legatees have in the testator's assets, or a *cestui que trust* in the trust estate. But such an interest, though immediate and direct, would not make him a party to the suit in which the subject was contested by the executor or trustee. (*Chappedelaine* v. *Decheneau*, 4 Cranch, 306.) "It may be laid down as a rule without exception, that when jurisdiction depends on the party, it is the party named on the record." **514***] (*Madrazo* *v. *The Governor of Georgia*, 1 Peters, 110.) Mr. Laffan, then, is not a defendant, and the third objection fails.

But it is said that the Bank of Charleston is a defendant in its corporate character, and that against a corporation as such, the federal court has no jurisdiction. In answer, it is sufficient to say that the court has jurisdiction, because all the persons who are sued are citizens of South Carolina. The members of the company must be understood to be persons. It is enough that against the persons sued the court has jurisdiction. There is no such thing as the communication of an immunity from justice. It would have been competent for the Legislature of South Carolina to exempt the Bank of Charleston from the ordinary jurisdiction. But the privilege would not have extended to every joint stock company in which the bank might become a shareholder. A corporation, as a mere faculty or legal entity, cannot be a member of an incorporated company, for by members is meant the natural persons of whom the body politic is made up. The property in the shares is a different matter. The stock of the company may be appropriated to objects animate or inanimate. A slave, an alien, an enemy, or even a dead man, might be a shareholder; or the shares might be dedicated to the repairs of a house, to the improvement of land, or to the use of persons unborn. But it would be a frivolous objection to a suit against the corporation that some of its shares belonged to nobody. When shares in one corporation are held by another corporation, they belong to the government of the corporation which is the shareholder, as trustee for the corporate uses. In fact, the Bank of Charleston would have been incompetent to make the contract on which the action in this case is founded: and if this could be regarded as an action against the bank, it might have been resisted as founded on an illegal contract.

4. The fourth objection is the same precisely as the third, and must be overruled for the same reasons.

Mr. Legaré, then Attorney-General, on the same side:

The argument of *Mr. Petigru*, for the defendant in error, contains such a clear and able exposition of the question arising under the demurrer, that I will submit it to the court, by way of an opening, and cast my own in the form of a reply to *Mr. Mazyck's* for the plaintiffs.

But I will, in the first place, barely recall to the recollection of the *court, that this [*515 is an action brought by a citizen of New York against a corporation chartered by the State of South Carolina, having its principal, if not only, office in Charleston, conducted by a president and directors who are all citizens and residents of the latter State, and composed of stockholders, among whom, two only are so much as surmised to be absent from the State (but neither of these resident in New York); and a third is another corporation, in all respects exclusively an institution—a creature of the law of South Carolina, identified with it even in name—viz.: the Bank of Charleston.

If this court has not jurisdiction to protect the rights of a citizen of New York, whose whole fortune—the fruit of his labor—is involved in a controversy with a trading company, thus created, thus composed, thus situated, under that article of the Constitution of the United States which gives to the federal courts cognizance of "controversies between citizens of different States," everybody will admit that there is somewhere a great chasm in our law, and a serious grievance in our practice.

But I am bold to assert that the paradox which I have just stated does not exist in our jurisprudence. All will admit that the burden of proof is upon him who affirms the existence of such a state of the law. In an age when, more than ever, and in a country where, most of all, from obvious peculiarities of position and of polity, the spirit of association goes hand in hand with that of commerce; and all great enterprises, without exception, throughout the whole extent of this vast confederacy, are carried on by incorporated companies, local in nothing but their name and origin, it will be admitted to be, *a priori*, a most improbable proposition, that in any courts, under any circumstances,

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in any cause in which mere voluntary partnerships would have a remedy, all redress is denied to a company, because it is clothed by law in the attributes of a partnership expressly adapted, by a peculiar organization, to the most important ends. This is putting the case in the least adventurous manner; for, in truth, in the eye of the law, a corporation, while it is a partnership for all the good purposes of such a company, differs from it in this, that its business can be transacted, and its existence perpetuated, without the complexity and embarrassments of rights, responsibilities, and representations incident to a change of individual members in a mere voluntary concern. (Bell's Comm.; *Adley v. Whitestaple Company*, 17 Ves., 323.) It is a legal unit—a distinct and well defined person—immortal; unchangeable; capable, as such, of 516*] taking, holding, conveying, *administering, and defending property; known to the law by its corporate name only; speaking (formally and strictly) its will only by its seal; appearing in the courts only by its attorney, with a warrant under seal; represented only by its regularly constituted trustees or managers—the feoffees, so to speak, to its uses; and having a *persona standi in judicio* in this representative capacity, and by this name, and none other. Therefore, as I shall contend, it ought to be less embarrassed in the judicial pursuit of its rights than an unincorporated company; but say that it is liable to the same and no greater disadvantages, the question is whether, in the present state of the law, it would be any answer to the demand of the defendant in error for justice in a federal court—the Circuit Court of South Carolina—against a partnership with its office in Charleston, and carrying on its business there, as the domicile of the company, that one of those interested in it, as a dormant partner, for so a mere stockholder is, or even as an open and proclaimed partner, resides in a third State, neither that of the plaintiff nor of the defendant.

If the Act of 1839 was not made to prevent the possibility of such a denial of justice, what is it good for?

That act dispenses with the appearance, in a suit, of a party confessedly necessary, at common law, to a complete representation of all the interests in controversy. It ordains, that when there shall be several defendants, any one or more of whom shall not be found within a district, or be inhabitants of it, or shall not voluntarily appear, the court may proceed to adjudication between the parties properly before it, and the nonjoinder shall not be pleadable in abatement.

Admit, therefore, that Baring and Rutherford, members of this partnership or company, are inhabitants of North Carolina, who do not choose to appear, and have not been found in Charleston; and admit, further (what is not the fact), that they are necessary parties as defendants—I say, put aside the corporation, which merges entirely their legal interests, and makes their appearance in person a legal impossibility, and violating every principle of pleading and practice known in an English court—admit them to be full, open, and avowed copartners, and competent co-suitors, of the defendants below—yet their appearance to this suit is dispensed with. If they appear, the jurisdiction is unquestionable, by the express words of the act, and the judgment binds them as parties; if they do not appear, they are not parties to the judgment, as they are not parties in interest, and it will *be time enough to plead their absence [*517 (if such a plea be possible in our law) when any suit shall be prosecuted against them personally on the strength of the judgment in this case. But how can their appearance or nonappearance affect the question of jurisdiction, which depends, even in the case of necessary parties, on the fact of citizenship? Who ever heard before that the voluntary appearance of a citizen of a State gives jurisdiction to the federal courts, in a case in which that jurisdiction depends, not on the character of the cause, or the state of the pleadings, or the service of process—still less the will of an individual—but simply on the fact of citizenship or no citizenship, or, as it is commonly expressed, on the character of the parties—that is, on a distinct and ascertained civil *status* in the parties.

But this is putting the case much too favorably for the plaintiffs in error. It is admitting Baring and Rutherford to be necessary parties; that is, parties having a legal capacity to represent the interests in controversy, and indispensable to an adjudication on the subject of those interests. This, however, is not the fact. These gentlemen, even considered as partners, were dormant partners, not known in the transaction; never heard of by the plaintiff below; no parties (except by legal distant consequence) to the covenant he sues upon; and, therefore, laying the charter and the metaphysical being of the corporation out of the case for the present, and in considering them as members of a mere voluntary partnership, it is not true that they could have come in and pleaded at all to the declaration; still less that the president and directors, who did contract and covenant with the plaintiff below, would be allowed to plead that these unknown, unheard of, foreign persons, ought to be made parties to the suit, for the purpose of defeating it. The law is settled that dormant partners, as defendants, are not only not necessary parties, but are not allowed to become parties to the record where they were not so to the contract, and thus to defeat by surprise (which might be a fraud) a plaintiff who had never heard of them. (*De Montford* v. *Saunders*, 1 Barn. & Adol., 398.)

It does not lie in their mouths, as the legal phrase is, after treating as A, B, and C, to say they represented the whole alphabet. To say that this is true in all contracts whatever, except where they are to be passed on by a federal court, would be simply absurd. It might just as well be pleaded to a separate action on a joint and several bond against a citizen of South Carolina, that the co-obligor resided in North Carolina.

*Analogous to this equitable rule is [*518 that which makes a distinction between the form of an objection for nonjoinder of parties in an action. If the plaintiff comes into court without making all who have a joint interest in the subject of the controversy a legal interest, that is, parties to the suit, it is a defect of which (if it appear upon the pleadings) advantage may be taken by demurrer, or in arrest of judgment. But in a nonjoinder of defendants, there is only one way and one time of

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taking the exception—it must be done by plea in abatement. It is no bar, it is no ground for nonsuit on variance, and if the cause is allowed to go on at all, it is too late to object that some parties to the contract have not been held to their responsibility. (*Whelpdale's* case, 5 Co., 119 *a;* 1 Saund., 154, *n.* 1, 291 *b*, *n.* 4, &c.)

Those well-established general principles should seem to make it very clear, that by the law as it stands, especially since the passing of the Act of 1839, Messrs. Baring and Rutherford were either no parties to this suit at all, as having nothing to do with the transaction of the ordinary business of the company, or might be dispensed with under that act as absent defendants.

It is beyond all controversy that, were this a mere voluntary partnership and they avowed members, their appearance might be dispensed with, and their existence, as citizens of North Carolina, would not affect the jurisdiction. This is the Act of 1839.

It is, if possible, still clearer, that were they only dormant partners of a firm, the aid of the Act of 1839 would not be at all wanted to dispense with their appearance. They would not be allowed at common law to come in and plead even in abatement, much less in bar, that they were parties; neither would the visible and legally responsible members of such a partnership be permitted to put in any such plea.

It is certain that, if they appeared voluntarily, the court would have jurisdiction, for so says the Act of 1839, in the words just cited: "if the absent do not voluntarily appear." So said this court in *Gracie* v. *Palmer* (8 Wheat., 699), and this notwithstanding the words of the 11th sec. of the Judiciary Act, in that very proviso of which the Act of 1839 was intended to mitigate or prevent the evil effects. That act, after conferring the jurisdiction in general terms, goes on to make an exception, which proves the extent of the rule it modifies and restricts. It authorizes suits to be brought "between a citizen of the State where the suit is brought and **519*]** a citizen of another State," with *this important qualification, "that no inhabitant of the United States shall be suable in any other district than that whereof he is an inhabitant, or in which he shall be found at the time of serving the writ." Nothing can be more express than this proviso, but the court said these words were to be understood there, "if he saw fit to object to it."

It is the settled law of this court, that a defendant may renounce the privilege extended to him in this proviso, and if he be suable at all in the Circuit Court, that is, if he be a citizen of a State different from that of the plaintiff, he may be sued by consent in any court; for it is only in matters of personal privilege that consent gives jurisdiction. This I say is settled law, and so clear and unquestionable that the learned counsel for the plaintiff in error admits that before the Act of 1839, if a creditor having two debtors, citizens of different States, could find them both in his own (New York), he might have sued them there in the Circuit Court of the United States, because his suit would then have been a suit between a citizen of the State in which it was brought and citizens of other States. (p. 7.) But suppose he did not find them there, and they chose to appear, or, which is the same thing, to be regarded in law as found in the State of one of them, how could the privileged partner at once waive and assert his personal exemption?—appear and not appear? Or, what is still more important, if consent can give jurisdiction in such a case in one place, why should it not have the same virtue in another?

The truth is, the moment it is admitted that a party may appear voluntarily, or be held in any other way to answer in any State, which is neither his own nor that of his adversary, the whole matter is settled to be one of mere procedure and service of process; jurisdiction is no wise involved in it, for that is matter of fundamental law, and not at the discretion of parties.

And so is the Act of 1839. It applies to the very case of a joint contract between parties residents of different States (both different of course from that of the plaintiff, for only in such a case was it competent for Congress to give jurisdiction), and it provides expressly, that if the absent party will not waive his privilege by appearing, as this court in *Palmer's* case (8 Wheat., 699) ruled that he might, the Circuit Court should go on without him.

The case appears to me so very simple, upon the principles and authorities already cited, that I should leave it here, but that the counsel for the plaintiff in error founds himself upon a recent decision of *this court, which he [**520** seems to think has made a law for corporations aggregate, altogether different from any law applicable to natural persons, either as individuals or as partnerships, and altogether different, I must say, from any law known to any system of jurisprudence with which I am acquainted.

He lays down these propositions:

1. "That a citizen of one State cannot sue a corporation in the Circuit Court of the United States in another State, unless all the members of the corporation are citizens of the State in which the suit is brought."

I have demonstrated that if this company be considered as a mere partnership, or voluntary association, the residence in another State, as well as the non-appearance of Messrs. Baring and Rutherford, would be wholly immaterial under the Act of 1839.

If the company be considered as a corporation, the same consequence follows, with the single anomalous exception which I shall presently notice, *a fortiori*.

The first great difference between a corporation and a private partnership or voluntary association is, that in the former the company acts only by its constitutional organs, whether a committee of directors or appointed officers; while, in the latter, the obligations of a single member, or number of members, by the subscription of the firm, will bind the society. (2 Bell's Com., 556, 5th ed.)

A corporation, or to speak in the more accurate and scientific language of the continental jurists, a "juridical person," is, as I have said, a creature of the law, known to it under a given name, whose essence is in that name, and the social identity it implies—whose capacities are defined in its charter; whose will is expressed under its seal; whose unity is affected by no change in the parts that compose it, and

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whose existence survives the deaths of its members.

It is, properly considered, a personification of certain legal rights under a description imposed upon it by the power that created it. Its name is a thing—it is everything; this creature of law is a standing fiction and style—*stat nominis umbra*.

The first consequence of this definition is, that the whole is essentially and unchangeably different from all the parts, which are as completely merged and lost in it as the ingredients are in a chemical compound.

This personification of the rights of property has, as a necessary instrument, a *persona standi in judicio* of its own; and it appears, defends, 521*] *and pleads in the court, as it transacts all its other business, *ex necessitate rei*, by means of living agents, generally organized in a particular form, proceeding in prescribed modes, and testifying the will of the ideal unity by authentic acts.

A corporation aggregate is the most common—in this country, perhaps, strictly speaking, the only form of this juridical person; but, the common condition of all of them, whether sole or aggregate, lay or ecclesiastical, civil or eleemosynary, *ordinata* or *inordinata*, is a capacity to enjoy the rights of property, without the capacity of contracting in regard to them, except through guardians, trustees, or curators. They stand in this respect precisely in the same category with minors, lunatics, and idiots. For instance, the church is considered in law as a minor; the text is express: *fungitur vice minoris. * * * Infra ætatem et in custodia domini regis est.* (2 Inst., 3.)

Therefore, as we have seen, for all the purposes of valid agreement or judicial remedy and representation, this ideal *cestui que trust* or ward, wills, speaks, acts, pleads, only in the name of its constitutional curator or trustee.

It is all-important to anything like correct thinking on the subject of corporations, that this distinction between the members as constituents, of an organized body, and as unorganized individuals, should never be lost sight of. The principle is inflexible that in a corporation all the parts are not the whole. This is not only true of the conduct or administration of a corporation; it is true also of its rights of property. They are referred, not to all the members, but entire and undivided to the judicial person, as a unity in law.

Hence, for the purpose of a suit, the corporation must appear by its constitutional organs or curators; the appearance of each and every member is no appearance at all. (Bro. Corporation, 28; Co. Litt., 66 *b*.)

A corporation, when it is a *universitas ordinata*, may be so organized that one or a few of its officers, or a small minority of its members, may exercise all its legal rights and powers (*Union Turnpike* v. *Jenkins*, 1 Caines's 381); but even were the whole body of the society required to pass upon every corporate act, in the spirit of a perfect democracy, yet a majority would be a quorum, and a majority of that quorum would have, in the absence of any restraints in the charter, the supreme disposal of its concerns. The fundamental maxim here is, *ubi est major pars, ibi est tota* (*universitas*).

522*] *On principle, therefore, and in the absence of all positive authority to the contrary, it must be considered as wholly immaterial, with a view to the validity of any legal act, what one or few members of a numerous incorporated society have thought, or wished, or done, in regard to it. "A corporation," as the greatest jurist of our day expresses it, "consists of the whole, formed of its members. The will of a corporation is not merely the concurring will of all its members, but that even of a bare majority of them. Therefore, the will of a bare majority of all its existing members is to be regarded as having the disposal, and being invested with all the rights of the corporation. This rule is founded on the law of nature, inasmuch as, if unanimity were demanded, it would be quite impossible for any corporation to will and to act. It is also confirmed by the Roman law. (Savigny's System of Roman Law, as it now is, Vol. II., p. 329, sec. 97, cites L., 160, sec. 1, reg. jur., Dig., 50, 17. *Refertur ad universos quod publicé fit per majorem partem.*)

And so it is by the common law, of which I have just cited the received maxim on this head. Indeed, as Savigny remarks, it must be so in the nature of things; and the consequence is irresistible, that, to set up the will of a few members of a society, artificially organized into a body corporate, against that of the majority or the governing part of it, is to violate fundamental principles, and to confound all ideas of such an association.

Take the case before the court: domicil, supposing it to depend on the will of the members of a corporation, is, perhaps, a subject of more vital importance than any other that can be submitted to their decision. Great interests of all sorts, as we see, in this case, depend upon it. And is it to be tolerated for a moment, as a doctrine of law, that such a question shall be determined by the caprice of every member of the body? According to such a doctrine, no corporation can possibly have a "local habitation" with its "name," or if it have one, be sure of keeping it for any time, although the rule of the common law is the very reverse of this, and requires every corporation to be named of some particular place, evidently with a view to this subject of jurisdiction. (10 Co., 123.)

Nothing can be more irresistible than the conclusion to be drawn from these premises, that a plea to a suit brought against a corporation created, established, and transacting all its business in South Carolina, with its president, directors, and all its constitutional organs there, that one or two individual stockholders reside in a neighboring *State, and so [*523 that the body is exempt from suit in the *forum domicilii*, is frivolous and impertinent. (See the analogy of commercial partnership, with its house in enemy's country, and one or two members residing in neutral territory, *The Antonia Joanna*, 1 Wheat., 159.) It is a legal absurdity, if there ever was one. A plea that an abbot or prior was an *alien né* was never good, for the reason that he was *civiliter mortuus*, as a monk professed in his natural capacity, and in his corporate character he was a subject of the crown of which his land was held.

But, then, it seems, however cogent, and indeed conclusive, all this reasoning may be, it is too late to urge it. The law has been long

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settled in this court that the federal courts will look beyond the charter to see whether the individual members are citizens who have a right, under the Constitution of the United States, to sue in those courts; and while I admit and deplore what I consider a deviation from clear principles, I do not desire any judicial innovation on a rule so well established, however wrong in itself. But what I confidently expect of the court is, that it will push this perverse doctrine not a step beyond the adjudged cases—*quod contra rationem juris receptum est, non est producendum ad consequentias;* but, on the contrary, looking at the immense inconveniences likely to result from it, will rather narrow it down once more to what it originally was; more especially as the great consideration which moved the judges who decided the first and leading case on the subject was, that unless they were permitted to look beyond the charter there would be a total failure of justice in the federal courts, as to all the rights and responsibilities of corporations; for it is quite manifest that if the three propositions advanced by the counsel for the plaintiffs in error, as legitimate corollaries from the decided cases, be recognized as the law of this court, there will soon be an end of all federal jurisdiction in this most important class of cases.

I have said that the court, in weighing the considerations of expediency connected with this subject, will be acting in the very spirit of its decision in the leading case in regard to it. This was *The Bank of the United States* v. *Deveaux* (5 Cranch, 61). So, *Lexington Manufacturing Company* v. *Dorr* (2 Lit., 256), where justice requires it, the court will look into the evidence of the individual members, &c. The great argument of the counsel of the bank there was, that a corporation not being a citizen of a State, under the words of the Constitution, if the court did not look beyond the charter to the 524*] *individuals that composed the company, there would be a denial of justice in a great number of the most important cases.

This argument was what principally led the court to the conclusion which they adopted. I confess I do not see the alleged necessity of departing at all from the principle which considers a corporation a legal unit and an ideal person. And, accordingly, the court afterwards, in the case of *The Bank of the United States* v. *The Planters' Bank of Georgia* (9 Wheat., 962), ruled that the jurisdiction of the Circuit Court over a corporation in Georgia was not ousted by the fact that one of its stockholders was the State itself. In other words, they ruled, *Chief Justice* Marshall expressly declares, that the State *qua* stockholder in a private company laid down its sovereignty, and became a citizen, and might be sued as such. But if a State, which is a corporation, and the greatest of all, can be sued as being, under certain circumstances, a citizen in legal contemplation, why should not any other corporation be considered, for the furtherance of a plain constitutional remedy, as a citizen for judicial purposes.

But conceding that the court was right in this very narrow construction of a great remedial provision in the Constitution, and that it was necessary to look beyond the charter of an incorporated company to give it jurisdiction, the next, and not less important, question was, how far was it necessary or proper to look? Certainly no further than to those who had the control of all the legal interests and rights of the company—to its government, its trustees, representatives, and administrators. This would have been agreeable to all the analogies of the law, which seldom inquires into secondary responsibilities and mere equities. At any rate, the most scrupulous adherence to the letter of the Constitution could not require more than an averment that the majority of an incorporated company were citizens of a different State, for that majority wills and acts for the whole—is, indeed, in legal contemplation, the whole, to all judicial intents and purposes whatsoever.

Now, this leading case of *The Bank* v. *Deveaux* settles nothing on this point. There is no intimation in it of any such legal solecism as that all the members of a corporation, without exception, should be of the same State, whether as defendants or plaintiffs. The court strained a point, according to their own view of the subject, to prevent a denial of justice in that case; but that they did not seriously contemplate pushing the matter further than was necessary for that purpose, is, I think, plain, from their recoiling from the application *of the principle in *The Bank of the* [*525 *United States* v. *The Planters' Bank of Georgia*. The attention of the court is particularly called to this latter decision under this head, as it will be under a subsequent one.

All that they aimed at was to do what the ecclesiastical courts are said to do in England. These tribunals have no power to summon a corporation aggregate to answer before them. (1 Kyd, 277; Skin., 27, 28.) They therefore cite the members (that is, the curators, directors, or constitutional organs, who are authorized and bound to appear for the body they represent), of such companies by their proper names, with the addition of the names of their corporate capacity, but they proceed against them in the latter character, for those courts have no other means of citing them. This is instead of the *distringas* at common law, which is the only means of compelling an appearance in the civil courts; so that if a corporation have no lands or goods, there is no way to make it appear. In the court, Christian, however, though the official or representative members are cited by their proper names, it is only in their political capacity. (Skin., 27, 28; 1 Kyd, 227.)

But although the case of *The Bank* v. *Deveaux* did not go beyond this practice of the ecclesiastical courts, and with a view to jurisdiction, to bring the parties into court, said only that it would look to the character of the members, without saying what members; and so, in legal contemplation, confined their views to the members representing the corporation, and capable of appearing for it; yet I admit that other cases, especially the recent case of *The Bank of Vicksburg* v. *Slocomb* (14 Peters), did go a step further.

That case decides that where a corporation sues, if any of its members reside in the State of the defendant, or *vice versa*, the court has no jurisdiction.

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I admit that this case, if it is to be supported as law, settles the doctrine, so far as to treat corporations precisely as if they were private societies or partnerships, but it goes not one step further; even this, as I have attempted to show, is clearly against all principle. But be it so. I have no interest in disputing it for the purposes of this case. This I have already established.

Suppose, as I argued above, this railroad company to be a private partnership, and the controversy is at an end; for beyond all doubt the act of 1839 would cure any defect in the process or pleadings in the case.

526*] *All that the court, in *Slocomb's* case, ruled, was that the Act of 1839 was not to be construed as enabling the parties, by their own contrivance, to give jurisdiction to the court, by severing a joint suit, and omitting some of the necessary parties to it, over whom the federal courts would have had no jurisdiction under the Constitution.

Nothing could be clearer under the decision in *Curtis* v. *Strawbridge* (3 Cranch, 267) than that if some of the members of a company or partnership, plaintiffs, were citizens of the same State with the defendant, this case could not be within the Act of 1839, because it was not within the provision of the Constitution itself. The Act of 1839 was not to be made unconstitutional by construction. Undoubtedly not; but *cessante ratione, cessat lex;* and there is not a word or a hint, that in a case clearly within the Constitution, where, namely, the plaintiff is of a different State from all the defendants, and where, consequently, if he could sever his action, he might, beyond all doubt, sue them all in the federal courts, even at common law—he cannot, under the Act of 1839, make that very severance and enjoy his constitutional privilege. I say there is not one word to that effect, and 'twere most strange if there were; for I ask again, if the Act of 1839 be not made for that very case, for what case was it made? or what is it good for?

The result of the whole now is, exactly to fulfill the provision of the Constitution in this particular, and to enable every citizen of the United States, who has a claim or complaint against citizens of other States, to assert his privilege under that instrument, whether the ground of action be joint or several. It is a statutable severance of the joint—it is a statutable ratification of the judgment of this court, in *Gracie* v. *Palmer*, as to a voluntary appearance in a several suit.

This, and no more than this, is what we claim, and what the Circuit Court has adjudged we have a right to claim under the law. It is unquestionably our right under the Constitution, and we ask only for that right, and unless the statutes passed to carry it into effect, and therefore to be read *in pari materia* with it, be mutilated by a subtle and unauthorized construction, the remedy is precisely co-extensive with the right, neither more nor less.

Since the Act of 1839, which was intended to complete and perfect the system established by that of 1789, this case does not rest on the latter act alone. It might, therefore, be safely conceded, that on a strict and subtle construction, it does not fall within that statute.

But in truth, there is no ground for the objection founded on a *mere literal interpretation of that statute. The argument proves too much, and so proves nothing. It would exclude all joint suits whatever from the jurisdiction of the federal courts. The words expressly are: "between a citizen (not citizens) of the State in which the suit is brought and a citizen (not citizens) of another State," (not other States). Now, on what principle can it be pretended that a joint action may be brought against citizens of another State under the word "citizen," and yet not against citizens of other States? What is there in the word "citizen," in the statute, that admits of an obvious and most reasonable generalization in the plural form, that is not in the word "State?" [1] [*527

Only one answer need be given to such interpretation, but it is fatal. It is summed up in a maxim as old as the common law: *qui heret in litera heret in cortice.*

But the court, in *Gracie* v. *Palmer*, seemed to feel no difficulty at all upon the subject, as in truth none ever existed.

2. As to the objection that the State of South Carolina is a stockholder, much of the reasoning upon the first point is applicable to this. But there is no possible escape from the doctrine of the court in the case of *The Bank of the United States* v. *The Planters' Bank of Georgia* (9 Wheat.) Either the state *qua* stockholder in a private company, as *Chief Justice* Marshall in that case, and the *jus gentium* everywhere affirm, is to be regarded as a citizen, and so suable in the Circuit Court, or it is still a sovereign, and not suable at all. In the former hypothesis, there is no difficulty under the Constitution; in the latter, the common law obviates all objections to proceeding without such a party.

The rule of pleading, as to parties (defendants) not legally responsible, is to omit them entirely in an action. This is the case even where they are expressly and on the face of the contract parties to it; *a multo fortiori* where they are only so consequentially and by construction. *Actus legis nemini facit injuriam.* The State of South Carolina is no party *eo nomine* to this covenant; but if her interest as a stockholder makes her so by construction of law, then, being by the supposition not suable as a sovereignty anywhere, she must be considered *as in legal contemplation not existing at all. (4 Taunt., 468; 1 Wils., 89.) If a married woman in New York were one of a partnership or voluntary association carrying on its business in Charleston, as this railroad company does, it would be no sort of objection to the jurisdiction, as between Letson and the others. It would be a ground of nonsuit to join her in a suit with persons legally responsible. So of an infant. Their names must be omitted altogether; and if the nonjoiner were pleaded, the reply of infancy or coverture would be conclusive. When a man is bound to an abbot, and J. N. not styling him monk in the bond, nevertheless the abbot alone shall have the action, and shall surmise that [*528

1.—Heir in the singular number (even in a deed) held by Mr. Hargrave to be good as a word of inheritance, being *nomen collectivum*. Harg. Co. Lit. 8 b., *note* 45. But in a will it is indisputably so, and statutes are construed like wills. 3 Rep., 27. Butler and Baker's case, and many other analogies might easily be cited.

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the other obligee was his *commoign* (and so incapable in law) at the time. (Bro. Abr. Dette, 191.) It would be an unheard of irregularity, nay, a gross infringement of law, to violate this fundamental rule of pleading and practice, merely to oust the jurisdiction in such a case.

It is obvious that the very same principle applies in the case of a sovereignty, that is, a political person not legally responsible, member of a voluntary joint stock company, or party to a joint contract, if as a member it is not considered as a mere private person.

Either way the jurisdiction is clear on principle, besides being conclusively settled by the case in 9 Wheat.

3. The third objection is a *reductio ad absurdum* of the principle of *The Bank of Vicksburg* v. *Slocomb* (14 Peters).

Where shall we stop? Not only do we look beyond the parties to the action, the constitutional organs of the first corporation, to see whether none of its members are citizens of the same State with the plaintiffs, we are now asked to carry this process of perversion *ad infinitum*. If we find out one of the members to be a corporation, we are to look still further, and if it be shown that of this corporation one share has been transferred, it may be in trust, or by way of pledge to another, then the court is not to meddle with an action against the first corporation. But suppose we find that a member of the second corporation is a third, and of that a fourth in an infinite series, is this seriously put forth as the doctrine of this court, or is it meant as a jest upon it?

The great moving cause, as I have shown, that influenced the court in *Deveaux's* case, was to authorize its jurisdiction in a category of all others the most important, and to prevent a failure of justice, just as the case in *Skinner* shows that the courts Christian summoned the natural person, whom they wished to hold re-
529*] sponsible *as an artificial one, *ex necessitate*. But now, it seems, this is to be done for the very opposite purpose, and the plainest rules of law to be broken through, in order to do injustice and to withhold a constitutional right.

To sum up the argument in a few words, a corporation, as such, has no *persona standi in judicio* in the federal courts, where the case is between citizens of one State and citizens of another; but for advancing the remedy and doing justice, and for no other purpose the court will look beyond the charter to the individual members. In other respects, and to other purposes, the existence of the corporation is not noticed *quoad hoc* in those courts.

On the whole, the case appears to me a very clear one. The mischiefs prevented by the judgment below are of the most serious character, and not only does no legal or constitutional difficulty stand in the way, but every consideration of right and justice, and the very principle of the leading case of *The Bank* v. *Deveaux*, imperatively require that the court should maintain the jurisdiction.

Mr. Mazyck, in reply, for the plaintiffs in error:

In addition to the argument formerly submitted (to which the attention of the court is again solicited), and by way of reply to the views put forward by the two learned counsel for the defendant in error, it is proposed now to offer some further remarks in support of the objections to the jurisdiction of the Circuit Court. Before noticing in detail the particular points made by the learned counsel on the other side, it may be well, as the clearest and most convenient method of proceeding, to premise one or two general observations, which will perhaps be found to cover them all.

In actions by or against corporations in the circuit courts of the United States, in which the jurisdiction depends on the character of the parties, in other words, where there is no other ground of jurisdiction than that the suit is one "to which an alien is a party," or that it is "between a citizen of the State in which the suit is brought and a citizen of another State," the court looks beyond the corporation to the individuals of which it is composed, for the purpose of ascertaining whether they have the requisite character, and for no other purpose. That being ascertained, the veil of the corporation is again thrown over the individuals, and in all other respects—in all matters of procedure—in all things concerning rights, obligations and remedies, the Circuit Court, like the ordinary tribunals of general jurisdiction, *loses sight of the individuals, [*530 and sees nothing but the legal entity, the corporation. The questions of jurisdiction, and of procedure, are totally distinct from, and independent of each other, and there can be no just reasoning from one to the other.

Again: the jurisdiction of the circuit courts of the United States is limited by their fundamental law, to certain specified descriptions of cases only, and even the consent of parties cannot give them jurisdiction of cases not falling within one or other of the specified descriptions.

A court of general and unlimited jurisdiction may be unable to take cognizance of a cause from the want of power to bring the parties before it. For example, a court of unlimited jurisdiction in South Carolina may be unable to take cognizance of a claim against a resident of New York, not found in South Carolina and having no property there, from the want of means to bring the defendant before the court. So a court of limited jurisdiction, having jurisdiction only of a certain class of cases may be unable to take cognizance of a case belonging to the prescribed class, from the want of power to bring the parties before it. This is sometimes called want of jurisdiction, but it is a very different thing from the inability of a court having jurisdiction only of a certain class of cases, to take cognizance of a case not within the prescribed class. The one is a want of jurisdiction of the party only, which may be removed by the consent or appearance of the party, the other is a want of jurisdiction of the cause, which cannot be removed by consent of parties. The case of *Gracie* v. *Palmer* (8 Wheat., 690), so often referred to by the counsel for the defendants in error, furnishes an illustration of this distinction.

That was an action brought in the Circuit Court of the United States in Pennsylvania by aliens against citizens of New York. Being a suit to which "an alien was a party," it was by the express terms of the 11th section of the Judiciary Act of 1789, within the jurisdiction of the court. But though the cause was with-

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in the jurisdiction of the court, the defendants were not subject to its jurisdiction, because they were not inhabitants of the district of Pennsylvania, nor were they found in that district to be served with process, and one of the provisos of the 11th section of the Act of 1789 is, that "no civil suit shall be brought before a circuit or district court, against an inhabitant of the United States, by any original process, in any other district than that whereof 531*] he is an inhabitant, or in which *he shall be found at the time of serving the writ." The defendants, however, voluntarily appeared, and afterwards objected to the jurisdiction of the court, because it did not appear on the record that they were inhabitants of, or found in Pennsylvania at the time of serving the writ. But *Chief Justice* Marshall, delivering the judgment of this court, said, "the uniform construction of the clause referred to, had been that it was not necessary to aver on the record that the defendant was an inhabitant of the district or found therein. It was sufficient if the court appeared to have jurisdiction by the citizenship or alienage of the parties. The exemption from arrest in a district of which the defendant was not an inhabitant, or was not found at the time of serving the process, was the privilege of the defendant, which he might waive by a voluntary appearance. If process was returned by the marshal, as served upon him within the district, it was sufficient, and where the defendant voluntarily appeared in the court below, without taking the exception, it was an admission of the service, and a waiver of any further inquiry into the matter."

That the cause should be within the jurisdiction of the court, that is to say, that it should belong to one of those classes of cases of which alone the court is authorized to take cognizance, is indispensable: that the parties should be before the court is matter of procedure and of the service of process. If the defendant is not an inhabitant of, or found within the district, he cannot be brought before the court by any compulsory process, but if he voluntarily appears, he is before the court, and then the court having jurisdiction of the cause, and having the parties before it, it would be strange if it declined to take cognizance of the matter, for no other reason than that if the defendant had not voluntarily appeared, he could not have been compelled to appear.

If the principles above stated be kept steadily in view, it is believed that all the points raised by the learned counsel in answer to the argument against the jurisdiction of the court in this case, will vanish, one after another, as they are approached.

In the first place it is said, that, according to all the authorities, it is sufficient that all the members of the corporation sued are citizens of some other State than that of which the plaintiff is a citizen. But there is no authority which says, that where the jurisdiction depends on the citizenship of the parties, a citizen of one State may bring an action in the Circuit Court in another State, against a citizen of that State and a citizen of a third State. If it had 532*] ever been so decided, *the decision would be utterly inconsistent with the highest authority, the Judiciary Act itself, which expressly limits the jurisdiction to cases between citizens of the State in which the suit is brought, and citizens of another State, and the court would rather conform to the plain language and meaning of the act than to a judicial decision or dictum clearly conflicting with it.

But it is now, for the first time, suggested, that in an action by or against a corporation, the citizenship of the governing members only need be inquired into, or, in other words, that an action by or against a corporation, is an action by or against the official members alone.

In *Curtis* v. *Strawbridge* (3 Cranch, 267) it was said that each distinct interest must be represented by persons, all of whom must be capable of suing, or liable to be sued in the federal courts.

The word "represented," used by the court in that case, is seized upon by the counsel, and it is said the governing members of a corporation represent the interests of the corporation; therefore, they are the real parties, and it is sufficient, if they have the requisite citizenship, to give the court jurisdiction. But in order to understand the true meaning of the court, we must advert to the fact that the suit was on the equity side of the court, where there may be several defendants having distinct interests from each other, and where it may happen that a complete decree may be made between some of the parties without affecting the interests of others.

Each party having an interest is said to represent that interest. If several persons have the same interest they jointly represent that interest, and if they all have the requisite citizenship, and a complete decree can be made as against them, without affecting other defendants having a different interest, notwithstanding such other defendants, or some of them, have not the requisite citizenship, the court will proceed to adjudicate between the complainant and the defendants, who have the requisite citizenship. (*Carneal* v. *Banks*, 10 Wheat., 181.)

In an action by or against a corporation, the corporate name represents the rights and interests of the corporation; that is to say, the corporate rights and interests of the members of the corporation, in the subject matter of the suit—not the governing members only, but all the members; for though the governing members ordinarily manage the business of the corporation, the corporate rights and interests belong to all the members, not according to their official *rank, but in [*533 proportion to their respective shares of interest in the corporation.

It is said that the governing members have the right to sue, and may be compelled to plead, and are therefore the real plaintiffs or defendants. But that a private member can neither sue nor prevent a suit, nor can his admissions be given in evidence against the company.

It is true that a single private member cannot sue, nor prevent a suit, nor could one only of the governing members, but the private members, acting together in their corporate capacity, might control the action of the official members, and cause a suit to be brought or defended. It would seem from the principle of the case of *The King* v. *The Inhabitants of*

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Hardwicke (11 East, 379), that the admissions of a private member might be given in evidence against the company; for, having an interest in the suit, he could not be made a witness. But if the admissions of a private member could not be given in evidence, so neither could the admissions of a single director. For the acts or declarations of a single director, or of anyone not authorized to act alone for the company, are not the acts or declarations of the company, and the interest of a single director, or even of the president, may be less than that of a private stockholder.

Again: It is said that a private member cannot be summoned or distrained to answer to a demand against a corporation. The rule is, that for a public concern the sheriff cannot distrain any individual member. (2 Bac. Ab. E., 2, *note; Thursfield* v. *Jones*, Skinner, 27.) It is true that a summons is served upon the chief officer of the company, but it is a summons of the company, not of the chief officer, who is only the organ through whom it is communicated to the company. If upon this summons the corporation does not appear, there is no further process either against the person or property of the head of the corporation, any more than against the person or property of any private member; but the process to compel the corporation to appear is a *distringas* against the corporate property.

But the manner of requiring the appearance of a corporation is mere matter of procedure, and even if it were allowable to reason from matter of procedure to the question of jurisdiction, so that only the individual upon whom process is served should be regarded as the real defendant, the summons which is served upon the head of the corporation is not the original process, but a mere preliminary notice which may always be dispensed with. The real pro-
534*] cess is *the *distringas*, which is not served upon the head or governing members of the corporation, but is levied upon its property. And if the summons were the original process, that is served upon the head of the corporation only, and not upon all the governing members, and by this rule the president would be the only defendant, and it would be sufficient if he had the requisite citizenship.

If in an action against a corporation, no member can be regarded as a defendant, against whom there is no process to compel him to appear, then no member, either official or private, can be a defendant, for there is absolutely no process by which any one of them can be compelled to appear: the only process is against the property of the corporation, which belongs not to the official members only, but to all the members in their corporate capacity.

It is not pretended that any individual member of a corporation has a right to be heard as a party objecting to the jurisdiction, nor does the objection in this case come from any individual member; it comes from the corporation, that is, from all the members in their corporate capacity. It is not that Baring and Rutherford object, that being citizens of North Carolina they cannot be sued in South Carolina, but the corporation objects that the action being against the corporation, and Baring and Rutherford being members of the corporation, it is an action against them, as well as against the other members, and is therefore not a suit between "citizens of the State in which the suit is brought and a citizen of another State."

A corporation in South Carolina cannot be sued in North Carolina by proceeding against a private member, or any member domiciled there, neither can it be sued in South Carolina by proceeding against any member domiciled there. But it is no solecism that the corporation cannot be sued in the Circuit Court, because A, one of the members, is a citizen of North Carolina, and yet that A cannot be sued anywhere for the same cause.

If one of the members, or at all events if one of the directors were a citizen of New York, it is conceded that the corporation could not be sued in the Circuit Court in South Carolina, nor could the New York member or director be sued in any court in New York for the same cause, yet where is the solecism in this? It is simply that the Circuit Court is a court of limited jurisdiction, and that the case is not within the jurisdiction. If the action were brought in a court of general jurisdiction, it would be no objection that some, or even all of *the members of the corporation were [*535 citizens of North Carolina or New York.

That the plaintiff cannot sue the corporation in the Circuit Court, because some of the members of the corporation are citizens of North Carolina, is no more than happens to every plaintiff whose case is not within the jurisdiction of that court; justice is not therefore denied him, it is only necessary for him to seek it in another tribunal.

The relation of the governing members of a corporation to the private members is rather that of agents than of trustees. If they were trustees, suits by and against the corporation ought to be brought in their proper names, and not in the corporate name which represents all the members in their corporate character, and not the governing members alone.

It does not follow, that because in matters of procedure a particular member of a corporation is not noticed as a party, therefore he shall not be noticed in the matter of jurisdiction. In matters of procedure, a particular director is no more noticed as a party to the record than a particular private member; why, then, should the citizenship of a director determine the jurisdiction any more than that of a private member?

That the particular members of a corporation have never been noticed as parties, except to defeat the jurisdiction of the Circuit Court, is not true. In *The Bank of the United States* v. *Deveaux* they were noticed for the purpose of sustaining the jurisdiction, which could not otherwise have been supported.

The residence of a corporation is not determined by the residence of its members, nor by that of the president and directors. A corporation created by a law of South Carolina, and for an object to be pursued in South Carolina, must have its location there, and nowhere else. Its artificial being, as a creature of the law of South Carolina, can only exist where that law is in force. The individual members, or even the president and directors, might be anywhere else, but the body corporate would still be there. It is by no means clear that a corporation is held to reside where its principal office is. In the case of *The Bank of the*

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United States v. *McKenzie* (2 Brock., 393), in which it was contended that the bank resided in Philadelphia, and therefore was not affected by the statute of limitations of Virginia, *Chief Justice* Marshall says, "the counsel for the plaintiff contends that the corporation resides in Philadelphia. How is this to be sustained? The corporate body consists of all the stock-
536*] holders and acts by a name *comprehending all the stockholders. These stockholders reside all over the United States, but being in their corporate capacity, in which alone they act, a mere legal entity, invisible, inaudible, incorporeal; they act by agents. It may well be doubted, and is doubted, whether the residence of those agents can fix the residence of the corporation," and the statute of limitations prevailed against the bank. Perhaps the true view of the matter is, that the corporate existence of the Bank of the United States, being a law of the United States, the corporation must be held to be wherever that law prevails. But however this may be, there is a wide difference between residence and citizenship. A corporation may have a residence, but, as this court has solemnly decided, it cannot be a citizen.

The supposed analogy between a corporation and a State is rather fanciful than real. When a State is called a corporation, or a corporation a State, it is a mere figure of speech. They are as different from each other as the creator and the thing created. A State is the law-maker, above and independent of the law. A corporation is a creature of the law, a modified association of individuals, and, like other associations of individuals, subject to the law.

Nor is it invariably true that in political societies public acts are referred to the persons who have the administration of the government. In England the public property, and other public rights, are vested in the king, and suits concerning them are brought in his name, but in these States the public property and rights are vested in the Commonwealth, and not in any individual, and suits concerning them are brought in the name of the Commonwealth, and not referred to any individual more than another as the plaintiff. The public business is necessarily done by agents, and these agents, like other agents, are trustees as to the powers with which they are invested, but the acts which they do within the limits of their powers are referred to the Commonwealth, and not to them, as individuals.

It is true that before the 11th amendment of the Constitution the States were liable to be sued, but not as corporations. They were liable to be sued as States, because by the Constitution, as it stood before the 11th amendment, the judicial power extended to controversies "between a State and citizens of another State, and between a State and foreign States, citizens or subjects." Without this provision of the Constitution, it would surely never have been pretended that because the individuals having the administration of the State government were citizens of the State, or because the
537*] State was composed *of its citizens, a suit between two States, or between a State and a citizen of another State, was a suit between citizens of different States, and therefore within the jurisdiction of the federal judiciary.

The case of *London and Wood* (12 Mod., 669) does not show that only the official members of a corporation will be noticed as parties. The judgment was reversed, because the mayor was both plaintiff and judge. The strong good sense of the common law would not permit substantial justice to be sacrificed to a legal fiction, by suffering the same person to be plaintiff in one capacity, and judge in another. True, it was said the objection would not have prevailed if one of the aldermen had been plaintiff,—not because he would not have been noticed as a member of the corporation, but because he would not have been both plaintiff and judge. Hatsell, Baron, said: "If one of the aldermen should bring an action before the mayor and aldermen, that may be a good judgment, because it may be a court of mayor and aldermen without him, and the plaintiff would not be an essential part of the court." But the mayor is an essential part of the court. No doubt if each individual of the commonalty had been an essential part of the court he would have been noticed as a party. As to suits in the name of the people of the State being tried before a judge who is one of the people, that is a matter of unavoidable necessity, and besides, the judge has no more interest in the suit than anybody else, not more than even the defendant himself.

It is true that a corporation acts by the agency of natural persons, but no principle is more familiar than that the acts of an agent, acting within the limits of his agency, are referred to the principal, and regarded as the acts of the principal only, and not of the agent. A corporation sues and defends suits by attorney. He is the natural person by whom the personal acts of suing and defending are done, yet nobody ever imagined that he is the party to the suit. The official members are concerned in the suit in their corporate character as well as the private members, and it is as much confounding the distinction between the natural and corporate character to call the official members parties to the suit, as it is to call the private members parties. To say that the corporate name represents the private members not as persons, but as a faculty, and the official members alone as individuals or persons, is an incomprehensible refinement—very little better, in fact, than a mere jargon of words without meaning. The truth of the matter is well expressed by *Chief Justice* Marshall in *The Bank of the United States* v. *McKenzie* (2 Brock., 393).

*"The president and directors at [*538
Philadelphia are neither the nominal nor real plaintiffs. The nominal plaintiffs are the president, directors and company; the real plaintiffs are all the stockholders: the corporate body consists of all the stockholders, and acts by a name comprehending all the stockholders."

But in point of fact, this action is brought against all the members of the corporation in their corporate character, and not against the official members only. The corporation is sued as one whose members are citizens of South Carolina. If the official members only are to be regarded as parties, why was it not sued as a corporation whose president and directors are citizens of South Carolina?

It seems to be admitted that though by the Constitution the judicial power of the United

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States extends to cases between citizens of different States, the Judiciary Act confers jurisdiction on the circuit courts only, as between citizens of the State where the suit is brought and citizens of another State. But it is said that since the Act of 1839, when one of two parties to a joint contract is sued, he cannot plead the nonjoinder of the other party who resides in another State, and is not found in the district where the suit is brought. This is because the Act of 1839 authorizes the plaintiff to sue each of the parties separately, as if the contract were joint and several. But the suit must still be "between a citizen of the State in which the suit is brought and a citizen of another State." And therefore a citizen of New York, having two joint debtors, one a citizen of Pennsylvania, and the other a citizen of Virginia, could not sue either of them in the Circuit Court in New Jersey, and even the voluntary appearance of the defendant would not give the court jurisdiction of the case. And if they were found in Pennsylvania, and sued jointly in the Circuit Court there, they might plead to the jurisdiction that the case was not one between citizens of the State in which the suit was brought and a citizen of another State; nor would the voluntary appearance of the citizen of Virginia make it such a case, so as to bring it within the jurisdiction.

The objection in this case is, not that some of the defendants are sued in a district in which they were not found, but that a suit is brought in the Circuit Court in South Carolina by a citizen of New York against citizens of South Carolina and citizens of North Carolina; for a suit against a corporation is a suit against all the members in their corporate character. If Baring and Rutherford had happened to be in South Carolina when the suit was commenced, **539*]** *still being citizens of North Carolina, it would not be a suit "between citizens of the State in which the suit is brought and a citizen of another State." And the voluntary appearance and consent of Baring and Rutherford, and every other member of the corporation, each in his natural character, and of all the members collectively in their corporate character, would not remove the objection.

All the members of the corporation may be said, in a certain ideal and fictitious sense, to be residents of South Carolina in their corporate character, because the corporation of which they are members resides there. But the corporation is not a citizen, and therefore they are not citizens of South Carolina in their corporate character. By becoming members of the corporation, they have subjected themselves to be sued in their corporate character in any court of general jurisdiction in South Carolina, but they could not, either by a general or particular consent, give jurisdiction to the Circuit Court of a cause of which it is not authorized by its fundamental law to take cognizance.

Again: It is said that if the company were a copartnership, having its office and carrying on business in South Carolina, and Baring and Rutherford, two of the partners, residing in North Carolina, their appearance would be dispensed with; and this position is fonnded on the Act of 1839. Since that act it is conceded that if they were partners in an incorporated company they might have been omitted altogether, and then all the defendants being cit zens of South Carolina, the jurisdiction woul be clear. But if they were included in the a tion, and described in the writ and declaratio as citizens of North Carolina, so that it a peared on the record that the suit was not o "between citizens of the State in which t suit was brought and a citizen of another State, it is very difficult to conceive how the jurisdi tion could be sustained. Or, if they were d scribed as citizens of South Carolina, and vo untarily appeared and pleaded, not that the were not found in the district of South Carol na, which is mere matter of procedure, and waived by the appearance, but that they we citizens of North Carolina, so that the case w not between citizens of South Carolina and citizen of New York, which is matter of j risdiction, there can be no doubt that as to the the plea must have prevailed. Though, pe haps, the court might then have proceede against the other defendants as if they h never been joined. But however this may in the case of a mere partnership, it is whol out of the question in the case of a corporatio *Who ever yet heard of an action or [*54 a judgment against a part only of the membe of a corporation on a contract of the corpor tion?

Surely if anything is settled beyond all co troversy, it is that an individual member of corporation, or any number of members le than the whole united under the corpora name, and in the corporate character, cann be sued on a contract of the corporation. Th indeed, is the very thing which constitutes t chief inducement to the formation of incorp rated companies.

There could be no action in this contract b against the corporation, by the corporate nam which includes all the members in their corp rate character and connection—those who a citizens of North Carolina, as well as those w are citizens of South Carolina; nor could the be any judgment which would not include t North Carolina members with those in Sou Carolina. An action against a corporation an action against all the members of the c poration, in the corporate name and charact which necessarily imply the corporate uni and association of all the members, and exclu the idea of any separate identity or liabilit with reference to the subject matter of the su

But it is said that Baring and Rutherfor considered as partners, were dormant partne and that dormant partners, as defendants, a not only not necessary parties, but are not allowed to become parties to the record whe they were not so to the contract, and thus defeat by surprise (which might be a fraud) plaintiff who had never heard of them.

They were no more dormant partners th any other stockholders, not more even than t directors. There is nothing in the name of t corporation to indicate who are the preside and directors, any more than who are the p vate members, and it is almost as easy in pol of fact, for a stranger to ascertain who are t private members as who are the official me bers. The corporation is sued, as it must b by the corporate name, and no individual me ber can come in and say, I ought to be includ in the action, and am not, nor can the wh

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body say, there is a member who ought to be and is not included in the action. Whoever is a member is included under the corporate name, and whoever is not included under the corporate name, is not a member. *DeMautort* v. *Sanders* (1 Barn. & Adol., 398) is no more than this.

Again: It is said that if Baring and Rutherford appeared voluntarily, it is certain the court would have jurisdiction, for so says the Act of 541*] *1839. But the Act of 1839 says no such thing. It does not enlarge the jurisdiction of the circuit courts so as to make it extend to all suits between citizens of different States, no matter where brought, provided the defendants can be found in the district or voluntarily appear. It leaves the matter of jurisdiction depending on the citizenship of the parties, confined as it was by the Act of 1789, to cases "between citizens of the State in which the suit is brought and citizens of other States," and only provides that when the case is within the jurisdiction, that is, when it is a case "between citizens of the State in which the suit is brought and citizens of another State," if the defendants voluntarily appear, though not inhabitants of, or found in the district, the court may proceed to adjudicate the cause; or if some of them are found in the district, or voluntarily appear, and others are not found, and do not appear, those who are found, or do appear, may be proceeded against without prejudice to the others. For example, the Circuit Court in New York would have jurisdiction of a suit brought by a citizen of New York against several defendants citizens of South Carolina and North Carolina, because it would be a case "between a citizen of the State in which the suit was brought and citizens of other States," but unless the defendants were found in New York, or voluntarily appeared, they could not be proceeded against. Since the Act of 1839, if either of them was found in New York, or voluntarily appeared, he might be proceeded against alone, and could not plead the nonjoinder of the others. This is the effect of the judicial exposition given to the proviso of the 11th section of the Act of 1789, in *Gracie* v. *Palmer* (8 Wheat., 690), and of the Act of 1839.

But the Circuit Court in New Jersey would not have jurisdiction of a suit between the same parties, because neither of them being a citizen of New Jersey, it would not be a case "between a citizen of the State in which the suit was brought and citizens of other States," and even if the defendants were found in New Jersey, or voluntarily appeared, they could not be proceeded against; for to use the language of the Attorney-General in this very case, "who ever heard before that the voluntary appearance of a citizen of a State gives jurisdiction to the federal courts in a case in which that jurisdiction depends, not on the character of the cause, or the state of the pleadings, or the service of process—still less the will of an individual—but simply on the fact of citizenship or no citi-542*]zenship, or as *it is commonly expressed, on the character of the parties; that is, on a distinct and ascertained civil *status* in the parties."

Now, the civil *status* on which the jurisdiction of the Circuit Court depends is, that the parties on one side should be citizens of the State in which the suit is brought, and those on the other side, citizens of one or more of the other States; and as citizens of North Carolina are and must be included as defendants in this action with citizens of South Carolina, under the corporate name, neither the plaintiff nor defendants are citizens of the State in which the suit is brought, and therefore the parties have not the civil *status* necessary to give the court jurisdiction, and the want of this necessary *status* cannot be supplied by consent.

Again: It is said that corporations aggregate in this country are without the capacity of contracting, except through guardians, trustees, or curators, and that in this respect they are like minors and lunatics; yet nothing is more certain than that in all the corporations with which we are acquainted in this country, the ultimate power of making by-laws for the government of the corporation, and of otherwise controlling the action of the official members, resides in the body of the members, and is frequently exercised by them; but who ever heard of a minor, or a lunatic, prescribing rules for the government of his guardian or curator?

But it is affirmed that in a corporation all the parts are not the whole. Now, nothing is more true than that a corporation aggregate, consisting of a given number of individuals, is in legal contemplation, for all purposes of administrations, rights, obligations, and procedure, a different thing from the aggregate of the individuals composing it. The legal entity, the corporation, is a different thing from the natural persons, the members, but it is nevertheless true that the corporation includes all the members, and that any one of them is just as much a part of the corporation as any other. It is not denied that in the language of Savigny, cited by the learned counsel, "a corporation consists of the whole, formed of its members," but it is not always true that the will of a bare numerical majority of the members is the will of the corporation, and has the disposal of, and is invested with all the rights of the corporation. That depends upon the charter. In all cases it is necessary that the concurring will of a part of the members should constitute the will of the corporation, since the concurrence of all the members would be generally impracticable.

*But admitting all that is said on this [*543 point, the will of one, or a few, or even a majority of the members of a corporation, has nothing to do with the domicil of the corporation. Does anybody suppose that if nine tenths of the members of this corporation were citizens and residents of New York, the domicil of the corporation would be any less in South Carolina than if all the members were citizens and residents of South Carolina; or that it would be any less liable to be sued in South Carolina in a court of general jurisdiction; or that it could be sued in any court in New York.

It might be frivolous and impertinent in a court of general jurisdiction to plead to a suit brought against a corporation, created, established, and transacting all its business in South Carolina, that one or two individual stockholders reside in a neighboring State, and therefore the corporation is exempt from suit in the *forum domicilii*. Such a plea would be wholly

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inadmissible if the plaintiff had brought his action in the State court of South Carolina, the real *forum domicilii*. But it is neither frivolous nor impertinent when the action is brought in the Circuit Court in South Carolina, which certainly has no jurisdiction of the cause, unless it is a suit between citizens of South Carolina and a citizen or citizens of some other State (the corporation itself not being a citizen of any State, and the jurisdiction depending on the citizenship of the members), to plead that two of the members are not citizens of South Carolina, but citizens of North Carolina.

Again: It is said that in *The Bank of the United States* v. *Deveaux* the court looked beyond the corporation to the individuals composing it only for the purpose of sustaining the jurisdiction, and *The Bank of the United States* v. *The Planters' Bank of Georgia* is invoked to show that they will not look beyond the corporation to defeat the jurisdiction. The truth is, that the court looks beyond the corporation neither for the purpose of sustaining nor defeating the jurisdiction, but simply for the purpose of ascertaining whether the citizenship of the parties is such as to bring the cause within the jurisdiction. If in *The Bank of the United States* v. *Deveaux* they had found that some of the stockholders of the Bank of the United States were citizens of the same State with the defendants, so that it was not a case "between citizens of different States," or that one of the defendants was a citizen of some other State than Georgia, so that it was not a case "between citizens of the State in which the suit **544*]** was brought and *citizens of another State," they would certainly not have taken cognizances of the cause.

There is no reason to believe that the course of this court, with respect to suits by or against corporations, was at all influenced by the alleged practice of the ecclesiastical courts in England, of which not the least notice was taken in the leading case of *The Bank of the United States* v. *Deveaux*.

The only point of resemblance is, that both look beyond the corporation to the individual members, but the ecclesiastical courts dealing only in ecclesiastical censures and discipline, which would be powerless and nugatory against the corporation or its property, proceed directly against the persons of the members, who are cited by their proper names with the addition of their corporate style; whereas, this court looks beyond the corporation only to ascertain whether the citizenship of the members is such as to give it jurisdiction, and that being ascertained, proceeds against the corporation.

The ecclesiastical courts, it is to be observed, take notice of and proceed against all the members, and not the curators or directors only, as the counsel suppose. In the case of *Thursfield* v. *Jones* (Skinner, 27, 28), the Master and Wardens of the Waxchandlers Co. were the whole corporation.

It is said that, at all events, it is sufficient that a majority of the members should have the requisite citizenship; for that a majority wills and acts for the corporation, and is indeed the corporation. But, besides that, it is not always or generally true that the ultimate power to will and act for a corporation resides in a numerical majority of the members; even if it were true, yet there is a very clear and obvious distinction between the majority of a body of individuals and the whole body. If a majority of the members be indeed the whole corporation, then it follows as a matter of course that the minority are no part of the corporation. By parity of reasoning, if the members of a mere copartnership should agree that a majority of the partners should control its affairs, such majority would be the partnership, and suit might be brought against the partnership in the Circuit Court of the United States by a person who was a citizen of the same State of which the minority of the copartnership were citizens.

It is admitted by the learned counsel that the case of *The Bank of Vicksburg* v. *Slocomb* (14 Peters) settles the doctrine so far as to treat corporations precisely as if they were private partnerships; but *this is only with [*545 reference to the question of jurisdiction as depending on the citizenship of the parties. That case is very far from having settled that as to the rights and obligations of the individual members, and the mode of judicial procedure a corporation is to be regarded as if it were a private partnership. And it is useless to appeal to the Act of 1839 to sustain that position. It is impossible so to torture that act as to make it mean that a party having a demand against a corporation, founded on a contract of the corporation, might sue a part of the members, and obtain judgment against them exclusively of the rest. In the case of a private partnership Congress might authorize the suing of a part of the members of the firm for a partnership obligation, because they are all individually bound, and whether they shall be proceeded against jointly or severally is mere matter of procedure. But nothing is more certain, indeed nothing has been more strenuously insisted on by the learned counsel themselves, than that the members of a corporation are not individually bound by the obligations of the corporation. How, then, can Congress be supposed to have intended to enact, that in the courts of the United States a part of the members of a corporation should be held bound by the contracts of the corporation, and that judgment should be given against them on account of such contracts? Surely such a law, not merely regulating the procedure of the courts, but totally changing the relative rights and obligations of the parties to a contract, and creating new obligations and liabilities entirely different from those which the parties intended to contract, would be utterly inconsistent with the plainest principles of constitutional liberty and common right. And nothing but the most unequivocal language could induce the court to suppose that such was the intention of Congress.

If the defendants in error found themselves upon the Act of 1839 to be consistent, they ought to have entered their judgment only against the South Carolina members. That would have been their proper course, and it would have been something novel and original but they have entered their judgment against the corporation by its corporate name, including the North Carolina members as well as the rest.

It is said that the construction of the Act of 1789, for which we contend, is inadmissible

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because it would exclude all joint suits whatever from the jurisdiction of the federal courts—that the words are "between a citizen (not citizens) of the State in which the suit is bought [*546] *and a citizen (not citizens) of another State," and it is asked very triumphantly why a plural signification should be given to the word citizen, so as to permit joint actions to be brought, and not to the word "State," so as to embrace actions between citizens of several different States. There is no reason why the word "State" should not be generalized by a plural construction as well as the word citizen; and accordingly it has been freely admitted throughout the whole argument that an action might be brought in the Circuit Court by or against citizens of several States, provided it was between "citizens of the State in which the suit was brought and citizens of other States," as it might well be. But there is a reason so obvious, that it is surprising, and almost incredible, it should have escaped the notice of the learned counsel, why the words "State in which the suit is brought" should not have a plural construction, and that is simply that the State in which the suit is brought can be but one.

2. As to the objection that the State of South Carolina is a stockholder, it is said that if an infant, or a married woman, a citizen of New York, were one of a partnership in Charleston, it would be no objection as between the plaintiff, a citizen of New York, and the other partners, citizens of South Carolina, because the infant, or married woman, not being suable at all, would be omitted, and the action would be brought only against the other partners, and so the State of South Carolina, not being suable, cannot be regarded for any purpose as a defendant to this suit, and therefore the other members of the corporation are the only defendants. Passing over the obvious distinction that the infant and married woman are omitted, because, being incapable of contracting, the contract is in fact only the contract of the other parties, and that the State is capable of contracting, as this court has repeatedly determined. (*Fletcher* v. *Peck*, 6 Cranch, 87; *New Jersey* v. *Wilson*, 7 Cranch, 164; *Dartmouth College* v. *Woodward*, 4 Wheat., 578; *Green* v. *Biddle*, 8 Wheat., 1.) There is another and a conclusive answer to this argument.

There is no doubt that infants and married women may be members of a corporation, and in their corporate character would be bound with the other members by the contracts of the corporation. It is equally certain that an action against the corporation would be as much an action against them as against the other members, and that their coverture or infancy would not protect them in their corporate interests from judgment and its consequences. [*547] In other words, *though not capable of contracting or suable in their natural character, as members of a corporation, in their corporate character they are both—and the counsel cannot forget that they themselves, in this very case, have cited *The Bank of the United States* v. *The Planters' Bank of Georgia*, to show that a State, as a member of a corporation, is suable in the corporate name with the other members.

3. The third objection, it is said, resolves itself into the question whether Mr. Laffan is a defendant in this suit, or, in other words, a member of the Louisville, Cincinnati and Charleston Railroad Company.

According to the law of corporations, Mr. Laffan is not a defendant; and so, according to the same law, no individual member of the railroad company is a defendant. But according to the Constitution of the United States, as interpreted by this court, with reference to the jurisdiction of the federal judiciary, either Laffan is a defendant, or the Bank of Charleston in its corporate character is a defendant; and in either case the jurisdiction cannot be sustained. It is said if he was a member, he would be entitled to the same privileges with other members, but he is incapable of doing any act which it requires a member of the company to do. By the law of the corporation he is not a member. That law regards only the Bank of Charleston in its corporate character as a member, and does not see or recognize the individuals of which it is composed. But this court is not governed by that law in deciding the question of jurisdiction. With reference to that question, it regards only the individuals composing the Bank of Charleston, and considers them as joint holders of an interest in the railroad company, and in that view Laffan is just as much a member of the company as if he were one of a partnership firm holding shares in it.

It is said, though he has an interest in the corporation sued, it is of the same kind as that which creditors or legatees have in the testator's estate, or a *cestiu que trust* in the trust estate. In the case of an executor or trustee, he alone is the legal party—he has the whole legal interest, as is said by this court in the case of *The Bank of the United States* v. *Deveaux*. But in the case of a corporation, the legal interest is in the body corporate—the artificial person, which this court for the purposes of this question regards as a common name and description of the natural persons composing the corporation; and it is impossible to deny in any rational and real sense, that Mr. Laffan is one of the natural persons of which the railroad company is composed, *though he has not, by the law [*548] of the corporation as an individual, a right to vote in the corporation, and is not, as an individual, liable to its burdens, because there is another artificial person interposed between him and the railroad company, which by the law of the corporation exercises the powers and is subject to the burdens of a member.

It is argued that the court has jurisdiction, because all the persons sued are citizens of South Carolina. According to the view taken by this court in the first instance, for the purpose of maintaining the jurisdiction, the persons sued are the natural persons who compose the corporation; and Laffan, as has just been shown, is one of the natural persons composing the corporation, though he is not by the law of corporations in his individual character a corporator. It is true, that if the Legislature of South Carolina had exempted the Bank of Charleston from the ordinary jurisdiction, that would not have extended to every joint stock company in which the bank might become a shareholder, but that is because, in the ordinary jurisdiction, it would be immaterial who were

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the members of the corporation sued, the suit being against the corporation as a legal entity. If the ordinary jurisdiction were expressly limited to cases against corporations, of which all the members were subject to the jurisdiction; then, if it appeared by the pleadings that the Bank of Charleston was a member of the corporation sued, and that bank was not liable to the jurisdiction, the court certainly would not take cognizance of the suit.

It is not true that the shares of a company may belong to an inanimate object. It may happen that some of the shares of a company may belong to nobody, as in the case of a dead man, whose estate is unrepresented; but in such case the owners of the other shares would be all the members of the company, and it would be no objection to the jurisdiction that some of the shares belonged to nobody. Again, it is said, that when shares in a corporation are held by another corporation, they belong to the government of the corporation, as trustee for the corporate uses; but this is no more true of shares in a corporation held by another corporation than it is of any other property held by them; they belong to the whole body and not to a part; that is, the legal estate is in the whole body and not in the governing members in trust for the others. It is suggested that the Bank of Charleston would have been incompetent to make the contract on which this action is founded; and if this could be regarded as an action against the bank, it might have been resisted as **549***] founded on *an illegal contract. But a corporation might be created for the very purpose of doing, and would of course be competent to do what no individual member of the corporation would be competent to do, yet it would not follow that the corporation had no members, or that an action against the corporation would not be an action against the members in their corporate character.

As to this objection, it might have been sufficient to observe, that the plaintiffs in error are very far from insisting that the court shall look into the composition of the Bank of Charleston and the Charleston Insurance and Trust Company. They are content that those corporations shall be considered simply as legal entities, without regard to the individuals composing them.

It is certain they are not citizens, but they are members of the railroad company, and therefore this action against the company would not be an action against citizens, if the individuals composing those corporations were not regarded. But this court has thought proper, with a view to the jurisdiction of the federal judiciary, to regard an action against a corporation as an action against the natural persons composing it. And if it appears that one of the members of the corporation sued is not an individual entering directly into its composition in his natural character, but another corporation, that is, an association of individuals entering together under a corporate name and in the corporate character into the composition of the first corporation, they are, beyond all question, individuals contributing to make up the corporation sued; and there is no imaginable reason why they should not be regarded as defendants and their citizenship considered, which would not be equally strong against regarding the immediate individual members as defendants, and considering their citizenship. Why should not they be seen through two corporations as well as through one? It is no sound objection that in pushing the analysis beyond the first corporation to the second, you may meet with a third and so on through many. The object of all judicial investigation is truth, and where it is attainable, there is surely nothing absurd or ridiculous in pursuing it through every cover to the end. The search could never prove interminable: it must sooner or later terminate in disclosing some individual not having the requisite citizenship, so as to render its further prosecution unavailing, as in this case, or in reducing the corporation sued to its original elements, and showing that they were all persons possessing the necessary civil *status*.

The whole argument for the defendant in error, is an effort to construe *the Con- [*550 stitution and the Judiciary Act, or rather to evade their natural sense, by means of legal subtleties and fictions. The Constitution declares that the party shall be a citizen, that is, a natural person having a domicil and a certain civil *status* in a State. The argument is—a corporation is "a juridical or legal person," why might it not as well be a "legal or juridical citizen?" Let it be called so, and it will come within the constitutional requisition.

The Judiciary Act requires that the suit should be between citizens of the State in which it is brought and a citizen or citizens of another State. The suit is brought in South Carolina against a corporation of which some of the members are citizens of North Carolina; the corporate name represents the corporation which consists of all the members; but it is said let it be considered, "in legal contemplation, that the corporate name represents only the president and directors, and that the suit is only against them; they are all citizens of South Carolina, and then the suit will be between citizens of the State in which it is brought and citizen of another State.

Again: If the members of a corporation are all citizens, a suit against the corporation is a suit against citizens, but the State of South Carolina is a stockholder in this corporation and two other corporations are also stockholders. It is said you have only to rule, that though a State and another corporation may be stockholders in a corporation, they cannot be members, and then all the members of this corporation will be citizens.

Surely it is not in this court that the Constitution and the law are to be evaded by such easy devices as these.

Mr. Justice WAYNE delivered the opinion of the court:

The jurisdiction of the court is denied in this case upon the grounds that two members of the corporation sued are citizens of North Carolina; that the State of South Carolina is also a member, and that two other corporations in South Carolina are members, having in them members who are citizens of the same State with the defendant in error.

The objection that the State of South Carolina is a member cannot be sustained. Cases have been already decided by this court which

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overrule it. The doctrine is, if the State be not necessarily a defendant, though its interest may be affected by the decision, the courts of the United States are bound to exercise jurisdiction. (*The United States* v. *Peters*, 5 Cranch, 115.) In the case of *The Bank of the United* 551*] **States* v. *The Planters' Bank of Georgia*, this court ruled "that when a government becomes a partner in a trading concern, it devests itself, so far as it concerns the transactions of that company, of its sovereign character, and takes that of a private citizen. Instead of communicating to the company its privileges and its prerogatives, it descends to a level with those with whom it associates itself, and takes the character which belongs to its associates and to the business which is to be transacted. Thus, many States of this Union, who have an interest in banks, are not suable even in their own courts, yet they never exempt the corporation from being sued. The State of Georgia, by giving to the bank the capacity to sue and be sued, voluntarily strips itself of its sovereign character, so far as respects the transactions of the bank, and waives all the privileges of that character." (9 Wheat., 907.) South Carolina stands in the same attitude in the case before us, that Georgia did in the case in 9 Wheat. It is no objection, then, to the jurisdiction of the court, on account of the averment in the plea, that the State of South Carolina is a member of the Louisville, Cincinnati and Charleston Railroad Company. The true principle is, that the jurisdiction of the circuit courts of the United States cannot be decreed or taken away on account of a State having an interest in a suit, unless the State is a party on the record. (*Osborn* v. *The Bank of the United States*, 9 Wheat., 852.) This must be the rule under our system, whether the jurisdiction of the court is denied on account of any interest which a State may have in the subject matter of the suit, or when it is alleged that jurisdiction does not exist on account of the character of the parties.

We will here consider that averment in the plea which alleges that the court has not jurisdiction, "because the Louisville, Cincinnati and Charleston Railroad Company is not a corporation whose members are citizens of South Carolina, but that some of the members of the said corporation are citizens of South Carolina, and some of them, namely, John Rutherford and Charles Baring, are and were at the time of commencing the said action, citizens of North Carolina."

The objection is equivalent to this proposition, that a corporation in a State cannot be sued in the circuit courts of the United States, by a citizen of another State, unless all the members of the corporation are citizens of the State in which the suit is brought.

The suit, in this instance, is brought by a citizen of New York in the Circuit Court of the United States for the District of South Carolina, which is the locality of the corporation sued.

552*] *Jurisdiction is decreed, because it is said it is only given, when "the suit is between a citizen of the State where the suit is brought and a citizen of another State." And it is further said that the present is not such a suit, because two of the corporators are citizens of a third State.

The point in this form has never before been under the consideration of this court. We are not aware that it ever occurred in either of the circuits until it was made in this case. It has not then been directly ruled in any case. Our inquiry now is, what is the law upon the proposition raised by the plea?

Our first remark is, that the jurisdiction is not necessarily excluded by the terms, when "the suit is between a citizen of the State where the suit is brought and a citizen of another State," unless the word "citizen" is used in the Constitution and the laws of the United States in a sense which necessarily excludes a corporation.

A corporation aggregate is an artificial body of men, composed of divers constituent members *ad instar corporis humani*, the ligaments of which body politic, or artificial body, are the franchises and liberties thereof, which bind and unite all its member together; and in which the whole frame and essence of the corporation consist. (Bac. Abr. Cor., A.) It must of necessity have a name, for the name is, as it were, the very being of the constitution, the heart of their combination, without which they could not perform their corporate acts, for it is nobody to plead and be impleaded, to take and give, until it hath gotten a name. (Bac. Abr. Cor., C.)

Composed of persons, it may be that the members are citizens—and if they are, though the corporation can only plead and be impleaded by its name, or the name by which it may sue or be sued, if a controversy arises between it and a plaintiff who is a citizen of another State, and the residence of the corporation is in the State in which the suit is brought, is not the suit substantially between citizens of different States, or, in the words of the act giving to the courts jurisdiction, "a suit between a citizen of the State where the suit is brought and a citizen of another State?"

Jurisdiction in one sense, in cases of corporations, exists in virtue of the character of members, and must be maintained in the courts of the United States, unless citizens can exempt themselves from their constitutional liability to be sued in those courts by a citizen of another State, by the fact, that the subject of controversy between them has arisen upon a contract to which the former are parties, in their corporate and not in their personal character.

*Constitutional rights and liabilities [*553 cannot be so taken away, or be so avoided. If they could be, the provision which we are here considering could not comprehend citizens universally, in all the relations of trade, but only those citizens in such relations of business as may arise, from their individual or partnership transactions.

Let it then be admitted, for the purposes of this branch of the argument, that jurisdiction attaches in cases of corporations, in consequence of the citizenship of their members, and that foreign corporations may sue when the members are aliens—does it necessarily follow, because the citizenship and residence of the members give jurisdiction in a suit at the instance of a plaintiff of another State, that all of the corporators must be citizens of the State in which the suit is brought?

The argument in support of the affirmative of this inquiry is, that in the case of a corpora-

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tion, in which jurisdiction depends upon the character of the parties, the court looks beyond the corporation to the individuals of which it is composed for the purpose of ascertaining whether they have the requisite character, and for no other purpose.

The object would certainly be to ascertain the character of the parties, but not to the extent of excluding all inquiry as to what the effect will be, when it has been ascertained that the corporators are citizens of different States, from that of the locality of the corporation, where by its charter it can only be sued.

Then the question occurs, if the corporation be only suable where its locality is, and those to whom its operations are confided are citizens of that State, and a suit is brought against it by a citizen of another State, whether by a proper interpretation of the terms giving to the Circuit Court jurisdiction, it is not a suit between citizens of the State where the suit is brought and a citizen of another State. The fact that the corporators do live in different States does not aid the solution of the question.

The first, obvious, and necessary interpretation of the terms by which jurisdiction is given, is, that the suit need not be between citizen and citizen, but may be between citizens. Then, do the words, "of the State where the suit is brought," limit the jurisdiction to a case in which all the defendants are citizens of the same State?

The constitutional grant of judicial power extends to controversies "between citizens of different States." The words in the legislative grant of jurisdiction, "of the State where the [*554] suit is brought and *a citizen of another State," are obviously no more than equivalent terms to confine suits in the circuit courts to those which are "between citizens of different States." The words in the Constitution, then, are just as operative to ascertain and limit jurisdiction as the words in the statute. It is true, that under these words, "between citizens of different States," Congress may give the courts jurisdiction between citizens in many other forms than that in which it has been conferred. But in the way it is given, the object of the Legislature seems exclusively to have been to confer jurisdiction upon the court, strictly in conformity to the limitation as it is expressed in the Constitution "between citizens or different States."

A suit, then, brought by a citizen of one State against a corporation by its corporate name in the State of its locality, by which it was created and where its business is done by any of the corporators who are chosen to manage its affairs, is a suit, so far as jurisdiction is concerned, between citizens of the State where the suit is brought and a citizen of another State. The corporators as individuals are not defendants in the suit, but they are parties having an interest in the result, and some of them being citizens of the State where the suit is brought, jurisdiction attaches over the corporation; nor can we see how it can be defeated by some of the members, who cannot be sued, residing in a different State. It may be said that the suit is against the corporation, and that nothing must be looked at but the legal entity, and then that we cannot view the members except as an artifical aggregate. This is so, in respect to the subject matter of the suit and the judgment which may be rendered; but if it be right to look to the members to ascertain whether there be jurisdiction or not, the want of appropriate citizenship in some of them to sustain jurisdiction, cannot take it away, when there are other members who are citizens, with the necessary residence to maintain it.

But we are now met and told that the cases of *Strawbridge* v. *Curtis* (3 Cranch, 267), and that of *The Bank of the United States* v. *Deveaux* (5 Cranch, 84), hold a different doctrine.

We do not deny that the language of those decisions do not justify in some degree the inferences which have been made from them, or that the effect of them has been to limit the jurisdiction of the circuit courts in practice to the cases contended for by the counsel for the plaintiff in error. The practice has been, since those cases were decided, that if there be two or more plaintiffs and two or more joint defendants, each of the plaintiffs must be capable of suing each *of the defendants in the [*555 courts of the United States in order to support the jurisdiction, and in cases of corporation to limit jurisdiction to cases in which all the corporators were citizens of the State in which the suit is brought. The case of *Strawbridge* v. *Curtis* was decided without argument; that of *The Bank* v. *Deveaux* after argument of great ability. But never since that case has the question been presented to this court, with the really distinguished ability of the arguments of the counsel in this—in no way surpassed by those in the former. And now we are called upon in the most imposing way to give our best judgments to the subject, yielding to decided cases everything that can be claimed for them on the score of authority except the surrender of conscience.

After mature deliberation, we feel free to say that the cases of *Strawbridge* v. *Curtis* and that of *The Bank* v. *Deveaux* were carried too far, and that consequences and inferences have been argumentatively drawn from the reasoning employed in the latter which ought not to be followed. Indeed, it is difficult not to feel that the case of *The Bank of the United States* v. *The Planters' Bank of Georgia* is founded upon principles irreconcilable with some of those on which the cases already adverted to were founded. The case of *The Commercial Bank of Vicksburg* v. *Slocomb* was most reluctantly decided upon the mere authority of those cases. We do not think either of them maintainable upon the true principles of interpretation of the Constitution and the laws of the United States. A corporation created by a State to perform its functions under the authority of that State, and only suable there, though it may have members out of the State, seems to us to be a person, though an artifical one, inhabiting and belonging to that State, and therefore entitled, for the purpose of suing and being sued, to be deemed a citizen of that State. We remark, too, that the cases of *Strawbridge* v. *Curtis* and *The Bank* v. *Deveaux* have never been satisfactory to the bar, and that they were not, especially the last, entirely satisfactory to the court that made them. They have been followed always most reluctantly and with dissatisfaction. By no one was the correctness of them more questioned

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than by the late Chief Justice who gave them. It is within the knowledge of several of us, that he repeatedly expressed regret that those decisions had been made, adding, whenever the subject was mentioned, that if the point of jurisdiction was an original one, the conclusion would be different. We think we may safely assert, that a majority of the members of this 556*] court *have at all times partaken of the same regret, and that whenever a case has occurred on the circuit, involving the application of the case of *The Bank* v. *Deveaux*, it was yielded to, because the decision had been made, and not because it was thought to be right. We have already said that the case of *The Bank of Vicksburg* v. *Slocomb* (14 Peters) was most reluctantly given, upon mere authority. We are now called upon, upon the authority of those cases alone, to go further in this case than has yet done. It has led to a review of the principles of all the cases. We cannot follow further, and upon our maturest deliberation we do not think that the cases relied upon for a doctrine contrary to that which this court will here announce, are sustained by a sound and comprehensive course of professional reasoning. Fortunately a departure from them involves no change in a rule of property. Our conclusion, too, if it shall not have universal acquiescence, will be admitted by all to be coincident with the policy of the Constitution and the condition of our country. It is coincident also with the recent legislation of Congress, as that is shown by the Act of the 28th of February, 1839, in amendment of the acts respecting the judicial system of the United States. We do not hesitate to say, that it was passed exclusively with an intent to rid the courts of the decision in the case of *Strawbridge* v. *Curtis*.

But if in all we have said upon jurisdiction we are mistaken, we say that the Act of 28th of February, 1839, enlarges the jurisdiction of the courts, comprehends the case before us, and embraces the entire result of the opinion which we shall now give.

The first section of that act provides, "that wherein any suit at law or in equity, commenced in any court of the United States, there shall be several defendants, any one or more of whom shall not be inhabitants of, or found within the district where the suit is brought, or shall not voluntarily appear thereto, it shall be lawful for the court to entertain jurisdiction, and proceed to the trial and adjudication of such suit between the parties who may be properly before it; but the judgment or decree rendered therein, shall not conclude or prejudice other parties, not regularly served with process, or not voluntarily appearing to answer." We think, as was said in the case of *The Commercial Bank of Vicksburg* v. *Slocumb*, that this act was intended to remove the difficulties which occurred in practice, in cases both in law and equity, under that clause in the 11th section of the Judiciary Act which declares "that no civil suit shall be brought before either of said 557*] *courts against an inhabitant of the United States, by any original process, in any other district than that whereof he is an inhabitant, or in which he shall be found at the time of serving the writ, but a re-examination of the entire section will not permit us to re-affirm what was said in that case, that the act did not contemplate a change in the jurisdiction of the courts as it regards the character of the parties. If the act, in fact, did no more than to make a change, by empowering the courts to take cognizance of cases other than such as were permitted in that clause of the 11th section which we have just cited, it would be an enlargement of jurisdiction as to the character of parties. The clause, that the judgment or decree rendered shall not conclude or prejudice other parties, who have not been regularly served with process, or who have not voluntarily appeared to answer, is an exception, exempting parties so situated from the enactment, and must be so strictly applied. It is definite as to the persons of whom it speaks, and contains no particular words, as a subsequent clause, by which the general words of the statute can be restrained. The general words embrace every suit at law or in equity in which there shall be several defendants, "any one or more of whom shall not be inhabitants of, or found within the district where the suit is brought, or who shall not voluntarily appear thereto." The words, "shall not be inhabitants of," applies as well to corporators as to persons who are not so; and if, as corporators, they are not suable individually and cannot be served with process, or voluntarily appear in an action against the corporation of which they are members, the conclusion should be that they are not included in the exception, but are within the general terms of the statute. Or, if they are viewed as defendants in the suit, then, as corporators, they are regularly served with process in the only way the law permits them to be, when the corporation is sued by its name.

The case before us might be safely put upon the foregoing reasoning and upon the statute, but hitherto we have reasoned upon this case upon the supposition that in order to found the jurisdiction in cases of corporations it is necessary there should be an averment, which, if contested, was to be supported by proof that some of the corporators are citizens of the State by which the corporation was created, where it does its business, or where it may be sued. But this has been done in deference to the doctrines of former cases in this court, upon which we have been commenting. But there is a broader ground upon which we desire to be understood, upon which we *altogether [*558 rest our present judgment, although it might be maintained upon the narrower ground already suggested. It is, that a corporation created by and doing business in a particular State, is to be deemed to all intents and purposes as a person, although an artificial person, an inhabitant of the same State, for the purposes of its incorporation, capable of being treated as a citizen of that State, as much as a natural person. Like a citizen it makes contracts, and though in regard to what it may do in some particulars it differs from a natural person, and in this especially, the manner in which it can sue and be sued, it is substantially, within the meaning of the law, a citizen of the State which created it, and where its business is done, for all the purposes of suing and being sued. And in coming to this conclusion, as to the character of a corporation, we only make a natural inference from the language of this court upon another occasion, and assert no new

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principle. In the case of *Dartmouth College* v. *Woodward* (4 Wheat., 636), this court says, "a corporation is an artificial being, invisible, intangible, and existing only in contemplation of law. Being the mere creature of law, it possesses only those properties which the charter of its creation confers upon it, either expressly or as incidental to its very existence. These are such as were supposed best calculated to effect the object for which it was created. Among the most important are immortality, and if the expression may be allowed, individuality—properties by which a perpetual succession of many persons are considered as the same, and may act as a single individual. They enable a corporation to manage its own affairs, and to hold property without the perplexing intricacies, the hazardous and endless necessity of perpetual conveyances for the purpose of transmitting it from hand to hand. It is chiefly for the purpose of clothing bodies of men in succession with these qualities and capacities that corporations were invented and are in use. By these means a perpetual succession of individuals are capable of acting for the promotion of the particular object like one immortal being." Again, in *The Providence Bank* v. *Billings et al.* (4 Peters, 514), it is said, "the great object of an incorporation is to bestow the character and properties of individuality on a collective and changing body of men. This capacity is always given to such a body. Any privileges which may exempt it from the burdens common to individuals do not flow necessarily from the charter, but must be expressed in it, or they do not exist." In that case the bank was adjudged to be liable to a tax on its property as an individual. Lord Coke says

559*] "every corporation *and body politic residing in any county, riding, city or town corporate, or having lands or tenements in any shire, *qua propriis manibus et sumptibus possident et habent*, are said to be inhabitants there, within the purview of the statute." In the case of *King* v. *Gardner*, in Cowper, a corporation was decided by the Court of King's Bench to come within the description of occupiers or inhabitants. In *The Bank* v. *Deveaux*, the case relied upon most for the doctrines contended for by the plaintiff in error, it is said of a corporation, "this ideal existence is considered as an inhabitant, when the general spirit and purposes of the law requires it." If it be so for the purposes of taxation, why is it not so for the purposes of a suit in the Circuit Court of the United States, when the plaintiff has the proper residence? Certainly the spirit and purposes of the law require it. We confess our inability to reconcile these qualities of a corporation—residence, habitancy, and individuality, with the doctrine that a corporation aggregate cannot be a citizen for the purposes of a suit in the courts of the United States, unless in consequence of a residence of all the corporators being of the State in which the suit is brought. When the corporation exercises its powers in the State which chartered it, that is its residence, and such an averment is sufficient to give the circuit courts jurisdiction.

Our conclusion makes it unnecessary for us to consider that averment in the plea which denies jurisdiction on the ground that citizens of the same State with the plaintiff are members of corporations in South Carolina, which are members of the Louisville, Cincinnati and Charleston Railroad Company.

The judgment of the Circuit Court below is affirmed.

ORDER.

This cause came on to be heard on the transcript of the record from the Circuit Court of the United States for the District of South Carolina, and was argued by counsel: on consideration whereof, it is now here ordered and adjudged by this court, that the judgment of the said Circuit Court in this cause be, and the same is hereby affirmed, with costs and damages at the rate of six per centum per annum.

Criticised—16 How., 349, 352.
Cited—14 How., 95, 100; 15 How., 248, 249; 16 How., 325, 340, 343, 344, 352; 20 How., 232-234; 21 How., 210; 1 Black, 296; 5 Wall., 542; 7 Wall., 121; 8 Wall., 17; 11 Wall., 216; 12 Wall., 82; 18 Wall., 574; 3 Otto, 20; 2 Wood. & M., 176, 231, 232; 3 Wood. & M., 336; Woods, 74; 1 Abb. U. S., 376; 2 Abb. U. S., 240; Dill., 298; 3 Dill., 272, 409-411; 6 Blatchf., 112; Blatchf., 144; 4 McLean, 224, 545; 3 Story, 78; Bond, 21.

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*NATHANIEL BURWELL, *Complainant and Appellant*, [*560

v.

DANIEL CAWOOD, WILLIAM C. GARDNER, Executor of JOSEPH MANDEVILLE, Deceased, AND JOHN WEST, *Defendants.*

Partnership may be continued after death of a member by express provision in his will—testator's intention governing extent of estate devised.

Although by the general rule of law, every partnership is dissolved by the death of one of the partners, where the articles of copartnership do not stipulate otherwise, yet either one may, by his will, provide for the continuance of the partnership after his death; and in making this provision, he may bind his whole estate or only that portion of it already embarked in the partnership.

But it will require the most clear and unambiguous language, demonstrating in the most positive manner that the testator intended to make his general assets liable for all debts contracted in the continued trade after his death, to justify the court in arriving at such a conclusion.

Where it appears, from the context of a will, that a testator intended to dispose of his whole estate, and to give his residuary legatee a substantial, beneficial interest, such legatee will take real as well as personal estate, although the word "devisee" be not used.

THIS was an appeal from a decree of the Circuit Court of the United States for the District of Columbia, holden in and for the County of Alexandria, sitting as a court of equity.

The case was this:

In July, 1836, Joseph Mandeville and Daniel Cawood, both of the town of Alexandria, entered into articles of copartnership, under the firm of Daniel Cawood & Company, which was to continue until the 1st of September, 1838. Numerous stipulations were made, which it is not necessary to mention.

NOTE.—*As to the interpretation of wills, and that intention of testator is to govern*, see note to Pray v. Belt, 1 Pet., 670.

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In June, 1837, Mandeville made his will, which began thus:

"I, Joseph Mandeville, of Alexandria, in the District of Columbia, thankful to Divine Providence, which has ever rewarded my industry and blessed me with a fair portion of health, do hereby direct the disposal which I desire of my earthly remains, after my decease, and of such real and personal property as I may possess when called hence to a future state."

After sundry legacies, he said: "If my personal property should not cover the entire amount of legacies I have or may give, my executors will dispose of so much of my real estate as will fully pay them," and then added:

"John West, formerly of Alexandria, now of Mobile, I hereby make my residuary legatee, recommending him to consult with, and follow the advice of, my executors in all concerning what I leave to him."

561*] *Robert J. Taylor and William C. Gardner were appointed executors.

In July, 1837, the following codicil was added:

Codicil to the preceding will, made this eleventh day of July, 1837.

It is my will that my interest in the copartnership subsisting between Daniel Cawood and myself, under the firm of Daniel Cawood & Company, shall be continued therein until the expiration of the term limited by the articles between us; the business to be conducted by the said Daniel Cawood, and the profit or loss to be distributed in the manner the said articles provide.

In witness whereof I have hereto subscribed my name. JOSEPH MANDEVILLE.

Shortly after adding the above codicil, Mandeville died, in July, 1837. Taylor announced the executorship, and Gardner obtained letters testamentary upon the estate.

Cawood & Company continued to carry on the business as before.

In July, 1838, the following note was given and draft drawn.

ALEXANDRIA, 28th July, 1838.

Dolls. 800.

Thirty days after date, we promise to pay to the order of Mr. N. Burwell, eight hundred dollars for value received, negotiable and payable at the Bank of Potomac.

DANIEL CAWOOD & CO.

ALEXANDRIA, 28th July, 1838.

Dolls. 1,000.

On the 31st inst. pay to the order of Mr. Wm. H. Mount one thousand dollars for value received, and charge to account of yours.

NATH'L BURWELL.

To Daniel Cawood & Co., Alexandria, D. C.

Accepted, DAN'L CAWOOD & CO.

Neither the note nor draft was paid at maturity and both were protested.

In December, 1838, Burwell, the appellant in the present case, filed a bill on the equity side of the Circuit Court against Cawood and Gardner, reciting the above facts, and praying relief.

In June, 1839, Gardner answered. He admitted those facts, but denied that the assets in his hands as executor were liable to the payment of the debts of the firm of Daniel Cawood & Company, and required the complainant to make proof of it. He further alleged a deficiency of personal assets.

*In October, 1839, Cawood filed his [*562 answer, admitting, in substance, the facts set forth in the bill, but neither admitted nor denied the insolvency of the firm.

The case was referred to a commissioner with instructions to adjust the accounts of the executor and also of the firm of Cawood & Company.

In May, 1841, the commissioner made an elaborate report, the particulars of which it is not necessary to state.

In November, 1841, on the motion of John West, claiming to be interested in the subject matter of the suit, it was ordered by the court that the complainant have leave to amend his bill and make John West a defendant. The case was again referred to a commissioner with instructions to state, settle, and report to the court the account of William C. Gardner as executor of Joseph Mandeville, deceased, stating the personal estate of the said Mandeville left by him at his death, and how much thereof has come to the hands of the executor, the value of it, and how the same have been disposed of; particularly whether any of the legacies have been paid out of the personal estate, and to what amount; and also the value of the personal assets still in the hands of the executor; and that he report any special matter that he may deem pertinent, or either party may require.

In December, 1841, the complainant, under the above order, filed his amended bill, making West a party.

In April, 1842, West demurred to the bill, because the other legatees of Mandeville were not made defendants, and because the complainant had not, by his bill, shown a case in which he was entitled to relief.

In May, 1842, the commissioner made a report, under the above reference, stating that Gardner, as executor, had then in his hands, assets, amounting to $1,036.70.

In June, 1842, the demurrer was argued, and the court being of opinion that the general assets of the estate of the said Joseph Mandeville, deceased, in the hands of his executor, William C. Gardner, one of the said defendants, are not chargeable with any debt contracted by the defendant Cawood, in the name of the firm of Daniel Cawood & Co., after the death of the former partner of the firm, the said Joseph Mandeville; and being of opinion that the defendant's said demurrer is well taken and fully sustained in argument, and that the complainant's bill contains no matter, allegation, or *charge laying any foundation [*563 for equitable relief in the premises, dismissed the bill with costs.

The complainant, Burwell, appealed from this decree.

Messrs. Neale and *Coxe* for the appellant.

Messrs. Smith and *Jones* for the defendants.

Mr. Neale, for the appellant, contended:

1. That all the necessary and proper parties were before the court below.

2. That John West was not a necessary or proper party, he being the residuary legatee of the late Joseph Mandeville, and the bill only sought to make the personal estate of Mandeville liable.

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3. That the surviving partner being insolvent, the creditors were well warranted in filing their bill in equity against the executor of Mandeville and the surviving partner.

4. That the general assets of the estate of Mandeville are liable for the debts contracted, as well after as before Mandeville's death by the late firm of Daniel Cawood & Co.

5. That Mandeville's real estate descended upon his heirs-at-law.

If the surviving partner is insolvent, the effects in the hands of the legal representatives of the deceased partners are liable in equity for the partnership debts. Such debts are both joint and several, and equally a charge upon the assets of the deceased partner, and against the person and estate of the surviving partner. (3 Kent's Commentary, 57; *Hamersly* v. *Lambert*, 2 Johns. Ch. Rep., 508; *Devaynes* v. *Noble*, 1 Merivale's Rep., 539: 3 Leigh, 548.)

A creditor of a firm may sue the surviving partner and the legal representative of a deceased partner, for payment out of the assets of the deceased partner, without showing the insolvency of the surviving partner. (*Wilkinson* v. *Henderson*, 1 Mylne & Keene's Rep., 582.)

And relief may be had in equity against the legal representative of a deceased partner, if the surviving partner be insolvent. (*Jenkins* v. *De Groot*, 1 Caines' Cases in Error, 122.)

In this case, Cawood, the surviving partner, is notoriously insolvent.

A joint creditor may file a bill in equity against the legal representative of a deceased partner, although the surviving partner be not insolvent. He is not compelled to sue the survivor in the first instance. (Mylne & Keene's Rep., 582; 1 Merivale's Rep., 529, 563; Collyer on Partnership, 343, 346.)

564*] *From the record in the cause, it appears that Mandeville died in July, 1837, more than a year before the time, when the partnership by its terms expired, to wit: the 1st September, 1838.

Had Mandeville lived until the 1st September, 1838, and the debt of the complainant been contracted before that date, there can be no doubt that on failure of partnership funds to pay the claim, the separate property of both partners would be liable for the payment of it.

If so, does not the codicil to Mandeville's will place the creditors subsequently to his death, and before the 1st September, 1838 (when the *post mortem* partnership expired), on the same footing that they would have been had Mandeville lived until the 1st of September, 1838?

If this was not the intention of Mandeville when he added the codicil to his will, then, in effect it was a fraud upon the public; for it was the general opinion where the *post mortem* partnership was carried on, that Mandeville's estate, or the general assets of his estate, were bound in common with the company or social funds.

By the codicil to his will, Mandeville directs that his interest in the copartnership of Daniel Cawood and himself, under the firm of Daniel Cawood & Co., shall be continued therein until the expiration of the time limited by the articles of copartnership. The business to be conducted by Daniel Cawood, and the profit and loss to be distributed in the manner the articles provide.

The articles of copartnership do not state what is the amount of capital put in by either party, all it states is the money or goods then furnished or that might thereafter be put in by either party, shall stand to his credit in account current, and bear interest—and all profits and losses to be equally divided.

If, then, the articles of copartnership would have bound the general assets of Mandeville had he lived until the 1st September, 1838 (assuming that at that time the firm was insolvent), then we contend that the codicil makes his estate equally liable for all debts contracted by Daniel Cawood & Co. prior to the 1st September, 1838, although Mandeville died in July, 1837. Because, if he could bind his estate by deed while living, so could he, by will, after his death—and in this case the codicil to his will affirms the obligation and continues his liability under the deed of copartnership, until the 1st September, 1838. It is conceded, that he might have limited his liability, either in the articles of copartnership or in the codicil to his will, but not having done so in either, and coupling the two papers together, *the only fair construction to [*565 be put upon them both, makes his estate generally liable for all debts due from the late firm of Cawood & Co. prior to the 1st September, 1838, less what that firm is able to pay towards their discharge. (7 Peters, 586.)

Had the firm of the late Daniel Cawood and Co. made money, to whom would the profits have belonged, after payment of Mandeville's debts and legacies? Clearly and beyond all doubt, to John West, the residuary legatee: and who would have claimed those profits? The answer is, John West; and he could and he would have successfully claimed them, for as residuary legatee, he, and he alone, would have been entitled to them under Mandeville's will, and bad must be the rule which works only one way. Entitled, then, to the profits, which the right to demand them, and, still more, to coerce their payment if refused, he should, upon principles of equality and justice sustain losses if any were made. And it is worthy of remark that although Mr. West remove to the town of Alexandria immediately after Mandeville's death; was present when the will was probated in the Orphans' Court of Alexandria County, September, 1837, and well knew the contents of Mandeville's will and codicil thereto; and was also an eye-witness to Cawood's proceedings under the codicil, yet did he remain entirely silent upon the subject, thereby acquiescing therein, as it would certainly seem, until the November Term, 1841, of the Circuit Court of Alexandria County, when, for the very first time, we were informed that he intended to defeat, if he could, all claims on Mandeville's estate, contracted with the firm of Daniel Cawood & Co. subsequent to the death of Mandeville, however just they might be. Does he, then, come into court with clean hands and for just purposes?

Had he intimated his intention, as here stated, before the credits were given, none would ever have been given; for it was perfectly notorious, to every person dealing with the firm of Daniel Cawood & Co., that the surviving partner was

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utterly insolvent from the beginning to the ending of his connection in business with the late Mr. Mandeville, unless the business should prove a profitable one.

West being, by the will, the recipient of the profits, after payment of debts and legacies, had a direct interest in the business, and having such interest, may be looked upon as a *quasi* partner therein, and consequently his right to the *residuum* of Mandeville's estate is in subordination to the paramount claims of *bona fide* creditors.

The essence of a partnership consists in the 566*] mutual participation *of profit and loss; there can be no partnership without this. If the testator by his will continues the partnership after his death (as in this case), he continues it for the benefit of his representatives; he makes them partners with the surviving partner; they are entitled to a joint participation in the profits, and ought they not, in sheer justice, to bear their portion of all losses? For if they did not, the distinctive features of a partnership would be lost sight of.

Mandeville, by his will, directs the partnership subsisting between him and Cawood to be continued for the period fixed by the articles; and the profit or loss, of the same, to be shared, as provided by them. The articles are thus made part of the will. The intention of the testator must govern; it is the "polar star which is to guide the decision," and the intention must be gathered from the testator's language. In this case, there is neither a patent nor latent ambiguity on the face of the will or the articles of copartnership; it is therefore clear (judging from the language employed in both) that Mandeville intended a continuance of the partnership, under the terms and conditions of the articles, according to their expressed as well as legal effect. They expressly provide for an equal participation in the profits, and an equal burden in all losses; their legal effect is, to render liable the general estate of both parties, to the just claims of creditors, in the event of losses. Now, if the partnership is continued in the same manner after the testator's death, by his express directions, as it existed before, must not his estate be liable to the demands of subsequent creditors?

If this is not so, then in the event of heavy profits his estate is entitled to an equal portion, but if there are losses, however large, his estate is exonerated—the whole falls on the surviving partner—ruinous to him and unjust and fraudulent as to creditors! This negatives the idea of a partnership, which is a communion, not of profit alone, but also of loss. This case is distinguishable from that of *Pitkin* v. *Pitkin* (7 Conn. Reports, 307.) The testator in that case directed that his interest, consisting of so much, to wit: (here he specifically enumerates it) is to be continued in the firm, after his death, for the term of four years. His interest, which is thus continued, is clearly defined, and clearly restricted, and is not a general direction of the continuance of the partnership. This language is too plain for creditors to misunderstand or misinterpret, and if under such circumstances they trust the partnership, which finally proves insolvent, they have no right to look to the general assets of 567*] the testator, *for he has only pledged so much for the partnership engagements, of which the creditors had due notice, and if they suffer, it is the result of their own imprudence. The distinction is plain and obvious: one is a general partnership, wherein the separate estate of each party is liable; the other, a special partnership, of which creditors had notice, and therefore they can only look to those funds especially provided to meet all losses. Were it otherwise, there would be no difference between a general and special partnership.

But the appellee, in the court below, contended that the demurrer was well taken and would hold, and cited the following authorities in support thereof, to wit: Edwards on Bills and Pleadings, 123; 1 Johns. Chan. Reports, 438; 1 Sch. & Lefroy, 386; 2 Sch. & Lefroy, 159; 3 Maddock's Chancery Reports, 791; Mylne & Keene's Reports, 116. And it was further contended, that upon a fair construction of Mr. Mandeville's will, John West is residuary devisee, and not, as declared by the testator, residuary legatee.

As to a fair construction of the will, is Mr. West a residuary devisee, or residuary legatee?

Mandeville, the testator, by his will, makes him, in plain terms, his residuary legatee, and upon a careful inspection of the whole will it is not perceived how he is to be considered a residuary devisee. Mr. Mandeville was a remarkably intelligent man, well understood the true import of words, and if he intended to make Mr. West his residuary devisee, why did he not say so? Why speak of his "heirs" if he intended that Mr. West should be his residuary devisee? If residuary devisee, then there was an end to all heirships, and the reason which he assigned for appointing two executors was just as false as it was clearly absurd. Assuming, then, that he well understood the technical meaning of "residuary legatee," then Mr. West should not have been made a party—and touching the construction of wills, we find, in the great case of *Thelusson* v. *Woodford*, (4 Ves., Jun., 329), that the Master of the Rolls, when deciding upon that case, makes, among others, these remarks: "The intention is to be collected from the whole will taken together. Every word is to have its effect. Every word is to be taken according to the natural and common import; and if words of art are used, they are to be construed according to the technical sense, unless upon the whole will it is plain the testator did not so intend." So in *Kennon* v. *McRoberts et al* (1 Wash. Rep., 130), the president of the court observes: "In *Hodgson* v. *Ambrose* *(Doug., 323), a distinction is [*568 made which seems to be a sensible one, to wit: 'If the testator use legal phrases, his intention should be construed by legal rules: if he use those that are common, his intention, according to the common understanding of the words he uses, shall be the rule.'"

The above are a few of the many cases that might be adduced, but they are deemed quite sufficient for the present occasion.

As to the authorities relied on:

So far from ousting the court of jurisdiction in this case, they must conclusively establish it; consequently, they must have been cited and relied on to sustain that part of the demurrer which objects for want of proper parties, and as such we shall shortly review them.

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(Edwards on Bills and Pleading, 123.) In that case it is said: "If a testator directs his debts to be paid out of his personal property, and the deficiency to be made up out of his real estate, and the personal property is not sufficient to pay the debts, a judgment creditor will have to make the personal representative and heir-at-law parties." Is Mr. West an heir-at-law in this case? Again, in the same book and same page, "neither the heir-at-law nor the personal representative were parties; in fact, the will had not been proved; there was no personal estate, and the executor refused to act, but the Master of the Rolls (Leach) ordered it to stand over for administration with the will annexed, and with leave to make the administrator and heir parties."

In the present case, has not the will been proved; the personal estate ascertained and duly administered, and a deficiency of personal assets clearly shown?

Where, then, is the analogy? And was this case decided under the influence of the statute of the 5 Geo. II. (ch. 7), or was it made upon common law principles? This would seem to be a necessary inquiry, because that statute enlarges the remedies of judgment creditors against the real estate of their debtors.

The cases of *Giffard* v. *Hart*, reported in 1 Sch. & Lefroy, 386, and *Plunket* v. *Joice* (2 Sch. & Lefroy, 158), have no application to the present case, unless it shall first be made clearly to appear that the appellee occupies the same ground that he would do were he the heir-at-law of the late Mr. Mandeville.

Wiser v. *Blachly et al.* (1 Johns. Chan. Rep., 437). In this case the Chancellor permitted the devisee of Vail to be made a party, because he had a direct interest in the event of the suit—
569*] was devisee; *and the bill sought to make liable the timber on the very land devised to him. But in the present case, is West devisee? Very different are the rights of devisees and legatees; a difference too well defined and understood to need the slightest notice on our part. But these principles have no application to the present case, inasmuch as the bill does not seek to charge the real assets.

The case *Ex-parte Garland* (10 Ves., Jun., 110 *et seq.*), also relied on to defeat this claim, has no bearing upon the merits of this cause. There a certain sum, to wit, £600, was embarked in the trade by the testator, and no more; and that trade carried on by the widow and executrix of the testator, and not by a copartner, under original articles of copartnership with the testator, wherein no sum is named, as in this case. In that case, distribution had long been made before the bankruptcy of the executrix; in this case, none has ever been made; in that case, the profits of the trade were to be applied for his widow's use, and for the maintenance and education of his children; but in this case, the profits (if any) are to become a part of Mr. Mandeville's personal estate. Where, then, is the similarity between the two cases? It scarcely deserves, *en passant*, a notice. The Lord Chancellor in his decree employs the following language: "in this case," he remarks, "I fear I shall be under the necessity of contradicting the authority of a judge I most highly respect, feeling a strong opinion that only the property declared to be embarked in the trade shall be answerable to the creditors of the trade. If I am not bound by decision, the convenience of mankind requires me to hold, that the creditors of the trade, as such, have not a claim against the distributed assets, in the hands of third persons under the direction of the same will which has authorized the trade to be carried on for the benefit of other persons. My opinion upon this case is, that it is impossible to hold that the trade is to be carried on, perhaps for a century, and at the end of that time the creditors dealing with the trade are, merely because it is directed by the will to be carried on, to pursue the general assets distributed, perhaps to fifty families."

But in this case it was to be carried on for about thirteen or fourteen months only, and without the slightest inconvenience either to "mankind" generally, or to the devisees and legatees of Mr. Mandeville in particular; nor has there been a distribution, either in part or whole, of Mr. Mandeville's personal estate. Wherein, we again ask, do the cases assimilate?

**Ex-parte Richardson et al., In re* [*570 *Hodgson et al.* (3 Maddock's Chan. Rep., 79).

This case stands upon the same ground as *Ex-parte Garland*, and consequently, this, like that case, is clearly distinguishable from the case now before the court, for the reasons already stated in regard to that case. (*Thompson* v. *Andrews*, 1 Mylne & Keene's Rep., 116.)

This case bears no analogy whatever to the case now under consideration, and is very similar to the two preceding cases of *Ex-parte Garland*, and *Ex-parte Richardson et al.* In this case, the testator merely expresses a wish that the trade may be carried on by his widow and son, after his death, "for their joint benefit and mutual advantage." And in further advance thereof, gives and bequeaths to them, as his "stock in trade of what nature or kinsoever," by him "employed or used in said trade," claiming in no manner any future interest therein; consequently they traded on their own property, for their own benefit, and not upon the testator's, for he had embarked nothing therein, and therefore the creditors must have known upon whose responsibility they dealt, and we are entirely at a loss to imagine how this can be considered a *post mortem* partnership, and if not a partnership, by what legal ways and means could the testator's estate be liable?

In support of the 5th point, *Mr. Neale* referred to the following authorities: 3 Bos. & Pull. 620; 6 Cruise, 206, 207; 3 Mumf., 76; 3 East, 516; 2 Mod., 313, 314; 12 Mod., 593; 1 Ves. Beames, 410; Doug., 789; 2 Cowp., 657; Swanston, 201.

Mr. Smith, for the defendant West, stated the following preliminary propositions:

1. That by a fair construction of the will the entire real and personal estate (except the interest in the firm of Cawood & Company) vested in West as general residuary devisee and legatee, subject only to debts and legacies.

After showing, with some minuteness, how far the courts in England had gone in order to carry out the intention of the testator, he referred to the cases of 3 Peters, 346, and 6 Peters 68.

The introductory words of the will show

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intention, in the testator, to part with his whole estate. To show the weight which courts have attached to the introductory clause of a will, and also what particular words and expressions, 571*] other than words of perpetuity *have been regarded as sufficient in devisees to pass an estate in fee, he cited, Forrester's Rep., or Cas. temp. Talbot, 157; 2 Atk., 37; 3 P. Wms., 295; 1 Wilson, 333; 2 Vern., 690; Preston on Estates, 90 *et seq.*, 1st Am. ed.; 6 Com. Law Rep., 191; 1 Johns. Chan. Rep., 494; 3 Cranch, 97; 1 Wash., 96; 3 Rand., 280.

The word "property" is sufficiently extensive, in connection with the general residuary clause, to pass real and personal estate. (1 Rev. Code of Va., 369, chap. 99, sec. 27; 11 East, 288, 516; 14 East, 368, 17 Com. Law Rep., 280, 289; 2 Des. Chan. Rep., 573; 6 Serg. & Rawle, 452; 1 Wash. Va. Rep., 45, 262; 11 East, 321; 1 Taunt., 288; 2 Vern., 564; 5 Burr., 36, 38; 1 Hen. Black., 223; 5 Taunt., 268.

[*Mr. Smith* here analyzed the clauses of the will.]

Even the word "legacy" may be applied to real estate, if the context of the will shows that such was the testator's intention. (1 Burr., 268; 5 Term Rep., 716; 11 East, 245; 15 East, 508.)

2. That being directly and materially interested in the subject in controversy, West is a proper party. (1 Johns. Chan. Rep., 437; 3 Johns. Chan. Rep., 553.)

3. That the general assets of the testator are not liable to the claim of the plaintiff in error; it being contracted since Mandeville's death. And that the testator, by the terms of his will, left nothing more at stake in the concern of Cawood & Company than his interest in the copartnership at the time of his death.

A testator may sever a portion from the main body of his estate to follow the hazards of a trade; and the general assets, in such case, are not responsible.

The only case denying this is *Hankey* v. *Hammond* (Cooke's Bankrupt Law, 5th ed., p. 67, cited in a note to 3 Madd. Chan. Rep., 148.) But this doctrine is reviewed in *Ex-parte Garland*, a leading case (10 Ves., Jun., 110). The latter case is supported by *Ex-parte Richardson* (3 Madd., Chan. Rep., 138, 157); also, in 1 Mylne & Keene, 116, the case of *Ex-parte Garland* is reviewed and sustained. See also *Pitkin* v. *Pitkin* (7 Conn. Rep., 307), where there is a strong analogy to the case at bar.

The doctrine of *Ex-parte Garland* has become incorporated into the elementary books. (3 Com. Dig., 609, pl. 12; 2 Madd. Chan., 651; 3 Roberts on Wills, 123.)

[*Mr. Smith* here compared the case at bar with the cases cited above.]

4. The general assets of the testator, not be- 572*] ing liable to the complainant's *demand, and such liability being the only ground for equitable relief, the demurrer was properly sustained, and the bill dismissed as to all the defendants. (1 Gallison, 630; 2 Vern., 292; 1 P. Wms., 682; 2 Ves., 101.)

Mr. Jones, on the same side, said that West had a right to be a party. Legatees are generally considered to be represented by executors, but it is not error if a legatee be made a party. (Calvert on Parties, 20, 21, 149, 171, 172.)

It was a matter of discretion in the court below; and this court will not review it.

The executor did not file a proper answer, because he impliedly admitted that the estate was bound. He is a creditor.

The case in 11 Serg. & Rawle, 41, relied on by the other side, is not in point, because there was an article in the original partnership for carrying it on.

Mr. Coxe, in reply and conclusion:

The counsel on the other side have not kept within the record. The surviving partner became insolvent, but the record does not show how. All parties considered the firm as the same after the death of Mr. Mandeville as it had been before; the executor, surviving partner and all; and the bill only charges the personal estate, not the real.

Was it necessary to make the devisee a party? The authorities are collected in Story's Eq. Plead., 135, 140, 141, 148, 150, 155.

The court would not dismiss the bill because the devisee was not made a party. (4 Wash. C. C. R., 202, 208; 3 Cranch, 227.)

Cawood is certainly liable because he contracted the debt. Have we mistaken our remedy against him? We call upon him to account, which is a matter peculiarly appropriate to equity. If the bill is good against him alone, it ought not to have been dismissed.

A partnership can go on by will (7 Peters, 594. 11 Serg. & Rawle, 41.)

(Story on Partnership, sec. 195, 196.) If it is restricted or limited, the burden of proving it is on the other side.

In *Ex-parte Garland* there was a limited sum left for the use of the firm.

In 3 Maddock, 145, each party put in a specific sum, and the court ordered an account up to the time of the death; and said it depended on the will how the business was to be carried on.

*Mylne & Keene, 116, is like the case [*573 in Maddock. As to the case in 7 Cowen, Rep., 312, limited partnerships are recognized in that State.

Mr. Justice STORY delivered the opinion of the court:

This is an appeal from a decree of the Circuit Court of the United States for the District of Columbia, sitting in equity in the County of Alexandria.

On the 9th of July, 1836, Joseph Mandeville, deceased, by certain articles then executed, entered into partnership with Daniel Cawood, one of the defendants, for the term of three years from the 1st of September, 1835, under the firm of Daniel Cawood & Company. On the 3d of June, 1837, Mandeville made his last will, by which, in the introductory clause, he said: "I do hereby direct the disposal which I desire of my earthly remains after my decease, and of such real and personal property as I may possess when called hence to a future state." He then proceeded to make sundry bequests of his real and personal estate to different persons; and then added: "If my personal property should not cover the entire amount of legacies I have or may give, my executors will dispose of so much of my real estate as will fully pay the same." He immediately added: "John West, one of the defendants, formerly of Alexandria, now of Mobile, I hereby make my residuary legatee, recommending him to consult

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with and follow the advice of my executors in all concerning what I leave to him." The testator on the 11th of July, 1837, made the following codicil to his will: "It is my will that my interest in the copartnership subsisting between Daniel Cawood and myself, under the firm of Daniel Cawood & Company, shall be continued thereon until the expiration of the term limited by the articles between us; the business to be continued by the said Daniel Cawood, and the profit or loss to be distributed in the manner the said articles provide." The testator appointed Robert J. Taylor and William C. Gardner (one of the defendants) executors of his will, and died in July, 1837. His will and codicil were duly proved after his death, and Taylor having renounced the executorship, Gardner took upon himself the administration of the estate under letters testamentary granted to him by the Orphans' Court of Alexandria County.

Cawood, after the testator's death, carried on the copartnership in the name of the firm, and failed in business before the regular expiration thereof, according to the articles.

574*] *The present bill was originally brought against Cawood & Gardner, as executors of Mandeville, by the plaintiff, Burwell, alleging himself to be a creditor of the firm upon debts contracted with him by Cawood, on behalf of the firm, after Mandeville's death, viz., on a promissory note, dated the 28th of July, 1838, for $800, and on an acceptance of a bill of exchange drawn by Burwell on the same day for $1,000, in favor of one William H. Mount, both of which remained unpaid. The bill charged the failure of Cawood in trade, and his inability to pay the debts due from the firm. It also charged that Gardner, the executor, had assets sufficient to satisfy all the debts of the testator, and all the debts of Cawood & Company; and it sought payment of the debt due to the plaintiff out of those assets.

The defendant (Gardner) put in an answer denying that he had such accurate information as to enable him to say whether the partnership funds in the hands of Cawood were sufficient to pay the debts of the firm or not; and not admitting that the assets of the testator in his hands were liable to the payment of the debts of the firm, and requiring proof of such liability, and alleging that he had not assets of the testator in his hands sufficient to satisfy the plaintiff's claims, after satisfying two specified judgments.

The defendant (Cawood) not having made any answer at this stage of the cause, the bill was thereupon taken against him *pro confesso*—subsequently he put in an answer; and thereupon it was, by consent of the plaintiff, and Cawood, and Gardner, the executor, referred to a master to take an account of the assets of the testator, of the debts due to him, of the value of his real estate, and to settle the accounts and transactions of the firm of Cawood & Company until its termination, and of the individual partners with the firm, to take an account of the assets of the firm, and the outstanding debts of the firm, and the debts due thereto, &c.; and also to ascertain whether the debt due to the plaintiff arose in the partnership transactions, and is now due.

Cawood, by his answer, admitted generally the facts stated in the bill; but he also alleged that he neither admitted nor denied the insolvency of the firm, averring that he had satisfied claims against the firm since it terminated to the amount of about $14,000 from the firm funds, and was engaged in the collection of the outstanding debts due thereto, and that the firm still owed debts to the amount of about $7,000.

The master made his report in May, 1841; the details of which it *is not necessary [*575 to mention. In November, of the same year, it was referred to another commissioner to take an account of the assets of Mandeville in the hands of his executor, who afterwards made a report accordingly. At this stage of the proceedings, John West (the residuary legatee, so called in the will) claiming to be interested in the subject matter, the bill was amended by making West a party; and he filed a demurrer to the bill. The demurrer was afterwards set down for argument, and the court being of opinion that the assets of Mandeville in the hands of his executor (Gardner) were not chargeable with any debt contracted by Cawood in the name of the firm, after the death of Mandeville, sustained the demurrer, and dismissed the bill with costs. From this decree of dismissal the present appeal has been taken to this court.

The argument has spread itself over several topics, which are not, in our judgment, now properly before us; whatever may have been their relevancy in the court below. The real question arising before us upon the record is, whether the general assets of the testator (Mandeville), in the hands of his executor, are liable for the payment of the debt due to the plaintiff, which was contracted after Mandeville's death. If they are not, the bill was properly dismissed, whatever might be the remedy of the plaintiff against Cawood, if the suit had been brought against him alone, for equitable relief, upon which we give no opinion. In general the surviving partner is liable at law only; and no decree can be made against him, although he may be a proper party to the suit in equity, as being interested to contest the plaintiff's demand, unless some other equity intervenes; and so it was held in *Wilkinson* v. *Henderson* (1 Mylne & Keene, 582, 589).

The bill, as framed, states the insolvency of Cawood, and seeks no separate relief against him, and therefore, if it is maintainable at all, it is so solely upon the ground of the liability of the general assets of Mandeville to pay the plaintiff jointly with the partnership funds in the hands of Cawood. In respect to another suggestion, that West was not a necessary party to the bill, in his character of residuary legatee of the personalty, that may be admitted; at the same time it is as clear, that as he had an interest in that residue, if Mandeville's general assets were liable for the plaintiff's debt; and therefore, the plaintiff might at his option join him in the suit, and if West did not object, no other person would avail himself of the objection of his misjoinder.

Then, as to the liability of the general assets of Mandeville in the hands of his executor for the payment of the plaintiff's debt—we are of *opinion that they are not so liable; and [*576 shall now proceed to state the reasons for this opinion.

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By the general rule of law, every partnership is dissolved by the death of one of the partners.[1] It is true that it is competent for the partners to provide by agreement for the continuance of the partnership after such death; but then it takes place in virtue of such agreement only, as the act of the parties, and not by mere operation of law. A partner, too, may by his will provide that the partnership shall continue notwithstanding his death; and if it is consented to by the surviving partner, it becomes obligatory, just as it would if the testator, being a sole trader, had provided for the continuance of his trade by his executor, after his death. But, then, in each case the agreement or authority must be clearly made out; and third persons, having notice of the death, are bound to inquire how far the agreement or authority to continue it extends, and what funds it binds, and if they trust the surviving party beyond the reach of such agreement, or authority, or fund, it is their own fault, and they have no right to complain that the law does not afford them any satisfactory redress.

A testator, too, directing the continuance of a partnership, may, if he so choose, bind his general assets for all the debts of the partnership contracted after his death. But he may also limit his responsibility, either to the funds already embarked in the trade, or to any specific amount to be invested therein for that purpose; and then the creditors can resort to that fund or amount only, and not to the general assets of the testator's estate, although the partner, or executor, or other person carrying on the trade may be personally responsible for all the debts contracted. This is clearly established by the case *Ex-parte Garland* (10 Ves., 110), where the subject was very fully discussed by Lord Eldon, and *Ex-parte Richardson* (3 Madd., 138, 157), where the like doctrine was affirmed by Sir John Leach (then Vice-Chancellor), and by the same learned judge, when Master of the Rolls, in *Thompson* v. *Andrews* (1 Mylne & Keene, 116). The case of *Hankey* v. *Hammock*, before Lord Kenyon, when Master of the Rolls, reported in Cooke's Bankrupt Law (67, 5th ed.), and more fully in a note to 3 Madd. Rep., 148; so far as may be thought to decide that the testator's assets are generally liable under all circumstances, where a trade is directed to be carried on after his death, has been completely overturned by other later cases, and expressly overruled by Lord Eldon in 10 Ves., 110, 121, 122, where he stated that [577*] it stood *alone, and he felt compelled to decide against its authority. The case of *Pitkin* v. *Pitkin* (7 Conn. Rep., 307) is fully in point to the same effect, and, indeed, as we shall presently see, runs *quatuor pedibus* with the present.

And this leads us to remark, that nothing but the most clear and unambiguous language, demonstrating in the most positive manner that the testator intends to make his general assets liable for all debts contracted in the continued trade after his death, and not merely to limit it to the funds embarked in that trade, would justify the court in arriving at such a conclusion from the manifest inconvenience thereof, and the utter impossibility of paying off the legacies bequeathed by the testator's will, or distributing the residue of his estate, without in effect saying at the same time that the payments may all be recalled, if the trade should become unsuccessful or ruinous. Such a result would ordinarily be at war with the testator's intention in bequeathing such legacies and residue, and would, or might postpone the settlement of the estate for a half century, or until long after the trade or continued partnership should terminate. Lord Eldon, in 10 Ves., 110, 121, 122, put the inconvenience in a strong light, by suggesting several cases where the doctrine would create the most manifest embarrassments, if not utter injustice; and he said, that the convenience of mankind required him to hold, that the creditors of the trade, as such, have not a claim against the distributed assets in the hands of third persons, under the directions in the same will, which has authorized the trade to be carried on for the benefit of other persons. This, also, was manifestly the opinion of Sir John Leach in the cases 3 Madd. Rep., 128; 1 Mylne & Keene, 116, and was expressly held in the case in 7 Conn. Rep., 307.

Keeping these principles in view, let us now proceed to the examination of the will and codicil in the present case. There can, we think, be no doubt, that the testator intended by his will to dispose of the whole of his estate, real and personal. The introductory words to his will already cited, show such an intention in a clear and explicit manner. The testator there says: "I do hereby direct the disposal which I desire of my earthly remains after my decease, and of such real and personal estate as I may possess, when called hence to a future state." He, therefore, looks to the disposal of all the estate he shall die possessed of. It is said that, admitting such to be his intention, the testator has not carried it into effect; because the residuary clause declares John West his "residuary legatee" only, and *not [*578 his residuary devisee also; and that we are to interpret the words of the will according to their legal import as confined altogether to the residue of the personal estate. This is, in our judgment, a very narrow and technical interpretation of the words of the will. The language used by the testator shows him to have been an unskillful man and not versed in legal phraseology. The cardinal rule in the interpretation of wills is, that the language is to be interpreted in subordination to the intention of the testator, and it is not to control that intention, when it is clear and determinate. Thus, for example, the word "legacy" may be construed to apply to real estate where the context of the will shows such to be the intention of the testator. Thus in *Hope* v. *Taylor* (1 Burr. Rep., 269), the word "legacy" was held to include lands, from the intention of the testator deduced from the context. The same doctrine was fully recognized in *Hardacre* v. *Nash* (5 Term Rep., 716). So, in *Doe, dem. Tofield*, v. *Tofield* (11 East, 246), a bequest of "all my personal estates" was construed upon the like intention to include real estate. But a case more directly in point to the present, and differing from it in no essential circumstances, is *Pitman* v. *Stevens* (15 East, 505). There the testator, in the introductory clause of his will, said: "I give and bequeath all that I shall die

1.—See Scholfield v. Eichelberger, 7 Peters, 586.

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possessed of, real and personal, of what nature and kind soever, after my just debts is paid. I hereby appoint Capt. Robert Preston my residuary legatee and executor." The testator then proceeded to give certain pecuniary legacies, and finally recommended his legatee and executor to be kind and friendly to his brother-in-law J. C., &c., and begs him to do something handsome for him at his death, &c. The question was, whether Preston was entitled to the real estate of the testator, under the will; and the court held that he was: and that the words "residuary legatee and executor," coupled with the introductory clause and the recommendation clearly established it. Upon that occasion, Lord Ellenborough, after referring to the words of the introductory clause, said: "Then he appoints Capt. P. his residuary legatee and executor—residuary legatee and executor of what? Of all that he should die possessed of, real and personal, of what nature and kind soever; that is, of all he should not otherwise dispose of. The word 'legatee', according to the cases, particularly *Hardacre* v. *Nash*, may be applied to real estate, if the context requires it, as was said by Lord Kenyon upon the word 'legacy'. Then in the subsequent parts of the will, he contemplates that his residuary legatee and executor will have **579*** the disposition *of his whole funds; but after some legacies and annuities, he recommends him to be kind and friendly to his brother-in-law, &c."

In the present case it is plain that the testator contemplated some positive benefit to West, when he designated him as his residuary legatee; and yet, at the same time, he contemplated that his personal property might not be sufficient to cover the amount of legacies given by his will; and in that event he directs his executors to dispose of so much of his real estate as will fully pay his legacies; so that, if we restrain the words "residuary legatee" to the mere personalty, we shall defeat the very intention of the testator, apparent upon the face of the will, to give some beneficial interest to West, in an event which he yet contemplated as not improbable. On the other hand, if we give an enlarged and liberal meaning to the residuary clause as extending to the real estate, it will at once satisfy the introductory clause, and upon a deficiency of the personal assets will still leave an ample amount to the beneficiary, who appears to have been an object of the testator's bounty. But if this interpretation should be (as we think it is not) questionable, one thing is certain, and that is, that the testator did not contemplate that his personal assets would not be more than sufficient to pay all his debts; for he does not charge his real estate with his debts, but only with his legacies, in case of any deficiency of personal assets, and the residuary clause, if it were limited to the mere residue of his personal assets, would also show that the testator did not provide for any debts which should arise from any subsequent transactions after his death.

If this be so, then we are to look to the codicil to see whether any different intention is there disclosed in clear and unambiguous terms. In the first place, the language of the codicil is just such as the testator might properly have used, if he intended no more than to pledge his funds already embarked in the partnership for the payment of the partnership debts. The codicil says: "It is my will that my 'interest' in the copartnership, &c., shall be continued therein until the expiration of the term limited by the articles." Now, his interest in the firm then was his share of the capital stock and profits, after the payment of all debts and liabilities due by the firm. It is this interest, and not any new capital which he authorizes to be embarked in the firm. He does not propose to add anything to his existing interest, but simply to continue it as it then was. How, then, can this court say that he meant to embark all his personal assets in the hands of his executor as a pledge for the future debts, *or future [*580 responsibilities, or future capital of the firm? That would be to enlarge the meaning of the words used beyond their ordinary and reasonable signification. And besides, it is plain that the testator did not mean to have the payment of his legacies indefinitely postponed, until the expiration of the articles, and the ascertainment and final adjustment of the concerns of the firm, which might perhaps extend to ten or twenty years. So that to give such an enlarged interpretation to the terms of the codicil as is contended for (for the codicil must be construed as if it were incorporated into the will), would be to subject the legatees to all the fluctuations and uncertainties growing out of the future trade, and might deprive the residuary legatee of every dollar intended for his benefit. There is another consideration of the matter which deserves notice. Would the real estate of the testator, upon a deficiency of his personal assets, be liable for the debts of the firm contracted after his death, by mere operation of law, as it would be for such debts as were contracted in his lifetime? If it would, then it is apparent that all the legatees and devisees might in the event of the irretrievable and ruinous insolvency of the firm be deprived of all their legacies and devises, although the legacies were charged upon the real estate. If it would not, then it is equally apparent that the testator did not contemplate any liability of his general assets, real and personal, for the payment of any debts, excepting those which were subsisting at the time of his death. There is yet another consideration, not unimportant to be brought under review. It is, that the whole business of the firm is to be conducted by Cuwood alone, and that neither the executor nor the legatees are authorized to interfere with or to scrutinize his transactions. Such an unlimited power over his whole assets by a person wholly unconnected with the administration of his estate could scarcely be presumed to be within the intention of any prudent testator. If to all these we add the manifest inconveniences of such an interpretation of the codicil, thus suspending for an indefinite time the settlement of the estate and the payment of the legacies, it is not too much to say, that no court of justice ought upon principle to favor, much less to adopt it.

And, certainly, there is no authority to support it; at least none, except *Hankey* v. *Hammock*, which cannot now, for the reasons already stated, be deemed any authority whatsoever. On the other hand, the case *Ex-parte Garland* (10 Ves., 110), and *Ex-parte Richardson* (3

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Madd. Rep., 138), although distinguishable 581*] from the present in *some of their circumstances, were reasoned out and supported upon the broad and general principle that the assets of the testator were in no case bound for the debts contracted after his death by the persons whom he had authorized to continue his trade, but the rights of such new creditors were exclusively confined to the funds embarked in the trade and to the personal responsibility of the party who continued it, whether as trustee, or as executor, or as partner—unless, indeed, the testator had otherwise positively and expressly bound his general assets. The case of *Pitkin* v. *Pitkin* (7 Conn. Rep., 307) is, however (as has been already suggested), directly in point. There, the testator, by his will, directed "that all his interest and concern in the hat manufacturing business, &c., as then conducted under said firm, should be continued to operate in the same connection for the term of four years after his decease, &c." The court there held, after referring to the cases in 10 Ves., 110, and 3 Madd. Rep., 138, that the general assets of the testator were not liable to the claims of any creditors of the firm who became such after the testator's death; and that such creditors had no lien on the estate in the hands of the devisees under the will, although they might eventually participate in the profits of the trade. There was another point decided in that case, upon which we wish to be understood as expressing no opinion.

Upon the whole, our opinion is that the decree of the Circuit Court dismissing the bill ought to be affirmed, with costs.

ORDER.

This cause came on to be heard on the transcript of the record from the Circuit Court of the United States for the District of Columbia, holden in and for the County of Alexandria, and was argued by counsel; on consideration whereof, it is now here ordered and decreed by this court, that the decree of the said Circuit Court in this cause be, and the same is hereby affirmed, with costs.

Cited—11 Otto, 329; 3 Story, 346.

SALLY LADIGA, *Plaintiff in Error*,

v.

RICHARD DEMARCUS ROLAND AND PETER HIEFNER, *Defendants*.

Treaty with Creek Indians—construction of.

By a treaty made between the United States and the Creek tribe of Indians, east of the Mississippi River, on the 24th of March, 1832, it was stipulated:

1. That ninety principal chiefs of the tribe should be allowed to select one section each.

[582* *2. That every other head of a Creek family should be allowed to select one half section each; and that these tracts should be reserved from sale, for their use, for the term of five years, unless sooner disposed of by them.

3. That twenty selections should be made, under the direction of the President, for the orphan children of the Creeks, and divided and retained or sold for their benefit as the President should direct.

In making the selections for the orphan children, the President had no authority, under the treaty, to choose any land embraced by the two preceding clauses. A grandmother, living with her grandchildren, was the head of a Creek family, and had a right to make a selection; and the sale of her selection under the authority of the President was a nullity.

THIS case was brought up, by writ of error, under the 25th section of the Judiciary Act, from the Supreme Court of the State of Alabama.

On the 24th of March, 1832, a treaty was made between the United States and the Creek tribe of Indians, east of the Mississippi River.

The articles of this treaty which bear upon the present case are as follows:

"Article I. The Creek tribe of Indians cede to the United States all their lands east of the Mississippi River.

"Article II. The United States engage to survey the said land as soon as the same can be conveniently done, after the ratification of this treaty, and when the same is surveyed, to allow ninety principal chiefs of the Creek tribe to select one section each, and every other head of a Creek family to select one half section each, which tracts shall be reserved from sale for their use for the term of five years, unless sooner disposed of by them. A census of these persons shall be taken under the direction of the President, and the selections shall be made so as to include the improvements of each person within his selection, if the same can be so made, and if not, then all the persons belonging to the same town, entitled to selections, and who cannot make the same, so as to include their improvements, shall take them in one body in a proper form. And twenty selections shall be selected, under the direction of the President of the orphan children of the Creeks, and divided and retained or sold for their benefit as the President may direct. Provided, however, that no selections or locations under this treaty shall be so made as to include the agency reserve.

"Art. III. These tracts may be conveyed by the persons selecting the same, to any other persons for a fair consideration, in such manner as the President may direct. The contract shall be certified by some person appointed for that purpose by the President, but shall not be *valid until the President approves the [*583 same. A title shall be given by the United States on the completion of the payment.

"Art. IV. At the end of five years all the Creeks entitled to these selections, and desirous of remaining, shall receive patents therefor in fee simple from the United States.

"Art. V. All intruders upon the country hereby ceded, shall be removed therefrom in the same manner as intruders may be removed by law from other public land until the country is surveyed, and the selections made; excepting, however, from this provision, those white persons who have made their own improvements, and not expelled the Creeks from theirs. Such persons may remain till their crops are gathered. After the country is surveyed and the selections made, this article shall not operate upon that part of it not included in such selections. But intruders shall, in the manner before described, be removed from the selections for the term of five years from the ratifi-

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cation of this treaty, or until the same are conveyed to white persons.

"Art. VI. Twenty-nine sections in addition to the foregoing may be located, and patents for the same shall then issue to those persons, being Creeks, to whom the same may be assigned by the Creek tribe.

"Art. XV. This treaty shall be obligatory to the contracting parties, as soon as the same shall be ratified by the United States.

Sally Ladiga claimed to be the head of a Creek Indian family, and, as such, entitled to a reservation of land. Being ejected, she brought an action of trespass *quære. clausum fregit* to try her title, in the Circuit Court of Benton County, State of Alabama, and recovered. But the case having been carried to the Supreme Court of Alabama, the judgment was reversed. Upon the certificate of the Supreme Court being produced in the Circuit Court, on the second trial, judgment was given for the defendant; which judgment was subsequently affirmed in the Supreme Court of the State.

To review this judgment the present writ of error was brought.

The facts of the case and ruling of the court are set forth in the following bill of exceptions.

Be it remembered that upon the trial of the above entitled cause the plaintiff claimed title to the land in controversy under and by virtue of the treaty made and concluded between the United States of America and the Creek tribe of Indians east of the Mississippi River, on the 24th day of March, A. D. 1832, the plaintiff introduced the following witnesses, viz.: Chr. A. 584*] Green, John Goodwyn, Horatio *Griffin, Benjamin Pope, Thomas C. Henderson, John Boyd, Thomas E. Montgomery, and Matthew M. Houston, by whom she proved substantially the following facts:

1. That said plaintiff, at the date of treaty aforesaid, to wit, on the 24th March, 1832, and long anterior to that period, and from thence to the present time, was and is the head of the Creek Indian family residing in and having an improvement upon the E. half of section 2, township 14, range 8 E, &c., in the district of land subject to sale at Mardisville, in the State of Alabama, which land is situated in Benton County, and is the same sued for in this action.

2. That the said land at the commencement of this suit, and ever since, has been, and is worth three thousand dollars and more. That the rents and profits of the same, since the institution of this suit, have been worth more than two thousand dollars. That the rents and profits have been received by defendants, who had possession of said land at and before the commencement of this suit, and from thence until the present time.

3. It was further proved by said witnesses, that at no time was there any other Indian improvement on the said land, and that the improvement and residence of the plaintiff alone was embraced in said half section by the legal lines of survey, and that plaintiff had lived there for many years, and raised a numerous family of children.

4. It was further proved, by the production of the census roll taken by order of the government of the United States, of the heads of families of the Creek tribe, in conformity with the second article of the treaty aforesaid, that the plaintiff was duly enrolled by the agent of the United States charged with this duty, as one of the heads of families belonging to the said Creek tribe, and as entitled to land under said treaty—her identity being shown by the witnesses.

5. That in 1834, the government, by agents charged with this duty, located the Indians. That the formula of location, as practiced by said agent, consisted in calling the Indians belonging to the respective Indian towns together, and in the presence of the chiefs and head men in the town, the agent would call over the names registered by the enrolling agent as being the heads of families in that town. That the persons whose names were so registered would appear and answer to their names, and their identity and residence, and also their improvements, would be proved, &c., pointed out by the chiefs and head men so assembled; and the agent would then designate by figures and letters, the land opposite the name of each reservee *on said census roll, to which [*585 he supposed them entitled under the treaty.

6. That upon the agent coming into the Tallasahatchee town of Indians, for the purpose of making the locations aforesaid, the plaintiff appeared before him, and being identified as the same whose name was enrolled on the census list of said town, claimed the land in dispute, on which her improvement, at the date of the treaty aforesaid, was situated, and which she then informed him she had selected as her reservation—there being no other improvement, location, or conflicting claim thereto at that time. That the deputy locating agent, who located the town to which she belonged, not regarding her the head of a family, by reason of her children having married and left her, and none but orphan grandchildren residing with her, refused to recognize her rights under the treaty, or set apart the land so by her selected opposite her name on the roll, as in other cases. That from the date of the treaty aforesaid, until the year 1837, she made continual and repeated applications to the government officers to assert her rights to said land, and through them to the government itself; until, in 1837, she was forced to leave the country and emigrate to Arkansas, by the armed troops in the employ and under the directions of the government. That she never had abandoned her claim, but insisted on her right under the treaty, to enforce which this action was brought. M. M. Houston, who was the locating agent, testified as to the reasons which induced him to refuse a recognition of plaintiff's right.

The defendant then introduced a patent or grant from the United States, signed by the President, Martin Van Buren, dated the 21st day of December, 1837, which, after reciting that by virtue of the treaty aforesaid of the 24th March, 1832, between the United States and Creek tribe of Indians, the United States agreed that twenty sections of land should be selected, under the direction of the President, for the orphan children of said tribe, and divided and retained or sold for their benefit, as the President might direct; and that the President, in making such selection, had included section 2, township 14, range 8 east, and divided the same into quarter sections; and said tract having been sold pursuant to instructions.

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Canton, Smith, and Heifner had become the purchasers of the southeast quarter of said section, which purchase had been sanctioned and approved by the President on the 3d November, 1836—gave and granted to said Canton, Smith, and Heifner, the said southeast quarter, 586*] to them, their *heirs, &c., forever, as tenants in common, and not as joint tenants; which grant being properly attested, was read to the jury. Another patent or grant from the government of the United Stated, similar in all its form to that above named, and containing like recitals, bearing the same date and properly authenticated, conveying the northeast quarter of said section to Richard de Marcus Roland, was offered and read to the jury. And this being all the testimony, the plaintiff's counsel asked the court to charge the jury as follows:

1. That if they believed from the evidence that the defendants were in possession of the land sued for at the institution of this suit, and continued to hold the same adversely, receiving the rents and profits thereof; and that if from the evidence the jury were further satisfied that the plaintiff, at the date of the treaty made and concluded at the city of Washington between the United States of America and the Creek tribe of Indians east of the Mississippi River, to wit, on the 24th day of March, 1832, was the head of a Creek Indian family, and that the United States enrolled her name under the provisions of the treaty aforesaid, requiring a census to be taken, &c., as the head of a Creek family; and that said plaintiff, before and at the time of the ratification of said treaty, and from thence until she was forced to leave the country by the United States, possessed said lands sued for, having an improvement and residence upon the same; and if the jury believe from the testimony that said plaintiff did select the said half section, including her improvement, and that such selection was so made without conflicting with the rights of any other Indian, or the rights or duties of the government reserved, secured, or prescribed by the treaty aforesaid, and if the proper officers of the government were duly notified of such selection by the said plaintiff, and that she had never forfeited her rights by a voluntary abandonment of the lands sued for, but had been compelled by force or coercion on the part of the United States, to emigrate from the country and leave the land, then the plaintiff is entitled to recover in this action.

2. The plaintiff asked the further charge—that under the second article of the said Creek Treaty of the 24th March, 1832, each head of a Creek Indian family, after the land ceded by said treaty had been surveyed, was entitled to select a half section of land so as to include their improvement, if the same could be made; and if the jury believed from the proof that the plaintiff was the head of a Creek family, and entitled to a selection under the treaty, and 587*] that *after such survey she could select, and did select, the half section in dispute, and in a reasonable time notified the government of such selection, and had never voluntarily abandoned said land, then plaintiff in such case acquired a vested right to said land inchoate, but sufficient under the laws of this State, coupled with possession, to maintain this action, and that such right could not be defeated by the subsequent disposition of the same by the United States to the defendants.

3. The plaintiff asked the court further to charge the jury: that if the plaintiff was entitled to select a half section of land, under the treaty aforesaid, as the head of a Creek family, duly enrolled as such, and the selection could have been so made, and was so made, as to include her improvement within the selection, that in such case the treaty itself located the plaintiff; and if the government, with a knowledge of such selection and location, exposed the land to sale, or reserved it for other purposes, such sale or disposition could not prejudice the right of the plaintiff. All which charges the court refused to give, and in lieu of them charged the jury: that notwithstanding the plaintiff was the head of a Creek family, duly enrolled as such by the authorized agent of the government, and entitled to select a half section under the second article of the Treaty of the 24th March, 1832; and that although, after the land ceded by the treaty aforesaid had been surveyed, she could have selected, and did select, the half section in dispute, which included her improvement, and of which selection she duly notified the government; yet the refusal of the locating agent to recognize her right and to set apart the land by a designation of it opposite her name upon the roll, as in other cases of location, coupled with the subsequent sale and grants of the same land to the defendants by the United States, whether right or wrong, devested the plaintiff of all right to said land, and vested in the defendants in this action titles paramount, which the plaintiff could not gainsay or dispute. To which refusals of the court to give the charges asked by the plaintiff, and to the charge given in lieu of them by the court, the plaintiff excepts, and now here tenders this bill of exceptions, which is signed and sealed by the court, and ordered to be made a part of the record of this cause, which is accordingly done.

This opinion of the Court of Benton County being, as has been said, affirmed by the Supreme Court of the State of Alabama, the present writ of error was brought to review it.

Mr. Coxe for the plaintiff in error. [*588

Mr. Coxe referred to the treaty (8 Laws United States, 1077), and commented on the several articles of it. He then argued that the treaty, *per se*, vested a title in the plaintiff, and cited the following cases where the point had been decided as arising under a treaty of 1819 with the Cherokees: 3 Yerger, 445, 452; 7 Yerger, 46: 8 Yerger, 249, 461; 6 Porter, 327, 413.

Mr. Justice BALDWIN delivered the opinion of the court:

Both parties claim the land in controversy under the United States, in virtue of the treaty of Washington, made on the 24th March, 1832, between the United States and the chiefs of the Creek tribe of Indians. The decision of the Supreme Court of Alabama was against the title set up by the plaintiff, the case is therefore properly brought here under the 25th section of the Judiciary Act of 1789. [The articles of the treaty are set forth in the statement of the reporter.] By an inspection of the second article it will be seen that there are

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three distinct classes of selections to be made from the ceded lands, for the benefit of the Indians, after the lands are surveyed.

1. The United States engage to allow ninety principal chiefs to select one section each.

2. And every other head of a Creek family to select one half section each, which tracts shall be reserved from sale for their use for the term of five years, unless sooner disposed of by them. A census is to be taken of these persons, and the selections are to include the improvements of each person within his selection.

3. And twenty sections shall be selected under the direction of the President, for the orphan children of the Creeks, and divided, retained, or sold, for their benefit, as he may direct.

By article third these tracts may be sold by the persons selecting them, to any persons, as the President may direct, and a title shall be given by the United States, on the completion of the payment of the consideration. The fourth article stipulates, that at the end of five years, those entitled to these selections, who are desirous of remaining, shall receive patents; and by article fifth, all intruders shall be removed from these selections, for five years after the treaty, or until the same are conveyed to white persons. By article sixth, twenty-nine sections more may be located, and patents shall issue to the Creeks to whom the same may be assigned by the tribe. The fifteenth article makes the treaty obligatory on the parties, when ratified by the United States.

589*] *The engagements of the treaty, then, are, to allow the chiefs and heads of families to select, for their own use, and reserve from sale for five years, the lands selected, that they may be sold and conveyed with the approbation of the President, and titles to be given by the United States, on payment of the purchase money, and at the end of five years to give patents to all who are entitled to select and desirous of remaining, and to remove intruders from their selections, during that time, till they are conveyed to white persons.

The lands to be selected for the orphans are placed under the exclusive direction of the President, as to their location and disposition, and are not embraced in the third or fourth articles, which are confined to selections made by the Indians themselves,—these are expressly reserved from sale for five years, whereas the selections for orphans may be made and the lands sold at any time the President directs.

No authority is given to the President to direct the selection of the twenty sections for orphans, on or out of those made by the chiefs or the heads of families, or those sections which the tribes may assign under the sixth article; all the lands so selected or located are placed beyond the power of any officer, consistently with the obligatory engagements of the treaty on the United States. In directing the selections for orphans, the treaty did not intend, and cannot admit of the construction, that they might be made on lands selected according to the first part of the second article. The provisions of the treaty were progressive —that relating to orphans is entirely prospective. "It is a principle which has always been held sacred in the United States, that laws by which human action is to be regulated, look forward, not backward, and are never to b construed retrospectively, unless the languag of the act should render that indispensable No words are found in the act which render this odious construction indispensable." (Peters, 434.) The last clause in this articl cannot have been intended to annul or impai a title which was valid under the first clause and guarantied from intrusion under the fift article for five years, unless sooner sold. (S. P. 9 Wheat., 479.)

Thus taking the treaty, and applying it t the evidence given at the trial, the instruction prayed of the court, and those given to th jury, it will not be difficult to decide in whic party is the right of this case.

The plaintiff "proved substantially the fo lowing facts." [For the facts proved upon th trial, see the statement of the reporter.]

From the evidence it appears that the plain iff claimed under the *first, and the [*59 defendants under the second clause of the se ond article of the treaty; that the plaintiff wa the head of a family within the description and had complied with all the requisites of th treaty, had selected the tract whereon her in provements were, where she resided before, a the time of the treaty, and until her expulsio therefrom by military force, on the frivolou pretense that she was not the head of a family her children having married and left her, an none but her grandchildren lived with he The defendants claimed under the secon clause of the second article, relating to orphan selections, by two patents dated in 1837, eac for a quarter section, being the two halves o the half section selected by the plaintiff, whic patents issued pursuant to a sale made by th agent appointed by the President, and affirme by him in November, 1836, five months befor the expiration of five years from the ratific tion of the treaty, and while the land was e pressly reserved from sale. The defendan gave no other evidence of title.

This sale was a direct infraction of the so emn engagements of the United States in th treaty. Though approved by the President, the plaintiff had previously selected it accor ing to the stipulations of the treaty, in suc case the sale was a nullity, for the want of an power in the treaty to make it. The Preside could give no such power, or authorize th officers of the land office to issue patents o such sales; they are as void as the sales, b reason of their collision with the treaty. Th only remaining inquiry is into the plaintif title. No other objection has been made to than the refusal of the locating agent or h deputy, to recognize her right, under the treat or to set apart the land so located by her o posite her name on the roll, as in other case solely for the reason he assigned. We cann seriously discuss the question, whether a gran mother and her grandchildren compose a fa ily, in the meaning of that word in the treat it must shock the common sense of all ma kind to even doubt it. It is as incompatib with the good faith and honor of the Unit States, and as repugnant to the Indian cha acter, to suppose that either party to the trea could contemplate such a construction to the solemn compact, as to exclude such perso from its protection, and authorize any officer

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force her from her home into the wilds of the far west. Such an exercise of power is not warranted by the compact, and the pretext on which it was exercised is wholly unsanctioned by any principle of law or justice.

Having a right by the treaty to select the 591*] land of her residence; *having selected, and been driven from it by lawless forces, her title remains unimpaired. She has not slept on her rights, but from 1832 to 1837 has made continuous and repeated applications to the government officers to assert her rights to said land, and through them to the government itself in 1837. She has never abandoned her claim, but has insisted on her rights under the treaty.

In our opinion, the plaintiff not only has a right to the land in question under the treaty, but one which it protects and guaranties against all the acts which have been done to her prejudice; and we are much gratified to find in the able and sound opinion of the Supreme Court of Tennessee, on the Cherokee Treaty of 1819, and the Supreme Court of Alabama on this treaty, a train of reasoning and conclusions which we very much approve, and are perfectly in accordance with our opinion in this case. (These cases are reported in 2 Yerger, 144, 432; 5 Yerger, 328; 5 Porter, Alabama Rep., 330, 427.)

The judgment of the Supreme Court of Alabama is therefore reversed.

ORDER.

This cause came on to be heard on the transcript of the record from the Supreme Court of the State of Alabama, and was argued by counsel; on consideration whereof, it is now here ordered and adjudged by this court, that the judgment of the said Supreme Court of the State of Alabama in this cause be, and the same is hereby reversed, with costs; and that this cause be, and the same is hereby remanded to the said Supreme Court of the State of Alabama, that further proceedings may be had therein in conformity to the opinion of this court, and as to law and justice shall appertain.

LESSEE OF JOHN POLLARD, WILLIAM POLLARD, JOHN FOWLER AND HARRIET, HIS WIFE, HENRY P. ENSIGN AND PHEBE, HIS WIFE, GEORGE HUGGINS AND LOUISA, HIS WIFE, JOSEPH CASE AND ELIZA, HIS WIFE, *Plaintiffs in Error*,

v.

JOSEPH F. FILES, *Defendant.*

Treaty of 1819 with Spain—right of Spain to grant permits to settle, &c.—title to water lots in Mobile.

It is the settled doctrine of the judicial department of the government, that the Treaty of 1819 with Spain ceded to the United States no territory west of the river Perdido. It had already been acquired under the Louisiana treaty.

In the interval between the Louisiana treaty and 592*] the time when the United *States took possession of the country west of the Perdido, the Spanish government had the right to grant permits to settle and improve by cultivation, or to authorize the erection of establishments for mechanical purposes.

These incipient concessions were not disregarded by Congress, but are recognized in the Acts of 1804, 1812, and 1819; and, as claims, are within the Act of 1824.

The Act of 1824 gave a title to the owners of old water lots, in Mobile, only where an improvement was made on the east side of Water Street, and made by the proprietor of the lot on the west side of that street. Such person could not claim as riparian proprietor, or where his lot had a definite limit on the east.

THIS case was brought, by writ of error under the 25th section of the Judiciary Act, from the Supreme Court of the State of Alabama.

It was an ejectment, brought by the plaintiff in error, in the Circuit Court of the State of Alabama for Mobile County, to recover a lot in the city of Mobile, on the east side of Water Street.

By the original plan of the town, a street was laid off called Water Street, on the margin of the river, running nearly north and south, which was afterwards filled up; and by the improvement, the water, at high tide, was confined to the eastern edge of the street.

Pollard's heirs claimed under a Spanish grant from Perez, in 1809, to Pollard, the ancestor; which grant, as they alleged, was saved in the Act of Congress of 1824, and expressly admitted in an Act of 1836, entitled "An Act for the relief of William Pollard's Heirs," under which a patent issued, embracing the premises in question.

The defendant (Files) connected himself with three different branches of title.

1. That of Forbes & Company.
2. That of Curtis Lewis.
3. That of the corporation of the city of Mobile.

1. The title of Forbes & Company.

They held a grant from the Spanish government for a lot fronting upon Royal Street (which is the next on the west to Water Street) and running back 304 feet to the east, to a water lot. It was alleged that the Act of Congress of 1824 (cited at large in the report of the case of *The City of Mobile* v. *Emanuel et al.* (1 Howard, 95), vested a title in the water lot to them as proprietors and occupants of the lot fronting on the river Mobile.

2. The title of Curtis Lewis.

It was alleged that he had made an improvement upon the water lot, and thus brought himself within another clause of the Act of 1824.

*3. The title of the city of Mobile. [*593

It was alleged that Congress, by the Act of 1824, had granted to the city of Mobile "all the right and claim of the United States to all the lots not sold or confirmed to individuals, either by this or any former act, and to which no equitable title exists in favor of any individual, under this or any former act, between high water-mark and the channel of the river," &c.; and that Pollard's claim not coming within any of the exceptions, the title of the United States passed to the city of Mobile. In this view, the United States in 1836, of course, had no title which they could transfer to Pollard's heirs.

The case was tried in the Circuit Court of the State, and the opinion of the court upon

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the law was in favor of the defendant, Files. It was carried by Pollard to the Supreme Court of the State, by which the judgment was affirmed, and to review this opinion the present writ of error was brought.

The facts are set forth in the bill of exceptions taken in the court below, which is as follows:

Bill of Exceptions.

Be it remembered, that in the term of the Circuit Court begun and held in and for the County of Mobile and State of Alabama, on the fifth day of May, in the year of our Lord one thousand eight hundred and forty-one, before the Honourable E. S. Dargan, judge of the tenth judicial district, came John Doe, by his attorney, George F. Sallè, and impleaded Bernard De Sylva, in whose stead the landlord (Files) was admitted to defend in a plea of trespass in ejectment, upon the demise of John Pollard, William Pollard, John Fowler and Harriet, his wife, late Harriet Pollard, Henry P. Ensign and Phebe, his wife, late Phebe Pollard, George Huggins and Louisa, his wife, late Louisa Pollard, Joseph Case and Eliza, his wife, late Eliza Pollard, for a term of years not yet expired, to a certain lot or parcel of land lying in the city of Mobile, between Church Street and North Boundary Street, and bounded on the north by the south side of what was formerly called John Forbes & Co's canal, on the south by what was called the King's wharf, on the west by Water Street, and on the east by the channel of the river; and thereupon issue was joined between the said lessors of the plaintiffs and the said Files, who, at the trial, in pursuance of an Act of the Legislature of Alabama, passed on the eighth day of January, one thousand eight hundred and thirty-six, entitled "An Act for the relief of tenants in pos-
594*] session against *dormant titles," suggested to the court that he and those whose estate he has in the lands or tenements sued for have had adverse possession of the same for three years next before the commencement of such suit, and have made valuable improvements on the lands, so on which suggestion issue was joined; also, on the day and year aforesaid, the said issue so joined, between the said parties as aforesaid, came to be tried by a jury for that purpose duly impaneled and sworn; at which day came there as well the said plaintiffs as the said defendant, by their respective attorneys; and the plaintiffs, in order to maintain the issue on their part, gave in evidence an Act of Congress passed on the twenty-sixth day of May, one thousand eight hundred and twenty-four, entitled "An Act granting certain lots of ground to the corporation of the city of Mobile, and to certain individuals of said city." They further gave in evidence an Act of Congress passed July 2, 1836, entitled "An Act for the relief of Wm. Pollard's heirs." They further gave in evidence a patent issued on the fourteenth day of March, one thousand eight hundred an thirty-seven, in pursuance of said Act of Congress of July 2d, 1836, which patent embraced the premises in question. They further gave in evidence a Spanish grant, of which the following is a translation:

MR. COMMANDANT: William Polland, an inhabitant of this district, before you, with all respect represents: that he has a mill established upon his plantation, and that he often comes to this place with planks and property from it, and that he wishes to have a place propitious or suitable for the landing and safety thereof, and that, having found a vacant piece at the river side, between the canal which is called John Forbes & Co.'s and the wharf at this place, he petitions you to grant him said lot on the river bank, to give more facility to his trading; a favor he hopes to obtain of you.

WILLIAM POLLARD.

Mobile, 11th December, 1809.

MOBILE, 12th December, 1809.

I grant the petition; the lot or piece of ground he prays for, on the river bank, provided it be vacant. CAYETANO PEREZ.

The plaintiff then proved the genuineness of the signature of Cayetano Perez, and referred to the State Papers relating to the public lands to show the different periods during which Perez was in command.

The plaintiff then gave in evidence that the premises sued for *were situated be- [*595
tween Church Street and North Boundary Street and immediately in front of lots known under the Spanish government as water lots, and that the said lot now sued for was, in the year one thousand eight hundred and twenty-four, and is now known as water lot; that it lies on the east side of Water Street; that what is now Water Street was, under the Spanish government, and at the date of the grant to Forbes & Co., hereafter attached, a natural ridge, and that the ordinary tides did not overflow said ridge, and very high tides entirely covered said ridge; that to the north of the lots lying immediately west of the lot sued for, near Conti Street, there was a depression in said ridge, where the water at high tide flowed around upon the eastern part of the lots lying, as before stated, immediately west of the lot sued for, and which were known as water lots under the Spanish government.

The plaintiffs then gave in evidence that John Forbes & Co. applied for and obtained permission, from the Spanish government, to open or cut the canal which was called John Forbes & Co.'s canal, after they had obtained a grant for the lot lying immediately west of said canal.

The defendant, in order to maintain the issue on his part, gave in evidence a Spanish grant to John Forbes & Company, for a lot of ground eighty feet front on Royal Street, with a depth of three hundred and four feet to the east, which is hereto attached and marked A, together with the plat or survey thereto attached, which is made part of this bill of exceptions; and proved that the said lot was situated immediately west of the lot sued for, and was separated from it now only by Water Street; but that Water Street was not known at the date of this grant, and that said street was laid off in 1820 and 1821. The defendant further gave in evidence a certificate of confirmation for the said lot of John Forbes & Company, who were the successors of Panton, Leslie & Company, the original grantees, which is also made a part of this bill of exceptions, and marked B, by which it will appear that 304 feet were confirmed to Forbes & Company.

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The defendant also proved that one Curtis Lewis, sometime in 1822 or 1823, sunk some flat boats in the canal called Forbes & Company's, and proceeded to fill up the lots now sued for, but that one James Inerarity, one of the firm of Forbes & Company, dispossessed him in the night, and erected a smith's shop, and continued in possession about nine months, when Curtis Lewis regained possession by writ of forcible entry and detainer.

596*] *It further appeared in evidence that the ridge in Water Street was about fifteen or twenty feet in width, and that it was covered by the ordinary tides for about one third of its width, up to the year 1822, and that all the land east of Water Street, as at present laid out, up to 1813, was below the ordinary high water-mark. It further appeared that the firm of Forbes & Company entered upon the lot granted to them as aforesaid, and made valuable improvements on it, and fulfilled the conditions of the grant, and on the 25th May, 1824, held the land to the west of Water Street without dispute.

It further appeared that the first improvements on the lot east of Water Street was made by Curtis Lewis, except the canal, and improvements along it, of John Forbes & Company; but it was also in evidence that, in 1811, a witness had seen the servants of Wm. Pollard removing some driftwood and piling some lumber on the lot in question.

The nature and extent of Curtis Lewis's improvements are before stated. The reports of commissioner Crawford, upon the titles before referred to, were read from 3d volume of the State Papers, and they are understood to form a part of this bill of exceptions.

E. S. DARGAN, [L. S.]

The defendant then connected himself with the title of Curtis Lewis, Forbes & Company, and the corporation of the city of Mobile, which claimed the same by virtue of the Act of 1824 above referred to.

In the progress of the trial, when the plaintiffs offered in evidence the Spanish grant to Pollard, the defendant's counsel offered evidence, the object of which was to prove that the date of the grant had been altered, the plaintiffs objected to the introduction of the evidence for that object, but was overruled by the court, to which he excepted. The defendant then passed the grant to the witnesses, who, upon an inspection of the same, were of opinion that the figures 09, in the date of 1809, on the face of the grant, had been altered.

The plaintiff then offered witnesses who proved, that having inspected it with a spy-glass, the alteration was from 1810 to 1809. Plaintiffs also proved that Cayetano Perez was commandant at Mobile in 1810.

The defendant further gave in evidence that he had made valuable improvements on the lot sued for since the 8th day of January, 1836, to the value of $7,000; whereupon the plaintiffs, by their counsel, prayed the court to charge the jury, First. That the said Spanish grant made to William Pollard was ratified and con-

597*] firmed by the 8th article *of the Treaty of Amity, Settlement and Limits, between the United States and His Catholic Majesty, dated 22d February, 1819; which charge the court refused to give; to which the plaintiffs, by their counsel, excepted.

The plaintiffs then, by their counsel, prayed the court to charge the jury that the Act of Congress of 26th May, 1836, confirmed the said Spanish grant to Pollard; which charge the court refused to give, but, on the contrary, charged the jury, if they believed the evidence to be true, the fee-simple to the premises sued for were vested in Forbes & Company, and that the Acts of Congress of 1824 and 1836, and the patent in pursuance thereof, were utterly void, so far as relates to the premises in question, and that no title vested in the lessors of plaintiff by virtue of said acts of Congress and said patent; to which charge the plaintiffs excepted.

The plaintiffs, by their counsel, then prayed the court to charge the jury, that if they should find that an alteration had been made in the date of Pollard's Spanish grant, advantage could not be taken of it in an action of ejectment, but by a *sci. fa.* in the name of the general government, or a bill in equity; which charge the court refused to give, but, on the contrary, charged, that if they should believe that the date had been altered, that they should find for the defendant, unless they were satisfied from the evidence that, though altered, it was made in fact whilst Perez was commandant; that the alteration of the date would not affect the grant if Perez was commandant at the time of the execution; but that if altered, the law would not presume that the grant was made while Cayetano Perez was commandant, but that this must be shown by the evidence; to which charge, so given, and the refusal to charge as prayed, the plaintiffs excepted.

The plaintiffs then prayed the court to charge the jury, that the Act of January 8th, 1836, passed by the Legislature of Alabama, entitled "An Act for the relief of tenants in possession, against dormant titles," is contrary to the tenth section of the first article of the Constitution of the United States, and is therefore void; which charge the court refused to give, but, on the contrary, charged that it is constitutional; to all which the plaintiff excepted, and prayed the court to sign and seal this his bill of exceptions, which is done.

E. S. DARGAN, Judge. [L. S.]

It has been before stated, that this opinion of the court was affirmed by the Supreme Court of the State of Alabama. The following extract from the opinion of the latter court is given, in order that the remarks *made by the [*598 Supreme Court of the United States may be fully understood:

"If the law, as laid down by a majority of the court in the *Lessee of Pollard's Heirs* v. *Kibbe* (14 Peters, 353), is to be regarded as decisive of the law applicable to the plaintiff's title, and as excluding all objection to it, then the answer given by the Circuit Court to the second charge prayed is confessedly erroneous. Of the authority of that case we have nothing to say. We may, however, be permitted to remark, with all deference, that we should yield to it more willingly if it had the sanction of a majority of the Supreme Court. We are aware that, as reported, the judgment seems to have been concurred in by five of the justices; but we have in our possession a manuscript copy of

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the opinions of *Justices* Thompson, McLean, Barbour, and Catron, and the judgment that was rendered; at the foot of which is the following memorandum: 'Dissenting Justices —Catron, Barbour, and Wayne. *Mr. Chief Justice* Taney did not sit in this case.' Attested as follows, 'True copy, test. Wm. Thos. Carroll, C.S.C., U. S.' That *Mr. Justice* McKinley was absent during the entire term, appears from a note of the reporter. If the attestation of the clerk be correct, then but four of the justices concurred in reversing the judgment of this court. And to all this, it may be added, that *Mr. Justice* McLean did not agree to the judgment of reversal, so far as we are informed by his opinion, upon the ground that the grant to William Pollard in 1809 was a 'new grant' within the meaning of the Act of the 26th of May, 1824. But he yielded his assent to the conclusion of *Mr. Justice* Thompson (as we understand it), because the second section of that statute required the improvement to be made on the lot east of Water Street, and to entitle the proprietor of the lot, immediately west of the water lot, the improvement should have been made by himself. These were questions, which, it seemed to us, were wholly unimportant to be considered, unless Pollard's was a 'new grant,' since it is an undisputed principle, that the plaintiff must recover upon the strength of his own title, and not upon the weakness of his adversaries.

"We have taken this view of the case referred to, with the most profound respect for the Supreme Court of the United States, and have only to say, that we hope an opportunity may soon be afforded for a re-examination of the Act of 1824."

Mr. Coxe for the plaintiff in error.

Mr. Sergeant for the defendant.

599*] *Mr. Coxe* contended:

1. That the judgment below was erroneous, and ought to be reversed.

2. That the Circuit Court erred in refusing to give the instructions as prayed by the plaintiff.

3. That it erred in giving the instructions which were given to the jury.

He considered the principle of the present case as decided in *Pollard's Heirs* v. *Kibbe* (14 Peters, 353). The same grant was there brought under review; and it was decided that the Act of 1836 was a private act which Congress had power to pass; that the claim of Pollard was excepted in the 2d section of the Act of 1824, and that the term "new" applied to grants made after the cession of Louisiana. (Pages 360, 362, 364.)

He referred also to 16 Peters, 284, where the question came up again, and quoted passages from pages 247. 251, 257, 265, 422, 427; from all which he inferred that the question had been decided and the rights under it settled.

Mr. Sergeant, for the defendant in error, said he did not mean to question any point decided in 14 Peters, but argued:

I. The plaintiff below had no right.

1. He derived no right from the Act of 1824, because he was not within the act; and also, because the United States had nothing in the premises to grant.

2. He derived no right from the Act of 1836, and the patent under it, as well for the reasons already stated, as because the right of th United States, if any they had, was alread granted by the Act of 1824 to those unde whom the defendant claims.

II. The court did not err in refusing to giv the instructions asked for by the plaintiffs, nc in giving the instructions which they did giv

III. The court did not err in refusing to in struct the jury that the Act of 8th January 1836, is contrary to the Constitution of th United States; and, if they did, it is immateria as the plaintiffs were barred on other grounds

This is a different case from *Kibbe's* and nc covered by that decision. There was an erro in fact there which misled the court, and whic was not discovered until this case was tried The claim is to a place between high and lo water-marks, and the grant called for fast land The grant was not surveyed or recorded.

*1. The plaintiff derived no right [*600 from the Act of 1824, because he was not witl in it. He cannot bring himself within any c the exceptions. He never owned a water-lo nor made any improvements. (7 Laws Unite States, 318, Act of 26th May, 1824.)

If it be said that the plaintiff claims under new and valid grant, the answer is, that if ther was any grant at all, it was issued when Spai had no power to make one. In *Pollard Lessee* v. *Kibbe*, the paper was said to have bee executed on December 12, 1809, and the cou took this for granted. It was the foundatio of the opinion. (14 Peters, 351.) But th record shows that the date was altered, and thi 1809 was not the true one. The jury found th fact of the alteration from 1810 to 1809, and issued in 1810, Perez had no authority to mak the grant.

The alteration must be presumed to be mad after execution. (Peters C. C. R., 369.) An the materiality of the alteration is a questio for the court. (1 Peters, 552.)

Perez, in 1810, having no power to grant, th basis of the plaintiff's title is gone, and the ca infected with fraud.

The Act of 1824 says the "Spanish goverr ment must have made a new grant or order c survey for the same, during the time at whic they had the power to grant the same;" an although the judges differed as to the precis time when the Spanish authority ceased, a agreed that it was extinct on the 12th Decembe 1810. (Opinion of *Judge* Baldwin, page 36 369, 370; of *Judge* McLean, 366; of *Judge* Catron and Barbour, 426, 428; of *Judge* Thomp son, 355.)

The proclamation of the President was i October, 1810. The point decided in *Kibbe* case was that the grant was issued when th Spanish government had a right to do it, an the case stood upon that. At page 361, *Judg* Thompson says the grant was dated 12th D cember, 1809, and was rejected by the com missioner because there were no improvement on the lot.

But possession is required to create a titl (1 Howard, 95.)

2. The plaintiff derived no right from th Act of 1836, or the patent under it. That ac is only a quitclaim on the part of the Unite States, but they had nothing to grant. All the title had previously been granted to Forbes Company, or to the city of Mobile, and th

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defendant unites those titles. The grant to Forbes & Company ran to the water; they had fulfilled all the conditions, had entered and made improvements before the Act of 1842 passed. There was no Water Street; nothing to 601*] divide them from the river. *The Act of 1824 vested a title *per se*, and the parties had nothing to do but go into court and show the facts in evidence. If the Act of 1836 be considered as explanatory of that of 1824, it is dangerous to construe a general act by a private one, obtained by a party for his own benefit. The true construction of that of 1824 is that the improvement must be made on the old lot; that every one who went to the water should not be cut off from it. It supposes an inchoate right to the lot in front, because an exception is, if a party has alienated the lot in front. He must, therefore, have had a right to alienate.

In *Eslava's* case, the record showed that the party who owned the old lot had improved both the old and new. The question, therefore, did not come up.

[The arguments of both counsel as to the right of the State of Alabama over navigable water in virtue of her sovereignty, are omitted, because the opinion of the court does not touch upon that point.]

Mr. Coxe, in reply:

It is said that the improvement must be upon the old lot, but, in 14 Peters, three of the judges dissented on this ground, and in 16 Peters, the court confirmed the dissent, and said it must be on the new lot. (16 Peters, 247.)

It has been said that Forbes & Company were riparian proprietors, running down to the water. But their grant calls only for a certain number of feet; and it was confirmed by the commissioner just in that way.

It has also been said that the grant of 1809 was void. But the plaintiff has a patent under the Act of 1836. If the plaintiff had recovered below, and the defendant had excepted to instructions, the question about the grant would have come up. The President's proclamation was in 1810, but no act of Congress was passed until 1811, and the country was not taken possession of until after that act. The record shows that evidence was given on the trial that Perez was commandant in 1810.

The volume of State Papers referred to, shows that Perez issued a grant in May, 1811, and even as late as November, 1811. (Vol. 3, Public Lands, 450, 454.)

Mr. Justice CATRON delivered the opinion of the court:

For the facts of the case, we refer to the report 602*] of it. It presents *the same titles, and substantially the same facts that were before this court in *Pollard's Heirs* v. *Kibbe* (14 Peters, 353).

The first instruction asked by the plaintiff of the State Circuit Court is, that the Spanish grant made to William Pollard was ratified and confirmed by the eighth article of the Treaty with Spain of 1819, by which the Floridas were acquired. This the court refused to give; and correctly.

It is the settled doctrine of the Judicial Department of this government, that the Treaty of 1819 ceded no territory west of the river Perdido, but only that east of it: and therefore all grants made by Spain after the United States acquired the country from France, in 1803, are void, if the lands granted lay west of that river; because made on territory acquired by the Treaty of 1803; which extended to the Perdido east. It was thus held in *Foster and Elam* v. *Neilson* (2 Peters, 254), and again in *Garcia* v. *Lee* (12 Peters, 515), and is not now open to controversy in this court.

2. The plaintiffs then, by their counsel, prayed the court to charge the jury that the Act of Congress of 26th May, 1836, confirmed the said Spanish grant to Pollard; which charge the court refused to give, but, on the contrary, charged the jury, if they believed the evidence to be true, the fee-simple to the premises sued for were vested in Forbes & Co., and that the Act of Congress of 1824, and 1836, and the patent in pursuance thereof, were utterly void, so far as relates to the premises in question, and that no title vested in the lessors of plaintiff by virtue of said acts of Congress and said patent; to which charge the plaintiffs excepted.

The questions raised by the instruction asked and refused, and that given, will be examined so far only as to decide the present case.

This court held, when Pollard's title was before it, formerly, that Congress had the power to grant the land to him by the Act of 1836: on this point there was no difference of opinion at that time among the judges. The difference to which the Supreme Court of Alabama, in the present case, refers (in its opinion in the record), grew out of the construction given by a majority of the court to the Act of 1824, by which the vacant lands east of Water Street were granted to the city of Mobile. That grant excepted out of it, all lots to which "the Spanish government had made a new grant, or order of survey for the same, during the time at which they had the power to grant the same." If Pollard's was such "a new grant," than the land covered *by it was excepted and did not pass to [*603 the city; and the Act of 1836, and the patent founded on it passed the title to Pollard.

After the country west of the Perdido had been acquired by the Treaty of 1803, the Spanish government continued to exercise jurisdiction over the country, including the city of Mobile, for some nine years; the United States not seeing proper to take possession, and Spain refusing to surrender it, on the assumption that the country had not been ceded by that kingdom to France in the Treaty of 1800; and of course that it did not pass to this country by our treaty with France. That Spain had no power to grant the soil, during the time she thus wrongful held the possession, is settled by the cases cited of *Foster and Elam* v. *Neilson*, and *Garcia* v. *Lee*. But the right necessarily incident to the exercise of jurisdiction over the country and people rendered it proper that permits to settle and improve by cultivation, or to authorize the erection of establishments for mechanical purposes, should be granted. And to this end the concession to Pollard, of December, 1809, was made. He set forth in his petition to the commandant, that he had a mill established on his plantation, and often came to Mobile with planks and property from it; and that he wished a place propitious and suitable for the landing and safety thereof; and having found a vacant piece at the river side, between the canal of

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Forbes & Co. and the public wharf, he solicits the commandant to grant him said lot on the river bank, to give more facility to his trading. This lot, the governor granted to Pollard for the purpose set forth by him.

The use, for the purpose solicited, during the time the Spanish authorities were exercised, could be properly granted; of this there can be no doubt.

Very many permits to settle on the public domain and cultivate, were also granted about the same time; which were in form incipient concessions of the land, and intended by the governor to give title, and to receive confirmation afterwards from the king's deputy, so as to perfect them into a complete title. Pollard's was also of this description. Although the United States disavowed that any right to the soil passed by such concessions, still they were not disregarded as giving no equity to the claimant: on the contrary, the first Act of Congress passed (of April 25, 1812) after we got possession of the country, appointed a commissioner to report to Congress on them in common with all others originating before the Treaty of 1803 took effect. The third section orders all persons, claiming lands, in the pre-
604*] viously *disputed territory "by virtue of any grant, order of survey, or other evidence of claim whatsoever, derived from the French, British, or Spanish governments, to be laid before the commissioner, with a notice in writing, stating the nature, &c., of the claim." On these (by sec. 5) the commissioner had power given him to inquire into the justice and validity of the claims; and in every case it was his duty to ascertain whether the lands claimed had been inhabited and cultivated; at what time the inhabitation and cultivation commenced; when surveyed, and by whom; and by what authority —and into every matter affecting their justice and validity.

By sec. 6, abstracts were to be furnished to the Secretary of the Treasury, of the claims, arranged in classes, according to their respective merits; and these abstracts, &c., were to be laid before Congress, for their determination thereon, &c.

By sec. 8, the commissioner was ordered to report to Congress at its next session, a list of all actual settlers on the land in his district, who had no claims derived from either the French, British, or Spanish governments, and the time such settlements were made.

In January, 1816, the report of commissioner (Crawford) was laid before Congress. (3 Am. State Papers, 6, "Public Lands.")

The 14th sec. of the Act of March 26th, 1804, declares all grants void if made for lands within the territories ceded by the French Republic to the United States, by the Treaty of the 13th of April, 1803 (and which had been acquired by France from Spain), that had been made after the date above. Provided, that the law should not be construed to make void any *bona fide* grant made by the Spanish government, to an actual settler on the lands granted, for himself, and for his wife and family, &c. On Pollard's claim the commissioner reported unfavorably, because it had "not been inhabited nor cultivated." (3 State Papers, 18.) The bill of exceptions refers to this report as it stands in the book, as part of the bill of exceptions, and as such it is treated by us.

In April, 1818, by a resolution of the Senate, it was referred to the Secretary of the Treasury to furnish a plan, for an adjustment of the claims reported on by the commissioners east and west of Pearl River: and on the 7th of December, 1818, the Secretary made his report in the form of a bill. (3 State Papers, 391.) On all the imperfect claims favorably reported on, by the commissioners, derived *from [*605 the authorities of Spain before the 20th of December, 1803, a confirmation was recommended. And the land that had been cultivated on or before that day, should be confirmed also, as if the titles had been completed. And as to all the other claims favorably recommended to Congress by the commissioners, the claimant should be entitled to a grant therefor, as a donation—not to exceed to any one person more than six hundred and forty acres: That all settlers before the 15th of April, 1813, shall receive a grant for the land claimed, not exceeding six hundred and forty acres, if actually inhabited and cultivated.

On this report the Act of March 3d, 1819, was founded—and by sec. 2, each settler with title papers, had confirmed to him his habitation as a donation, not to exceed one thousand two hundred and eighty acres; and this irrespective of the time when the settlement was made, if previous to the 15th of April, 1813; but the grant not to exceed six hundred and forty acres to such settlers as had presented no written evidences of title.

By the 7th, 8th, and 9th sections, those who had filed their notices of claim before the commissioner, and which had not been recommended for confirmation, were allowed to the 1st of July, 1820, to file additional evidence in support of the claim with the register and receiver of the land offices respectively established by that act, in the country divided by Pearl River who had the same powers conferred on them that the commissioner previously had. New claims might also be filed. On these the register and receiver were to report; of course, after the 20th of July, 1820. The land office for the country including Mobile was at Jackson court house. Thus the matter stood for eight years.

By the Act of March 3d, 1827, further time was given to the first of September, 1827, to claimants whose evidences of claim had been previously filed with the commissioner, to produce further evidence, and "to present their titles and claims, and the evidence in support of the same, to the register and receiver of the land office at St. Stevens." By sec. 2, they were ordered to hold their sessions at the city of Mobile, and there examine the suspended claims on the same principles the commissioner had done.

Thus suspended and protected, stood the title of Pollard when the Act of 1824 was passed granting to the city of Mobile the river front. And from anything appearing to the contrary, it stood equally *protected until con- [*606 firmed by the Act of 1836. It was for the sovereign power to judge of its merits; it had never been rejected, and was awaiting the final action of Congress. Furthermore, it was from its situation as a city lot not subject to entry in

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land office, being in no survey of the public lands: and it is a fair construction of the exception to the Act of 1824, to hold Pollard's claim was intended to be within the following exception; as well as the one commented on in *Pollard* v. *Kibbie:* That is—"Provided, that nothing in this act contained shall be construed to affect the claim or claims, if any such there be, of any individual, or of any body politic or corporate."

We think Pollard's was a claim of an individual within the exception, and was so deemed by Congress; as the United States, by the first section, only profess to grant their right to the city front: and except all lots confirmed by Congress by that, or any previous act—and also such "to which an equitable title existed in favor of any individual under this, or any former act." Then in the second section, the provision examined in the case of *Pollard* v. *Kibbe* has direct reference to protection by excepting lots "to which the Spanish government had made a new grant or order of survey," &c. It is obvious the previous obscurity and confusion were intended to be explained by the proviso: simply expressed, that nothing which preceded should affect any individual claim, regardless of the fact whether it was good or bad, so it was a recognized claim by the United States. That Pollard's was so, is most apparent by the protection afforded to it; and such is the unanimous opinion of this court, for the reason formerly and now given, taken together.

Pollard's patent is therefore valid, unless the second instruction given be true—that the Act of Congress of 1836, and the patent founded on it, be void, as relates to the subject in controversy; and therefore the lessors of the plaintiff derived no title from these sources, because the fee-simple of the premises was in John Forbes & Co. when Pollard took his title.

It was held in *The City of Mobile* v. *Eslava* (16 Peters, 247), that the improvements referred to in the Act of 1824, by virtue of which a title was given to the owner of the old water lot west of Water Street, to the lot immediately east of it, must have been made on the new, and eastern water lot; second, that such improvement must have been made by the proprietor of the old lot.

607*] *Forbes & Co. had none such, and therefore took no benefit under the Act of 1824.

If the instruction intended to maintain that Forbes & Co., as riparian proprietors of the lot west of Water Street, could claim all the land east of it, to the channel of the river, then we think the court erred: and we take it for granted the court so intended; as by no other means could the land sued for be claimed by Forbes & Co. from any evidence in the record. Their lot was a grant of 1802, for 80 feet front by 304 feet deep, west of what is now Water Street; and bounded on the east by the street as it now exists. High tide formerly reached it; low tide did not: but we deem this an immaterial circumstance. Forbes & Co.'s grant was a specific town lot bounded by streets, then existing or expected to exist; it fronted to the east on a contemplated street, reserved to the public use, as ungranted property; and it never was contemplated by the grant to give any right to the soil beyond its fixed boundary east, as actually surveyed. It does conform, and must conform, to the city arrangement of lots: if it was held otherwise, then every other proprietor of an old front lot could claim over the mud flat to the channel of the river, as a riparian owner; sweeping through the city property as it now exists by filling up, and raising the flat, to the extent east of probably a thousand feet, or more. We deem such an assumption entirely inadmissible: and therefore think the court also erred in the second instruction given, as well as in refusing that asked on part of the plaintiffs.

With the third instruction this court cannot interfere; and the jury having found for the defendant, no question arises on the fourth instruction.

For the reasons assigned, we order the judgment of the Supreme Court of Alabama to be reversed.

ORDER.

This cause came on to be heard on the transcript of the record from the Supreme Court of the State of Alabama, and was argued by counsel; on consideration whereof, it is now here ordered and adjudged by this court, that the judgment of the said Supreme Court of the State of Alabama be, and the same is hereby reversed, with costs; and that this cause be, and the same is hereby remanded to the said Supreme Court, that further proceedings may be had therein, in conformity to the opinion of this court, and as to law and justice shall appertain.

Rev'g 3 Ala., 47.
Cited—3 How., 54, 231-235.

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*JOHN L M'CRACKEN, *Plaintiff in Error,* [*608

v.

CHARLES HAYWARD.

Illinois statute declared unconstitutional — in adoption of State process by circuit court there must exist no variance.

A law of the State of Illinois, providing that a sale shall not be made of property levied on under an execution, unless it will bring two third of its valuation, according to the opinion of three householders, is unconstitutional and void.

The case of Bronson v. Kenzie (1 Howard, 311) reviewed and confirmed.

Where the Circuit Court, by a rule, adopts the process pointed out by a State law, there must be no essential variance between them. Such a variance is a new rule, unknown to any act of Congress or the State law professedly adopted.

THIS case came up on a certificate of division in opinion from the Circuit Court of the United States for the District of Illinois.

The case was this: In 1840, McCracken, the plaintiff in error, recovered a judgment in the Circuit Court against Hayward for the sum of $3,986.67 and costs.

In February, 1841, the State of Illinois passed the following law:

NOTE.—*As to laws impairing the obligation of contracts, and when void for that reason,* see note to Fletcher v. Peck, 6 Cranch, 87; and note to Sturgis v. Crowninshield, 4 Wheat., 122; and note to Dartmouth College v. Woodward, 4 Wheat., 518.

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"An Act regulating the Sale of Property.

"Sec. 1. Be it enacted by the people of the State of Illinois, represented in the General Assembly: That when any execution shall be issued out of any of the courts of this State, whether of record or not, and shall be levied on any real or personal property, or both, it shall be the duty of the officer levying such execution, to summon three householders of the proper county, one of whom shall be chosen by such officer, one by the plaintiff, and one by the defendant in the execution; or, in default of the parties making such choice, the officer shall choose for them: which householders, after being duly sworn by such officer so to do, shall fairly and impartially value the property upon which such execution is levied, having reference to its cash value, and they shall indorse the valuation thereof upon the execution, or upon a piece of paper thereunto attached, signed by them; and when such property shall be offered for sale, it shall not be struck off unless two thirds of the amount of such valuation shall be bid therefor: Provided, always, that the plaintiff in any execution issued from any court of record of this State, may elect on what property he will have the same levied, except the land on which the defendant resides, and his personal property, which shall be last taken in execution. And in all other executions issued from any of the courts of this State not being courts of record, the plaintiff in execution may elect on what personal property he will have the same **609*]** *levied; excepting and reserving, however, to the defendant in execution, in all cases, such an amount and quantity of property as is now exempt from execution by the laws of this State: And provided, further, that all sales of mortgaged property shall be made according to the provisions of this act, whether the foreclosure of said mortgage be by judgment at law, or decree in chancery. The provisions of this act shall extend to judgments rendered prior to the first day of May, eighteen hundred and forty-one, and to all judgments that may be rendered on any contract or cause of action accruing prior to the first day of May, eighteen hundred and forty-one, and not to any other judgments than as before specified.

"Sec. 2. When any property shall be levied on and appraised in the manner required by this act, and the same shall be susceptible of a a division, no greater quantity thereof than will be sufficient to pay the amount of the execution or executions thereon levied, together with the proper costs, at two thirds of the valuation thereof, shall be offered for sale by the officer in whose hands such execution or executions may have been placed for collection.

"Sec. 3. This act shall be in force from and after its passage, and the Secretary of State is hereby required to have a thousand copies thereof printed immediately after its approval, and transmit them to the clerks of the county commissioners' courts of the several counties in this State for distribution among the proper officers thereof. Approved, February 27, 1841."

In June, 1841, the Circuit Court of the United States adopted the following rule:

"When the marshal shall levy an execution upon real estate he shall have it appraised and sold under the provisions of the law of this State, entitled 'An Act regulating the sale of property,' approved 27th February, 1841, if the case come within the provisions of that law; and any two of the three householders selected under the law agreeing, may make the valuation of the premises required."

In May, 1842, a pluries execution was issued on the judgment, under which the marshal levied upon real estate, and advertised it for sale in the ensuing August. It was appraised by three householders, and no person bidding two thirds of the valuation, it was not sold.

In March, 1843, the plaintiff sued out a *venditioni exponas* to sell *the property lev- [*610 ied upon as above stated; and in May served a written notice on the marshal, directing him not to have the property valued, but to sell it to the highest bidder, regardless of the statute of Illinois. The marshal replied that he conceived it to be his duty to be governed by the rule of court.

In June, 1843, the plaintiff, by his counsel, made the following motion to the court:

"1. The plaintiff, by Arnold, his attorney, comes and moves the court to set aside the return to the pluries execution issued in this cause, dated 16th day of May, 1842, under which the property levied upon was appraised, and not sold, because no one would bid two-thirds of appraised value.

"2. That the court direct the marshal to sell said property to the highest bidder, without regard to the valuation already made, and without having it valued again.

"3. That the marshal proceed to sell said property without regard to the provisions of the laws regulating the sale of property, passed since the rendition of the judgment, but that he execute the process of the court, enforcing the judgment according to the remedy existing at the time of the rendition of the judgment, and the making of the contract between the parties.

"4. That the marshal be directed to proceed and sell the property levied upon, without regard to the provisions of the Act of February, 1841, of the Legislature of Illinois, and of January, 1843, regulating the sale of property, above referred to."

This motion was sustained by an affidavit, setting forth the facts in the case.

Upon the argument of the motion, the judges were divided in opinion upon the following points:

"1st. Whether the said motion shall be granted in the manner and form as the same is asked or refused, or any part thereof.

"2d. Whether the return of the marshal on the execution above set forth, dated May 16, 1842, under which the property was appraised and not sold, because two thirds of appraised value was not bid therefor, shall or shall not be set aside as insufficient.

"3d. Whether the court shall or shall not make an order directing the marshal to sell the property levied on in the usual mode at public auction to the highest bidder, without having the same valued by three householders, and without regard to valuation which has been *made, and without requiring two thirds [*611 of said valuation to be bid therefor.

"4th. Whether the court shall or shall not direct the marshal to proceed and sell the property levied upon without regard to the provisions of the Act of February 27, 1841, of the

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Legislature of Illinois, and the rule adopting said law at the June Term, 1841.

"5th. Whether the court will or will not direct the enforcement of said judgment according to the laws regulating the remedy when said judgment was entered and the contract made."

Upon which certificate of division the cause came up to this court.

The case was submitted upon a printed argument by *Mr. Isaac N. Arnold*, counsel for the plaintiff, which the reporter regrets his limits will not allow him to re-publish.

Mr. Justice Baldwin delivered the opinion of the court:

It appears from the record in this case that the plaintiff obtained a judgment against the defendant, in June, 1840, on which a *pluries fi. fa.* issued at May Term, 1842; real property was levied on; appraised according to the provisions of a law of Illinois, passed on the 27th February, 1841, and the rule of the Circuit Court of that State, adopted in June of the same year, which law and rule are inserted in the statement of the case by the reporter.

The property levied on was advertised for sale by the marshal, in August, 1842, but was not sold, as no one bid two thirds of the appraised value. In March, 1843, the plaintiff sued out a *venditioni exponas*, with directions to the marshal to sell the property, regardless of the State law, which the marshal refused to obey, conceiving himself bound by the aforesaid rule of court. Whereupon the plaintiff moved the court for an order directing the marshal to sell to the highest bidder, without valuation, or any regard to the State law.

"1. The plaintiff, by Arnold, his attorney, comes and moves the court to set aside the return to the *pluries* execution issued in this cause, dated 16th day of May, 1842, under which the property levied upon was appraised, and not sold, because no one would bid two thirds of appraised value.

"2. That the court direct the marshal to sell said property to the highest bidder, without regard to the valuation already made, and without having valued it again.

612*] "3. That the marshal proceed to sell said property without regard to the provisions of the laws regulating the sale of property, passed since the rendition of the judgment, but that he execute the process of the court, enforcing the judgment according to the remedy existing at the time of the rendition of the judgment, and the making of the contract between the parties.

"4. That the marshal be directed to proceed and sell the property levied upon, without regard to the provisions of the Act of February, 1841, of the Legislature of Illinois, and of January, 1843, regulating the sale of property above referred to."

On the argument of this motion, the court were divided in opinion on the points mentioned in the statement. These questions must be considered in two aspects: 1. In reference to the Constitution. 2. The laws of the United States, as the tests of the validity of the law of Illinois and the rule of court, which, it is said, affect only the remedy, but not the right of the plaintiff arising on the contract between the parties, and the judgment rendered upon it.

In placing the obligation of contracts under the protection of the Constitution, its framers looked to the essentials of the contract more than to the forms and modes of proceeding by which it was to be carried into execution; annulling all State legislation which impaired the obligation, it was left to the States to prescribe and shape the remedy to enforce it. The obligation of a contract consists in its binding force on the party who makes it. This depends on the laws in existence when it is made; these are necessarily referred to in all contracts, and forming a part of them as the measure of the obligation to perform them by the one party, and the right acquired by the other. There can be no other standard by which to ascertain the extent of either, than that which the terms of the contract indicate, according to their settled legal meaning; when it becomes consummated, the law defines the duty and the right, compels one party to perform the thing contracted for, and gives the other a right to enforce the performance by the remedies then in force. If any subsequent law affect to diminish the duty, or to impair the right, it necessarily bears on the obligation of the contract, in favor of one party, to the injury of the other; hence any law, which in its operation amounts to a denial or obstruction of the rights accruing by a contract, though professing to act only on the remedy, is directly obnoxious to the prohibition of the Constitution.

*This principle is so clearly stated [*613 and fully settled in the case of *Bronson* v. *Kinzie*, decided at the last term (1 How., 311), that nothing remains to be added to the reasoning of the court, or requires a reference to any other authority than what is therein referred to; it is, however, not to be understood that by that, or any former decision of this court, all State Legislation on existing contracts is repugnant to the Constitution.

"It is within the undoubted power of State Legislatures to pass recording acts, by which the elder grantee shall be postponed to a younger, if the prior deed is not recorded within the limited time, and the power is the same whether the deed is dated before or after the passage of the Recording Act. Though the effect of such a law is to render the prior deed fraudulent and void as against a subsequent purchaser, it is not a law impairing the obligation of contracts; such, too, is the power to pass acts of limitation, and their effect. Reasons of sound policy have led to the general adoption of laws of both descriptions, and their validity cannot be questioned. The time and manner of their operation, the exceptions to them, and the acts from which the time limited shall begin to run, will generally depend on the sound discretion of the Legislature, according to the nature of the titles, the situation of the country, and the emergency which leads to their enactment. Cases may occur where the provisions of a law may be so unreasonable as to amount to the denial of a right, and call for the interposition of the court." (3 Peters, 290.)

The obligation of the contract between the parties, in this case, was to perform the promises and undertakings contained therein; the right of the plaintiff was to damages for the breach thereof, to bring suit and obtain a judg-

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ment, to take out and prosecute an execution against the defendant till the judgment was satisfied, pursuant to the existing laws of Illinois. These laws giving these rights were as perfectly binding on the defendant, and as much a part of the contract, as if they had been set forth in its stipulations in the very words of the law relating to judgments and executions. If the defendant had made such an agreement as to authorize a sale of his property, which should be levied on by the sheriff, for such price as should be bid for it at a fair public sale on reasonable notice, it would have conferred a right on the plaintiff, which the Constitution made inviolable; and it can make no difference whether such right is conferred by the terms or law of the contract. Any subse-
614* quent law which *denies, obstructs, or impairs this right, by superadding a condition that there shall be no sale for any sum less than the value of the property levied on, to be ascertained by appraisement, or any other mode of valuation than a public sale, affects the obligation of the contract, as much in the one case as the other, for it can be enforced only by a sale of the defendant's property, and the prevention of such sale is the denial of a right. The same power in a State Legislature may be carried to any extent, if it exists at all; it may prohibit a sale for less than the whole appraised value, or for three fourths, or nine tenths, as well as for two thirds, for if the power can be exercised to any extent, its exercise must be a matter of uncontrollable discretion, in passing laws relating to the remedy which are regardless of the effect on the right of the plaintiff. This was the ruling principle of the case of *Bronson* v. *Kinzie*, which arose on a mortgage containing a covenant, that, in default of payment, the mortgagee might enter upon, sell, and convey the mortgaged premises, as the attorney of the mortgageor; yet the case was not decided on the effect and obligation of that covenant, but on the broad and general principle that a State law, which professedly provided a remedy for enforcing the contract of mortgage, effectually impaired the rights incident to, and attached to it by the laws in force at its date, was void. No agreement or contract can create more binding obligations than those fastened by the law, which the law creates and attaches to contracts; the express power which a mortgageor confers on the mortgagee to sell as his agent is not more potent than that which the law delegates to the marshal to sell and convey the property levied on, under an execution. He is the constituted agent of the defendant, invested with all his powers for these purposes. The marshal can do under the authority of the law whatever he could do under the fullest power of attorney from the execution debtor; and no State law can prohibit it. It follows that the law of Illinois now under consideration, so far as it prohibits a sale for less than two thirds of the appraised value of the property levied on, is unconstitutional and void.

The second aspect in which this case must be considered, is with reference to the acts of Congress relating to process and proceedings in the courts of the United States in cases at common law. All the early laws on this subject were carefully and most ably reviewed by this court in *Wayman* v. *Southard*, and *The Bank of the United States* v. *Halstead*, in which it was held that the proceedings in the courts *of the United States should be the [*615 same as they were in the several States at the time of passing the acts of Congress, subject to be altered by the circuit courts, or regulations of the Supreme Court. That the proceedings on executions were to be governed by such laws until final satisfaction was obtained, regardless of any subsequent changes by State legislation. (10 Wheat., 20, 51.)

Prior to 1828, Congress had passed no process acts applicable to the States admitted into the Union after 1789. To remedy this defect, and to confirm the decisions in the above cases, the Act of May, 1828, directed that writs of execution and other final process issued on judgments and decrees, and the proceedings thereupon, shall be the same in each State as are now used in the courts of such State, &c.; thus adopting the same principles which had been established by this court in the construction of the Acts of 1789 and 1792. Consequently no State law passed since May, 1828, can have any effect on the proceedings on executions issued from the courts of the United States, unless such laws are adopted by those courts under the proviso in the third section of the act.

The rule adopted by the Circuit Court of Illinois does not fall within this proviso, which declares, "that it shall be in the power of the courts, if they see fit in their discretion, so far to alter final process in said courts as to conform the same to any change which may be adopted by the Legislatures of the respective States for the State courts."

This authorizes the court to adopt the change so made by a State law, but not to adopt it only in part, or alter it in any respect. The law directs the appraisement to be made by three householders, one to be selected by the defendant, one by the officer, and one by the plaintiff, without any authority to any two to make it, and, consequently, requiring the concurrence of all. The rule of court adopting this law provides, "that any two of the three householders selected under the law agreeing, may make the valuation required,"—such an adoption is not warranted by the Act of 1828; it is legislation in effect, by prescribing a new rule unknown to any act of Congress, or the State law professedly adopted. But had the adoption been in the terms of the law, it could not be recognized, inasmuch as the appraisement therein directed, with the prohibition to sell at less than two thirds of the valuation, is repugnant to the Constitution of the United States. It also conflicts with the process acts, as construed *in *Wayman* v. *Southard* [*616 and *The Bank of the United States* v. *Halstead*, and the repeated decisions of this court in later cases—that no State law can be adopted under the Act of 1828, which is in collision with any act of Congress. (16 Peters, 94, 312–314.)

It must therefore be certified to the Circuit Court, that the motion made by the plaintiff's counsel ought to be granted, and that the directions to the marshal prayed for by the plaintiff, ought to be given in the manner stated in the second, third, fourth, and fifth points certified.

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Mr. Justice CATRON.

The third section of the Act of 1828 provides, "that writs of execution, and other final process, issued on judgments and decrees rendered in any of the courts of the United States, and the proceedings thereupon, shall be the same (except their style) in each State, respectively, as are now used in the courts of such State."

A system of rules has been adopted in the Circuit Court of the Kentucky district, regulating final process, and giving a widely different effect to such process from what it had by the laws of Kentucky; a violent controversy was the consequence in that State, and which gave rise to the cases of *Wayman* v. *Southard* and *The United States Bank* v. *Halstead*, reported in 10 Wheat. The agitation, it is understood, was one prominent reason for the introduction of the Act of Congress of 1828. It repealed all rules made by the courts of the United States regulating final process, in all the districts, and adopted the execution laws of the respective States, as they then stood; and if nothing more had been done, future legislation on the subject, by the States, would have been cut off. Congress, however, foreseeing new States might come into the Union, to which the act would not apply, and that it might be proper to adopt future State laws, in the existing States, provided "that it should be in the power of the courts, if they see fit, in their discretion, by rules of court, so far to alter final process in said courts as to conform the same to any change which may be adopted by the Legislatures of the respective States for the State courts."

An adoption of the State law, as the Legislature had made that law, is the extent of the power conferred. If the courts can alter the law in one respect, it may be altered in all respects; this is not "conformity," but an exercise of the same power the Act of 1828 prohib-
617*] ited. *The rule before us will illustrate it. The State law of Illinois enacts that, three valuers shall determine the value of the property levied on by the sheriff; one chosen by the plaintiff, one by the defendant, and the other by the sheriff; that the three must agree in the valuation; and if the property does not bring two thirds of such valuation, it shall not be sold.

The rule provides, that if the appraisers disagree, the value fixed by any two of them shall be sufficient to authorize the marshal to sell. The debtor will naturally select one who he supposes will set the highest value on the property; the creditor one he supposes will fix the lowest value; the marshal may be favorably disposed to the one side or the other; most probably to the absent creditor—the appraiser of his selection, and the one selected by the debtor, may agree, and usually would. This will cut out all the advantages the statute secured to the creditor, as his selection would have no effect. Take it the other way, and the operation will be the same.

If this change were sanctioned, then, in Pennsylvania and other States, where there are statutes by which lands are directed to be valued by a jury of twelve, to ascertain whether the rents and profits will pay the debt in a given number of years: in which case the debtor is compelled to take the accruing profits in satisfaction as they arise; and if not, then the lands are to be sold to the highest bidder, could also be altered, and by a rule of court, a majority of two thirds of the jury be authorized to assess the annual income. It is manifest, if amendments and alterations can be made by the courts, of the State statutes, they must, of necessity, run into an unlimited discretion, if any one feature of the State law is retained. I therefore think the rule of court, adopting the statute of Illinois, with the foregoing amendment, is merely void; and that no part of the State statute is in force in the Circuit Court of the United States in the district of Illinois.

And not having been adopted, it is not before this court for construction; and that it is unnecessary and improper to inquire into the constitutionality of the State law, as the laws in force in 1828 must govern. In this respect, the opinion in the case of *The United States Bank* v. *Halstead* is followed, where the precise question arising in the case before us was presented (the rule aside), and in which this court then declined giving any opinion on the valuation law of Kentucky. I have found no opinion whether the statute of Illinois is constitutional *or otherwise. The question [*618 raised on it is one of the most delicate and difficult of any ever presented to this court; and as our decision affects the State courts throughout, in their practice, I feel unwilling to form or express any opinion on so grave a question, unless it is presented in the most undoubted form, and argued at the bar.

On the questions propounded by the certificate of division, I agree in the answers given by my brethren, because the execution is governed by the laws of Illinois as they stood at the passing of the Act of Congress of 1828, without going farther, as I know the constitutional question will affect other States besides Illinois; many, not to say most of them, have had, and some now have, valuation laws, in which no distinction is made between contracts made before the passing of the act, and those made afterwards, and that the decision against their validity as to past contracts, will reach a great way farther than may be supposed on a slight examination.

ORDER.

This cause came on to be heard on the transcript of the record from the Circuit Court of the United States for the District of Illinois, and on the points and questions on which the judges of the said Circuit Court were opposed in opinion, and which were certified to this court for its opinion, agreeably to the act of Congress in such case made and provided, and was argued by counsel; on consideration whereof, it is the opinion of this court: 1st. That the motion made by the plaintiff's counsel ought to be granted in manner and form as the same is asked. 2d. That the return of the marshal on the execution as set forth, dated May 16th, 1842, under which the property was appraised and not sold, because two thirds of the appraised value was not bid therefor, should be set aside as insufficient. 3d. That the court should direct the marshal to sell the property levied on in the usual mode at pub-

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lic auction to the highest bidder, without having the same valued by three householders, without regard to the valuation which has been made, and without requiring two thirds of said valuation to be bid therefor. 4th. That the court should direct the marshal to proceed and sell the property levied upon without regard to the provisions of the Act of February 27, 1841, of the Legislature of Illinois, and the rule adopting said law at the June Term, 1841. And, 5th and last. * That the court should
619*] *direct the enforcement of said judgment, according to the laws regulating the remedy when said judgment was entered and the contract made. Whereupon, it is now here ordered and adjudged by this court, that it be so certified to the judges of the said Circuit Court.

Cited—5 How., 315; 6 How., 328, 330, 332, 540; 15 How., 310, 319; 24 How., 465; 4 Wall., 550, 551, 554; 8 Wall., 583; 12 Otto, 419; 1 Wood. & M., 132, 134; 1 Woods, 424; 2 Bond, 163; 1 Biss, 186; 1 Sawy., 712; 2 Curt., 193; 3 McLean, 546, 575; 4 McLean, 542; 2 Bank. Reg., 569; 3 Wall., Jr., 214; Hemp., 537; McAll., 518; 5 Dill., 214.

EDMUND P. GAINS ET UX.,

v.

BEVERLY CHEW, RICHARD RELF ET AL.

Bill in equity—what constitutes multifariousness—jurisdiction of Louisiana Probate Court—testamentary title in Louisiana.

It is impossible to lay down any general rule as to what constitutes multifariousness in a bill in equity. Every case must be governed by its own circumstances, and the court must exercise a sound discretion.

A bill filed against the executors of an estate and all those who purchased from them, is not, upon that account alone, multifarious.

Under the Louisiana law, the Court of Probate has exclusive jurisdiction in the proof of wills; which includes those disposing of real as well as personal estate.

In England, equity will not set aside a will for fraud and imposition, relief being obtainable in other courts.

Although by the general law, as well as the local law of Louisiana, a will must be proved before a title can be set up under it, yet a court of equity can so far exercise jurisdiction as to compel defendants to answer, touching a will alleged to be spoliated. And it is a matter for grave consideration, whether it cannot go farther and set up the lost will.

Where the heir-at-law assails the validity of the will, by bringing his action against the devisee or legatee who sets up the will as his title, the district courts of Louisiana are the proper tribunals, and the powers of a court of chancery are necessary, in order to discover frauds which are within the knowledge of the defendants.

Express trusts are abolished in Louisiana by the law of that State, but that implied trust, which is the creature of equity, has not been abrogated.

The exercise of chancery jurisdiction by the Circuit Court of the United States, sitting in Louisiana, does not introduce any new or foreign principle. It is only a change of the mode of redressing wrongs and protecting rights.

THIS case was a sequel to that which came before the court twice before, and is reported in 13 Peters, 404, and 15 Peters, 9.

It came up again from the Circuit Court of the United States for the Eastern District of Louisiana, sitting as a court of equity, on a certificate of a division of opinion in that court, upon the three following questions:

*1. Is the bill multifarious? And [*620 have the complainants a right to sue the defendants jointly in this case?

2. Can the court entertain jurisdiction of this case without probate of the will set up by the complainants, and which they charge to have been destroyed or suppressed?

3. Has the court jurisdiction of this case, or does it belong exclusively to a court of law?

The case was this, as set forth by the complainant; the defendant not yet having answered the bill.

It is stated with some particularity, because the counsel for the complainants dwelt strongly upon the injustice that would follow if such a case (supposed in the argument to be admitted by the demurrer) should prove remediless in a court of chancery. It is proper to refer to the report of the argument of the counsel for the defendants, in which he affirmed that the important facts alleged to exist by the complainant would be denied and disproved, if the court should be of opinion that the cause should go on. Some of the circumstances mentioned came out upon cross-examination.

In the year 1796, there was a French family by the name of Carriere residing in New Orleans. One of the daughters was named Zuline, and about sixteen years of age. A person by the name of De Grange came there and married her; they continued to live together

NOTE.—*Multifariousness.*

By multifariousness in a bill is meant the improperly joining in one bill distinct and independent matters, and thereby confounding them, as the uniting in one bill of several matters, perfectly distinct and unconnected, against one defendant, or the demand of several matters of a distinct and independent nature against several defendants in the same bill. 1 Coop. Eq. Pl., 182; Mitf. Eq. Pl., by Jeremy, 181 and note; West v. Randall, 2 Mason, 201; Saxton v. Davis, 18 Ves., 80; Burke v. Harris, Hardr., 337; Fellows v. Fellows, 4 Cow., 682.

Seeking to enforce different demands against persons liable respectively, but not as connected with each other, it (the bill) is clearly multifarious. Saxton v. Davis, 18 Ves., 80; West v. Randall, 2 Mason, 181; Banks v. Walker, 2 Sandf., 344; Campbell v. Mackay, 1 Myine & Cr., 618; Att'y-Gen. v. St. John's College, 7 Sim., 241; Newland v. Rogers, 3 Barb. Ch., 432; Hoggart v. Cutts, 1 Craig & P., 204; Bignold v. Audlum, 11 Sim., 24.

In the latter case, the proceeding would be oppressive, because it would tend to load each defendant with an unnecessary burden of costs, by swelling the pleadings with the statement of the several claims of the other defendants, with which he has no connection. Mitf. Eq. Pl., by Jeremy, 181, 18; Cooper Eq. Pl., 183; Ward v. Duke of Northumberland, 2 Anst., 469; Benverie v. Prentice, 1 Bro. Ch. 200; Berke v. Harris, Hardr., 337; Whaley v. Dawson, 2 Sch. & Lefr., 371; West & Randall, 2 Mason 201; Brinkerhoff v. Brown, 6 Johns. Ch., 139; Whit v. White, 5 Gill., 381; Fellows v. Fellows, 4 Cow., 68

In the former case, the defendant would be compellable to unite, in his answer and defense, different matters, wholly unconnected with each other and thus the proofs, applicable to each would apt to be confounded with each other, and great delays would be occasioned by waiting for the proofs respecting one of the matters, when the others might be fully ripe for hearing. Whaley Dawson, 2 Sch. & Lefr., 371; Berke v. Harris, Hardr 337; Boyd v. Hoyt, 5 Paige, 65.

The case against one defendant may be so entirely as to be incapable of being prosecuted in several suits; and yet some other defendant may be a necessary party to some portion only of the case stated. In the latter case, the objection to multifariousness could not be allowed to prevail. Att'y Gen. v. Poole, 4 Myine & C., 17, 31; Turner v. Ro

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for several years, until about the year 1800, when it was reported that De Grange had another wife living. A separation took place between him and Zuline. In 1802 she went to New York (where it was said De Grange's former marriage had been celebrated) to obtain proof of it; but the registry of marriages having been destroyed, the proof was not obtained. She then went to Philadelphia, where Mr. Gardette was living, who was one of the witnesses of the prior marriage, and confirmed it. Whilst she was there, she had a daughter, to whom the name of Caroline was given, and who is the same person spoken of in the proceedings in this suit, by the name of Caroline Barnes. Clark treated her as his child, and afterwards placed her to live with his mother.

In 1803 De Grange's first wife came from France to New Orleans, and he, being there also, was seized and prosecuted for bigamy. He was arrested and thrown into prison, but effected his escape, and never afterwards returned. Clark was married to Zuline in Philadelphia, in the same year, but required the [621] marriage to be kept secret *until judicial proof could be obtained of the nullity of her marriage with De Grange.

In 1805, Clark having returned to New Orleans, and established Zuline in a separate establishment from his own, the commercial firm of Davis & Harper was formed, and rested almost entirely upon the credit furnished by Clark. In 1806 Zuline was about to give birth to another child, and, at the instance of Clark, arrangements were made by Davis for its being received into his (Davis's) family. It proved to be a daughter, and was called Myra. She was suckled by Mrs. Harper, who put out an infant of her own to enable her to do so. Clark treated her as his daughter, furnished her with expensive clothing and playthings, and purchased a servant for her use.

Shortly afterwards Clark became a member of Congress, and was absent from New Orleans for a considerable length of time. During his absence, a report reached New Orleans that he was about to contract a marriage at the north, and Zuline, whose feelings were fretted and irritated by his refusal to promulgate their marriage, sailed for Philadelphia, to obtain the legal proofs of her own marriage. When she arrived there, she was told that the priest who had performed the ceremony was gone to Ireland. Being informed by counsel, whom she consulted, that she would not be able to establish the validity of her marriage, she determined to have no further communication with Mr. Clark, and soon afterwards married Mr. Gardette, of Philadelphia.

Clark returned to New Orleans. In 1811, being about to visit Philadelphia on a special emergency, he made a provisional will, as follows:

Daniel Clark. In the name of God: I, Daniel Clark, of New Orleans, do make this my last will and testament.

In primis. I order that all my just debts be paid.

Second. I leave and bequeath unto my mother, Mary Clark, now of Germantown, in the State of Pennsylvania, all the estate, whether real or personal, which I may die possessed of.

Third. I hereby nominate my friend, Richard Relf and Beverly Chew, my executors, with power to settle everything relating to my estate.

DANIEL CLARK.

Ne varietur. New Orleans, 20th May, 1811.
Signed J. PITOT, Judge.

*About the time of executing this [*622 will, he conveyed to Joseph Bellechasse, about fifty lots in the city of New Orleans, in the suburbs or Fauxbourg St. John's, near the bayou of that name, in fee-simple, with the confidential understanding that they were to remain under his control for the use and benefit of his daughter Myra.

On the 27th of May, 1811, Clark, being so far upon his voyage, wrote to his friend Mr. Davis the following letter:

Dear Sir: We are preparing to put to sea, and I hope I shall have a pleasant passage; my stay will be but short in Philadelphia, unless a forced one. In case of any misfortune to me, be pleased to deliver the inclosed to General Hampton; I count on him as a man of honor to pay the amount of notes mentioned in my letter to him, which in that case you will dispose of as I have directed. It will naturally strike you that the letter to the General is to be delivered only in case of misfortune to me, remember me kindly to Mrs. Davis and all your family. Yours,

(Signed) DANIEL CLARK.

P. S. Of the inclosed letter you will say

...ns, 1 Sim. & Stu., 313; Att'y-Gen. v. Cradock, 3 Myne & C., 85; 8 Sim., 456; Lumsden v. Frazer, 1 Sim., 555; 1 Myine & C., 589.

It is not indispensable that all the parties should have an interest in all the matters contained in the suit; it will be sufficient if each party has an interest in some matters in the suit, and they are connected with the others. Addison v. Walker, 4 Bing. & Col., 444; Parr. v. Att'y-Gen., 8 Clarke & Fin., 435; Worthy v. Johnson, 8 Ga., 238.

To support the objection of multifariousness, because the bill contains different causes of suit against the same person, two things must concur; first, the different grounds of suit must be wholly distinct; second, each ground must be sufficient if stated, to sustain a bill. Bedsole v. Monroe, 5 Mont. Eq. R., 313; Larkins v. Bidd, 21 Ala., 252; Nail v. Mobley, 9 Ga., 278; 23 Ala., 558; 3 Ned. Ch. D., 4; Robinson v. Cross, 22 Conn., 171.

There is no definite rule as to what constitutes multifariousness in a pleading in chancery. Each case must depend upon its own circumstances, and must be left to the sound discretion of the court. 1 Myine & Cr., 603, 621; 3 *Id.*, 85; Story Eq. Pl., § 530; Oliver v. Platt, 3 How., 333, 411; Aff'g S. C., 3 McLean, 27; McLean v. Fafayette B'k, 3 McLean, 415.

A plea is multifarious which sets up, as a defense, an accord and compromise of a disputed right, and also a right by prescription. R. I. v. Mass., 14 Pet., 210.

If several claimants of portions of an estate unite in filing a bill, this does not make it multifarious. Shields v. Thomas, 18 How., 253; Turner v. Am. Bapt. Mis. Union, 5 McLean, 344; Robinson v. Giuld., 12 Metc., 323; Kensington v. White, 3 Price, 164.

The bill is not multifarious because it claims to enforce the liens for assessments upon several lots in a city benefited by the improvements on the street. Fitch v. Creighton, 24 How., 159.

See, also, the following cases on the subject of multifariousness: Harkey v. Mutual Ben. Life Ins. Co., 3 Law & Eq. Reporter, 647; Bunnell v. Stoddard, 2 Am. L. Rec., 145, 202; Campbell v. Railroad Co., 1 Woods, 368; Haines v. Carpenter, 1 Woods, 262; Gaines v. Mausseaux, 1 Woods, 118; Wilkinson v. Dobbie, 12 Blatchf., 298; Copen v. Flesher, 1 Bond., 440.

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* * unless in case of accident, when you may communicate it to Chew and Relf.

S. B. Davis.

The direction alluded to in the above, was to place the amount of the notes to the best advantage for his daughter Myra's interest. Having arrived safely at Philadelphia and remained there until July, he addressed the following letter to Mr. Davis, on the eve of his sailing for New Orleans, on his return:

PHILADELPHIA, 12th July, 1811.

My dear Sir: In case of any accident or misfortune to me, be pleased to open the letter addressed to me, which accompanies this, and act with respect to the inclosures as I directed you with respect to the other affairs committed to your charge before leaving New Orleans. To account in a satisfactory manner to the person committed to your honor, will, I flatter myself, be done by you when she is able to manage her own affairs; until when, I commit her under God to your protection. I expect to sail to-morrow for New Orleans in the ship Ohio, and do not wish to risk these papers at sea.

Yours,

(Signed) DANIEL CLARK.

S. B. Davis, Esq.

623*] *Upon Clark's safe arrival in New Orleans, Davis returned to him the package inclosed in the above letter, and also the letter addressed to General Hampton in the letter which he had written from the Balize.

Upon Clark's return, Bellechasse also offered to reconvey the lots, which Clark declined, and Bellechasse continued to hold them until Clark's death, when he conveyed them in equal portions to Myra and Caroline, being influenced to include the latter by the representations of some of Clark's friends.

In 1812 Davis removed to the north with his family, carrying with him Myra, who passed for his daughter, and bore his name. He had then in his hands funds of Clark to the amount of $2,360, the interest of which, by arrangement between then, was to be applied toward her education.

In 1813 Clark died. It was alleged that before his death he made an olographic will, leaving the bulk of his fortune to his daughter Myra. The circumstances under which he is represented to have made it are thus detailed by some of the witnesses:

Dusuau de la Croix says, "that he was very intimate with the late Daniel Clark for a great many years, and up to the time of his death; that some few months previous to the death of Daniel Clark, he visited deponent on his plantation, and expressed a wish that he, deponent, should become his executor; deponent at first refused, but after a little, from the persuasion of said Clark, he consented to become his executor; that in this conversation, Clark spoke of a young female then in the family of Captain Davis, named Myra; that said Clark expressed a wish that deponent should become tutor to this female, and that she should be sent to France for her education, and that Mr. Clark would leave her a sufficient fortune to do away with the stain of her birth; that a month or two after this conversation at the plantation of deponent, he, deponent, called to see Clark at his house on the Bayou road; he there found him in his cabinet, and had just sealed u packet, the superscription of which was as lows: 'pour etre ouvert en cas de mort.' Cl threw it down in the presence of depon and told him that it contained his last and some other papers which would be of vice; deponent did not see the will, nor c he know anything about its contents; he c saw the packet with the superscription on i before recited."

*Bellechasse says: "A very short time [*6 before the sickness that ended in his death, Clark, conversed with us about his said daug Myra in the paternal and affectionate term theretofore. He told us that he had compl and finished his last will. He, Clark, theref took from a small black case his said last and gave it open to me and Judge Pitot to l at and examine. It was wholly written in handwriting of said Daniel Clark, and i dated and signed by the said Clark in his handwriting. Pitot, De la Croix and my were the executors named in it, and in it the Myra was declared to be his legitimate daug and the heiress of all his estate. Some time afterwards I called to see him, Clark, learned from said Relf that the said Clark sick in bed, too sick to be seen by me; how I, indignant at an attempt to prevent me f seeing my friend, pressed forward into room. He, said Clark, took him by the h and with affectionate reprehension said, 'I is it, Bellechasse, that you have not com see me before since my sickness? I told to send for you.' My answer was, that I ha ceived no such message or account whatev his sickness from Relf. I said further, " friend, you know that on various occasio have been your physician, and on this occa I wish to be so again.' He looked at me squeezed my hand. Fearful of oppres him, I retired, and told Relf that I would main to attend occasionally to Clark. said there was no occasion for it, that the tor or doctors had ordered that he, Cl should be kept as quiet as possible, and no allowed to talk. I expressed apprehension the situation of Clark, but Relf expresse different opinion; and on his, Relf, promi to send for me if there should appear to be danger, I departed. On the next day, wit receiving any message from Relf, I went found Clark dead."

Mrs. Harper (afterwards Mrs. Smyth) s "In 1813, some few months before Mr. Cla death, he told me he felt he ought no lo to defer securing his estate to his daughter M by a last will.

"Near this period he stopped one day at house, and said to me he was on his way to plantation of Chevalier de la Croix, for the pose of requesting him to be named in his one of his executors, and tutor to his daug Myra. On his return, he told me with m apparent gratification that De la Croix consented to serve, and that Judge Pitot Col. Bellechasse had consented to *be [*6 the other executors. About this time he me he had commenced making his last Between this period and the time he brou his last will to my house, Mr. Clark spoke often of being engaged in making his last he always spoke of it in connection with

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ly and beloved daughter Myra; said he was king it for her sake, to make her his sole ress, and to insure her being educated ac- ding to his wishes. At the times Mr. Clark ke of being engaged in making his last will, old me over and over again, what would stitute its contents; that he should in cknowledge the said Myra as his legitimate ghter, and bequeath all his estate to her, direct that an annuity of $2,000 a year ld be paid his mother during her life, an annuity of $500 a year to a young female e north of the United States, named Car- e De Grange, till her majority; then it was se, and $5,000 were to be paid her as a cy, and that he would direct that one year the settlement of his estate $5,000 should aid to a son of Judge Pitot, of New Orleans, legacy; at the same period $5,000 as a cy to a son of Mr. Du Buys, of New Or- s; that his slave Lubin was to be freed, and intenance provided for him. In his con- ations respecting his being engaged in mak- his last will, he talked a good deal about plan of education to be laid down in his for his daughter Myra; he expressed fre- ly his satisfaction that the Chevalier de la would be the tutor in his will; he often e with earnestness of the moral benefit to daughter Myra from being acknowledged im in his last will as his legitimate daugh- and he often spoke of the happiness it ld give his mother; he expressed the most vagant pride and ambition for her, he d frequently use the emphatic language he was making her a bill of rights; he ioned at these times that this would con- a complete inventory of all his estate, explanations of all his business, so as both der the administration on his estate plain easy to his friends, Chevalier de la Croix, e Pitot, and Col. Bellechasse, and as a guard to his estate, in case he should not long enough to dissolve and adjust all his ary relations with others. About four s before his death, Mr. Clark brought this to my house; as he came in, he said, 'Now will is finished,' my estate is secured to beyond human contingency, 'now, if I o-morrow, she will go forth to society, to relations, to my mother, acknowledged by *me, in my last will, as my legitimate ghter, and will be educated according to minutest wishes, under the superintendence e Chevalier de la Croix, and her interests be under the care of Chevalier de la Croix, e Pitot, and Col. Bellechasse; here is the ter of her rights, it is now completely fin- d, and I have brought it to you to read;' t it in my possession until the next day, I it deliberately from beginning to end. In will. Mr. Clark acknowledged Myra Clark his legitimate daughter and only heir, ating her as then living in the family R. Davis; Mr. Clark in this will bequeathed s estate to the said Myra, but directed that nuity of $2,000 should be paid to his her during her (his mother's) life, and an ity of $500 should be paid to Caroline de e, till she arrived at majority, when the ty was to cease, and $5,000 were to be her as a legacy. He directed that one year his estate was settled $5,000 should be paid as a legacy to a son of Judge Pitot, of New Orleans; and that one year after his estate was settled $5,000 should be paid as a legacy to a son of Mr. Du Buys, of New Orleans; he provided for the freedom and maintenance of his slave Lubin; he appointed Mr. Dusuau de la Croix tutor to his daughter Myra; he gave very extensive instructions in regard to her education; this will contained an inventory of his estate, and explanations of his business relations; he appointed Mr. Dusuau de la Croix, James Pitot, and D. D. Bellechasse, executors; the whole of this will was in Mr. Clark's handwriting; it was dated in July, 1813, and was signed by him; it was an olographic will; I was well acquainted with said Clark's handwriting. The last time Mr. Clark spoke to me about his daughter and his last will, was on the day he came out for the last time (as far as I know) from his house, which was the last time I saw him; he came to my house at noon, complained of feeling unwell, asked leave to have prepared for him a bowl of tea; he made his visit of about two hours' duration, talking the whole time of his daughter Myra, and his last will; he said a burden of solicitude was removed from his mind from the time he had secured to her his estate beyond accident, by finishing his last will; he dwelt upon the moral benefit to her in society from being acknowledged by him in his last will as his legitimate daughter; he talked about her education, said it would be the greatest boon from his God to live to bring her up, but what was next to *that were his comprehensive instruc- [*627 tions in his will in regard to her education, and her being committed to the care of the Chevalier de la Croix, who would be a parent to her.

After Clark's death, the will of 1811 was presented to the Court of Probate, and proved; letters testamentary were issued to the executors; a power of attorney was given to them by Mr. Clark's mother, and various pieces of property were sold under it and under the will.

In 1832, Myra married William Wallace Whitney, and about the time of her marriage became acquainted with her true name and parentage; and in 1836 filed a joint bill, with her husband, in the Circuit Court of the United States for the District of Louisiana against Relf and Chew, the executors in the will of 1811, the heirs of Mary Clark, and all the purchasers and occupants of the estate of which Clark died in possession, claiming to be the heir and devisee of Clark, and calling upon them all to account for the rents and profits of the several portions of the estate. The bill charged that the will of 1813 was fraudulently suppressed, that its existence and suppression were notorious, and that all the purchasers did, in their consciences, believe that the will of 1811 had been fraudulently admitted to probate. In addition to the prayer for an account, it prayed for general relief.

In the progress of the suit, Whitney having died, Edmund P. Gaines, sometime afterwards, married the widow and became a party to the suit.

The defendants all demurred, but filed separate demurrers. Barnes and wife demurred upon six grounds:

1. The want of equity in the bill.
2. That there existed a complete remedy at law.

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3. Multifariousness and misjoinder.
4. That the will of 1813 was not probated.
5. That forced heirship gave title to but one third, which was recoverable at law.
6. That the Orleans and Carrollton Railroad Company, with whom they were conjoined, was not shown to be a corporation.

Chew and Relf demurred generally, and also pleaded to the jurisdiction of the court.

Upon the argument of the demurrers, the three questions arose which are mentioned at the commencement of this statement, and upon
628*] *which the court were divided. These questions were the subject for consideration by this court.

Messrs. Henderson, Coxe and *Barton* (leave having been obtained for three counsel to address the court on the same side) for the defendants below, who had demurred.

Messrs. R. Johnson and *Jones* for Gaines and wife.

Mr. Henderson:

As to the 1st point. Is the bill multifarious? If the interests of the defendants are distinct, it is unlawful to make them join in the defense.

[The counsel here examined their relative interests.]

2. Can the court entertain jurisdiction without a probate of the will?

Some of the parties are aliens, living in England and Ireland. How can they be brought into court? Yet they must be, because they are all interested in the will of 1811. The equity power of this court is limited by the Constitution and Judiciary Act to the usual powers of the English Chancery; but it cannot possess all those powers, because our institutions are different. If the chancery power of England could not reach a State court, this cannot. Its powers must be uniform. If a State strips its courts of jurisdiction over mortgages, for example, this court must part with the power too. (4 Wheat., 115, 180.)

Local laws cannot confer jurisdiction on the courts of the United States. (11 Peters, 184.) The States may prescribe rules of proceeding, but not jurisdiction. (9 Peters, 632; 13 Peters, 259.) The powers of this court cannot exceed or even come up to those of the English Chancery. In England there is a distinction in chancery between real and personal property. It will entertain a bill to establish a will, when repeated decisions have been made about it, which is called a bill of peace. But the Chancellor does not decide a will without referring it to a jury. This is the measure of the power of this court; it cannot go further. But can it go this far? The probate courts of Louisiana have the exclusive power of establishing wills as to personal property. Why not real also? In England the probate courts have not the power, and therefore the Chancellor comes in. The decision of a probate court is final as to
629*] *real as well as personal estate. (2 Vernon, 9, 76, 441; 2 Atkyns, 324, 334.)

The court cannot set aside a will by decree. In this case, the court must clash with the Probate Court, because it must revoke the probate of the will of 1811, before that of 1813 can be established. The prayer of the bill here is to carry into effect the will of 1813, to do which, this court must first take probate of it, and then execute its provisions. No ca the books goes as far as this.

While a probate stands, it is not examin in chancery. (2 Vernon, 9.)

Where personal estate is concerned, c cery declines to interfere. (2 Vernon, 76, 4

A probate is conclusive until repealed. Strange, 670, 673, 408: 1 Lord Ray., 262, R., 129; 4 T. R., 159.)

That jurisdiction over wills belongs ex sively to those courts which represent the clesiastical courts of England. (See 12 Wh 375; 9 Peters, 176; 2 Harris & Gill, 49, 5 Devereux, 341; 1 Nott & McCord, 327; 3 Le 817, 819, 32; 3 Davy's Rep., 326; 3 Littell, 1 Story's Rep., 525, 503; 3 Missouri Rep., 6 Miss. Rep., 177; Walker's Rep., 323; 2 H ard (Miss.) Rep., 351; 1 La. Rep., 51; 2 ep., 250; 5 La. Rep., 393; 10 La. Rep., 595; 10 Wheat., 469; 12 Wheat., 153.)

In Louisiana, under their State law, co of probate have exclusive jurisdiction wills. (Civil Code, sec. 1637, 1650; Cod Practice in civil cases, pages 924, 928, 936,

The bill charges that the will of 1813 is pressed or destroyed. If it is suppressed, is power in those courts to reach it. (Cod Practice, &c., 604, 607, 608, 609, 611.)

The power of chancery in England ext to cases of spoliation of papers, but not to ting up a will of personalty. (1 Willia Executors, 209.)

To the same point, see 1 Fillmore's Rep 153, 154; 4 Bibb, 553; 3 Porter, 53; 4 Miss Rep., 210, 211.

It is the duty of the court to set up an tablish lost wills. (Civil Code of Louisi 2248.)

Spoliation of papers does not include a will of personal property. (3 Atkyns, 360; Wms., 748; 1 P. Wms., 723, 726.)

This bill claims to set up a will of both and personal estate.

**Mr. Coxe*, on the same side: [*6

The bill is unskillfully prepared. Whe murred to, such a bill is often decided grounds which do not appear in the rec There are two grounds in this case.

1. The jurisdiction of the court.
2. The multifariousness of the bill.

Myra claims to be the legitimate dau and heir of Clark, and also under a wi 1813; and the bill is filed not only agains executors, but every one who is in poss of any part of the estate. But there is n gation in the bill that any part of the real passed to the holders under the will of 18 is said that Clark died seized; but is whether this property was assets in the of the executors or not. It alleges that t ecutors conveyed the land, under a pow attorney from Clark's mother. If the t true, then the possessors are merely tort-f and this is not the remedy against them. the English cases are those of devisees a heirs—the heir-at-law has a remedy at But the complainant here is under peculi ficulties on account of State Legislation. tendency in this country is to assimilat with personal property, and in ten S courts of probate have jurisdiction over species. These States have power over r tate, and over the jurisdiction of their c

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In Louisiana all trusts are abrogated. A *cestui que trust* cannot set up a title. Can this court say that any one shall hold land in trust there? Suppose that a devise of real estate were forbidden; could this court recognize it? In Louisiana, a probate is essential, and the courts which have charge of it have the same jurisdiction as a court of chancery in England. This court can neither revoke nor set up a will. If an executor sell property under a proved will, the title of the purchaser cannot be impeached, although the will be afterwards set aside for fraud. How can the Circuit Court in Louisiana revoke a proved will, when the English Court of Chancery will not? If the Court of Probate compels the executors to go on, the Circuit Court cannot grant an injunction to stop a State court from proceeding. The decree would therefore be impotent. Chancery will act upon the person, and compel the surrender of a paper, or the entry of satisfaction upon a fraudulent judgment; but in this case it would have to act upon a court.

The bill also prays that the declarations of [*631 Clark as to the legitimacy of the complainant may be established. Under what branch of power is this, and how can the court examine such a point? It also prays that all the sales made by the executors may be set aside. But if any of these were made by order of a court, can they be set aside also?

Mr. R. Johnson, for Gaines and wife, complainants:

Is the bill multifarious? The demurrer admits the heirship, the will of 1813, the charge that it was placed in the hands of two of the defendants, that they fraudulently destroyed it, and set up the will of 1811; admits also that the existence of the will of 1813 was notorious, and the heirship of the complainant equally so. The argument admits all this, and asks the court to turn away the complainant, because parties are made defendants who ought not to be. The rule is within the sound discretion of the court, and designed to protect the innocent. But if the facts alleged in the bill be true (and the argument admits them), it will be here made the means of shielding the guilty. In this case, we need not invoke the discretion of the court, because, according to the authorities, the bill is not multifarious either as to the interests involved or the parties.

The complainant claims as heir and devisee of the whole estate, and the object is to have the title to the whole decreed to be valid. The parties are the original parties to the fraud and their confederates, taking with notice of the fraud. The defendants all deny the title of the complainant, and have, therefore, a common object. The rule of chancery is that multiplicity of litigation is to be avoided; but if we were to establish the will in a suit against one, it would be good only as to that one, and each of the defendants would have to be separately sued. This is not the spirit of the rule. Whoever has an interest to be bound, must be made a party. (Mitford's Pleading, 181, 182; 1 Atkyns, 282; 1 Mylne & Craig, 603, 616.)

In Mylne & Craig it was said to be impossible to lay down an abstract proposition, as to what should constitute multifariousness. (See, also, 3 Price, 164; 2 Peters, 4 7; 4 Peters, 190.)

If it be said that our remedy is at law, it is admitting that we have a case. But equity will maintain a concurrent jurisdiction where there is fraud, because it can sift the conscience and compel the delivery of papers. If there is a fraudulent deed, equity strikes it down, never to rise again. If we had gone to law and recovered the estate, complete justice would not have been done, because the will of 1811 *would have remained standing to de- [*632 fraud the living and injure the memory of the dead. Full and final relief is only to be had in chancery.

If we had a probate of the will of 1813, it is admitted that we could be relieved, and the question is, whether chancery, in England, could relieve without going through the forms of probate. Suppose the court in Louisiana has exclusive jurisdiction of probates, still the question is, whether the bill shows a case proper for the Circuit Court. The demurrer admits that the will of 1813 has disappeared by the fraudulent conduct of the defendants, or that it remains in their possession and they refuse to produce it. Is there nothing here upon which the chancery power of this court can act? The Probate Court of Louisiana has no power commensurate with the case. Its jurisdiction is given by statute. What is it?

It can take probate of wills in the manner directed, but the case of a suppressed will is not provided for.

The power is contained in Code of Practice, art. 924; but 925 says, it has no jurisdiction except in cases enumerated in the preceding article. There is authority given to open, receive, and record a will, but none to bring it out when suppressed. (See articles 928, 930, 931, 933, 935, 936, 937.) By 937, if the notary or other person refuse to produce it, he shall be arrested, and if he can give no good reason, shall be committed to prison and re-respond in damages. But a remedy in damages is utterly insufficient in this case. We want the land and property. It is said that a copy can be evidence; but the civil court only makes evidence copies of such papers as are already recorded. The question before the court is, whether we can get on without a probate, which we cannot obtain; for the demurrer admits that the will is either suppressed or destroyed. We want the only evidence which will enable us to obtain relief; the probate of the will of 1811 would be no obstacle. It must be shown, by the other side, that jurisdiction over the case is vested exclusively in some other court. But in England the case of a spoliated will falls within chancery powers. Lord Hardwicke said, in the case cited from 3 Atkyns, that he would, in such a case, hold an executor trustee for the devisee. (3 Atkyns, 359.)

The other cases are, 1 Chan. Rep., 13, 66; 1 Vernon, 296; Prec. in Chan., 3, 123; 1 P. Wms., 287, 731; 2 Vernon, 700; 1 Bro. Par. Ca., 250; 3 Bro. Par. Ca., 550.

*These cases establish two proposi- [*633 tions.

1. That a probate in England, obtained by fraud, will be relieved against in chancery.

2. That a probate for personalty and realty, obtained by fraud, will make the party a trustee for the person interested, leaving the probate to stand, provided the fraud be perpetrated by spoliation or destruction of papers.

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The only two exceptions are, where part of the will is fraudulent and part not, and where there is a fraudulent agreement between the heir and devisee. But if spoliation be proved upon the person who sets up the will, chancery will interfere.

The Constitution of the United States, and the Judiciary Act of 1789, and the Process Act of 1792, give to the federal courts jurisdiction in all cases of law or equity. All that we have to do is to show that this is a case of equity.

Constitution of the United States (art. 3, sec. 2; Judiciary Act, sec 11); it is a matter of right for all persons who have a case of equity to go into the courts of the United States and ask relief. (4 Wheat., 108; 3 Peters, 433; 3 Wheat., 212; 9 Peters, 655; 13 Peters, 358; 15 Peters, 9, 13.) In the last case the same objection was made that has now been made, but the court decided against it.

It is asked how we are to reach the Court of Probate. The answer is found in the Constitution of the United States. If it is a case, &c., all State power falls. It was intended to protect the people from State prejudice; the framers of the instrument knew that local prejudices would exist, and saved the people from their operation. Another answer is, that the Chancery Court acts upon persons, passing by State tribunals. If they interfere, the twenty-fifth section of the Judiciary Act meets the case.

It is objected that our argument destroys all State regulations, but this begs the question. We say that Louisiana has recognized the right to transfer property by will, and this right was exercised in the present case. Besides, State power cannot limit the Constitution of the United States and the jurisdiction of this court under it. The bill was filed in 1836. It took the defendants five years to find out that the bill did not make a case, and to file their demurrer.

Mr. Jones, on the same side:

The first objection on the other side is, that **634***] the confederates are *not charged to have derived their titles from the will. The printed abstract does not say so, it is true, but the record itself does. The bill charges, that they claim under color of title from pretended executors, referring directly to the will.

The next objection is on account of the aliens, living in England and Ireland. But we have done all that we can as regards them. The court cannot lose jurisdiction because some of the parties reside abroad.

Is the bill multifarious?

It is the nature of equity to bring in all parties who have an interest. It is said in the books that claims must not be joined together when they are different, nor parties who have not an entire interest. But it is esteemed a virtue in equity that all proper parties are brought in. Thus in a case of a fishery; all came in, although their rights were separate. A demurrer will not hold, if the plaintiff claims under a general right. (Mitford's Pleading, 181, 182.)

If we were to sue separately, we should have to prove the same thing in every case, and a multiplicity of action is not favored by equity.

As to the jurisdiction of the court.

It is said that a State court here claims exclusive jurisdiction. If a State can say that its courts shall have exclusive jurisdiction, it can, by extending the range of subjects, shut out the courts of the United States from all jurisdiction whatever. The only question is, is it a case of equity? If so, no matter how far the claim of exclusiveness of jurisdiction in the State courts may be pressed, the Constitution of the United States comes in with paramount authority. The opposite counsel have confounded the two questions of the exclusiveness of State jurisdiction and the conclusiveness of a final judgment of a court of competent jurisdiction. We agree that the judgment of such a court is conclusive upon all coordinate courts, until regularly reversed by an appellate court. But here we do not impeach any such judgment. By the law of Louisiana, a will of real estate has the same effect that a will of personalty has in England. We admit this. And we admit, too, that a probate is necessary to vest a title to real estate, as much so as recording a deed is, to give it validity. If our claim would be good against a proved will in England, it is good here. The Code of Louisiana is made up of the civil law and Napoleon Code. But what power has a probate court to prove a will which is not produced. They cannot set it up and admit it as a **factum* (Civil Code, 1537, 1560; Code [**635* of Practice, 924; 3 Martin, 144; 12 Martin, 63; 5 Martin, N. S., 184; 3 La. Rep., 99; 6 Harr. & Johns., 67.)

The case in 11 Louisiana Rep., 593, is thought by the other side to sustain the position that the Court of Probate could prove a will although it was not produced; but the case does not say so.

But it is argued that the will of 1811 must be set aside before that of 1813 can be set up, and that the Circuit Court cannot do this. Why not? It has as much right to do it as the Probate Court; not as an appellate tribunal, reviewing the decision of that court, but in the exercise of a separate jurisdiction. The will of 1811 may stand among the records, but its effect will be destroyed. So it is in England with spoliated deeds. Equity constantly sets aside law instruments when an equitable title is asserted.

What other remedy have we? We cannot go to the Probate Court and ask them to set up the will of 1813. They cannot do it. And even if they could, that would not debar us of this remedy. (Code of Practice, 604 to 613; 3 Martin, 518; 5 La. Rep., 393.)

If a State court had jurisdiction and the remedy is imperfect, a party must not be driven there. The Probate Court is shackled, and limited to matters of administration. It may compel an administrator to settle, but cannot direct a suit against third persons, and cannot give us the property in dispute. (1 La. Rep., 183; 3 La. Rep., 520.)

It is said that a probate court is the only tribunal that can set aside a will. But we deny this. (10 Martin, 1; 1 Martin, N. S., 577; 3 Martin, N. S., 473; 5 Martin, N. S., 10, 217; 1 La. Rep., 215; 6 Martin, N. S., 305.)

As to equity jurisdiction. It is a general principle that courts of equity have jurisdiction over all cases of fraud. Although courts of law have it, equity does not lose it. There are two exceptions recognized in the books, but neither of them includes this case. Generally,

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the heir need not go into chancery, because the title is cast upon him by descent; but where there is a devisee who thus appears to have the legal title, the heir cannot resort to a court of law, but must apply to equity. (13 Price, 721.)

Mr. Barton, for the defendants, being demurrents, in reply and conclusion:

The facts in the case, although nominally, 636*] admitted by the demurrer *for the sake of argument, are not in reality admitted. Some of the worthiest citizens of Louisiana are denounced in the bill, as perpetrating atrocious frauds. If this court shall require them to answer the bill, they will deny all the important facts charged in it. Thirty years have elapsed since the transactions took place; and at the last term, this court refused to open a case after twenty years had expired. This is called a bill of peace. It is not like one. The heirs of Mary Clark sold the land and received the money thirty years ago; and yet those heirs are not made parties so that a cross-bill could be filed against them.

[*Mr. Barton* here referred to a high opinion of Clark which had been expressed in the course of the argument, in which he concurred.]

The will of 1811 gave the whole estate to his mother. Where was his wife, if he had one?

So the will of 1813 is said to have given his wife nothing, in violation of all duties. The bill itself, therefore, attacks his character. It says also that the complainant was kept in ignorance of her true name until she was nineteen years of age. Her own mother is alleged not to have told her, and yet this mother is said to have been the wife of Clark.

Is the bill multifarious?

Story's Equity Pleadings (sec. 271 to 279), has numerous references on this point. (See, also, 1 Jacob, 151; 1 Maddock's Rep., 86; 2 Maddock's Rep., 294; 6 Maddock's Rep., 94; 18 Ves., 50; 2 Ves., 486; 2 Mass. Rep., 181; Littell's Select Cases, 320; 2 Bibb, 314; 4 Johns. Chan. Cases, 199; 8 Peters, 123; 1 Johns. Chan. Rep., 349, 437, 606; 4 Randolph, 74; 2 Gill & Johns., 14; 5 Paige, 65; 6 Dana, 186; 6 Johns. Chan. Rep., 163; Halsted's Dig., 168; 5 Cowen, 36.)

The bill is not only multifarious as to parties and subject matters, but also as to jurisdictions. Suppose the will of 1813 were actually probated and the plaintiff claimed under it, would this court act upon such a question, or would they not rather send it to a court of law to be tried?

The plaintiff confounds rights even in herself.

If the claim of legitimacy be established and the will of 1811 should remain, the testator by the old code could dispose of one fifth of his estate away from his child. (Old Civil Code, p. 212, art. 19, chap. 3.) Mary Clark would therefore have one fifth, and her heirs ought to be parties. And besides, if the legitimacy be 637*] established, *the mother of the complainant must of course have been the wife of the testator, and as such, entitled to half of the estate, of which he could not deprive her. (New Civil Code, art. 148; Old Civil Code, p. 336, art. 63 to 69.) And yet the alleged wife is not a party.

So if the will of 1813 be set up, and the legitimacy proven, the wife will have half, and yet she is not made a party, although everyone knows that she is living. The executors of the will of 1813 are said to have been Bellechasse and Pigot, the latter one of the judges of the Court of Probate. The commission is two and a half per cent. for executors. Did not Pigot know how to get the will, if there was one? (New Civil Code, 2369 to 2376; Old Civil Code, p. 248, art. 179.)

There is a multifariousness as to things.

The bill embraces twenty-six pieces of land, and it is not said who owns all these. And so of the slaves; ninety-three are allotted amongst different owners, whilst one hundred and thirty-three are not accounted for. An interest in the mere question is not sufficient to authorize all these persons to be joined in one bill; they must all have an interest in the subject matter. Persons are also made parties who are said to be in the occupancy of a square of ground. What interest have they, if they are mere occupants? If their testimony would be admissible as impartial persons, they ought not to be parties.

An insuperable difficulty will be found if any of these sales of real estate have been made under a warranty. By the Louisiana law, in such a case, the warrantor may be summoned in at once to defend the title; and if he is not, the warrantee loses his remedy against him. But under the present process, this cannot be done, and the benefit of our wise law is lost. Our system has been called a mongrel system, but it is good enough for us. It does not follow that laws are unjust because they emanate from a despotic government. The Napoleon Code was not destroyed by the Bourbons. The practice in Louisiana is a complete equity; either party may arrive at the knowledge of facts in the possession of the other with more simplicity than the English chancery process. The District Attorney of the United States has preferred resorting to the State tribunals in a controversy between the government and Bank of the United States, rather than go into the federal court. To a case like the present, our system is peculiarly applicable. But in the proposed mode, you are deciding here the interests of a vast number of persons not seen at all.

*The position that a State cannot en- [*638 large or restrain the equity power of the Circuit Court of the United States, is laid down too broadly. The Parliament of England might have placed the probate and jurisdiction over wills of real and personal estate exclusively in the ecclesiastical courts; and if so, why cannot Louisiana do the same thing? The sovereignty of a State over its domestic policy is complete, and especially over its land laws. The clause in the Constitution was inserted, undoubtedly, for the security of impartial justice, but justice administered with uniformity by State and federal tribunals. Both were intended to be guided by the same rules. If they adopt different ones, you may obtain impartiality, but where is the uniformity?

There is another case upon the docket of this court by the complainants, in which they have prosecuted their claim singly against Patterson. If they can maintain a suit against one of these numerous parties by himself, it shows that their interests must be distinct.

It is important to keep in view the distinction between overthrowing a proved will and setting up another one. The will of 1811 is not said to

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be defective or irregular, but it is the probate which is objected to, and that is the judgment of a court of competent jurisdiction. Until appealed from, it is as binding as a decree of this court. (Story's Equity Pleadings, sec. 511; 2 Roper on Legacies, 532.)

In 3 Merivale, 161, the Master of the Rolls says, "it is no question whether a chancery court can set up a will." If an English court can overthrow the *dictum* of Lord Hardwicke 100 years ago, cannot the Legislature of a free State do it?

Probate courts have exclusive jurisdiction over wills, and no other court can interfere, by the laws of Massachusetts. (4 Mason's Rep., 461; 16 Mass. Rep., 441.)

The judgment of a court of probate is good until reversed. (4 La. Rep. N. S., 413, 414; 1 La. Rep., 21; 2 La. Rep., 250; 6 La. Rep., 656; 8 La. Rep., 519.)

In 17 La. Rep., 14–16, it was held that where an action was brought in the District Court against one in possession and claiming under a will, if the will was set up, it might be inquired into. But that is not the present case, because it is not averred that Mary Clark's heirs are in possession.

The claim to set up the will of 1813 is attempted to be sustained by being made analogous to the case of a spoliated will in England, and the case in 1 Ves., Jun., 286, relied on with great confidence, but it does not apply to the Circuit Court of the United States. There is **639*]***no case which has been cited, in which the Chancellor acted upon any other person than the wrong-doer himself. But here the executors are *functus officio*, and third persons, purchasers, are parties. Can they be imprisoned for not producing the will of 1813? And if Relf should be imprisoned, how can that affect the title of the city of New Orleans to property which it has held for twenty-five years? It has been said that a party can be decreed to be a trustee for the benefit of the person really interested. But before you can do this, you must repeal the statute of Louisiana, abolishing all trusts. They were abolished by the Code of 1808, and again by the Code of 1825. (Civil Code (new) 1506, 1557.)

Can this court fasten upon the people of Louisiana all the doctrine of uses and trusts, against their positive law? Suppose the purchasers are decreed to stand seized to the use of the complainant; you will have created fifty or sixty trusts. And when one of these trustees dies, or makes a *cessio bonorum*, what will be done? Will you sell an estate, the title to which is in one person and the use in another? But the law of Louisiana positively prohibits this.

A power to compel a man to go before the court and resign his probate, is, in effect, a revocation of the judgment itself and an overthrow of the court. But the decision of that court can never be inquired into by another tribunal. (1 Pickering, 547.) And the probate courts of Louisiana have as exclusive a jurisdiction as those of Massachusetts. The English cases are not applicable. (3 Porter, Al. Rep., 52, 58; 4 Missouri Rep., 210.)

It is said by the other side that the probate courts of Louisiana are different from other orphans' courts. It is not so; but suppose it was. How can a citizen of another State claim more rights than a citizen of the State itself? The Constitution requires all to be placed upon an equal footing, but nothing more. In fact, The Louisiana courts of probate have more power than similar courts in Massachusetts. For these propositions, see Code of Practice, 324; 1 Story's Rep., 552; 2 Harr. & Gill, 51; 4 Bibb, 553; 3 Missouri Rep., 365; 4 Missouri Rep., 210; Civil Code (new), art. 21; Civil Code (old), art. 246; Code of Practice, art. 130, 936; 8 La. Rep., N. S., 520; 5 La. Rep., 293; 11 La. Rep., 593, 150.

No court can now set up the will of 1813, because if it were presented to the Probate Court in the shape in which it is alleged to have existed, that court could not receive it for want of a date. Civil Code (art. 1567 to 1581); 1588 describes what wills are good, *1581 [***640** treats of an olographic will, *i. e.*, written, dated, and signed, by the testator, and the next article says, unless these formalities are observed the will is null and void.

Civil Code (old, art. 160) contains the same provisions. The date here is important, for if a will was written at all, it might have been before 1811, and therefore revoked by it.

Mr. Justice McLEAN delivered the opinion of the court:

This case is brought before the court from the Eastern District of Louisiana, by a division of the judges on certain points, which are certified under the act of Congress.

The complainants in their bill state that Daniel Clark, late of the city of New Orleans, in the State of Louisiana, in the year 1813 died, seized in fee-simple, or otherwise well entitled to, and lawfully possessed of, in the district aforesaid, a large estate, real and personal, consisting of plantations, slaves, debts due, and other property, all of which is described in the bill.

That the said Myra was the only legitimate child of the said Clark. That about the month of July, 1813, he made his last will and testament, according to law, and in which he devised to his daughter Myra all his estate, real and personal, except certain bequests named. Col. Joseph Deville, Degontine Bellachasse, James Pitot, and Chevalier Dusuau de la Croix were appointed executors of the will, and the said Chevalier de la Croix was also appointed tutor to the said Myra, who was then about seven years of age. In a few days after making the will the said Clark died.

From her birth, the said Myra was placed, by her father, in the family of Samuel B. Davis, who at the time resided in New Orleans, but in 1812 removed to Philadelphia, where the said Myra resided until her first marriage, being ignorant of her rights and her parentage.

In the year 1811, being about to make a journey to Philadelphia, and fearing some embarrassments from a partnership transaction, the said Clark conveyed property to the said Samuel B Davis and others, to the amount of several hundred thousand dollars, to be held in trust for the use of the said Myra. And about the same time he made a will devising to his mother, then residing out of Louisiana, his property, and appointed Richard Relf and Beverley Chew, two of the defendants, his executors. That afterwards, on his return from

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Philadelphia, he received back a portion of the property conveyed in trust as aforesaid; and by the will of 1813 revoked that of 1811.

641*] *The bill charges that immediately upon the death of the said Clark, the will of 1813 came into the possession of the said Relf, who fraudulently concealed, suppressed, or destroyed the same, and did substitute in its place the revoked will of 1811; that the will of 1813 was never afterwards seen except by the said Relf and Chew, and their confederates.

It is further charged that the said Relf fraudulently set up the revoked will of 1811, and obtained probate of the same; that he, with the said Chew, being sworn as executors, fraudulently took possession of the real and personal estate of the deceased, and also his title papers and books. That they appropriated to their own use large sums of money and a large amount of property of the estate, and in combination with the defendants named, who "had some knowledge, notice, information, belief or suspicion, or reason for belief or suspicion, and did believe," so that the said Relf and Chew had acted fraudulently in setting up and proving the will of 1811. And the complainants pray that effect may be given to the will of 1813, and that the will of 1811 may be revoked; and that the defendants may be decreed to deliver up possession of the lands purchased as aforesaid, and account for the rents, &c.; and that the executors may be decreed to account. The complainants also represent that the said Myra is the only heir-at-law of the said Clark; and that his property descended to her, &c. In addition to the special relief asked, the complainants pray for "such other and further relief in the premises as the nature of the case may require."

To the bill, several of the defendants filed a special demurrer. On the argument of the demurrer, the opinions of the judges were opposed on the following points:

1. Is the bill multifarious? And have the complainants a right to sue the defendants jointly in this case?

2. Can the court entertain jurisdiction of this case, without probate of the will set up by the complainants, and which they charge to have been destroyed or suppressed?

3. Has the court jurisdiction of this case, or does it belong exclusively to a court of law? The demurrer is not before the court, but the points certified. In considering these points, all the facts stated in the bill are admitted.

Whether the bill be multifarious or not is the first inquiry.

The complainants have made defendants, the executors named in the will of 1811, and all who have come to the possession of property

642*] *real and personal, by purchase or otherwise, which belonged to Daniel Clark at the time of his death. That a bill which is multifarious may be demurred to for that cause is a general principle; but what shall constitute multifariousness is a matter about which there is a great diversity of opinion. In general terms a bill is said to be multifarious, which seeks to enforce against different individuals, demands which are wholly disconnected. In illustration of this, it is said, if an estate be sold in lots to different persons, the purchasers could not join in exhibiting one bill against the vendor for a specific performance. Nor could the vendor file a bill for a specific performance against all the purchasers. The contracts of purchase being distinct, in no way connected with each other, a bill for a specific execution, whether filed by the vendor or vendees, must be limited to one contract. It has been decided that an author cannot file a joint bill against several booksellers for selling the same spurious edition of his work, as there is no privity between them. But it has been ruled that a bill may be sustained by the owner of a sole fishery against several persons who claimed under distinct rights. The only difference between these cases would seem to be, that the right of fishery was necessarily more limited than that of authorship. And how this should cause any difference of principle between the cases is not easily perceived.

It is well remarked by Lord Cottenham, in *Campbell* v. *Mackay* (7 Simon, 564), and in 1 Mylne & Craig, 603, "to lay down any rule, applicable universally, or to say what constitutes multifariousness, as an abstract proposition, is, upon the authorities, utterly impossible." Every case must be governed by its own circumstances; and as these are as diversified as the names of the parties, the court must exercise a sound discretion on the subject. Whilst parties should not be subjected to expense and inconvenience, in litigating matters in which they have no interest, multiplicity of suits should be avoided, by uniting in one bill all who have an interest in the principal matter in controversy, though the interests may have arisen under distinct contracts.

In a course of reasoning in the above cited case, Lord Cottenham observes: "If, for instance, a father executed three deeds, all vesting property in the same trustees, and upon similar trusts, for the benefit of his children, although the instruments and the parties beneficially interested under all of them were the same, it would be necessary to have as many suits as there were instruments. That is a proposition *(he says) to which I do not [*643 assent. It would, indeed, be extremely mischievous, if such a rule were established in point of law. No possible advantage could be gained by it; and it would lead to a multiplication of suits, in cases where it could answer no purpose to have the subject matter of contest split up into a variety of separate bills." The same doctrine is found in Story's Equity Pleadings, sec. 534; *Attorney-General* v. *Cradock* (3 Mylne & Craig, 85); 7 Sim. Rep., 241, 254.

In the above case against Cradock, the Chancellor says: "The object of the rule against multifariousness is to protect a defendant from unnecessary expense; but it would be a great perversion of that rule, if it were to impose upon the plaintiffs, and all the other defendants, two suits instead of one."

The bill prays that the defendants, Relf and Chew, may be decreed to account for moneys, &c., which came into their hands, as executors, under the will of 1811; and that the other defendants, who purchased from them real and personal property, may be compelled to surrender the same, and account, &c., on the ground that they had notice of the fraud of the executors.

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The right of the complainant (Myra) must be sustained under the will of 1813, or as heir-at-law of Daniel Clark. The defendants claim mediately or immediately under the will of 1811, although their purchases were made at different times and for distinct parcels of the property. They have a common source of title, but no common interest in their purchases. And the question arises on this state of facts, whether there is misjoinder or multifariousness in the bill, which makes the defendants parties.

On the part of the complainants there is no misjoinder, whether the claim be as devisee or heir-at-law. And the main ground of the defense, the validity of the will of 1811, and the proceedings under it, is common to all the defendants. Their interests may be of greater or less extent, but that constitutes a difference in degree only, and not in principle. There can be no doubt that a bill might have been filed against each of the defendants, but the question is whether they may not all be included in the same bill.

The facts of the purchase, including notice, may be peculiar to each defendant; but these may be ascertained without inconvenience or expense to co defendants. In every fact which goes to impair or establish the authority of the executors, all the defendants are alike interested. In its present form the bill avoids multi [*644] plicity of suits, *without subjecting the defendants to inconvenience or unreasonable expense. There are, however, two exceptions to this remark, one of which relates to Caroline Barnes and her husband. She is represented to be a devisee in the will of 1813, and, consequently, can have no common interest under the will of 1811. The other exception is, the prayer of the bill that the executors may account. In the rendition of this account the other defendants have no interest, and such a matter, therefore, ought not to be connected with the general objects of the bill. The bill in these respects may be so amended, in the Circuit Court, as to avoid both the exceptions.

We come now to inquire "whether the court can entertain jurisdiction of this case, without probate of the will set up by the complainants, and which they charge to have been destroyed or suppressed".

The bill charges that the will of 1813 was fraudulently suppressed or destroyed by Relf, and that he fraudulently procured the will of 1811, in which he and Chew were named as executors, to be proved.

It is contended that the Court of Probate in Louisiana has exclusive jurisdiction of the probate of wills, and that a court of chancery can exercise no jurisdiction in such a case.

In the Code of Practice (art. 924) it is declared, that "courts of probate have the exclusive power":

1. "To open and receive the proof of last wills and testaments, and to order the execution and recording them." There are thirteen other specifications which need not be named. By art. 925, it is declared that "the courts of probates shall have no jurisdiction except in the cases enumerated in the preceding article, or in those which shall be mentioned in the remaining part of this title."

In regard "to the opening and proving of wills," after providing where application for probate shall be made, and the mode, the following articles are adopted:

Art. 934. "If the will be contained in a sealed packet, the judge shall order the opening of it at the time appointed by him, and shall then proceed to the proof of the will."

Art. 936. "If the petitioner alleges under oath in his petition that he is informed that the will of the deceased, the opening of which and its proof and execution are prayed for, is deposited in the hands of a notary or any other person, the judge shall issue an order to such notary or other person, directing him to produce the will or the packet containing it, at a certain time to be mentioned, that it may be *opened and proved, or that the ex- [*645 ecution of it may be ordered."

Art. 937. "If the notary or other individual to whom the said order is directed, refuses to obey it, the judge shall issue an order to arrest him, and if he does not adduce good reasons for not producing the will, shall commit him to prison until he produces it; and he shall be answerable in damages to such persons as may suffer from his refusal."

From the above provisions it is clear that, in Louisiana, the Court of Probates has exclusive jurisdiction in the proof of wills; and that its jurisdiction is not limited, like the Ecclesiastical Court in England, to wills which dispose of personal property. Has a court of equity power to set up a spoliated will, and carry it into effect?

Formerly it was a point on which doubts were entertained, whether courts of equity could not relieve against a will fraudulently obtained. And there are cases where chancery has exercised such a jurisdiction. (*Maundy* v. *Maundy*, 1 Chan. Rep., 66; *Welly* v. *Thornagh*, Prec. Chan., 123; *Goss* v. *Tracy*, 1 P. Williams, 287; 2 Vernon, 700.) In other cases, such a jurisdiction has been disclaimed, though the fraud was fully established, as in *Roberts* v. *Wynne* (1 Chan. Rep., 125); *Archer* v. *Moss* (2 Vernon, 8). In another class of cases the fraudulent actor has been held a trustee for the party injured (*Herbert* v. *Lawnes*, 1 Chan. Rep., 13; *Thynn* v. *Thynn*, 1 Vernon, 296; *Devenish* v. *Baines*, Prec. Chan., 3; *Barnesly* v. *Powell*, 1 Ves., 287.) These cases present no very satisfactory result as to the question under consideration. But since the decision of *Kenrick* v. *Bransby* (3 Brown's P. C., 358), and *Webb* v. *Cleverden* (2 Atkyns, 424), it seems to be considered as settled, in England, that equity will not set aside a will for fraud and imposition. The reason assigned is, where personal estate is disposed of by a fraudulent will, relief may be had in the Ecclesiastical Court; and at law, on a devise of real property. (*Bennett* v. *Vade*, 2 Atkyns, 324; 3 Atkyns, 17; *Gingell* v. *Horne*, 9 Sim., 539; *Jones* v. *Jones*, 3 Mer., 171.)

In the last case the Master of the Rolls says, "it is impossible that, at this time of day, it can be made a serious question, whether it be in this court that the validity of a will, either of real or personal estate, is to be determined."

In cases of fraud, equity has a concurrent jurisdiction with a court of law, but in regard to a will charged to have been obtained through fraud, this rule does not hold. It may

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646*] be difficult to assign any very *satisfactory reason for this exception. That exclusive jurisdiction over the probate of wills is vested in another tribunal, is the only one that can be given.

By art. 1637 of the Civil Code, it is declared that "no testament can have effect unless it has been presented to the judge," &c. And in *Clappier et al.* v. *Banks* (11 La. Rep., 593), it is held, that a will alleged to be lost or destroyed and which has never been proved, cannot be set up as evidence of title, in an action of revendication.

In *Armstrong* v. *Administrators of Kosciusko* (12 Wheat., 169) this court held, that an action for a legacy could not be sustained under a will which had not been proved in this country before a court of probate, though it may have been effective, as a will, in the foreign country where it was made.

In *Turner* v. *Turner et al.* (9 Peters, 180), one of the objects of the bill being to set aside the probate of a will, the court said, "the bill cannot be sustained for the purpose of avoiding the probate. That should have been done, if at all, by an appeal, from the Court of Probate, according to the provisions of the law of Alabama."

The American decisions on this subject have followed the English authorities. And a deliberate consideration of the question leads us to say, that both the general and local law require the will of 1813 to be proved before any title can be set up under it. But this result does not authorize a negative answer to the second point. We think, under the circumstances, that the complainants are entitled to full and explicit answers from the defendants, in regard to the above wills. These answers being obtained may be used as evidence before the Court of Probate to establish the will of 1813 and revoke that of 1811.

In order that the complainants may have the means of making, if they shall see fit, a formal application to the Probate Court, for the proof of the last will and the revocation of the first, having the answers of the executors, jurisdiction as to this matter may be sustained. And, indeed, circumstances may arise, on this part of the case, which shall require a more definite and efficient action by the Circuit Court. For if the Probate Court shall refuse to take jurisdiction, from a defect of power to bring the parties before it, lapse of time, or on any other ground, and there shall be no remedy in the higher courts of the State, it may become the duty of the Circuit Court, having the parties before it, to require them to go before the Court of Probates, and consent to the proof of the 647*] will of 1813 and the revocation *of that of 1811. And should this procedure fail to procure the requisite action on both wills, it will be a matter for grave consideration, whether the inherent powers of a court of chancery may not afford a remedy where the right is clear, by establishing the will of 1813. In the case of *Barnesly* v. *Powell* (1 Ves., Sen., 119, 284, 287), above cited, Lord Hardwicke decreed, that the defendant should consent, in the ecclesiastical court, to the revocation of the will in controversy and the granting of administration, &c. If the emergencies of the case shall require such a course as above indicated, it will not be without the sanction of Louisiana law. The twenty-first article of the Civil Code declares that, "in civil matters, where there is no express law, the judge is bound to proceed and decide according to equity. To decide equitably, an appeal is to be made to natural law and reason, or received usages where positive law is silent."

This view seemed to be necessary to show on what ground and for what purpose jurisdiction may be exercised in reference to the will of 1813, though it has not been admitted to probate.

The third point is, "has the court jurisdiction in this case, or does it belong exclusively to a court of law?"

Much that has been said in relation to jurisdiction on the second point, equally applies to this one. Indeed, they might have been considered under the same general head.

The bill is inartificially drawn, and, to reach its main objects, may require amendment in the Circuit Court. It presents the right of the complainants in two aspects:

1. Under the will of 1813.
2. As heir at-law of the deceased.

The first has been examined, and we will now consider the second.

In prosecuting their rights as heirs-at-law by the complainants, no probate of the will of 1813 will be required. The complainants must rest upon their heirship of the said Myra, the fraud charged against the executors, in setting up and proving the will of 1811, and notice of such fraud by the purchasers. In this form of procedure, the will of 1811 is brought before the court collaterally. It is not an action of nullity, but a proceeding which may enable the court to give the proper relief without decreeing the revocation of the will. Such a proceeding at law in regard to the real estate is one of ordinary occurrence in England. And it is upon the ground that such a remedy is plain and adequate, that equity will not give relief. There can be no doubt, as between the heir-at-law and devisee, in ordinary *cases, the proper [*648 remedy is to be found in a court of law. Without enlarging on this point, at present, we will refer to the doctrine on this subject as established by the Louisiana courts. The case of *O'Donagan* v. *Knox* (11 La. Rep., 384) was "an heir-at-law claiming a share of the succession of her deceased sister, who was the wife of the defendant, who holds possession of it under a will, as instituted heir and universal legatee." The defendant pleaded to the jurisdiction of the District Court, on the ground that the Court of Probates for the parish St. Landry had exclusive jurisdiction of the matters and things set up in the petition."

The district judge held, "that as the will sought to be annulled had been admitted to probate, and ordered to be executed, the court had no jurisdiction, but that the Probate Court had exclusive jurisdiction of the case."

After stating the above decision of the District Court, the Supreme Court say: "The plaintiff sets up a claim under the law of inheritance to lands, slaves, and a variety of movable property; that these are proper subjects for the exercise of the jurisdiction of district courts cannot be doubted. But the petitioner proceeds further, and alleges the nullity of the will, which

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constitutes the very title under which the defendant holds the property in controversy. Before what court, then, must the validity of this will be tested?"

The court consider the jurisdiction of the Court of Probates, and then proceed to say: "It appears that the jurisdiction of the courts of probate is limited to claims against successions for money, and that all claims for real property appertain to the ordinary tribunals, and are denied to courts of probate. The plaintiff in this case was, therefore, compelled, in suing for the property of the succession, to seek redress in the District Court, and whether she attacked the will, or the defendant set it up as his title to the property, the court having cognizance of the subject must of necessity examine into its legal effect."

"When in an action of revendication a testament with probate becomes a subject of controversy, it will surely not be contended," say the court, "that a court of ordinary jurisdiction, having cognizance of the principal matter, shall suspend its proceedings until another court of limited powers shall pronounce upon the subject." "If the ordinary courts should examine into the validity of testaments, drawn in controversy before them, they will do no more than we have often said a court of limited jurisdiction may do, even in relation to a question it could not directly entertain." The court cite 649*] **Lewis's Heirs* v. *His Executors* (5 La. Rep., 387), and say there is no conflict, as indeed there is none, between that case and the one before them. They say that in the case before them the functions of the executor had expired, the probate of the will had taken effect, and the devisee had entered into possession under it. The decision of the District Court was reversed on the ground that it had jurisdiction of the case.

The above doctrine is fully affirmed in *Robert* v. *Allier's Agent* (17 La. Rep., 15). "On the question of jurisdiction arising from the state of the case, we understand," say the court, "the distinction repeatedly made by this court to be, that whenever the validity or legality of a will is attacked, and put at issue (as in the present case), at the time that an order for its execution is applied for, or after it has been regularly probated and ordered to be executed, but previous to the heirs or legatees coming into possession of the estate under it, courts of probate alone have jurisdiction to declare it void." "But when an action of revendication is instituted by an heir-at-law, against the testamentary heir or universal legatee who has been put in possession of the estate, and who sets up the will as his title to the property, district courts are the proper tribunals in which suits must be brought." (6 Martin's N. S., 263; 2 La. Rep., 23.)

The functions of the executors under the will of 1811 have long since terminated, and the property of the deceased, both real and personal, has passed into the hands of purchasers. If the heir-at-law and the devisee were the only litigant parties, a suit at common law might afford an adequate remedy. But the controversy is rendered complicated by the numerous parties and the various circumstances under which their purchases were made. Besides, many facts essential to the complainant's rights are within the knowledge of the defendants, and may be proved only by their answers. Of this character is the fraud charged against the executors in proving the will and acting under it, and the notice of such fraud before their purchase, alleged against the other defendants.

If the fraud shall be established against the executors, and a notice of the fraud by the other defendants, they must be considered, though the sales have the forms of law, as holding the property in trust for the complainants. Under these circumstances a suit at law could not give adequate relief. A surrender of papers and a relinquishment of title may become necessary. The powers of a court of chancery, *in [*650 this view, are required to do complete justice between the parties.

This remedy under the Louisiana law, and before the Louisiana courts, of ordinary jurisdiction, would be undoubted. For, although those courts cannot annul the probate of a will, when presented collaterally, as a muniment of title, they inquire into its validity. Under the peculiar system of that State the forms of procedure being conformable to the civil law, are the same in all cases. But the Circuit Court of the United States, exercising jurisdiction in Louisiana, as in every other State, preserves distinct the common law and chancery powers. In either the State or federal court the relief is the same; the difference consists only in the mode of giving it.

It is insisted that trusts are abolished by the Louisiana code, and that, consequently, that great branch of equity jurisdiction cannot be exercised in that State.

Art. 1507 of the Civil Code declares, "that substitutions and *fidei commissa* are and remain prohibited." "Every disposition by which the donee, the heir or legatee, is charged to preserve for, or to return a thing to a third person, is null, even with regard to the donee, the instituted heir, or the legatee," &c.

This abolishes express trusts, but it does not reach nor affect that trust which the law implies from the fraud of an individual who has against conscience and right, possessed himself of another's property. In such a case the Louisiana law affords redress as speedily and amply as the law of any other State. There is, therefore, no foundation for the allegation, that an implied trust, which is the creature of equity, has been abrogated in Louisiana. Under another name it is preserved there in its full vigor and effect. Without this principle, justice could not be administered. One man possesses himself wrongfully and fraudulent of the property of another; in equity, he holds such property in trust, for the rightful owner.

In answer to the objection, that the validity of the will of 1811, collaterally, can only be tested by an action at law and on an issue *devisavit vel non*, it may be said, that such an issue may be directed by the Circuit Court.

Complaint is made that the federal government has imposed a foreign law upon Louisiana. There is no ground for this complaint. The courts of the United States have involved no new or foreign principle in Louisiana. In deciding controversies in that State the local law governs, the same as in every other State. Believing that *the mode of proceeding [*651 there in the State courts was adequate to all the

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urposes of justice, and knowing with what ertinacity even forms are adhered to, I was verse to any change of the practice in the fedral courts. But I was overruled; and I see in he change only a change of mode, which pro uces uniformity in the federal courts through ut the Union. No right is jeoparded by this, nd to say the least, wrongs are as well redress-d, and rights as well protected, by the forms f chancery as by the forms of the civil law.

From the foregoing considerations, the court nswer the first point certified in the affirmative, subject to the amendments of the bill, as uggested. And they answer the second and hird points, with the qualifications stated, also n the affirmative.

Mr. Justice CATRON:

I agree the points certified must be answered avorably to the complainants; but I do not altogether agree with the reasoning that has led majority of my brethren to this conclusion.

The answer to the second question controls the answers to the others; it is: "Can the Circuit Court entertain jurisdiction of this case without probate of the will set up by the complainants, and which they charge to have been destroyed, or surpressed?"

The will of 1813 cannot be set up without a destruction of the will of 1811; this will has been duly proved, and stands as a title to the succession of the estate of Daniel Clark; nor can the Circuit Court of the United States set the probate aside: this can only be done by the Probate Court.

Nor can the will of 1813 be set up in chancery as an inconsistent and opposing succession to the estate, while the will of 1811 is standing in full force. Such is the doctrine in the English Court of Chancery, as will be seen by the cases of *Archer* v. *Mosse* (2 Vern., 8), *Beale* v. *Plume* (1 P. Wms., 388), and which are confirmed by the case of *Kenrick* v. *Barnsby* in the House of Lords (7 Bro. Par. Cases, 437). Nor do the doubtful suggestions of Lord Hardwicke in *Barnsby* v. *Powel* (1 Ves., Sen., 119, 284) conflict with the previously settled doctrine, as I understand that case. The argument that a fraudulent probate is a fraud on the living, and therefore chancery can give relief by setting aside such probate, is a mistaken idea of the chancery powers. Surely the probate of a fraudulent or forged paper is a fraud on the living as much as the suppression of the last will, and the causing to be proved a revoked one; still chancery has not assumed juris-652*] diction *to set aside the probate of a will alleged to have been forged or to be fraudulent, after the testator's death; as will be seen by the cases cited; although he who committed the fraud, or forgery, procured the probate to be had of the paper in the Probate Court.

It by no means follows, however, that the court below has no jurisdiction of the case made by the bill in one of its aspects. Mrs. Gaines claims to be the only child and lawful heir of Daniel Clark. This we must take to be true. By the Civil Code of 1808 (ch. 3, sec. 1, art. 19, p. 212), it is declared "that donations either *inter vivos*, or *mortis causa*, cannot exceed the fifth part of the property of the disposer, if he leaves at his decease one or more legitimate children or descendants, born or to be born."

By the case made in the bill, Mr. Clark could only dispose of one fifth part of his property at the time of his death; provided he had no wife living; and if she was living, then only of the one fifth part of one half. It follows, if the will of 1811 is permitted to stand as Daniel Clark's last and only will, that Mrs. Gaines can come in as heir for the four fifths. On this aspect of the bill she can proceed to establish and enforce her rights as heir, without making probate of the will of 1813—and the second question must be answered in the affirmative.

By the will of 1811, Mary Clark is the principal devisee. She made her will and died; by this will, Carolina Barnes is entitled to part of Daniel Clark's estate, and ought to be before the court to maintain her rights. I, therefore, do not concur that as to her the bill is multifarious. As to the purchasers from the executors I have more difficulty. I agree, where there is one common title in the complainant; and this could only be the true source of all the titles in all the defendants, and they have not obtained the first link in the chain of title; that then the true owner may sue them together in chancery, although the claim by separate purchases from a spurious source. Such is the general rule; nor do I think the purchasers from Chew and Relf are exempt from its operation, on the ground that they have no concern with the settlement of the accounts growing out of the administration. I therefore concur in answering the first question—that the bill is not multifarious.

The third question presents no difficulty as to the executors; they are properly sued in chancery for distribution beyond doubt: and so I imagine are the devisees of Mary Clark; they being by the will of *Mrs. Clark co- [*653 distributees with Mrs. Gaines under the will of 1811, as to the one fifth part of Daniel Clark's estate.

The purchasers are charged with having purchased with knowledge of Mrs. Gaines's superior title; and with having fraudulently purchased from the executors with such knowledge; there being jurisdiction to grant relief against the executors in chancery, the same court can grant relief against the purchasers, involved in the fraud of the executors. If they could be compelled to account in regard to the real estate when it remained in their hands; purchasers with notice of Mrs. Gaines's rights; and who purchased with the intention to defeat her rights and deprive her of them, can stand in no better situation than the executors, and must account likewise; both being held in a court of equity equally as trustees for the true owner. Therefore, on the face of the bill, a court of equity has jurisdiction; and a court of law has not exclusive jurisdiction, and thus the third point ought to be certified.

ORDER.

This cause came on to be heard on the transcript of the record from the Circuit Court of the United States for the Eastern District of Louisiana, and on the points and questions which were certified to this court for its opinion agreeably to the act of Congress in such case made and provided, and was argued by counsel; on consideration whereof, it is the

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opinion of this court that the first question should be answered in the affirmative, but that the bill should be so amended in the Circuit Court as to avoid both of the exceptions stated in the opinion of this court, and that the second and third questions should also be answered in the affirmative, with the qualifications stated in the opinion of this court. Whereupon, it is now here ordered and adjudged that it be so certified to the judges of the said Circuit Court.

Cited—3 How., 411; 6 How., 582, 584; 22 How., 488; 24 How., 565, 566, 577; 21 Wall., 512; 1 Wood. & M., 112; 2 Wood. & M., 34, 221; McAll., 258; 1 Woods, 59, 115, 120-122; 1 Sawy., 650; 5 Sawy., 378; 2 Curt., 204; 3 Story, 537; 3 Woods, 11.

WILLIAM R. HANSON, JOSEPH L. MOSS, ISAAC PHILLIPS, JOSEPH M. MOSS, AND DAVID SAMUEL, *Plaintiffs in Error*,

v.

LESSEE OF JOHN H. EUSTACE

Evidence—Refusal to produce books and papers on notice—secondary evidence of deed from member of firm to firm—presumptions.

A refusal to produce books and papers under a notice, lays the foundation for the introduction of secondary evidence of their contents, but affords neither presumptive nor *prima facie* evidence of the fact sought to be proved by them.

654*] *Where the fact sought to be proved by the production of books and papers is the existence of a deed from one of the partners of a firm to the firm itself, secondary proof, that an entry existed on the books of a transfer of real estate to the firm; that an account was open, in them, with the property; that the money of the firm was applied to the consideration of the purchase; that the persons who erected new buildings on the property were paid by the notes and checks of the firm, which buildings were afterwards rented in the name, and partly furnished through the funds of the partnership, and that the taxes were paid in the same way, is not sufficient for the presumption of a deed by a jury, as a matter of direction from the court.

Nor are the jury at liberty, in such a case, to consider a refusal to furnish books and papers as one of the reasons upon which to presume a deed; and instruction from the court which permits them to do so is erroneous.

THIS case was brought up by writ of error from the Circuit Court of the United States, holden in and for the Eastern District of Pennsylvania. It was an ejectment brought by Eustace, a citizen of the State of Virginia against the plaintiffs in error, for two pieces of property in the city of Philadelphia; particularly described in the declaration. One of them fronted sixty-six feet, upon Chestnut Street being upon the west side of Schuylkill Seventh Street, and the other was on the westerly side of South Sixth Street, between High and Chestnut streets, fronting twenty-five feet on Sixth Street, nearly the whole of the lot being covered with a large building. The plaintiff below (Eustace) claimed title under a sheriff's sale; the defendant (Hanson) also claimed title under a public sale, but made under the authority of the assignees of R. and I. Phillips, who had become insolvent. Eustace alleged that the whole of the proceedings, both before and after the insolvency, were void on account of fraud and that, this being so, there was nothing to impair his own title. The firm of R. and I. Phillips which carried on a very extensive commercial business in Philadelphia, was composed originally of Robert Phillips and Isaac Phillips. After the death of the former, which occurred as will be hereafter stated, the partners were Isaac Phillips and Joseph L. Moss, who continued to use the same partnership name.

In April, 1830, Isaac Phillips was regularly naturalized as a citizen of the United States.

On the 9th of June, 1832, Herring and wife conveyed to Robert Phillips, in fee, the property in Sixth Street.

In December, 1833, Robert Phillips died intestate; Isaac being then in Europe. John Moss, whose daughter Isaac had married, entered *a *caveat* at the office of the probate of [*655 wills, to prohibit anyone from taking out letters of administration upon his estate.

On the 29th of August, 1834, three several persons conveyed each a lot upon Mulberry Street, or Arch Street, being called by either name (the three lots being adjoining to each other, and making in the whole sixty-six feet) to Sarah Moss Phillips, wife of Isaac Phillips subject to the payment of a ground rent therein mentioned.

In September, 1834, Isaac Phillips entered into a contract with one Linck, a house-carpenter, to build a house for him on the lot just

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NOTE.—*Evidence. As to the effect as evidence, of a refusal of a party to produce a paper, or its destruction by a party.*

A party is not obliged to produce evidence against himself, though such evidence is in court, and he has had notice to produce it. Law v. Wells, Peake, 93 Kenyon.

If upon notice to produce books of account they are not produced, this circumstance affords no legal ground for any inference respecting their contents, and merely entitles the opposite party to prove their contents by parol evidence. Cooper v. Gibbons, 3 Camp., 363, Gibbs. See Leeds v. Cook, 4 Esp., 256.

When a document is called for, and its production declined, the party so declining to produce it cannot afterwards make use of it for any purpose. Collins v. Gashon, 2 F. & F., 47; Thompson v. Hodgson, 4 P. & D., 142; 12 A. & E., 135; 2 M. & Rob. 283; 4 Jur., 1202.

When a party refuses to produce a deed at the trial, and a copy is duly proved, he cannot afterwards exclude it by producing the original, and requiring it to be proved. Edmonds v. Challis, 6 D. & L., 581; 7 C. B. (M. G. & S.), 413.

Defendant's refusal to produce his books and papers, raises a presumption that if produced, they would give a complexion to the case, at least unfavorable, if not directly adverse, to the interest of the party. Clifton v. U. S., 4 How., U. S., 242, 247; The Luminary, 8 Wheat., 407; Chaffee v. U. S., 18 Wall., 545; Bas. v. Steele, 3 Wash. C. C., 381; United States v. Gilbert, 2 Sumn., 19, 78.

The presumption of innocence may be overthrown, and a presumption of guilt be raised, by the misconduct of the party in suppressing or destroying evidence, which he ought to produce, or to which the other party is entitled. 1 Greenl. Ev. sec. 37.

Whatever rule may be laid down by the courts on this subject, it would not be possible in many cases to prevent a jury from being influenced by such a suppression of evidence; and in some cases the jury might very reasonably be influenced by it. Bate v. Kinsey, 1 Cr. M. & R., 41; Roe v. Harvey, 4 Burr., 2484; 2 Phill. Ev., 3d. Am. Ed., 222.

The refusal of a party to produce his books and papers, is not to be regarded as *prima facie* evidence that, if produced, they would prove what the party calling for them alleges they contain. The rule is this: the latter, in such case, may give secondary proof of the contents, if the papers are shown or admitted to be in the possession of his adversary; and if the secondary evidence is imper-

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mentioned in Arch Street, and agreed to pay said Linck $20,000 for it, in the manner stated in the contract.

On the 1st of January, 1835, R. & I. Phillips leased the property in Sixth Street to one Saint for four years; R. & I. Phillips agreeing to assist in furnishing to the amount of $1,000, which was to be refunded by Saint in the first year, after which Saint was to pay $1,600 per annum as rent.

On the 9th of June, 1835, Thompson and wife conveyed to Isaac Phillips, his heirs and assigns, the Chestnut Street property, subject to the payment of an annual ground-rent of $212 per annum; and subject also to the payment of a mortgage debt of $3,500.

On the 22d of June, 1835, Phillips, having purchased the ground-rent thus reserved upon his lot, received a deed for it from the then owner, paying $4,533.33.

On the 30th of January, 1837, the register issued a notice to John Moss, stating that, in consequence of his *caveat*, no letters of administration had been taken out upon the estate of Robert Phillips, whereby the collateral inheritance tax was unattended to, and the Commonwealth was suffering.

On the 4th of February, 1837, letters of administration were granted to Isaac Phillips, who gave the required bond and security.

On the 18th of February, 1837, R. & I. Phillips wrote to Eustace, instructing him to draw on them at ninety days for $30,000 or $40,000, and to send sterling or French bills.

On the 4th of March, 1837, Eustace drew a bill of exchange, dated at Richmond, upon R. & I. Phillips, payable fifteen days after date to the order of Henry Thassall, for $9,085.92, which was accepted by the drawees.

On the 20th of March, 1837, Joseph L. Moss [*656] conveyed to David *Samuel certain property therein mentioned, situated on Walnut Street, for the sum of $7,000.

On the 22d of March 1837, Isaac Phillips and Joseph L. Moss, composing the firm of R. & I. Phillips, made a conveyance to Joseph M. Moss and David Samuel, reciting that the parties of the first part had been compelled to suspend payment, and conveying to the parties of the second part "all and singular the joint and several property and estate of the said parties of the first part, and of each of them, real and personal, situate, lying and being, or due, owing or belonging to them or either of them, within the State of New York," upon trust to pay certain persons therein mentioned. This deed was verified and recorded in New York on the 23d of March.

On the 24th of March, 1837, Joseph L. Moss executed a warrant of attorney, to confess judgment in favor of John Moss, for $48,000, conditioned for the payment of $24,600.

On the 25th of March, 1837, David Samuel re-conveyed to Joseph L. Moss the same property which Moss had conveyed to him on the 20th of March.

On the 27th of March, 1837, a judgment was entered up, in the District Court for the city and County of Philadelphia, in favor of John Moss, against Joseph L. Moss, for the sum of $48,000, in conformity with the warrant of attorney just referred to.

On the 10th of April, 1837, Isaac Phillips conveyed to John Moss the life estate which he derived from being tenant by the courtesy, in the Mulberry Street property, which has been heretofore mentioned as having been conveyed to Sarah Moss Phillips, wife of the said Isaac, on the 29th of August, 1834. This property was subject to a ground-rent of $231 per annum, but is understood to be considered in Pennsylvania as a fee. The consideration received by Isaac Phillips is stated to have been $7,102.17.

On the 27th of May, 1837, Joseph L. Moss executed to John Moss a bill of sale of sundry articles of furniture, valued at $3,950, to pay in part the judgment which had been entered on the 27th of March against the said Joseph L. Moss.

On the 3d of June, 1837, Isaac Phillips executed to Joseph M. Moss a bill of sale of certain furniture, in consideration of $5,707.

On the 22d of June, 1837, Isaac Phillips, and Sarah, his wife, and Joseph L. Moss, and Julia, his wife, executed a deed to Joseph M. Moss and David Samuel, assigning their property generally, and particularly *describing [*657 the two pieces of property which are the subjects of the present suit, upon certain trusts. After providing for preferred creditors, the deed directed the trustees to pay and satisfy in full, or ratably, all the other creditors who should, on or before the 21st day of August,

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fact, vague and uncertain, as to dates, sums, boundaries, &c., every intendment and presumption shall be against the party who might remove all doubt by producing the higher evidence. Life and Fire Ins. Co. v. The Mechanics' Fire Ins. Co., 7 Wend., 31, 33, 34.

All inferences from it shall be taken most strongly against the party refusing to produce. Thayer v. Middlesex Mutual Fire Ins. Co., 10 Pick., 329.

Every fair presumption that can arise is to be made against such party, as to these parts of the contents which do not appear from the secondary evidence. Sumington v. M'Lin., 1 Dev. & Batt., 430, 436.

The fact that a party refuses to produce his books upon a trial is not alone sufficient to establish a fraudulent disposition of the books with intent to deceive the adverse party. Burr v. Am. Spiral Spring Butt. Co., 8 Abb. N. C., 406; S. C., 81 N. Y., 378; affirming, 17 Hun, 188.

If a party refuses to produce at the trial a written instrument material to the case after being notified to do so, every inference in respect to the contents thereof, which is warranted by the evidence, should be indulged against him. Wylde v. Northern R. R. Co., 14 Abb. N. Y., 213; 53 N. Y., 156.

The refusal to produce does not supply the place of secondary evidence so as to raise a presumption that the fact is as alleged; but it aids the secondary evidence by a presumption in favor of the construction of it most adverse to the party refusing. Caken v. Continental Life Ins. Co. of N. Y., 69 N. Y., 300, 305; rev'g, 14 Super. Ct. (J. & S.), 296.

And a party refusing, on notice, to produce a paper in his possession or under his control, and thus obliging his adversary to resort to parol or secondary evidence of its contents, cannot be allowed to contradict the secondary evidence thus given, without producing the paper itself. Bogart v. Brown, 5 Pick., 18.

Indeed, it has been held, that a party refusing to produce a paper in his possession, called for under a notice to produce, cannot be allowed afterwards to retract and put in the paper. Higg v. Cockell, 6 Carr. & Payne, 525.

The act of a party destroying a written instrument, furnishes presumptive proof of its due execution; but, before this presumption can arise, the purport of the paper destroyed must be shown what it is alleged to have been. In other words, it must be identified in some way. M'Reynolds v. M'Cord, 6 Watts, 288, 290; Cowper v. Earl Cowper, 2 P. Wms., 720, 752.

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1837, at twelve o'clock, noon, and if resident in Europe, on or before the 20th of October, 1837, at twelve o'clock, noon, execute and deliver to the said R. & I. Phillips, a full, valid and general release. The trust was accepted.

On the 8th of July, 1837, the property thus conveyed was valued by appraisers, appointed by the Court of Common Pleas, at $139,373.69. The Chestnut Street property was valued at $15,000, and the Sixth Street property at $20,000.

On the 2d of October, 1837, Phillips and Moss separately petitioned for the benefit of the Insolvent Law of Pennsylvania, but did not execute an assignment of their property to trustees. Two of the creditors opposed their discharge, but on the 19th of October their opposition was withdrawn, and Phillips and Moss were severally discharged.

On the 17th of November, 1837, Isaac Phillips, as the administrator of Robert Phillips, represented to the Orphans' Court that the said Robert, at the time of his death, was seized in fee of the Sixth Street property; that he owed the petitioner the sum of $35,473.35 and prayed for an order to sell the property. Whereupon the court, on due consideration, granted the prayer of the petitioner, and awarded an order of sale accordingly.

In December, 1837, an action was brought by the Farmers' Bank of Virginia against Phillips and Moss, trading under the firm of R. & I. Phillips, in the District Court of the city and County of Philadelphia, upon the bill of exchange drawn upon them by Eustace as before mentioned.

On the 19th of January, 1838, Isaac Phillips, as administrator of Robert, reported to the Orphans' Court that he had, on the 26th of December, sold the Sixth Street property to David Samuel and J. Mora Moss, assignees of R. & I. Phillips, for $22,500, which sale was duly confirmed.

On the 22d of January, 1838, a judgment was entered in the District Court against R. & I. Phillips, at the suit of the Farmers' Bank of Virginia for the sum of $9,541.58, subject to the defendants' discharge under the insolvent laws of Pennsylvania.

658*] *On the 30th of January, 1838, Isaac Phillips, as administrator of Robert, executed a deed for the Sixth Street property to David Samuel and Joseph Mora Moss, assignees of R. & I. Phillips; which was ratified and confirmed by the Orphans' Court.

On the 19th of March, 1838, a *fieri facias* was issued upon the judgment obtained in March, 1827, by John Moss against Joseph L. Moss, for $48,000, the proceedings upon which were set aside on the 5th of May for irregularity.

On the 11th of May, 1838, Eustace filed a bill in equity, in the Court of Common Pleas against R. & I. Phillips and their assignees, claiming that the proceeds of certain notes and bills should be specifically applied to the payment of his, the said Eustace's, claim.

On the 12th of May, 1838, an *alias venditioni exponas* was issued upon the judgment in the case of *John Moss* v. *Joseph L. Moss*, and on the 4th of June the sheriff sold to John Moss, for $150, the interest of Joseph L. Moss in the Walnut Street property.

On the 8th of June, 1838, the judgment which the Farmers' Bank of Virginia had obtained against R. & I. Phillips was entered for the use of Eustace, upon which a *fieri facias* was issued on the 12th of September. The sheriff levied upon several pieces of property, amongst which were the two which are the subject of the present suit, viz., the Chestnut Street and Sixth Street properties.

On the 29th of September, 1838, the subject of the insolvency of Phillips and Moss was brought before the Court of Common Pleas, which passed an order permitting the petitioners to sign the assignments annexed to their petitions, and directed the date of said assignments to be filled up, as of that day; and that the time from which said assignments should take effect should thereafter be determined by the proper authority; and the court refused to alter the appointment of assignees, made at the time the petitioners were sworn and discharged, to wit, in the Term of December, 1837. The trustees gave bonds on the same day.

From September, 1838, to April 24th, 1839, there were five writs of *venditioni exponas* issued on the judgments which the Farmers' Bank of Virginia had against R. & I. Phillips, all of which writs and the proceedings under them were set aside for irregularity. On the 24th of April, a *pluries venditioni exponas* was issued. But before the sale was made, viz., on the 30th of April, 1839, the assignees of R. & I. Phillips sold at public sale, at the Philadelphia Exchange, *the Chestnut Street [*659 and Sixth Street properties to William R. Hanson, one of the defendants in the suit below and one of the present plaintiffs in error, at the following prices, viz., the Chestnut Street property for $16,000, and the Sixth Street property for $20,500. Both properties were advertised as clear of all incumbrances, title indisputable.

At the sale the following notice was read:

"Bidders will please take notice that the property on the north side of Chestnut street 42 feet west of Schuykill Seventh Street, being 66 feet front, by 158 feet deep; and also that on the west side of Delaware Sixth Street between Market and Chestnut streets, formerly known as Rubican Hotel, have been levied upon as the property of the late firm of R. & I. Phillips, and are actually advertised by the sheriff; and that the right of the assignees of R. & I. Phillips to convey any title to either of said properties is disputed and denied.

C. FALLON."

On the 10th of May, 1839, the assignees executed deeds to Hanson for the Chestnut Street and Sixth Street properties.

On the 20th of May, 1839, the sheriff, under the last writ of *venditioni exponas*, issued in the case of *The Farmers' Bank of Virginia* v. *R. & I. Phillips*, set up and exposed to public sale several pieces of property, amongst which were the Chestnut Street and Sixth Street properties, for which Christopher Fallon became the highest bidder and purchaser.

On the 22d of June, 1839, the sheriff executed a deed of the above to Fallon, who, on the 11th of September conveyed them to Eustace, the plaintiff in the suit below.

In October, 1839, Eustace brought an ejectment to recover possession.

The cause came on for trial in October

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1840. The facts stated above were established by proof, and evidence farther offered to show that the property in Sixth Street was recognized by the firm of R. & I. Phillips as partnership property; that an account was opened with it on the books, and the taxes paid by the firm. On the part of the defendant, evidence was offered to show that, at the time of the death of Robert Phillips, there was another brother living besides Isaac, who was called Samuel, and also that two children of a third brother, named Lawrence, were living; that the Walnut Street property was not included in the assignment, because it was thought that 660*] *the incumbrances upon it were so heavy as to destroy its value as property.

In an early stage of the trial, the counsel for the plaintiff gave notice to the defendant to produce the books and papers belonging to the firm of R. & I Phillips. After the testimony was closed, the court called on the plaintiff's counsel to proceed to address the jury, at which time a large number of books were brought into court, said to be the books of R. & I. Phillips, and the inspection of them was offered to the plaintiff's counsel; but the court said it was too late, and they would not permit time to be taken up in that stage of the case.

The court having delivered a charge to the jury, a verdict was found by the latter for the plaintiff; but the following exceptions were taken to the charge:

"Mr. Joseph L. Moss and Isaac Phillips, the defendants in the judgment, have been devested of all their interest, either by their voluntary assignment in June, 1837, and the proceedings under the Insolvent Act in October following, or the sheriff's sale in May, 1839. They can set up no title adverse to the plaintiff, and though the assignment in June may be perfectly valid, they have no right to retain possession, unless, perhaps, with the assent of the assignees, under their title, as distinct from theirs. Mr. Joseph M. Moss and David Samuel have no legal estate in the property; their deed to M. Hanson devested their interest in May, 1839; they have, therefore, in themselves, no right to retain possession; though, if they are in possession, they may defend, under the assignment, and the title of M. Hanson, as a purchaser from them, unless such privity exists between them and the defendants in the judgment as prevents them from setting up an outstanding title—a question which is not very important in this case, and might rather tend to make it more complicated than is necessary, by discussion."

And thereupon the said defendants further excepted to the following matters or propositions of law contained in the said charge to the jury, to wit:

"It is further objected to the plaintiff's right, that having accepted a judgment, subject to the discharge of the defendants under the insolvent law, he took it, subject to all its incidents and effects, whereby he can come upon the property of the debtors only as a 661*] *general creditor, on an equal footing with all others, through the intervention of the trustees, or in their name. This is, however, not the true construction of the agreement; it means that by confessing judgment, the defendant waived no rights or exemptions which accrued to him by the discharge; it left him free to claim freedom from arrest on any process on the judgment, or any other right secured by the law; but it left the plaintiff at liberty to pursue any property which had belonged to the defendants, by a proceeding adversary to a purchaser under him, or any assenting creditor. If, notwithstanding any previous assignment, either voluntary or under the insolvent law, there was any property to which his judgment could attach, there was nothing in the assignment or its legal effects which prevents the plaintiff from pursuing it by legal process, till by its consummation by a sheriff's sale and deed acknowledged, he put himself in a position to assert his pretensions in a court of law, or which could, in any manner, compel him to come in under either assignment, or lose his debt.

"As a judgment creditor he might contest with the assignees under the voluntary assignment, the validity of their title, or that of any person claiming under them, or the right of the trustees under the insolvent assignment; and if he could defeat the right thus claimed, the property was open to his claim, if he could establish it. In endeavoring to do so by this suit, we think he is not acting inconsistently with the terms on which the judgment was confessed; the defendants disclaim all interest in the property from the time of their first assignment, and are, therefore, not competent to question the plaintiff's right to try title with others. On a contrary construction, he would be compelled to acquiesce in the exclusion from the benefits under the assignment, by not having released in time; or if it was inoperative, to come in only as a general creditor for his ratable proportion of the available effects of the insolvents. We think this objection is not sustained."

And thereupon the said defendants further excepted to the following matters or propositions of law contained in the said charge to the jury, to wit:

"It is next objected that the plaintiff is precluded from contesting the validity of the assignment of June, 1837, by having filed a bill in equity, admitting its effect, and claiming under it, on the same principle which binds a creditor who takes his dividend under it. *That principle is undoubtedly a sound [*662 one, but we cannot perceive its application to this case.

"The bill states the fact of an assignment—its acceptance by the assignees—their action under it, with the consequences of such action on the equitable rights of the plaintiff; without affirming or denying the legal efficacy of the assignment, he alleges that the assignees have made, or are about to make a disposition of certain specified notes, in violation of an agreement between the plaintiff and the assignees, prejudicial to his interest and rights. He asks the court to interfere, for the purpose of protecting him from the effects of the assignment, to prevent the assignees from diverting the notes or their proceeds from the purposes agreed upon by the assignors before the assignment; he avers this agreement to be binding on the assignees, who are not authorized, on principles of equity to apply this fund to the purposes of the assignment. It is con-

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sequently a disaffirmance of the terms and conditions prescribed by the assignors—a claim to the whole of the notes and proceeds, for his own sole benefit, in opposition to the claims of every other creditor. The whole bill is founded on the equitable obligation and duty of the assignees to apply this portion of the assigned effects, contrary to the express terms of the assignment, on the ground that for the causes alleged, the law of equity controls its effect, and must regulate their distribution of the funds. On these principles the equitable claim of the plaintiff to this portion of the personal property assigned, is as adverse to the assignment as his legal claim to the real estate in controversy. The difference between the two claims is this: in the bill in equity the plaintiff avers the delivery of the notes to the assignees—that they were payable to, and indorsed by Robert and Isaac Phillips—that having then come to their hands, his remedy to recover possession af the unpaid notes, or the proceeds of those which are paid, is in equity. Whether his remedy is at law or in equity, is for the court, before whom the bill is pending, to decide; the object of a suit in either court would be the same; the question in both must be—in whom is the right to the notes or their proceeds—as it is in this case, in whom is the right of possession to the real estate? In the one case the validity of the assignment in passing the right to these notes to the creditors under the assignment, is as much contested by the plaintiff as it is in the other; the fact of an assignment is admitted in both, but the plaintiff takes different modes of avoiding its effects.

663*] *"Having accepted and acted in execution of the trust, the assignees cannot deny the validity of the assignment; the law places their action under the supervision of a court, to whom the plaintiff applies for the application of a specific fund to his exclusive benefit, notwithstanding the contrary application by the assignees, under the requisitions of the assignment.

"Had the plaintiff resorted to a court of equity for a remedy as to the land in controversy, in virtue of his sheriff's deed, he must have stated his case, as he has done in his bill in equity in relation to the notes, praying for a re-conveyance of what was not sold, an account for, and payment of what had been sold, on the ground that the property did not pass in equity by the assignment, and that in the hands of the assignees, it remained subject to his paramount right as a creditor attempted to be defrauded by it. Broader ground might be taken in the latter than in the former case; the plaintiff might rest his claim to the notes, on the principles of equity implanted in his case, without an allegation of fraud in fact, while he might put his claim to the land on every ground of fact, law, and equity, which his case covered; but when his object is to paralyze the assignment, either as to the notes or land, he cannot be held to affirm or claim under it.

"So long as he claims adversely to the terms and conditions upon which the assignees must act pursuant to the assignment, he may, according to the nature of his case, apply to a court of equity, to compel them to execute the trust, according to their legal and equitable obligations; or apply to a court of law, on the ground that the assignment passed no legal right to personal or real property. In resorting to a court of equity in one case, and a court of law in the other, the plaintiff is at liberty to choose his ground in affirming or disaffirming the legal effect of the assignment in creating a trust. The assignees are precluded from a choice; they have fastened on themselves a trust, either for the assenting or dissenting creditors, which the appropriate court will carry into execution, according to its settled principles. As the trust may be a legal or equitable one, its execution is enforced at law or in equity; as to one portion of the assigned property, the proper remedy may be at law, and as to the other, in equity; yet the pursuit of one can be no bar to the other, unless the grounds respectively assumed are wholly incompatible. A creditor who asks for such an execution of a trust as puts him in *the same situation as if a trust never [*664 existed, and defeats the objects intended to be effected by the creation of the trust, by directing the subject of the trust from those for whom it was designed to himself, cannot be said to claim a benefit from the trust, or to affirm what he disaffirms. By pursuing this course, he gives up no right which he could assert at law, by invalidating the instrument creating the trust — his objects are the same; the results of a decree in equity, or a judgment at law, are the same, when his rights are established to the same extent as they existed before the assignment, or as if it had never been made. Should the plaintiff obtain a decree in his favor, as to the notes and their proceeds, he thus far annuls the assignment, that it no longer impairs his rights, and is used by a court of equity as the mere instrument for the purposes of justice, and a conduit to the equitable jurisdiction which it exercises over the trustee. Should he obtain a judgment at law, an execution gives him all the fruits of a decree in equity—the different modes of proceeding being but the varied means of effecting the same object. We are, therefore, of opinion that the filing and pending of the plaintiff's bill in equity does not, in law, impair his rights to proceed by ejectment to recover the property now in dispute, any more than bringing and prosecuting the present action would prevent him from prosecuting his bill in equity. This objection must consequently fail."

And thereupon the said defendants further excepted to the following matters or propositions of law contained in the said charge to the jury, to wit:

"Another objection to our entering on an investigation of this case is founded on the decisions of the Supreme Court of this State, in the case of *Fassit* v. *Phillips*, which it is said established the validity of this assignment, and is obligatory on this court, on the principles which it has adopted and acted on uniformly. We cannot so view it. That was a bill in equity, praying for an injunction against any proceedings under the assignment, on account of its invalidity for the causes set forth in the bill, being acts of alleged fraud on the part of Joseph L. Moss, one of the assignors; an injunction was granted, but on the coming in of the answer, there appeared a positive denial of fraud, and of every fact on which the equity

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of the plaintiff depended. A motion to dissolve the injunction was made and heard on the bill and answer alone; the court dissolved the injunction, the only effect of which was, that assuming the answer to be true, as the 665*] *court were bound to do in the then state of the case, all action upon it was suspended till evidence was taken, and the cause came to a final hearing, when it will be competent for the plaintiff to disprove the answer, and support the allegations of his bill. In the meantime, the merits of the cause remain as open as before; the injunction was granted on the *prima facie* case stated in the bill and exhibits, but as the whole equity of the plaintiff was denied, the *prima facie* case was rebutted, whereby the parties now stand as if the court had not acted on the bill; an interlocutory order, in granting an injunction, or taking it off, has no effect on the rights of either party at the hearing. The facts set up or denied in the answer, can neither be considered as established or negatived: for the purposes of the motion to dissolve the injunction, the answer was taken as true; it has performed its office, leaving its future effect dependent, in the opinion of the court, on the effect of opposing evidence on the part of the plaintiff. Had the decisions of the court been made on a hearing of the cause on the pleadings, exhibits, and evidence, it would have been entitled to great weight in our mind, and yours, on the facts before them, and perhaps conclusive on matters of law; certainly so, if their decree had been founded on any State law, statute or common, which was local, and not in conflict with the laws of the Union."

And thereupon the said defendants further excepted to the following matters or propositions of law contained in the said charge to the jury, to wit:

"It has also been contended, that whatever may be the effect of the assignment of June, 1837, on the rights of the parties, or if it is wholly void, the estate of the assignors passed to the trustees appointed by the court, on the discharge of Moss and Phillips, under the insolvent law of 1836, by the force of the law and the discharge, from the time of the filing the petitions for the benefit of the act, so that there was no interest in the defendant on which the judgment under which the plaintiff claims could attach. If this position is well taken, it takes away all right in either the plaintiff, the assignees, or Mr. Hanson, to the property in controversy; for if it is still vested in the trustees for the benefit of all the creditors of the insolvent, without any assignment made by them, then as the trustees have made no conveyance, the plaintiff's judgment was no lien on their rights; and if the assignment of June, 1837, is void, Mr. Hanson has no right.

666*] *"As this position is founded on the words of the thirty-fourth section of the Insolvent Act, it becomes necessary to examine its various provisions, in order to ascertain the intention of the Legislature in this particular.

"By the first section, the courts of common pleas have power to grant relief to insolvent debtors, 'on application made in the manner hereinafter provided.' (Purdon, 503.)

"Sec. 2. 'The jurisdiction of the said court must be exercised as follows, and not otherwise,' viz.: 'by sec. 9, the petitioner must present a statement of his estate, effects, and property, debts due by him, &c.;' by sec. 12, he must exhibit a true account of his debts, credits, and estates, and shall satisfy the court that he has neither concealed or conveyed, for his own use, or for any of his family or friends, or whereby to expect any future benefit to him or them, any part of his estate, effects, or credits.

"Sec. 13 directs, that if he shall be entitled to relief, he shall take an oath that he will deliver up, and transfer to his trustees, for the use of his creditors, all his property, debts, rights, and claims, &c.; that he has not given, sold, or intrusted any part of his property, rights, or claims, to any person, whereby to defraud his creditors, or any of them, or to receive or expect any profit, benefit, or advantage thereby.

"Sec. 14. 'The petitioner shall thereupon execute an assignment of all his estate, property, and effects whatever,' to such trustees as may be nominated by his creditors, or appointed by the court.

"Sec. 15. When such assignment shall have been executed, the court shall make an order of discharge; and then follows the thirty-fourth section, enacting that, 'The trustees appointed as aforesaid, shall be deemed to be invested with all the estate and property of the insolvent, at the time of filing his petition, subject to existing liens, and the trustees shall take possession of such property and estate, and may sue therefor in their own names, as well as for debts and things in action, to which there are these provisos: 1st. That no purchase or assignment of real estate in the county, made *bona fide* for a valuable consideration, before the assignment, to any person not having actual notice of the petition, shall be impeached thereby. 2. Nor if situated out of the county, if so sold or assigned before the recording of the assignment in the other county. 3. Nor a sale of personal property to any person, not having actual notice of the petition or assignment. 4. Nor if any person pays a debt, or delivers *property to the insolvent, [*667 without actual notice, shall he be liable to pay or deliver the same to the trustees.

"Sec. 36. 'If any insolvent shall, prior to such assignment, have conveyed any part of his property to his wife and children, or either, or to anyone in trust for them, or to have conveyed to any other person with intent to defraud creditors, the trustee shall have power to recover and dispose of the same, as fully as if the insolvent had been seized or possessed thereof at the time of the assignment.'

"From this summary view of the law, it is evident that the Legislature intended that an assignment should be made before a discharge; the sections subsequent to the fourteenth are predicated on the supposition that it had been made, and their most important provisions will become a dead letter, if none is made, especially the thirty-sixth. By referring to the preceding Act of 1814, it appears that no assignment was requisite; but as the Act of 1836 is an entirely new system, superseding the old, its requisitions cannot be overlooked.

"The fourteenth section is peremptory, that an assignment shall be executed; and the fif-

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teenth, in terms, makes the discharge dependent on its having been done; the making the estate vest before the assignment, or without one, is restoring the law of 1814, by entirely annulling the provisions of the fourteenth and fifteenth sections of the new act; and making it impossible to carry the thirty-sixth section into effect by any other construction than substituting petition for assignment. We are aware of no rule or principle of law which justifies such construction by the force of the thirty-fourth section; it must be taken in connection with the other parts of the law, so as to make the system consistent in all its parts, unless its words exclude all construction and reference, which in our opinion they do not: on the contrary, they contain a reference which makes them in perfect harmony with what precedes and follows. Thus, in the fifteenth section the 'trustees appointed as aforesaid,' necessarily refers to the fourteenth section, by which they become trustees in virtue of the assignment; they are the persons to whom the court direct it to be made; its execution is the prerequisite to a discharge by the very words of the fifteenth section, and is the only mode in which the petitioner can comply with the oath prescribed in the thirteenth section.

"Had the law used the term "assigns," instead of "trustees," there could have been no doubt they are the persons to whom the debtor swore he would deliver and transfer all his property, debts, rights and claims, in the thirteenth section, to whom he was bound to execute **668*]** *an assignment by the fourteenth, on which alone the court could discharge by the fifteenth, or give such effect to their order made after the assignment, as declared in the sixteenth section. They are assignees to all intents and purposes; as such they became trustees; but however named, their character, powers, rights, and duties are the same, and were complete without the thirty-fourth section, to vest in them the estate of the petitioner at the time of the assignment; but the Legislature thought proper to make provision for transfers and conveyances of the estate and effects of the insolvent, between the filing the petition and the execution of the assignment, which was the object of the thirty-fourth section, and not to repeal any preceding provision, or to dispense with the assignment.

"Hence its true construction is, that the assignment, when made, shall relate to the filing of the petition, so as to cut out all intermediate dispositions by the debtor, except in the cases provided for in the thirty-fifth section, which are exceptions to the thirty-fourth, by way of a proviso, limiting its effect. Such construction gives effect to the thirty-sixth section, according to its words, which it cannot have, if there has been no assignment, while it is in harmony with every preceding provision, as well as in effectuating the intention of the Legislature in requiring the execution of an assignment before discharge. We cannot think it the meaning of the law, that a debtor should be discharged who has made no assignment; that there should be trustees who were not assignees, or that the oath of the petitioner need not be complied with, as to the act specially enjoined to be done as the basis of all subsequent action by the court of trustees.

"There is another important view which must be taken of this law. In conferring power on the Court of Common Pleas, to grant relief, the first section applies only to an application made in the 'manner thereafter directed;' the second section directs that the jurisdiction of the courts 'may be exercised as follows, and not otherwise:' this section is, consequently, a limitation on jurisdiction, so far as it applies. These words are broad enough to extend to all the provisions of the law; it is certainly no strained construction to hold, that they apply to those acts which are positively directed to be done, before any subsequent action can be had pursuant to the law; and if such should be its ultimate construction, that the requisites prescribed are matters on which jurisdiction depends, the consequences may be very serious and alarming. We do not mean to say that such is the true inference to be drawn from the words of the law, or desire *to be the [*669 first to give them a judicial exposition: our duty is to await the course of the courts of the State, and to follow it, unless the exigency of a case requires us to take the lead. We can decide all questions which have arisen under this law, without inquiring into the jurisdiction of the Court of Common Pleas, on the cases of the parties in this case; we can, with perfect consistency, hold that the estate of the insolvent does not pass to the trustees, without an assignment, so as to cut out the lien of a judgment rendered after the discharge, but before an assignment executed; and at the same time hold the judgment, or order of discharge, to be perfectly valid for all the purposes declared by the law. So we take this law as applicable to this case; the omission to make the assignment before the discharge does not impair its effect in protecting the debtor, but it leaves the parties free to assert their respective rights—the plaintiff as a creditor by original right or by assignment, and Mr. Hanson as a purchaser, notwithstanding the provisions of the thirty-fourth section. Other considerations tend to the same conclusion. The words of the thirty-fourth section are, 'all the estate and property of the insolvent, at the time of filing his petition,' which cannot apply to the property in question, because the assignment made in June preceding devested the assignors of the whole estate and property whether it was valid or void, as against creditors. If it was valid, all the right of the assignors passed to the assignees; if it was void as to the creditors, it was good between the parties, and all others, except the creditors who were intended to be defrauded, or whom it might tend to defraud. As to them and them alone, the assignors are held to be vested in trust, without any other right, or for any other purpose than making the property subject to debts. So that in any event there was no interest or right which the assignor could pass to the trustees for all the creditors, either by operation of law under the thirty-fourth section, or by an assignment under the fourteenth.

"The thirty fourth section provides only for the case of an insolvent having property at the time of his petition, which he had not before conveyed; it is wholly silent as to the case of his having conveyed or assigned to his wife, children, or in trust for them, or to any other person, with intent to defraud creditors; such

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case is provided for by the thirty-sixth section, when the insolvent has made an assignment to trustees previous to his discharge. By making this distinct, substantive provision, the law clearly excludes such conveyance and transfer from the operation of the thirty-fourth section; 670*] thereby making a clear distinction *between the property which had never been transferred before the discharge, and property had been so transferred contrary to law. Whether, then, we look to the provisions of the insolvent law in connection, or the words of the 34th section alone, we are fully satisfied that an assignment by the insolvent at some time previous to the discharge, is necessary to vest his estate in the trustees, so as to prevent a subsequent judgment from becoming a lien. This section, then, does not affect the plaintiff's case, as contended by the defendants; the judgment may attach, notwithstanding the discharge, if we assume, as we do at present, that no assignment was made before the 29th September, 1838, after the plaintiff had made a levy; an assignment was then made, and this brings up the construction of the 36th section, which provides that when a conveyance is made prior to such assignment to defraud creditors, the trustees shall have power to recover the estate so conveyed. It follows, that if they do recover it, it must be distributed among all the creditors in the same manner as if the insolvent had been seized or possessed of it, at the time of such assignment. So construed, this section would take the property in controversy from Mr. Hanson, as a purchaser under the assignment of June, 1837, however fair his purchase may have been; it is very analogous to the enacting clause of the 13th Eliz., without the aid of the 6th section of that statute; there is no proviso to except a purchaser for valuable consideration without notice of the fraud between the assignors and assignees. There is, indeed, no declaration in terms, that the fraudulent conveyance shall be void, but it is done in effect by declaring that the trustees may recover and dispose of what has been so conveyed 'as fully and effectually' as if the insolvent had actually been seized at the time of the assignment, which to all intents and purposes annuls the fraudulent conveyance, and takes the estate from the purchaser under it, as would the 13th Eliz., but for the exception in the 6th section.

"Literally construed, it would also destroy the lien of plaintiff's judgment, and any right founded on it; other than this ratable proportion of the general effects of the insolvent; giving it this effect, the 36th section would supersede the 13th Eliz., the common law on which it is founded, and deprive the creditor, who was attempted to be defrauded, of rights which have been unquestioned for two hundred and seventy years. It has never been doubted, that a creditor who takes measures for avoiding a fraudulent conveyance of real or personal property, by levying on and buying it under 671*] his judgment, or *a stranger who is such purchaser, shall hold and enjoy the property for his own use; and we cannot believe it was intended by the Act of 1836 to uproot the whole system of jurisprudence which has grown out of the 13th Eliz., or that it is the fair construction of the provisions of the 36th section. In our opinion, they apply to a case where no creditor having previously acquired a lien or right to property fraudulently conveyed, the trustees proceed to invalidate the conveyance; and that it does not apply where the property is in the hands of a *bona fide* purchaser for valuable consideration, without notice of the fraud before the assignment made by the insolvent. We will not be the first to so construe a State law, which will produce the most mischievous effects on a long settled system of jurisprudence.

"We have been asked to consider the assignment as having been made before the discharge, but the insolvent record shows the contrary—it shows the form drawn up, unsigned, and without date, the actual execution by the order of the court on the 29th of September, 1838, as of that date, together with the refusal of the court to give it a retrospective effect to the time of the discharge or petition. This was the proper course to pursue, leaving it to be thereafter decided what was the legal effect of the proceeding, when it should be brought in question.

"There are cases where a court may order that an act be done presently, and to take effect as if done before, but the cases are few: the power is a delicate one, which ought to be used with extreme caution, so as to do no injustice to third persons, or in any way prejudice their rights; when it is intended to be exercised, it should be done in clear terms, and an entry thereof made of record—it is even then viewed with much jealousy, and is never favored. (*Vide* 2 Peters, 521, &c.) In this case it may well be doubted whether the Court of Common Pleas could give to an assignment actually made in September, 1838, the effect of taking away the lien of a judgment rendered in January preceding, and which the judgment creditor had followed up by a levy, while the assignment remained unexecuted; that court very properly refused to make such order, and this court will not consider that as having been done which was not intended, and ought not to have been done. (2 Peters, 522, 523.)"

And thereupon the said defendants further excepted to the following matters or propositions of law contained in the said charge to the jury, to wit:

*"Having disposed of these objec- [*672
tions, we now proceed to another, which was much pressed during the trial—that the plaintiff had not shown a legal title to the property in controversy, so as to enable him to recover in this action. As this objection presents questions of fact, as well as of law, we must refer to the evidence of title, which has been exhibited by the plaintiff, as direct proof of its being in him in virtue of the sheriff's sale, together with the principles of law by which the evidence must be applied.

"A legal title is the right to real estate, derived from the original owner of the soil, and passed to the party claiming it by deed, will, descent, or legal process operating as a deed by force of a law.

"An equitable title is one acquired without a regular deed or formal conveyance of any description, which a court of law considers as a transfer of the estate of one to another; but a title so acquired, as in equity, justice, and

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good conscience to vest the beneficial interest—the real and substantial ownership of the property—in the person claiming it. In such a case, a court of equity, whose appropriate and peculiar jurisdiction is to act upon the conscience of the person who holds the formal or legal title to the property, compels him to convey it to the person to whom he is bound in good conscience to make a complete title, thus uniting form to substance.

"As when B sells to A. for a price which is paid by A, who takes possession and makes valuable improvements, that B holds the title, and refuses or neglects to make a deed, A is the real owner in equity, but B is the owner in law, and the contract of purchase is by the most solemn articles of agreement under seal, with covenants to make a deed on payment of the purchase money. B may turn A out of possession by ejectment in a court of law, because such courts cannot recognize merely equitable titles. But a court of equity would prevent B from following up his legal right, and order him to convey it; such is the course and settled rule of this court, though in the courts of this State. A might successfully defend himself in an ejectment. State courts act in the same case, and at the same time, as a court both of law and equity, which we cannot do, as the courts of the United States are, by the Constitution and laws, organized on common law principles; and though we have full common law and equity jurisdiction, we must exercise it in distinct capacities, as judges or chancellors, as the nature of the case may require.

"There are, however, cases where a court of law will not inquire whether the title of a plaintiff is legal or equitable; a tenant will not **673*]** *be allowed to dispute the title of his landlord while he holds under him; a defendant in a judgment cannot contest the title of one who holds a sheriff's deed under a sale on the judgment, nor any person who holds possession under them, by privity arising after the judgment; in all such cases the plaintiff will recover possession, so that this objection cannot be made by Mr. Joseph L. Moss or Isaac Phillips.

"So where both parties claim under the same title, neither is bound to trace theirs beyond the common source, or to show any other right than what appears there; the court will not inquire whether such title is legal or equitable. The right of possesion depends on the question, in which party the title is invested. Thus, in the present case, both parties claim the right of possession to the Chestnut Street lot, under George Thompson's deed to Isaac Phillips. It is, therefore, not necessary for the plaintiff to show the nature of the title of Thompson, or to trace it through the title deeds to the first owner; the only contest between the parties being, to whom the right conveyed to Phillips has passed—and neither can call on the other for the exhibition of any other title than that under which both assert the right of possession. As to the house in Sixth Street, the case may be different, if the assignees have any claim to it, by any other than the title of J. L. Moss and Isaac Phillips, or Mr. Hanson is clothed with the character he assumes, or claims by a title adverse or independent. He has assumed the position of a *bona fide* purchaser, for a valuable consideration, without such notice as the law requires; if this position is well taken, Mr. Joseph M. Moss and David Samuel can have no interest in either piece of property, or be actors in the suit in opposition to the plaintiff in any other than a derivative right, as before stated.

"Claiming under the assignment of June, 1837, under the Orphans' Court sale, or under Mr. Hanson as a purchaser from them, their possession, if they had any, on the service of the writ, must be rightful or wrongful, as the case may be in evidence; it is, however, clear, that in their own right, by the assignment, they cannot controvert the title of Isaac Phillips and Joseph L. Moss, or call on the plaintiff to produce any other. Whether they do claim under the Orphans' Court sale, how or what they do or can claim by it, will be considered hereafter; any claim they can have under Mr. Hanson depends on the nature of his title, and how he has a right to claim, and does claim the property.

*"If he is clothed with the charac- [*674 ter he assumes—that of a purchaser of the title of Robert Phillips, in virtue of the Orphans' Court proceedings—the deed of Isaac Phillips to the assignees, and theirs to him, by a right adverse to the title of the assignees, as conveyed by the assignment, Mr. Hanson may rely on it in opposition to the equitable right of the assignors, as a distinct, independent right, passing to him in virtue of the judicial proceedings, and not in virtue of the assignment. But if he does not stand as the purchaser of an adverse title, but claims under the assignment, through the deed of the assignees founded upon it, he cannot contest the title of the assignors, even if he assumes another position as a purchaser, which is this: a purchaser from the assignees, *bona fide*, for a valuable consideration, without any notice of any fraud in the assignment. Conceding for the present, that in this position he might hold the property, though the assignment was fraudulent, he neither need, or could contest the title under which he claimed; for such as it was, his purchase would protect him from all the consequences of fraud between the assignors and assignees, unless it was affected by the plaintiff's judgment and proceedings upon it.

"The only position, therefore, in which Mr. Hanson can set up a title adverse to that of J. L. Moss and Isaac Phillips, or call on the plaintiff for any other, is as a purchaser under the Orphans' Court sale; considering him at present as so standing, the present question for consideration is, whether the legal title of the Sixth Street lot was in the heirs of Robert Phillips, or in Joseph L. Moss and Isaac Phillips as the firm of R. & I. Phillips, at the time of the judgment in January, 1838.

"The plaintiff may show a legal title, without producing a deed from Robert Phillips to R. & I. Phillips; being a purchaser at sheriff's sale, he is not supposed to have the title papers, or bound to produce, or to account for them; it is sufficient if he can prove that a deed once existed, or if he can prove such facts as will authorize a jury to presume that one had been made, if notice was given to those in whose possession it is presumed to have been, to produce it at the trial."

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And thereupon the defendants further excepted to the following matters or propositions of law contained in the said charge to the jury, to wit:

"In an ordinary case, the jury must decide from the evidence before them what facts have been proved; but in this case there is 675*] *one feature which is rather unusual, and to which it is necessary to call your special attention, as a matter which has an important bearing on some of its prominent points. Timely notice was given by the plaintiff's counsel to the counsel of the assignors and assignees, to produce at the trial the books of R. & I. Phillips; no objection was made to the competency of the notice—they were called for, but were not produced till the day after the evidence was closed, and at the moment when the court had called on the plaintiff's counsel to address the jury. No reason was assigned for their nonproduction, save the reference to the illness of Mr. Moss; but Mr. Phillips was in court; notice was given to Mr. Hanson, though none was necessary, as the books could not be presumed to be in his possession. That they could have been produced before the evidence on both sides was closed, can scarcely be doubted, when so many were produced afterwards. Their production, then, was no compliance with the notice; the plaintiff could not, without leave of the court, have referred to them; he was not bound to ask it, and had a right to proceed, as if they had not been produced.

"Mr. Hanson had a right to call for the books; claiming by an adverse title, he might have moved the court for an order to produce them, but he made no effort to procure them; we say so, because there was no evidence that he did in any way endeavor to have them produced, although the court, in their opinion on the motion for a nonsuit, plainly intimated the effect of their nonproduction.

"There has, therefore, been no satisfactory or reasonable ground assigned for their having been kept back, and the plaintiff has a fair case for calling on you to presume, whatever the law will authorize you to presume as to the contents of the books. On this subject the fifteenth section of the Judiciary Act has made this provision: 'That all the said courts of the United States shall have power, in the trial of actions at law, on motion and due notice thereof being given, to require the parties to produce books or writings in their possession or power, which contain evidence pertinent to the issue, in cases, and under circumstances where they might be compelled to produce the same by the ordinary rules of proceeding in chancery; and if a plaintiff shall fail to comply with such order to produce books or writings, it shall be lawful for the courts, respectively, on motion, to give the like judgment for the defendant, as in cases of nonsuit; and if a defendant shall fail to comply with such order to produce books or writings, it shall be lawful for the courts, respect-676*] ively, on *motion as aforesaid, to give judgment against him or her by default.' This enables courts of law to apply the same rules and principles, where papers or books are withheld, as have been adopted by courts of equity, which are these, in our opinion, as long since expressed in *Askew* v. *Odenheimer* (1 Baldwin's Rep., 388, 389.)"

And thereupon the said defendants further excepted to the following matters or propositions of law contained in the said charge to the jury, to wit:

"It must not, then, be supposed that the only effect of the suppression or keeping back books and papers, is to admit secondary evidence of their contents, or that the jury are confined, in presuming their contents, to what is proved to have been contained in them; a jury may presume as largely as a chancellor may do, when he acts on his conscience, as a jury does, and ought to do, and on the same principles.

"Mr. Bridges states that he believes there is an entry on the books of the transfer from Herring to Robert and Isaac Phillips, but don't know how the transfer was made. It is in proof, by the clerks of Robert and Isaac Phillips, that an account was open on their books with the Sixth Street lot; that the money of the firm was applied to the payment of the consideration money to Herring; one of the persons who erected the new building says he was paid by the notes and checks of the firm; a tenant proves that Joseph L. Moss rented it in the name of the firm, who furnished it to the amount of $1,000, and the tax collectors prove the payment of taxes by the firm. In opposition to this evidence, the defendants offer nothing; the books of the firm are suppressed, when they could and ought to have been produced; and the sole reliance in support of the title of Robert Phillips, is the deed from Herring. If you believe the witnesses, Robert Phillips never was the sole and real owner of this property on the first purchase; and if you think the facts stated are true, you may and ought to presume that if the books had been produced, they would have shown that the payment of the whole purchase money, and the whole expense of the improvements made on the lot, were paid by the firm; that it formed an item of their joint estate, and was so considered by the partners. You may, also, and ought to presume, that the production of the books would have been favorable to the plaintiffs, and unfavorable to the defendants, in any other aspect as bearing on the ownership of this property. On such evidence we would, as a court of equity, hold that there was such a clear equitable title in the *firm, that Robert Phillips, or his heirs, [*677 were bound, on every principle of justice, conscience, and equity, to make a conveyance, so as to make that title a legal one. And when it appears that the members of the new firm had conveyed it in trust for creditors, as their joint property, that the grantees had accepted the conveyance, and sold the property under the assignment; that the purchaser from them had accepted a deed reciting theirs, and no other title, we cannot hesitate, as judges in a court of law, in instructing you that you may presume that such a conveyance from Robert Phillips, or his heirs, has been made, as they were bound in equity and good conscience to make.

"Legal presumptions do not depend on any defined state of things; time is always an important, and sometimes a necessary ingredient in the chain of circumstances on which the presumption of a conveyance is made; it is more or less important, according to the weight of the other circumstances in evidence in the

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case. Taking, then, all in connection, and in the total absence of all proof of any adverse claim by Robert Phillips, or his heirs, from 1832, every circumstance is in favor of the presumption of a conveyance; and we can perceive little, if any weight, in the only circumstance set up to rebut it, which is the proceedings in the Orphans' Court. You will give them what consequence you may think they may deserve, when you look to the time and the circumstances under which they were commenced, carried on, and completed by a sale for $22,500, which counsel admit was not paid, and also admit that the sole object was to extinguish the mere spark of legal right remaining in Robert Phillips, or his heirs, and not because he or they had any beneficial interest in the property. If there was lawful ground for presuming the existence of a conveyance from him, or them, before November, 1837, we should think that anything accruing afterwards was entitled to no weight in rebutting such presumption: and were we in the jury box, we would think it operated the other way. It was for the interest of the assignees and assenting creditors to consider the conveyance as not made; for if it had been made previously, a non-assenting creditor to the assignment might take it under a judgment, as was done by the plaintiff, and thereby hold it, if the assignment did not pass the title; whereas, by taking the deed as not made, the Orphans' Court sale would vest the title in the assignors, and leave no legal right on which a judgment against Joseph L. Moss and Isaac Phillips could attach. As, however, this is a matter entirely for your **678*]** *consideration, we leave it to your decision, with this principle of law for your guide: that on a question whether a conveyance shall be presumed or not, the jury are to look less to the direct evidence of the fact than to the reasons and policy of the law, in authorizing them to infer that it was made if the party who was in possession of the legal title was bound in equity to convey to the real, true, equitable owner. This legal presumption is not founded on the belief alone that the fact existed, but much more on those principles which enforce justice and honesty between man and man, and tend to the security of possessions which have remained uninterested and undisturbed. Should your opinion be in conformity with ours on this point, you will presume that there was a deed from Robert Phillips, or his heirs, competent to vest the title to the Sixth Street lot in the firm of Robert and Isaac Phillips—that it so remained at the time of the assignment, and that it was by such conveyance as would enable them to enjoy the property against Robert Phillips and his heirs."

And thereupon the said defendants further excepted to the following matters or propositions of law contained in the said charge to the jury, to wit:

"Should you think otherwise, you will find accordingly; but even then your finding would not affect the merits of the case, because Mr. Hanson, or those under him, cannot make the objection of the want of a legal title, unless he stands firm in the position he assumes—that of a *bona fide* purchaser for valuable consideration, without notice, such as the law requires.

"There are two classes of purchasers of this description.

"First. Those who are thus referred to, and the requisites to clothe themselves with such character prescribed by the Supreme Court of the United States, in *Boom* v. *Chiles* (10 Peters, 210 to 212). 'It is a general principle in courts of equity, that when both parties claim by an equitable title, the one who is prior in time is deemed the better in right (7 Cranch, 18; 18 T. R., 532; 7 Wheat., 46); and that where the equities are equal in point of merit, the law prevails.' This leads to the reason for protecting an innocent purchaser, holding the legal title, against one who has the prior equity; a court of equity can act only on the conscience of a party; if he has done nothing that taints it, no demand can attach upon it, so as to give any jurisdiction. (Sugden on Vend., 722.) Strong as a plaintiff's equity may be, it can in no case be stronger than that of a purchaser *who has put himself in peril by pur- [*679 chasing a title, and paying a valuable consideration, without notice of any defect in it, or adverse claim to it; and when in addition, he shows a legal title from one seized and possessed of the property purchased, he has a right to demand protection and relief (9 Ves., 30–34), which a court of equity imparts liberally. Such suitors are its most especial favorites. It will not inquire how he may have obtained a statute, mortgage, incumbrance, or even a satisfied legal term, by which he can defend himself at law, if outstanding; equity will not aid his adversary in taking from him the *tabula in naufragio*, if acquired before a decree.

"But this will not be done on mere averment or allegation; the protection of such *bona fide* purchase is necessary only when the plaintiff has a prior equity, which can be barred or avoided only by the union of the legal title with an equity, arising from the payment of the money, and receiving the conveyance without notice, and a clear conscience.

"Second. Those who claim the character of purchasers under the 6th section of the 13th Eliz., the requisites of which are thus defined by the law: 'That this act, or anything therein contained, shall not extend to any estate or interest in lands, tenements, hereditaments, leases, rents, commons, profits, goods, or chattels, had, made, conveyed, or assumed, or hereafter to be had, made, conveyed, or assumed, which estate or interest is or shall be upon good consideration and *bona fide* lawfully conveyed or assumed to any person or persons, or bodies politic or corporate, not having at the time of such conveyance or assurance to them made any manner of notice or knowledge of such covin, fraud, or collusion as is aforesaid, anything before mentioned to the contrary hereof notwithstanding.'

"Our first inquiry must be, whether Mr. Hanson comes within the first class of such purchasers, by any evidence he has adduced.

"He claims the Chestnut Street lot under the title of Isaac Phillips, by the deed of the assignees, as the estate of Isaac Phillips, without any claim by any outstanding legal title. As to this property, then, he does not come within the first class; he relies exclusively on the deed of Thompson to Isaac Phillips, the assignment, and the deed of the assignees. He claims the

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Sixth Street lot under Robert Phillips, and not Isaac Phillips, and adduces, as evidence thereof, the following chain of title:

"The deed from Herring; the Orphans' Court proceedings: the sale under them; the deed from Isaac Phillips, the administrator, to [680*] *Joseph M. Moss and David Samuel, in the 30th January, 1838, and the deed of 10th May, 1839 (made by them pursuant to the public sale to Mr. Hanson, on the 30th April, preceding), recorded on the 23d May, 1839; and there rests his case as to the adverse title of the Sixth Street lot, as one distinct from the Chestnut Street property. On inspecting the deed for the Sixth Street lot, there is found no reference to the title of Robert Phillips, or the Orphans' Court sale; the whole recital of the title is the assignment of June, 1837, and there is no other covenant in the deed than against the acts of the grantors, who execute the deed as assignees; and not as purchasers from Isaac Phillips, of the title of R. Phillips, in virtue of the Orphans' Court proceedings.

"No evidence is offered of any agreement, or even intention to sell, or purchase, any other than the title which passed by the assignment; so that there is no obligation, legal, equitable, or moral, on the assignees, to make any conveyance of the right of Robert Phillips, unless Mr. Hanson can affect them with some fraud, or show some accident or mistake under which he accepted the conveyance. The form of this deed is in substance the same as the deed for the Chestnut Street lot; the recital of the assignment the same, and both made in the capacity of assignees. There seems no one feature of difference between the two purchases, which can make one refer to the title of Robert, and the other to Isaac Phillips; and if you believe the evidence of Mr. Blackstone, there is one fact in evidence which goes strongly to prove that he neither purchased, or intended to purchase any other title than what his deed purported to convey. Mr. B. says, that after the ejectment was served on him, he had a conversation with Mr. Hanson, and expressed some doubt about paying the rent; to which Mr. Hanson replied that the property was his, he had purchased it at auction, under the best legal advice. If this was so, and he had purchased the title of Robert, and not Isaac Phillips, or that of the firm, it is scarcely credible that he would not have been advised to at least take a deed with a reference to, and recital of that title, and that he would not have done so; on the contrary he took a deed in the form it appears, and claimed exclusively under it. By reference to the auction sale, it appears that there was no notice of the title of Robert Phillips, but the title under the assignment was stated to be good, and the sale made under it. In the absence of all explanatory evidence, the legal construction of the deed is, that it conveyed, and purported to convey no other than the [681*] *title of the assignors, and that no legal presumption can be made that any other right passed, especially when it does not appear that Mr. Hanson had, at any time before this trial, claimed under the Orphans' Court sale, or the title of Robert Phillips. On this ground alone, Mr. Hanson has failed to bring himself within the principles established by the Supreme Court, as necessary to constitute a purchaser of the first class: and there are other circumstances in the case equally conclusive to exclude him. (*Vide* 10 Peters, 211, 212.)

"We are next to consider his character as a purchaser at the assignees' auction sale of the title which is claimed to have passed by the assignment.

"The evidence of his filling this character is his bid at the auction, his acceptance as a purchaser, and the deed from the assignees, its record, his possession of the property, and claim of title by the purchaser; but no evidence is offered of the actual payment of any money, independently of the recital of the deed and the receipt at the foot of it, which is for the whole consideration, while the counsel of Mr. Hanson distinctly admit before you that only one third has been paid. There is, therefore, no pretense set up that any more was actually paid, or that the recital of the deed, or the admission in the receipt is correct; but we do not think proper to put this part of the case on the admission of counsel, as they might fairly contend that the admission should be received as made, whereby the payment of one third would be taken as part of the admission, or the whole be disregarded. It is better and safer to take the case as the law considers it, independently of any admission, and according to well established principles, as applicable to a purchase set up under the circumstances in evidence, of an estate in lands, conveyed 'upon good consideration, *bona fide* lawfully conveyed, to a person not having at the time of such conveyance any manner of notice or knowledge of such covin, fraud, or collusion' as is recited in the law. You will observe, that by the preamble and enacting clause of the English statute, all conveyances, bonds, judgments, &c., made with intent to hinder, delay, or defraud creditors, are declared actually void, although the person who accepts of them is no participator in the fraud; it is a sweeping, general denunciation of such acts as unlawful, having no effect as against the person designed to be defrauded, but good between the parties and all others; the consequence whereof is, as we have heretofore held, that the fraudulent grantor remains the legal owner of the property, not because his deed *is not binding on him, or his heirs, but [*682 the law has put it out of his power to devest himself of property, by a deed designed to defraud creditors; he therefore holds the legal title in trust for his creditors, and for the purpose of applying it to the payment of his debts, is as fully the legal owner after the conveyance as before, though as to all others the estate is in the fraudulent grantee. (1 Baldwin, 356.)

"Such is the effect of the enacting part of the statute, which would not protect the fairest of purchasers for the want of any words limiting or qualifying its imperative terms, and precludes any construction or exception; but the sixth section operates as an exception in the case provided for, which is a conveyance, &c., designed by the grantor to defraud creditors, but in which the grantee has in no way participated, or had any notice or knowledge of any fraud before the conveyance. (*Magniac* v. *Thompson* 7 Peters, 389, &c.) Mr. Hanson claims to be a purchaser of this description from the assignors under the assignment, and in virtue of the proviso in the law, claims to be

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protected; although the assignment was fraudulent between the parties, the question now to be considered is, whether, if the assignment be void, he can be in a better situation than the assignors; in deciding which, it must be assumed that the assignment is void as to creditors, unless Mr. Hanson can hold what the assignors cannot. The true inquiry, then, is, not what was the character of the assignment, but his character as a purchaser from the fraudulent grantee; for if the assignment is valid, then the plaintiff's judgment was no lien, and he can have no right. We must, therefore, see whether Mr. Hanson fills the character of a purchaser under the sixth section of the 13th Eliz., assuming the assignment to be fraudulent for the purpose of this inquiry, and this only.

"The first question is, what he is bound to prove; the general answer is at hand, that claiming under an exception to the law, he must bring himself within it, or he comes under the enacting clause; and he must prove it by other evidence than what is repudiated in the law by clear, comprehensive words, as not sufficient to take a conveyance out of it; they are 'any pretense, color, feigned consideration, expressing of use, or any other matter or thing to the contrary notwithstanding.'

"No words can better or more clearly apply to the consideration, or uses expressed in a conveyance, or other recital, averments, or declarations, which are set forth as the reasons of making it; hence it is incumbent on the party to do **683*]** more than to produce the deed *containing them; for if the mere statement of the parties imposes on a creditor the necessity of proving their falsity, he might not be enabled to do it, as the matters so recited are not within his knowledge. But if they exist, they must be known to the parties to the deed, and can be easily proved; if the law was otherwise, it would be easy, as the Supreme Court of the United States say (4 Wheat., 507), for the grantor to make out such a case by his own recital that 'there would no longer exist any difficulty in evading the rights of creditors.' The Supreme Court of this State have also established it as a rule, that whoever sets up a plea of purchase for valuable consideration, must support it by other evidence than the conveyance, or the receipt at the foot of it, which is only the acknowledgment of the grantor. We cannot better state the law on this subject, than in the words of that court in *Rogers* v. *Hall* (4 Watts, 362): 'Though in the absence of proof to the contrary, the presumption is in favor of the fairness of a transaction, yet flight and an absolute general assignment are in themselves circumstances demonstrative of fraud; and though not conclusive, they undoubtedly impose on the assignee the necessity of elucidation. He is the most cognizant of the transaction, and best able to explain it; and why should the business of explanation be laid on the creditors placed by him in the dark, though entitled to light? The question is on the existence of a valuable consideration; and it would be against a fundamental rule of evidence to burden them with the necessity of producing negative proof. The policy of handing these transactions with little attention to tenderness, is obvious and uncompromising. They are ulcers of frequent occurrence in practice, which require to be thoroug ly probed, and, if necessary, laid open to t bone, and on him be the consequences w withholds the means of doing so.

"'But the defendant claims to hold d charged of the fraud, if such there were, having, as he alleges, purchased without notice it. A decision of the question of notice is unca ed for by the circumstances, and we give no There was neither proof of valuable consider tion, nor the semblance of it; and nothing clearer than that a plea of purchase for val must be sustained by other evidence than t conveyance. Even the receipt of the debtor not proof against his creditor claiming pa mount to the debtor's grantee, inasmuch as h fraudulent conveyance is no conveyance at against the interest intended to be defraude His receipt or other acknowledgment of pa ment, therefore, is the act of a grantor, do subsequently *to a title derived from [*68 him, which, consequently, may not be prej diced by it. Now, the defendant produced not ing but the conveyance, with whatever collater evidences of payment may have been imbodi in it, or appended to it; and they fell far sho of proof of actual payment; for, giving a sec rity for the purchase money, which in practi is often the consideration for a receipt at t foot of the conveyance, is not enough to entit him to the character of a purchaser for valuab consideration, and the court properly rejecte the prayer for protection on that ground.' Watts, 362.)

"A deed is evidence of a conveyance in fac and when the payment of the consideration proved, it is *prima facie* evidence of a purcha presumed to be fair till the contrary appear unless there is something on the face of it excite suspicion.

"This rule is founded on the same soun reasons as the rule that an asserted purchas must prove the payment of the consideratio recited; for a party who alleges fraud, ought be prepared to prove it, and it is as difficult f a party claiming under a deed to prove affirm atively his *bona fides*, or want of notice, as for party claiming against it to prove the nonpa ment of the money. Hence the law has bee long and well settled, that on the production a deed of conveyance, it shall be presumed t be as to fraud, &c., what it purports on its fac to be, until some evidence is brought forwar to impeach it in some particular which the la makes a requisite to its validity. How far th evidence goes to prove the fact, which will i validate the deed, is for a jury to decide, if th court shall be of opinion that it conduces t prove it. Whatever would satisfy a jury tha the fact existed, if the law would authorize ther to presume it from the evidence, or if the cour on a demurrer to the evidence would rende judgment for the party offering it, then th burden of proof is shifted onto the party offer ing the deed, and he must bring himself withi the exception of proviso of the statute, in orde to make out a case under it. The creditor nee not offer evidence to disprove every requisite t make out a valid purchase; it suffices to throw the proof of every requisite on the alleged pur chaser, if the creditor can satisfactorily estab lish the want of one; in such case the genera principle applies, that a party who claim

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under a proviso or exception to a law, must make out a case which brings himself within it, or he comes within the enacting clause, standing in no better position than the fraudulent grantor against the rights of the creditors attempted to be defrauded. In cases of this [*685] description an important *inquiry is: had the purchaser such notice as affects his purchase unfavorably? Purchasing under the assignment, the law presumes he had notice of it and its contents, whatever it referred to, and 'of such other facts as those already known necessarily put him on inquiry for, and as such inquiry, pursued with ordinary diligence and prudence, would bring to his knowledge. But of other facts, extrinsic of the title, and collateral to it, no constructive notice will be presumed, but it must be proved.' (2 Mason, 536.) Besides, if there is anything on the face of the deed of assignment to which the law imputes fraud, or from which a jury can infer it, the purchaser has, by legal intendment, constructive notice of it, so as to impair his purchase; so as to any matter in the deed from assignees to him, the same consequences follow.

"If a purchaser has notice of a fact, he is presumed to have notice of the consequences. (4 Gill., 42.) It is in full proof that the following notice was publicly read from the rostrum, at the sale by the assignees on the 30th of April, when Mr. Hanson became the purchaser, by a note in writing signed at the time:

"'Bidders will take notice that the property on the north side of Chestnut Street, 42 feet west of Schuylkill Seventh Street, being 66 feet front by 158 feet deep, and also that on the west side of Delaware Sixth Street, between Market and Chestnut streets, formerly known as Rubicam Hotel, have been levied upon as the property of the late firm of R. & I. Phillips, and are actually advertised for sale by the sheriff, and that the right of the assignees of R. & I. Phillips to convey any title to either of said properties, is disputed and denied.

April 29, 1839. CHRISTOPHER FALLON.

"The Chestnut Street lot was advertised and sold as 'clear of all incumbrance,' 'title indisputable'—the house and lot on Sixth Street as 'clear of all incumbrance;' yet, if you believe the witnesses, here was actual notice that the title of the assignees was disputed—that there was an order for the sale of the property under a levy, and that it was then advertised for sale by the sheriff. It was, therefore, noticed of an incumbrance by some act of record which would authorize the sale—it referred to the advertisement which pointed to the nature of the incumbrance, and was in law sufficient to put Mr. Hanson on inquiry at least. And if he had pursued it with due diligence and prudence, he must have found the judgment and other proceedings of record as they appear on the transcript read, which, connected with the notice, would show an adverse claim, and by a creditor of the assignors prosecuted with great dili- [*686 gence by the plaintiffs, *contested by the assignors and assignees, and then approaching a consummation by effective process.

"It is said that this notice was not such as the law requires, to taint Mr. Hanson's purchase, because it did not specify the particular grounds on which the right of the assignors to convey was contested, by stating that the assignment was void by reason of fraud; and therefore the law holds that he is deemed to have had 'no manner of notice or knowledge of the fraud, covin, or collusion,' between the parties to the assignment, this notice not being sufficient to put him on inquiry. Yet if the law were so, it seems that this or some other notice did put him on inquiry, if he consulted counsel and purchased under their advice.

"This objection has assumed a strange aspect by the remarks of counsel, that if the written notice had contained an allegation of fraud in the parties to the assignment, a suit or prosecution for a libel would have been the consequence: while it is contended that the want of such charge makes the notice inoperative, as if the law compelled a creditor to commit a civil injury, or a public offense, in order to put a person on inquiry about the title he was about to purchase. On the other hand, if Mr. Hanson had not examined the subject fully, and satisfied himself that there was no fraud, how did it happen that when the terms of the sale were to convey a 'title clear of all incumbrance,' on any of the property, and an 'indisputable title' to the Chestnut Street lot, with actual notice of an incumbrance and dispute of the title—that he accepted of a deed with only a covenant against incumbrances by the grantors, or suffered by them, taking no security against a judgment against the assignors? If he consulted counsel on the kind of title he should take, the form of the deed, and the covenants to be inserted, and was advised to accept a deed without any covenant against the very incumbrance referred to in the notice, and to pay his money, to the amount of $36,000, on the transfer of the right of the assignees without better warranty, the client must have stated a strange case to his counsel, if he was advised that he filled the character of a *bona fide* purchaser for a 'valuable consideration, without any manner of notice or knowledge, &c.' Mr. Hanson was not bound to accept a conveyance without covenants of warranty to the extent of the terms of sale; he might repudiate the purchase on any other terms than those stated in the notice of sale by the auctioneer; and if, when he accepted such a deed as he now produces, *he shall be consid- [*687 ered by you as filling the character he assumes, we think you must presume very largely and liberally in his favor, if you think he has acted with reasonable diligence and due prudence. Under all the circumstances of the case, our view of the evidence is very different; you will, however, decide on the facts for yourselves, bearing in mind, however, that the notice was sufficient, in law, to put him on inquiry into the fraud set up, to set aside the assignment. (3 Penna., 66, 67.)

"There are other circumstances in this case which may affect the nature of Mr. Hanson's purchase, and his character as a purchaser, after the acceptance of the deed of the 10th of May, which are worthy of your consideration. The sheriff sale took place on the 20th of May, at which Mr. Fallon attended on behalf of the plaintiff, and Mr. Ingraham for the assignees. Mr. Fallon states that Mr. Ingraham gave verbal notice that the property about being sold belonged to the assignees, and had been as-

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signed to them before the judgment. Mr. Ingraham states that, on behalf of the assignees, he gave notice that the property did not belong to the defendants in the judgment at the time it was rendered, and referred to the assignment; but neither state that any notice was given, that the property selling had been conveyed by the assignees to Mr. Hanson; that he was present, or any one for him; it also appears that the deed to him was not put on record till the 23d of May, 1839. Under such circumstances, Mr. Hanson rests his case as a purchaser on his paper title, without producing a witness to prove the payment of any money, or the delivery of the deed in fact; he does not produce any evidence that it was recorded by him, or offer any reason for the omission, but asks you to presume from his paper title that he has made out all the requisities of a purchaser, such as is protected by the law from the effects of any fraud which may attach to the assignment. If he has paid one third of the purchase money, it cannot well be doubted that he can prove it affirmatively, and so of the delivery of the deed, and its being put on record by him. But he adheres to his perilous position, and asks you to presume that he has done that, of which he has offered no other proof than the acknowledgment of the assignees in the deed, and their receipt at the foot; that the grantors delivered the deed, without calling the witnesses to its execution, and that it was recorded by him as a purchaser.

"We will not say that you cannot presume **688*]** these things, and overlook *those circumstances which would authorize you to make a contrary presumption in the three particulars; but we feel bound to say that in your places we would not so presume.

"Should your opinion coincide with ours on the evidence and facts of the case, Mr. Hanson would not be considered to be the purchaser who is protected by the law, as to any of the requisities mentioned; but the consequences are the same, if he fails in any one. To be so, he must be, in your opinion, not only a purchaser without any manner of notice or knowledge of any fraud in the assignment, such as the law requires to be given to him; he must also be a purchaser for a valuable consideration, actually paid, and the property must have been *bona fide* conveyed to him, pursuant to the purchase, so that the purchase must be in all respects an absolute one, such as it purports to be. If you are not satisfied that this is the character of his purchase, and his as a purchaser, then he is in no better situation than the assignees; if you think otherwise, you may find a verdict for the defendants; if so, we must request you to find it subject to the opinion of the court on the point reserved, which is, whether if he is in fact a purchaser such as the sixth section of the law defines, he can hold the property against the plaintiff, if the assignment is fraudulent on its face. On that subject we do not think it proper now to express any opinion; it is a pure question of law, which we have not had time to examine fully during the trial, and it will better the exigency of the case to reserve it."

And thereupon the said defendants further excepted to the following matters or propositions of law contained in the said charge, wit:

"We now come to the inquiry, whether t assignment is valid or void.

"It is alleged to be fraudulent in fact, a in law. Fraud, in fact, consists in the inte tion to prevent creditors from recovering the just debts, by any act which withdraws t property of a debtor from their reach; bo parties must concur in the illegal intention. Bald., 356, 357; S. C., 7 Peters, 398, &c.) B the least degree of concert or collusion betwe the parties to an illegal transaction, makes t act of one the act of all. (4 Watts, 36 Fraud in law consists in acts which, thou not fraudulently intended, yet as their te dency is to defraud creditors, if they vest t property of the debtor in his grantee, they a void for legal fraud, which is deemed tan mount *to actual fraud, full evidence [*68 of fraud, and fraudulent in themselves. t policy of the law making the acts illegal. Bald., 356, 553.) The alleged acts of fraud a numerous, covering a large space of time, b all are offered in evidence as bearing on t assignment; they are competent evidence impeach it, if the plaintiff has satisfied you th they tend to show the intention of the parti at the time of making it. With this objec you may take into consideration whatever pr ceded or followed it, if the circumstances sho a connected chain of facts leading to, or fo lowing the assignment, and they can be in an way brought in to explain its nature and cha acter. But proof of fraud in any transactio wholly unconnected with this, or not tendin in any way to affect its fairness in fact or law ought not be regarded.

"Fraud must be brought home to this tran action, but as to acts which led to it, whic were preparatory, and with reference to it, a well as those which followed or grew out of i in order to effectuate the intention of the pa ties, they are as proper to be considered a those which took place at the time. The cha acter of a deed, or other act which affects cred itors or purchasers, may be judged of by th subsequent conduct of the parties, whic throws back light on their conduct. (5 Peters 280, &c.) You will, therefore, carry thes principles into your consideration of the vari ous acts of alleged fraud, which the plaintif has set up to invalidate this assignment. Th evidence of fraud consists, 1st, in not assign ing the Walnut Street house and lot, and fur niture. The house and lot was conveyed t Joseph L. Moss, in 1834, for the consideratio of $3,000 paid, and a mortgage of $8,000 which remained a lien on it; on the 20th March 1837, he conveyed it to David Samuel, one o the assignees, for $15,000, by deed recorde on the 21st; Samuel re conveyed to Moss o the 25th March, for the same consideration, b deed recorded on the 27th; on the 24th March 1837, Joseph L. Moss gave a warrant of attor ney to confess a judgment to John Moss fo $24,600, reciting a bond for that amount whic was not produced at the trial, on which judg ment was entered on the 27th March. On th 27th May, 1837, Joseph L. Moss made a bill o sale of his household furniture to John Mos for $3,900, in consideration of the money du on the judgment of $24,600; but no credit wa

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given for the amount of the furniture on the execution which issued upon that judgment. Notice was given to produce the bond, and 690*] prove the consideration *for which it was given, but neither was done; Joseph L. Moss continued in possession of the house and furniture, and John Moss paid one or more of the creditors of Joseph L. Moss and Isaac Phillips, who opposed their discharge under the Insolvent Act, but withdrew their opposition in consequence.

"In deciding on this transaction throughout, we must be understood as not intending, in any way, to intimate any opinion as to its effects on any controversy existing, or which may arise between Mr. John Moss and the plaintiff, or on any other creditor of R. & I. Phillips, or either; we look upon it solely with a reference to withholding the house, lot, and furniture from the assignment, as a badge, evidence, or ground of inferring fraud in the assignment, in the first place. Next, to ascertain whether Joseph L. Moss has offered any evidence to rebut the proof or presumption of fraud attending the transaction; for it is one thing whether a debt is really owing to John Moss to the amount of the judgment, and a very different thing whether Joseph L. Moss has given such evidence as he was bound to do, in order to repel the imputation of fraud in keeping this property back.

"He sets up the incumbrance upon it as a reason for not assigning it, and if there is in the evidence anything proving or conducing to prove fraud in so doing, anything from which a jury may presume fraud, he must rebut it, or the imputation may be fastened upon his conduct.

"As to the furniture, there is evidence and a strong badge of fraud in retaining possession, even if the sale was made to a purchaser, and the money proved to have been actually paid; the want of possession by the purchaser must be accounted for—it is not enough to set up family considerations; they will not suffice, unless a sheriff's sale has intervened, or some other reasons given why possession did not accompany the bill of sale. This has not only not been done, but no proof has been offered that any consideration has been paid, except that the bill of sale recites the judgment as the consideration which is set up by Joseph L. Moss as evidence that he owed the amount for which it was rendered. We will not say whether, as between John Moss and other persons, this judgment is evidence of the debt or not, without other proof, but as between Joseph L. Moss, and one of his creditors, who alleges it to be fraudulent, it is only his acknowledgment that he owed the amount, which is no evidence 691*] *between him and the plaintiff under the circumstances in this case. He has been called on to prove the consideration of this judgment, which he may be presumed to have been able to do, and has not done it, but relies solely on the record of the judgment, and proceedings upon it; as between the parties to this suit, this is not sufficient to rebut the fraud of this transaction, if there was any, or if he sets up Mr. John Moss as a purchaser of the furniture in part payment of the judgment, he must show it by something more than appears.

"As to the house, there is much unaccounted for in the change of apparent ownership in so short a space of time, especially when Mr. Samuel is an actor; he is an assignee in the assignments of March and June, in 1837; fraud is imputed to him, as well as the assignors; he and Joseph L. Moss can explain these transfers, but do not do it; they, too, rest exclusively on the papers which are in evidence, without calling a witness to explain what you will probably agree in opinion with us requires explanation. Their deeds purport to be for the consideration of $15,000 each, with receipts at the foot for the payment in full, which must be taken as true, or false; if true, why, then, was this passing of property and money from one to another in five days, we are not informed; if false, the deeds are entitled to no credit till explained.

"As to the Arch Street house and lots, it appears that the lots were conveyed to Mrs. Phillips in August, 1834, for the consideration of $1,200, and an annual ground-rent of $693, recorded on the 23d of March, 1837, the day after the execution of the New York assignment. In September, 1834, Isaac Phillips made a contract for building a house on the Arch Street lots, which was finished in the summer of 1835, at an expense exceeding $22,000, exclusive of furniture. In November, 1821, a house and lot in Locust Street was conveyed to Sarah Moss, afterwards Mrs. Phillips, who with her husband conveyed the same, on the 1st October, 1834, to Peter McCall, for $10,000. In April, 1837, Isaac Phillips conveyed his life estate in the Arch Street house and lots to John Moss, for $7,102.12, being the value of his life estate therein, as estimated at the annuity office; which sum was recited and receipted for in the deed as paid. In June following, Isaac Phillips made a bill of sale of the furniture remaining in the Arch Street house, in consideration of $5,507 paid, and possession stated at the foot of the bill of sale to have been delivered, to which was attached a schedule of certain articles *valued at $860. This sale was to [*692 Joseph M. Moss, one of the assignees.

"The assignment of June, 1837, did not embrace the house and lots in Arch Street, the furniture, or any claim by Isaac Phillips on the property as the separate estate of his wife, or for any debt due by her on account of the money expended in building the house. Though the furniture was not assigned, it was appraised as part of the assigned effects, and entered on the inventory thereof.

"In reference to these transactions, the same remarks are applicable as to the Walnut Street property; reliance is had solely on the papers produced, without any effort at explanation of what requires it; no proof is offered of the payment of any money on the bill of sale of the furniture, or of any delivery of possession to the purchaser, other than the statement at the foot. Nor is this any evidence that any money was paid on the sale of the life estate of Isaac Phillips in the house and lots, except his own acknowledgment in the deed; or any proof of what money was paid on the sale of the Locust Street lot, other than the recital and receipts of Phillips and wife; and there was no attempt to show the application of any part of it, to building, or in furnishing the house.

"These circumstances, and the withholding from record the deeds to Mrs. Phillips till after

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the declared insolvency of the firm, and their assignment of the New York effects, leave the expenditure of so large a sum on the house open to much ground for your consideration. It has been contended by defendants' counsel, that though these transactions may be open to suspicion, yet that they can effect only the property in question, and that the assignment is valid notwithstanding. This argument is good, so far as it respects the non-delivery of possession of the furniture; that may be considered as rather evidence or a badge of legal, than of actual fraud, not affecting the validity of the assignment, as a substantive cause for holding it void. But if you are of opinion that these transactions indicate an intention in the parties, assignors and assignees, to make such a disposition of the property of the assignors as to place it beyond the reach of creditors, by any other means than fair and *bona fide* sales, transfers, and dispositions of it, or by incumbrances for debts justly due, and you can trace such intention in the conduct of the parties from March till June, and that the last assignment was the carrying such intention into effect, then it is void throughout. We do not say **693*]** *that keeping back property from an assignment is alone evidence of fraud—our opinion is founded on all the circumstances of the case which are in evidence, of which one of great weight in our minds is the entire want of any attempt at explanation of matters which throw the burden of proof on the defendants. It is a bold requisition on a jury to make presumptions of facts merely from papers which contain only the declarations and recitals of the party who makes them, where direct proofs of the facts can be made if the parties desired to make it. The law makes no such presumptions in favor of the party who produces deeds, or papers, if it does not appear that he offers the best evidence of the facts which it is in his power to produce; especially if he keep back better evidence which is presumed or appears to be at his command; and a jury ought to be very cautious in making such presumptions, which may tend more to encourage than check the suppression of truth.

"The plaintiff has referred to the records of the Court of Common Pleas and the discharge of the assignees under the Insolvent Act, as evidence of fraud, which is reflected back on the assignment; you will judge how far it is proved by extraneous evidence, taking what appears on the record and papers attached to it as fully proved and operating according to its legal effect. But whatever may be your opinion of the matters so proved, or apparent on the record, you will refer them to the assignment; and though you may think there was fraud in the insolvent proceedings, you will not attach it to the assignment, unless you have reason to believe that it shows a fraudulent intention in some way connected with it, growing out of it, or tending to effectuate its object more completely.

"The composition with the opposing creditors was an improper act, and taints the conduct of the parties who made it with suspicion, which may be thrown back on the assignment, if you think it was connected with, or formed a part of the original design.

"Much has been said about the proceedings in the Orphans' Court, and were it necessary for the purposes of this case to decide all the questions which have been raised in relation to them, we should have much difficulty in doing it; for there are terms and provisions introduced into the Act of 1832, under which these proceedings were conducted, that are not to be found in preceding laws, and are of rather an unusual character as respects the jurisdiction of that court, being similar to the provisions in the insolvent law of *1826, which we have [*694 before noticed. If it was an act of Congress we should have less difficulty, but being a law of a State, affecting many titles, we would give an opinion on its construction, only in case of its being necessary to decide the merits of this case, which we think it is not, as in our opinion it cannot avail the defendants in this case, admitting the power of the court to be undoubted, to do what it has done in relation to the Sixth Street property.

"On inspecting the record of the Orphans' Court proceedings, it appears there, that in November, 1837, about a month after the discharge of Joseph L. Moss and Isaac Phillips, under the Insolvent Act, Isaac Phillips, as administrator of the estate of Robert Phillips, applied to the Orphans' Court for authority to sell the Sixth Street lot and house, for the purpose of paying a debt due to himself, amounting to more than $35,000, which, he stated in his petition, was the only debt due by Robert Phillips at his death. A sale was made in December, 1837, by the administrator, reported to and confirmed by the court; whereupon a deed was executed to Joseph M. Moss and David Samuel, the purchasers, for the consideration therein expressed and receipted for as paid, of $22,500, dated 30th January, 1838; on the back of which was a conveyance by them to Mr. Hanson, dated 10th May, 1839, for $20,300 for which a receipt was given at the foot.

"The record contains no evidence of the debt due by Robert to Isaac Phillips, except the statement of the latter in his petition, verified by his own affidavit thereto annexed; yet Mr. Bridges and Mr. Welch, two of the clerks of the firm of R. & I. Phillips, state that in the books of the firm there was an account open with each partner. The petition states the exact sum due on its date to be $35,000. A schedule attached to the insolvent petition of Isaac Phillips, states in detail the personal expenses of the members of the firm for nineteen years, in exact sums, which could not well be done without a reference to books or accounts; yet they are all suppressed, and the whole proceedings of the Orphans' Court are based on the mere statement and affidavit of Isaac Phillips, of the existence of so large a debt, when there can be little, if any doubt, that if such a debt was due, there was better evidence in the party's power.

"In looking at the deed, we find it to express the payment of $22,500 to I. Phillips, as the purchase money; yet there is nowhere found any assignment of this alleged debt by Isaac Phillips, nor any *notice of it in his [*695 schedule in the insolvent proceedings; it must be observed, too, that Robert Phillips left three surviving brothers, so that Isaac Phillips was entitled only to one third the purchase money beyond the debt justly due to himself. It ap-

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pears, too, that Joseph M. Moss, one of the assignees, and Joseph L. Moss, were securities in the administration bond, and John Moss and E. L. Moss were securities approved by the court, for the appropriation of the proceeds of the sale according to law. It also appears that, though Robert Phillips died in December, 1833, no administration was taken out on his estate till in January, 1837, after a citation from the register's office, in conformity with the law respecting collateral inheritances. Now, if we take this transaction as it purports to be on the face of the Orphans' Court proceedings, it is this, and nothing else:

"In June, 1837, Isaac Phillips and Joseph L. Moss assign to J. M. Moss and David Samuel the Sixth Street house and lot, on certain trusts as their estate, owned by them and the firm of R. & I. Phillips; in December, 1837, the assignees purchase this property from Isaac Phillips as the estate of Robert Phillips, for $22,500, take this amount from the residue of the assigned fund, pay it to Isaac Phillips in January, 1838, and in May, 1839, convey it to Mr. Hanson for $20,300, making a dead loss to the fund assigned $2,200, besides interest.

"This is the transaction as it appears on the record and deeds; if it was so in fact, how would it look when it appeared in the accounts of the assignees as trustees, when they were called on for a settlement? Would auditors, or the court, approve of such conduct?

"In our opinion, a grosser fraud could not well be imagined, and in order to avoid its imputation, the parties who set up the Orphans' Court proceedings, as giving a title to the assignees by the deed of Isaac Phillips, most distinctly admit its falsity, that no money was paid, and that the whole proceeding was got up for the purpose of extinguishing the mere legal right, which was supposed to be in Robert Phillips, and not to effect any rights against the assignment.

"This saves us the necessity of further inquiry, whether these proceedings are available to the defendants as a title distinct from, and adverse to that of the firm of R. & I. Phillips; but these proceedings furnish a salutary lesson to courts and juries not to give much credence to deeds and papers, when the parties to them keep back evidence of their true character, whereby light is excluded which would otherwise explain their nature and object.

[696*] *"If these proceedings were conducted by Isaac Phillips and the assignees, for the purpose of injuriously affecting the creditors of R. & I. Phillips, who did not assent to the assignment, they are so far void as the evidence of participation in the fraud by the assignees is sufficient on the authority of the Supreme Court of this State, in 4 Watts, 361, to make the act of one the act of all. On their own admission, it was not a real sale and purchase—no consideration was paid or stipulated to be paid; it was not intended to pass any title adverse to that of R. & I. Phillips, but merely to unite what was supposed to be an outstanding legal title, to the equitable right existing in the members of the firm. That such was the object, and no other, appears not only by the admission of all the parties now, but is manifest from the conduct of the assignees, in conveying to Mr. Hanson; for they neither recited any title derived under the Orphans' Court sale, nor professed to convey any; as between the parties, therefore, it was not a binding sale, and if the object was merely what has been declared, it must operate according to the intention with which it was made, and the legal effect of what was done. Of consequence, it cannot impair the right of the members of the firm; if the assignment is valid, the sale inures to the use of the assignees, as an extinction of any right in Robert Phillips, unless his heirs contest it; and if the assignment is void as to the plaintiff, the Orphans' Court sale does not affect his right, but inures to his use, as standing in the place of the defendants in the judgment under which he purchased.

"Having thus disposed of the matters set up by the plaintiff, in support of the allegation of actual fraud in the assignment, which is exclusively a question for your consideration, we proceed to notice the objections to its validity on the ground of legal fraud, which presents questions of law for the decision of the court.

"Of these objections, a very prominent one is, that the requiring a release from the creditors of the firm, as a condition precedent to their coming in for any portion of the property assigned, is illegal, and invalidates the assignment. If this were a new question, or was now open to examination in this court, we should be strongly inclined to hold the assignment void, as contrary to the policy of the law; but the Supreme Court of the United States have decided otherwise. In *Brashear* v. *West* they hold, that when a debtor assigned all his property for the benefit of his creditors, a stipulation for a release had been settled by the courts of this State to be valid, and that this settled *construction of the law must be fol- [*697 lowed in the courts of the United States. (7 Peters, 615, 616.) This decision is binding on you and us, as the established law of the case; you will consequently disregard any opinion of ours to the contrary, and consider the law to be settled in favor of the assignment on this point. Had the case in the Supreme Court of this State, in which the question was supposed to have been decided, been as closely examined, and that cause been argued as this has been, the result might have been different; it is, however, now too late to re-examine the question here; elsewhere I may feel at liberty to think otherwise; yet it may tend to shake too many titles held under such assignments, to interfere with them in any other way than by prospective legislation.

"But though you will take the law to be thus settled, when the assignment is of the whole of the debtor's property and effects, it is otherwise if any portion is fraudulently kept back from the assignment; should such be your opinion in this case, then the assignment would be void by the exaction of a release from the creditors, according to the opinion of the Supreme Court of this State, in 5 Rawle, 221, as well as the soundest principles of law. We, however, are not desirous of giving you any imperative instructions on any of the grounds of legal fraud on which this assignment is assailed, nor do we think it necessary to state them in detail; they arise on the face of the assignment, —they form a part of the plaintiff's case, which cannot be excluded from it, and must be de-

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cided by the court as questions of law, should your verdict on the evidence make it necessary.

"This case is an interesting and important one, not only to the parties concerned, as to the value of the property in dispute and what may be consequently involved, but, on public considerations, arising from the nature of the transactions in evidence, their character and tendency. We think it better that the case should be decided on the questions of fact involved, reserving for future consideration any matters of law not yet stated to you, which your verdict may leave for our decision, should it be for the defendants. But though every question of fact is for your consideration solely, we are not desirous of throwing on you the whole responsibility, without expressing our opinion on the result of the evidence, not as a direction to bind, but as opinion merely, which will have such weight, and such only, as you may think proper to give it. It is a painful **698*]** *task to view the transactions which are in evidence, in order to ascertain whether they are fraudulent; but it is a duty not to falter, and it will have a better effect, if there is a concurrence of opinion between the jury and the court on that question, than to have it in doubt as to either. A careful consideration of all the testimony in the case has led our minds to the conclusion, that there are such circumstances as will fully justify your finding the assignment to be invalid on the ground of its being fraudulent as to creditors in point of fact."

And inasmuch as said charges and instructions, so excepted to, do not appear upon the record, the counsel for the defendants did then and there tender this bill of exceptions to the opinion of the said court, and requested the seals of the judges to be put to the same, according to the form of the statute in such case made and provided; and thereupon the aforesaid judges, at the request of the counsel for the defendants, did put their seals to this bill of exceptions, pursuant to the aforesaid statute in such case made and provided.

HENRY BALDWIN, [L. S.]
JOS. HOPKINSON, [L. S.]

Messrs. Hubbell and *Sergeant* for the plaintiffs in error.

Messrs. Guillou and *Fallon* for the defendant in error.

Thirty-seven points were stated by the counsel for the plaintiffs in error, in which, it was alleged, the court below erred. The argument upon both sides branched out into numerous points of law which the record suggested. The reporter would take pleasure in stating all these arguments, but for the excessive length of the bills of exception and the circumstance that the decision of the court rests upon a single point in the charge of the court below, viz., the effect of the refusal to furnish books and papers, in conformity with a notice. He only mentions, therefore, such portions of the argument as bear upon that part of the charge.

Four of the points of the plaintiff in error were thus stated by his counsel.

11th. The court below erred in charging the jury that they might presume that Robert Phillips, or his heirs, had made a conveyance, vesting the legal title in the firm of R. & I. Phillips, and that it so remained at the time of the assignment, and that it was by such a c veyance as would enable them to enjoy property against Robert Phillips and his he

*12th. The court below erred in charg-[*6 ing the jury that this presumption is founded on the belief alone that the fact isted, but must more on those principles wh enforce justice and honesty between man man, and tend to the security of possessions

13th. The court below erred in charging jury that the defendant below, Hanson, under any obligation to produce the books Joseph L. Moss and Isaac Phillips, or of firm of R. & I. Phillips, and that any presu tion whatever could be made to his disadv tage by the nonproduction of them. And as against the defendant below (Hanson) in mitting evidence of their contents.

14th. The court below erred in charging jury that they had the right to presume t the production of the books would have b favorable to the plaintiff below, and unfa able to the defendants below, in every resp as bearing upon the ownership of the prope

Mr. Hubbell said:

Another defense set up by the defendants low is, that the legal title of part of the s ject of this ejectment, viz.: the Sixth St house was never vested in the assignors, R I. Phillips, and that therefore the plaintiff low, claiming under them, cannot sustain action of ejectment for that property.

His honor, the judge, charged the jury, t a conveyance of the outstanding legal title the assignors may be presumed by the jury

There is no warrant in law for the jury presume a conveyance of the legal title.

There are three ingredients commonly c curring with such presumption.

1. Time.
2. Duty.
3. Acts inconsistent with the outstanding the legal title.

There are four classes of cases in which s presumption has been made.

1. Where, in the deduction of title, the de before and after the step sought to be presu are produced, and possession has gone accord to the limitations in the latter. After thi or forty years, the chasm will be filled up presumption.

2. Deeds proper to have effected a chang alteration in a family estate, when the fam have treated it as so altered, will be presu after the lapse of many years. (Matthews Presumptive Evidence, 219.)

*3. Where the legal title is vested in [*7 trustees for a specific purpose and to convey a specified time, and the property is delive into the hands of the *cestui que trust* at specified time, a conveyance will be presu after the lapse of many years. (Matthe 220.)

4. Even where there is no express trust convey, a conveyance has been presumed two cases where the purpose of vesting the t in the trustees was temporary; the presumpt was made in one case after a hundred yea and in the other after the lapse of seve years. But these cases are considered of qu tionable authority. (Matthews, 225.)

Where lands are conveyed to trustees wi out any expressed or manifest object, requir

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he separation of the legal and equitable estates nd the beneficial enjoyment continues from he first in the same persons or their privies, nd there is nothing in this enjoyment incon-istent with the outstanding of the legal estate, o lapse of time will establish the presumption f a conveyance by the trustee of the legal tate to the *cestui que trust*. (Matthews, 228.)

If there had been, in the present case, a duty o convey, of which there was no evidence, still o ingredient of time was wholly wanting. he conveyance to Robert Phillips was in 1832, nd the sale under the judgment in 1839—an in-rval of but seven years: a period far short of e statute of limitations, which seems to fur-ish, except under extraordinary circumstances, e minimum of time necessary to such pre-mption. (13 Johns., 513; 7 Wheat., 59, 108; Wheat., 581; 2 Wend., 1; 5 Taunt., 170.)

The court further charged the jury, that the dmission of secondary evidence to prove the ntents of the books was not the only effect of eir suppression, but that they ought to pre-me that the production of the books would ve been favorable to the plaintiffs and un-vorable to the defendants in any other aspect bearing on the ownership of the property; at the court would, as a court of equity, hold such evidence that there was such a clear uitable title in the firm, that Robert Phillips r his heirs were bound, on every principle of stice, conscience, and equity, to make a con-yance so as to make that title a legal one; nd that the jury might presume as largely as a ancellor might do.

Our objections to this charge may be subdi-ided into

1st. The error in charging that the plaintiff elow had any right to call for the production f these books, or that the effect of the notice [701*] *and non-compliance with it was any-ing more than to admit him to produce econdary evidence of their contents.

2d. The error in charging the jury that anson was in anywise to be affected by the nproduction, or that he was under any ob-gation to resort to the act of Congress to com-l their production, or that he or the plaint-f below could compel their production under e act of Congress.

The act of Congress only compels a party to roduce books or papers which contain evi-nce pertinent to the issue, in cases and under rcumstances where he might be compelled o produce the same by the ordinary rules of roceedings in chancery.

To the rules of chancery we must resort to now under what circumstances chancery com-ls the production of books and papers. ergeant's Constitutional Law, 158, 159.)

The party requiring the production of books nd papers must show right, property, or in-erest in them. (2 Coxe's Chancery Cases, 02; 1 Coxe's Chancery Cases, 277, 365; 4 ohns. Chan. Cases, 382.)

The party requiring the production of books nd papers must obtain a rule on the opposite arty to produce them, which must be sup-orted by affidavit, showing that they are n the possession of the party required to roduce them; that they contain evidence ertinent to the issue, and that all the ircumstances exist which would induce a court of chancery to direct their produc-tion. And the party required to produce them may deny all this by counter-evidence on the trial. (4 Wash. C. C. Rep., 126; 3 Wash. C. Rep., 582; *United States* v. *Twenty Packages of Goods*, 1 Gilpin, 306.)

The party required to produce, is, upon every principle of chancery practice, entitled to deny upon his own oath, the whole of the allegations upon which their production is sought, to explain any entries found in the books, &c. (2 Penn. Rep., 139; Hare on Dis-covery, ch. 2, sec. 6, pp. 228, 238; 2 Chitty's Eq-uity Digest, 1129, where the whole is reviewed.)

The court must rely on the oath of the party required to produce, as to the relevancy of the books; also, as to what parts are material. (Hare on Discovery, 230.) He may seal up such parts as he declares to be immaterial. (Hare on Discovery, 230; 1 Swanston, 539.)

But we particularly complain of this error as affecting Mr. Hanson, who had not the custody of the books, against whom they would not have been evidence if produced. He could not have made the affidavit required to enforce their production, and he could not have *enforced the penalty given by [*702 the act of Congress for their nonproduction, viz., judgment against the recusant party.

Mr. Guillou, for the defendant in error:

In vindication of the charge of the court, that the jury might presume a deed from R. Phillips to R. & I. Phillips, cited, 11 East, 56; 4 Durn. & East, 682; 1 Caines, 457; 3 Watts, 167; 10 Serg. & Rawle, 389, 391; 7 Wheat., 110; 2 Wendell, 13, 15; 12 Ves., 24, 251, *note;* 6 Bingh., 180; 5 Barn. & Ald., 233; 19 Johns., 345; 8 East, 263. And further to sustain the court in leaving it optional with the jury, 9 Wheat., 486; 4 Dallas, 132; 1 Yeates, 82.

Mr. Fallon, on the same side, after directing his attention to other points of the case, said:

We wanted the books to show, amongst other things, that the Sixth Street house was purchased with the partnership funds, in which case it became partnership property. (1 Sumner, 182; 2 Wash. C. C. R., 441; 7 Serg. & Rawle, 438.)

Mr. Sergeant, in reply and conclusion:

Hanson never had the books, and yet is made responsible for their not being produced. The notice was to produce the books of a firm carrying on a very extensive business, running through six years, and tax receipts for eight years. In the courts of the United States a party can choose one of three modes.

1. A common law notice.
2. A proceeding in equity for papers.
3. An affidavit and rule under the Judiciary Act.

This was a common law notice exclusively. As such, it only gave the party a right to use secondary evidence by proving the contents of papers. The law presumes that a party knows what he wants, and allows him to call for it, but does not give him the power, under a drag-net notice like this, to bring up the books and papers of six years' accumulation. Can it be that a party, without affidavit, without an order of court, without specification, shall be entitled to have a cart load of papers brought into court, many of them of a private char-acter, and open to the inspection of every-

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body? If this was the rule, the act of Congress must have been passed to restrain it; otherwise it would both be insufficient and intolerable.

The charge says, where papers are suppressed by a party it is a ground of suspicion. This is true in a chancery proceeding. But 703*] *there is no spoliation of papers in this case, nor is the notice to be brought under the chancery head; neither is it under the act of Congress. There is no affidavit, no order of court, no hearing of the party.

It has been already argued that before a presumption can be raised circumstances and time must justify it. *It is in favor of possession and time. Supposing, here, that Robert Phillips bought the property with the partnership funds, and thereby became a trustee for the firm, where is there any ground to presume an end of the trust? The presumption would be to the contrary, that he was to hold it as long as both parties agreed.

Mr. Justice WAYNE delivered the opinion of the court:

The defendants in this case having failed to produce on the trial of it certain books of original entry, day books, &c., of the late firm of R. & I. Phillips, which had been called for by a regular notice, the court permitted the plaintiff to give secondary evidence of their contents. The object of the plaintiff in introducing the secondary evidence was to prove that the legal title to the Sixth Street property was in R. & I. Phillips, the defendants having previously introduced a deed to that property from R. J. Herring and wife, dated the 9th June, 1832, to Robert Phillips.

The partners of the firm of R. & I. Phillips were Robert Phillips and Isaac Phillips. That firm, however, was dissolved by the death of Robert Phillips in 1833. The survivor then took into partnership Joseph L. Moss, and the new firm traded under the style of the original firm of R. & I Phillips.

The court, in reference to the refusal of the defendants to produce the books, and to the secondary evidence which had been given of their contents in respect to the Sixth Street property, charged the jury that, "In an ordinary case, the jury must decide, from the evidence before them, what facts have been proved; but in this case there is one feature which is rather unusual, and to which it is necessary to call your special attention, as a matter which has an important bearing on some of its prominent points. Timely notice was given by the plaintiff's counsel to the counsel of the assignors and assignees, to produce at the trial the books of R. & I. Phillips; no objection was made to the competency of the notice; they were called for, but were not produced till the day after the evidence was closed, and at the moment when the court had called on the plaintiff's counsel to address the jury. No reason was assigned for their non-
704*] production, *save the reference to the illness of Mr. Moss; but Mr. Phillips was in court; notice was given to Mr. Hanson, though none was necessary, as the books could not be presumed to be in his possession. That they could have been produced befere the evidence on both sides was closed can scarely be doubted, when so many were produced afterward Their production, then, was no complian with the notice; the plaintiff could not, wit out leave of the court, have referred to the he was not bound to ask it, and had a right proceed, as if they had not been produced.

"Mr. Hanson had a right to call for t books; claiming by an adverse title, he mig have moved the court for an order to produ them, but he made no effort to procure the we say so, because there was no evidence th he did in any way endeavor to have them pr duced, although the court, in their opinion the motion for nonsuit, plainly intimated t effect of their nonproduction.

"There has, therefore, been no satisfactory reasonable ground assigned for their having be kept back, and the plaintiff has a fair case f calling on you to presume whatever the law w authorize you to presume as to the contents the books. On this subject the fifteenth se tion of the Judiciary Act has made this pr vision: 'That all the said courts of the Unit States shall have power, in the trial of actio at law, and on motion and due notice there being given, to require the parties to produ books or writings in their possession or pow which contain evidence pertinent to the issu in cases and under circumstances where th might be compelled to produce the same the ordinary rules of proceeding in chancer and if a plaintiff shall fail to comply with su order to produce books or writings, it shall lawful for the courts, respectively, on motio to give the like judgment for the defendant, in cases of nonsuit; and if a defendant sh fail to comply with such order to produ books or writings, it shall be lawful for t courts, respectively, on motion as aforesaid, give judgment against him or her by defaul This enables courts of law to apply the sa rules and principles, where papers or books withheld, as have been adopted by courts equity, which are these, in our opinion, long since expressed in *Askew* v. *Odenheimer* Baldwin Rep., 388, 389)."

"It must not, then, be supposed that t only effect of the suppression or keeping ba books and papers is to admit secondary e dence of their contents, or that the jury confined, in presuming their contents, to wh is proved to have been contained in them; *jury may presume as largely as a [*70 chancellor may do, when he acts on his co science, as a jury does, and ought to do, a on the same principles.

"Mr. Bridges states that he believes there an entry on the books of the transfer fro Herring to Robert & Isaac Phillips, but do know how the transfer was made. It is proof, by the clerks of Robert & Isaac Phillip that an account was open on their books wi the Sixth Street lot; that the money of t firm was applied to the payment of the co sideration money to Herring; one of the p sons who erected the new building says he w paid by the notes and checks of the firm; tenant proves that Joseph L. Moss rented in the name of the firm, who furnished it to t amount of $1,000, and the tax-collectors pro the payment of taxes by the firm. In oppo tion to this evidence, the defendants offer no ing; the books of the firm are suppresse

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when they could and ought to have been produced; and the sole reliance in support of the title of Robert Phillips is the deed from Herring. If you believe the witnesses, Robert Phillips never was the sole and real owner of this property on the first purchase; and if you think the facts stated are true, you may and ought to presume, that if the books had been produced they would have shown that the payment of the whole purchase money, and the whole expense of the improvements made on the lot, were paid by the firm; that it formed an item of their joint estate, and was so considered by the partners. You may, also, and ought to presume, that the production of the books would have been favorable to the plaintiff, and unfavorable to the defendants, in any other aspect as bearing on the ownership of this property. On such evidence we would, as a court of equity, hold that there was such a clear equitable title in the firm, that Robert Phillips, or his heirs, were bound, on every principle of justice, conscience, and equity, to make a conveyance so as to make that title a legal one. And when it appears that the members of the new firm had conveyed it in trust for creditors, as their joint property, that the grantees had accepted the conveyance, and sold the property under the assignment; that the purchaser from them had accepted a deed reciting theirs, and no other title—we cannot hesitate, as judges in a court of law, in instructing you that you may presume that such a conveyance from Robert Phillips, or his heirs, has been made, as they were bound in equity and good conscience to make.

"Legal presumptions do not depend on any [*706] defined state of things; *time is always an important, and sometimes a necessary ingredient in the chain of circumstances on which the presumption of a conveyance is made; it is more or less important, according to the weight of the other circumstances in evidence in the case. Taking, then, all in connection, and in the total absence of all proof of any adverse claim by Robert Phillips, or his heirs, from 1832, every circumstance is in favor of the presumption of a conveyance; and we can perceive little, if any weight, in the only circumstance set up to rebut it, which is the proceedings in the Orphans' Court. You will give them what consequence you may think they may deserve, when you look to the time and the circumstances under which they were commenced, carried on, and completed by a sale for $22,000, which counsel admit was not paid, and also admit that the sole object was to extinguish the mere spark of legal right remaining in Robert Phillips or his heirs, and not because he or they had any beneficial interest in the property. If there was lawful ground for presuming the existence of a conveyance from him, or them, before November, 1837, we should think that anything accruing afterwards was entitled to no weight in rebutting such presumption: and were we in the jury box, we would think it operated the other way. It was for the interest of the assignees and assenting creditors to consider the conveyance as not made; for if it had been made previously, a non-assenting creditor to the assignment might take it under a judgment, as was done by the plaintiff, and thereby hold it, if the assignment did not pass the title; whereas, by taking the deed as not made, the Orphans' Court sale would vest the title in the assignors, and leave no legal right on which a judgment against Joseph L. Moss and Isaac Phillips could attach. As, however, this is a matter entirely for your consideration, we leave it to your decision, with this principle of law for your guide: that on a question whether a conveyance shall be presumed or not, the jury are to look less to the direct evidence of the fact than to the reasons and policy of the law, in authorizing them to infer that it was made, if the party who was in possession of the legal title was bound in equity to convey to the real, true, equitable owner. This legal presumption is not founded on the belief alone that the fact existed, but much more on those principles which enforce justice and honesty between man and man, and tend to the security of possessions which have remained uninterested and undisturbed. Should your opinion be in conformity with ours on this point, you will presume that there was a deed from Robert Phillips *or his heirs competent to vest [*707 the title to the Sixth Street lot in the firm of Robert & Isaac Phillips; that it so remained at the time of the assignment, and that it was by such conveyance as would enable them to enjoy the property against Robert Phillips and his heirs."

It appears, then, that the court made the refusal of the defendants to produce the books, the secondary evidence of their contents, and other evidence in the cause, the basis upon which it gave the foregoing instructions to the jury. The defendants excepted to them.

The inquiries therefore arising are: had a case been made, which authorized the court, as a matter of law, to give an opinion to the jury, that the facts proved would justify the presumption of a deed; and, if not, were the instructions given in terms which left the jury to make the inference from the evidence alone, unaffected by considerations which it is not the province of a jury to indulge, that the legal title to the Sixth Street property was in the late firm or R. & I. Phillips?

This property may be the partnership estate of the original firm of R. & I. Phillips, without the legal title being in the copartnership or in either of the partners. A deed was in evidence that the legal title had been made to Robert Phillips. The plaintiff wished to show that Robert Phillips had conveyed it, before he died, to the firm, or that there were circumstances in the case which raised the presumption that he had done so. No evidence was given to show that Robert Phillips had made such a conveyance. On the contrary, as the case stood, the proof was, that R. J. Herring and wife had conveyed the Sixth Street property to Robert Phillips, by deed dated the 9th June, 1832. The deed was in evidence. The plaintiff then proceeded to give secondary evidence of the contents of the books, which the defendants had refused to produce. That secondary evidence, as it is stated in the instruction, is, that "Mr. Bridges states that he believes there is an entry on the books of the transfer from Herring to Robert & Isaac Phillips, but don't know how that transfer was made. It is in proof, by the clerks of Robert & Isaac Phillips, that an account was open on

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their books with the Sixth Street lot: that the money of the firm was applied to the payment of the consideration money to Herring. One of the persons who erected the new building says he was paid by the notes and checks of the firm; a tenant proves that Joseph L. Moss rented it in the name of the firm, who furnished it to the amount of $1,000; and the tax-collectors prove the payment of the taxes by the firm." **708*]** Such is the proof, and *the only proof in the cause to show that the legal title to the Sixth Street property was in the late firm of R. & I. Phillips. It may justify the inferences in the court's instructions, that Robert Phillips never was the sole and real owner of this property on the first purchase; that, if the books had been produced, it would have been shown that the consideration money for the lot was paid by the firm; that all the improvements were paid for by the money of the firm; that it formed a part of their joint estate; that they so considered it, and that Robert Phillips was bound in equity and good conscience to make a title to the firm; but the evidence is certainly deficient in those particulars which, according to the established law, will permit the presumption of a deed by a jury, as a matter of direction from the court. Before a court can instruct a jury to presume a grant or deed for land, time or length of possession must be shown, which, of itself, in certain cases, and in other cases, in connection with circumstances, will induce the presumption of a grant as a matter of law, or as a legal effect from evidence, which the jury is instructed to make, if in its consideration of the evidence the jury believe it to be true. Or when the presumption in fact as to a legal title is founded upon the principle of *omnia rite esse acta*. Supposing, then, that the court did not intend to instruct the jury that the legal effect of the evidence was to raise the presumption of a deed; we will now inquire, what effect the refusal to produce books and papers under a notice has upon the point which a party supposes they would prove. The refusal to produce books, under a notice, lays the foundation for the introduction of secondary evidence. It affords neither presumption nor *prima facie* evidence of the fact sought to be proved by them. A party cannot infer from the refusal to produce books which have been called for, that if produced they would establish the fact which he alleges they would prove. The party in such a case may give secondary evidence of the contents of such books or papers; and if such secondary evidence is vague, imperfect, and uncertain as to dates, sums, boundaries, &c., every intendment and presumption as to such particulars shall be against the party who might remove all doubt by producing the higher evidence. (*Life and Fire Insurance Co. of N. Y.* v. *Mech. Fire Insurance Co.*, 7 Wend., 33, 34.)

All inferences shall be taken from the inferior evidence most strongly against the party refusing to produce; but the refusal itself raises no presumption of suspicion or imputation to the discredit of the party, except in a case of spoilation or equivalent suppression. There the **709*]** *rule is that *omnia præsumantur contra spoliatorem*. In other words, with the exception just mentioned, the refusal to produce books or papers upon notice is not an independent element from which anything can be inferred as to the point which is sought to be proved by the books or papers. Nor can any views of policy growing out of the refusal be associated with the secondary evidence to enlarge the province of the jury, to infer or presume the existence of the fact to which the evidence relates. For considerations of policy being the source, origin, and support of artificial presumptions, having no application to conclusions as to actual matter of fact, the finding of a jury in conformity with such consideration and not according to their actual conviction of the truth, resolves itself in a rule of presumption of law.

Apply these principles to the instruction and we find that the court, under a notice at common law to produce books and papers, and the refusal to produce them, without any other foundation having been laid to permit secondary evidence to be given of the existence of a deed which had not been specifically called for and the destruction or loss of which had not been alleged, permitted the plaintiff to give secondary evidence that a deed had been made and upon his failure to do so, instructed the jury that it "must not be supposed that the only effect of the suppression or keeping back books and papers is to admit secondary evidence of their contents, or that the jury are confined, in presuming their contents, to what is proved to have been contained in them. The jury may presume as largely as a chancellor may do, when he acts on his conscience as a jury, does and ought to do, and on the same principles." And further, after reciting the evidence which the court thought led to its conclusion, the court says: "Upon such evidence we would, as a court of equity, hold that there was such a clear equitable title in the firm, that Robert Phillips or his heirs were bound on every principle of justice, conscience and equity to make a conveyance, so as to make the title a legal one." To which the court adds: "When it appears that the members of the new firm had conveyed it in trust for creditors, as their joint property; that the grantees had accepted the conveyance and so the property under the assignment; that the purchaser from them had accepted a deed reciting theirs and no other title; we cannot hesitate as judges in a court of law, in instructing you that you may presume that such a conveyance from Robert Phillips or his heirs had been made as they were bound in equity and good conscience to make." "Legal presumptions *do not depend on any defined [*710 state af things; time is always an important and sometimes a necessary, ingredient in the chain of circumstances on which the presumption of a conveyance is made; it is more or less important according to the weight of the other circumstances in evidence in the case. Taking then, all in connection, and in the total absence of all proof of any adverse claim by Robert Philips or his heirs, from 1833, every circumstance is in favor of the presumption of a conveyance." And the instruction finally concludes with this direction: "As, however, this is a matter entirely for your consideration, we leave it to your decision with this principle of law for your guide, that on a question whether a conveyance shall be presumed or not, the ju

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are to look less to the direct evidence of the fact than to the reasons and policy of the law, in authorizing them to infer that it was made, if the party who was in possession of the legal title was bound in equity to convey to the real, true and equitable owner. This legal presumption is not founded on the belief alone that the fact existed, but much more on those principles which enforce justice and honesty between man and man, and tend to the security of possessions which have remained undisturbed. Should your opinion be in conformity with ours on this point, you will presume that there was a deed from Robert Phillips or his heirs, competent to vest the title to the Sixth Street lot in the firm of Robert & Isaac Phillips, that it so remained at the time of the assignment, and that it was by such conveyance as would enable them to enjoy the property against Robert Phillips and his heirs."

Supposing, then, the term "legal presumption" to have been used in its known professional sense, it is obvious that the court did not mean it to be one that was absolute and conclusive, but one of law and fact. If the latter, we have already said such a presumption did not arise under the evidence, and the conclusion must be that the construction did not leave the jury to presume, from the evidence alone, that a conveyance had been made of the Sixth Street property by Robert Phillips, which vested the legal title to it in the late firm of R. & I. Phillips. We think the exception taken to these instructions must be sustained, and direct the judgment to be reversed.

In the consideration of this case, the court has not forgotten that there were many other points in the cause which were argued with great learning and ability. The court, how-[*711] ever, abstains from *noticing them, and directs that its opinion should be exclusively confined to the instructions which have been considered.

ORDER.

This cause came on to be heard on the transcript of the record from the Circuit Court of the United States for the Eastern District of Pennsylvania, and was argued by counsel; on consideration whereof, it is now here ordered and adjudged by this court, that the judgment of the said Circuit Court in this cause be, and the same is hereby reversed, with costs; and that this cause be, and the same is hereby remanded to the said Circuit Court, with directions to award a *venire facias de novo*.

Cited—13 How., 147.

THE BANK OF THE UNITED STATES, *Plaintiff in Error,* v. THE UNITED STATES.

United States liable in damages under Maryland statute on nonpayment of bill of exchange drawn on France and negotiated by Bank of U. S.

By a treaty between the United States and France, the latter agreed to pay to the former a certain sum of money, the first installment of which became due on the second of February, 1833.

The Secretary of the Treasury, under a power conferred by Congress, drew a bill of exchange upon the French government, which was purchased by the Bank of the United States.

Not being paid upon presentation, it was protested and immediately taken up by bankers in Paris, for the honor of the bank.

The bill is not liable to objection as being drawn upon a particular fund.

The United States, as drawers, are responsible to the bank for fifteen per cent. damages, under a statute of Maryland, which allows that amount to the holder of a foreign protested bill.

When the bankers in Paris took it up and charged the amount of the bill to the bank, in their account with it, the bank became thereby remitted to its original character as holder and payee.

Under the law merchant, the drawer of a foreign bill of exchange is liable, in case of protest, for costs and other incidental charges, and also for re-exchange, whether direct or circuitous. The statute of Maryland, allowing fifteen per cent., fixes this in lieu of re-exchange, to obviate the difficulty of proving the price of re-exchange.

When the bank came into possession of the bill, upon its return, the indorsements were in effect stricken out, and the bank became, in a commercial and legal sense, the holder of the bill.

THIS case was brought up by writ of error from the Circuit Court of the United States for the District of Pennsylvania.

*The facts in the case were these: [*712

By the second article of the Convention of 4th of July, 1831, between the United States and France, which was ratified on 2d of February, 1832, 25,000,000 of francs, with interest at the rate of four per cent. per annum, were payable, at Paris, in six annual installments, into the hands of such person or persons as should be authorized by the government of the United States to receive it, the first installment to be paid at the expiration of one year next following the exchange of the ratifications. It was further agreed, however, by the treaty, that the sum of 1,500,000 francs should be reserved by France for purposes therein stated.

On the 13th of July, 1832, Congress passed an act by which it was made the duty of the Secretary of the Treasury to cause the several installments, with the interest thereon, payable to the United States in virtue of the said convention, to be received from the French government and transferred to the United States in such manner as he might deem best, and the net proceeds thereof to be paid into the treasury.

In October and November, 1832, and January, 1833, a correspondence took place between Louis McLane, Secretary of the Treasury, and Nicholas Biddle, president of the Bank of the United States, upon the best means of transferring to the United States the first installment, which would become due on the 2d of February, 1833. Mr. Biddle offered to purchase the bill at the rate of five francs thirty-two and a half centimes to the dollar, which would have yielded to the government $912,050.77, but this offer was declined by the secretary. Subsequently, on the 30th of January, 1833, a negotiation was concluded at the rate of exchange of five francs thirty-seven and a half centimes to the dollar, and the following bill was drawn:

NOTE.—*As to acceptance and payment of a bill for honor*, see note to Connig v. Bayard, 1 Pet., 250. *As to United States as a party to bills and notes, rights and liabilities of*, see note to United States v. Barker, 12 Wheat., 559.

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[L. S.] TREASURY DEPARTMENT OF THE UNITED STATES, WASHINGTON, February 7th, 1833.

SIR: I have the honor to request, that at the sight of this, my first bill of exchange (the second and third of the same tenor and date unpaid), you will be pleased to pay to the order of Samuel Jaudon, cashier of the Bank of the United States, the sum of 4,856,666 francs and 66 centimes; which includes the sum of $3,916,666.66, being the amount of the first install-
713*] ment to be paid *to the United States under the convention concluded between the United States and France, on the 4th of July, 1831 (after deducting the amount of the first installment to be reserved to France, under the said convention), and the additional sum of 940,000 francs, being one year's interest at four per cent. on all the installments payable to the United States, from the day of the exchange of the ratifications to the 2d of February, 1833.

I have the honor to be, with great respect, your obedient servant,

(Signed) LOUIS MCLANE.

MR. HUMANN,
Minister and Secretary of State for the Department of Finance, Paris.

E. 2682—Mem.

Total amount of indemnity payable to the United States -	25,000,000 00
Less amount of indemnity to be reserved to France - - -	1,500,000 00
	23,500,000 00
1 year's interest from 2d Feb., 1832, to 2d Feb., 1833, at four per cent. - - - - - - - -	940,000 00
First installment payable to the United States, - - - - -	3,916,666 66
Amount of the bill - - - - -	4,856,666 66

This bill was purchased by the Bank of the United States on the 11th of February, 1833, at the above mentioned rate of exchange of five francs and thirty-seven and a half centimes to the dollar, and the amount of $903,865.89 carried to the credit of the Treasurer of the United States, which sum was increased on the 9th of March, by adding $200 for a short credit given, thus making altogether the sum of $903,565.89.

The bill was accompanied by a power from the President of the United States, authorizing Samuel Jaudon to receive the amount of the bill, and to give full receipt and acquittance to the government of France.

The bill was indorsed:

Pay to the order of Messrs. Baring, Brothers & Co., of London.

(Signed) S. JAUDON,
Cashier of the Bank of the United States.

714*] *Pay to the order of N. M. Rothschild, Esq., value received.

(Signed) BARING, BROTHERS & Co.
London, 19th March, 1833.

Pay to Messrs. De Rothschild, Brothers, or their order, value in account.

(Signed) N. M. ROTHSCHILD.
London, 19th March, 1833.

It was presented for payment on the 22d March, 1833, at the office of Mr. Humann, laws of France not allowing any days of gr The answer of the cashier of the central mo chest of the public treasury was, "that ha had the orders of the minister, Secretary State for the Department of Finance, he instructed to say that diplomatic treaties, wh impose engagements on the French treasury be discharged, do not become obligatory u it until the Chambers have sanctioned financial dispositions which are therein braced. Therefore, the treaty concluded w the United States, not being yet sanctioned the Legislature, the minister of finance can at present make any payment to avail upon obligations contracted by the said treaty."

The notary further states, that immediate after the protest Messrs. Hottinguer & Co bankers, intervened for the account of M Samuel Jaudon, cashier of the Bank of t United States, and agreed to pay the amount the bill and costs.

On the 30th of March, 1833, Hottinguer Co. made up the following account against t bank:

Statement of the payment and charges made Hottinguer & Co., of Paris, on a bill 4,856,666 66, drawn by the Secretary the Treasury of the United States upon Humann, minister of finance, protested f nonpayment, and which they paid for t honour of the signature and for account of Jaudon, cashier of the Bank of the Unit States of America.

F.	4,856,666 66	amount of the bill.
	24,283 33	commission half per cent.
F.	4,880,949 99	
	3,399 90	stamp.
	27 65	protest and translation.
	14 45	second and third of prote and legalization.
	35 00	paid to American Consul Havre, expenses for t document to be copi upon his books.
F.	4,884,427 99	

*Say four million eight hundred and [*71 eighty-four thousand four hundred and twent seven francs and ninety-nine centimes, whic we place to the debit of the Bank of the Unit States, due 22d March, 1833.

Errors excepted. HOTTINGUER.
Paris, 30th March, 1833.

On the 26th of April, 1833, the bank receive information of the fate of the bill, and o the same day informed the Secretary of t Treasury that they would hold him responsib for principal, interest, costs, damages, and e change.

On the 18th of May, 1833, the bank forwar ed to the Secretary the following account:

BANK OF THE UNITED STATES, May 13, 183 Account of return, with protest for nonpa ment, of a bill of exchange drawn by Lou McLane, Secretary of the Treasury, date Treasury Department of the United State Washington, February 7th, 1833, at sigh to the order of Samuel Jaudon, cashier of t Bank of the United States, on M. Humann

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minister and Secretary of State for the Department of Finance, Paris:

Principal due, March 22, 1833,	fr. 4,856,666 66	
Costs of protest, as per Messrs. Hottinguer & Co.'s account of charges herewith, exclusive of their commission, which is covered by the damages charged below - -	3,478 00	
	4,860,144 66	
Interest from March 22d (the date of protest), to May 13th, fifty-two days - - - - -	42,121 25	
Damages on fr. 4,856,666 66 at 15 per cent. - - - - -	728,500 00	
	5,630,765 91	

Which, at 5.30, the current rate of exchange for a bill, at sight, on Paris, is $1,062,408.66, due in cash this day, with interest until paid.

On the 16th of May, 1833, the secretary replied that the proceeds of the bill had not been brought into the treasury by warrant, and therefore he had it in his power to return the amount immediately to the bank; which was accordingly done, and on the 18th of May the bank debited the United States upon its books with the sum of $903,565.89, being the exact sum for which the bill had been bought.

716*] *On the 24th of May, 1833, the Attorney-General of the United States addressed the following letter to the Secretary of the Treasury:

ATTORNEY-GENERAL'S OFFICE, May 24, 1833.

SIR: I have carefully examined the claims presented by the Bank of the United States, on account of the protest of the bill of exchange drawn by you on the French government for the first installment and interest due the United States, under the convention with France of July 4, 1831.

The account stated by the bank, if supported by proper vouchers, appears to be correct, with the exception of the claim of fifteen per cent. damages on the amount of the bill. This item, in my opinion, has no foundation in law or in equity, and ought not to be paid by the government. The bank is entitled to indemnity, and to nothing more.

I will take another occasion to state to you the reasons on which my opinion is formed, and am very respectfully,

your obedient servant,

(Signed) R. B. TANEY.

To the Secretary of the Treasury.

On the 7th of July, 1834, the bank declared a dividend of three and a half per cent. on its capital stock, which, upon 66,692 shares held by the United States, amounted to $233,422.

On the 10th of April, 1835, the Secretary of the Treasury drew upon the bank for the difference between this sum and the amount which the bank claimed to hold for the purpose of paying itself the damages on the protested bill, being as follows:

Amount of dividend - - - -	$233,422
Claimed by the bank on that day	170,041 18
Amount drawn for by Secretary of the Treasury - - - - -	$63,380 82

On the 29th of July, 1837, the first auditor of the treasury stated an account with the bank, in which he sanctioned the principle of all the claims of the bank, except that for fifteen per cent. damages, saying that the costs and charges for stamp, protest, &c., together with the charge of Hottinguer for commission, were disallowed "for want of vouchers merely," but, if properly vouched, would be admissible.

The United States brought a suit against the bank on the second of March, 1838, for the withheld portion of the dividend, being $170,041.18, with interest. The bank claimed a set-off as follows:

*Amount claimed in letter of 13th May, 1833, - -	[*717 $1,062,408.66
Refunded by the United States, - - -	903,565.89
Amount of set-off, -	$158,842.77

with interest from 13th of May, 1833.

The bill having been drawn in that part of the District of Columbia where the laws of Maryland, anterior to the cession, were in force, the following statute of that State, a knowledge of which is necessary to understand the points raised in the bill of exceptions, is transcribed:

"November, 1785. Chap. 38.

An Act ascertaining what shall be recovered on protested bills of exchange, and to repeal an act of Assembly therein mentioned.

"Be it enacted by the General Assembly of Maryland, That upon all bills of exchange hereafter drawn in this State on any person, corporation, company, or society, in any foreign country, and regularly protested, the owner, or holder of such bill, or the person or persons, company, society, or corporation, entitled to the same, shall have a right to receive and recover so much current money as will purchase a good bill of exchange of the same time of payment, and upon the same place, at the current exchange of such bills, and also fifteen per cent. damages upon the value of the principal sum mentioned in such bill, and costs of protest, together with legal interest upon the value of the principal sum mentioned in such bill, from the time of protest until the principal and damages are paid and satisfied; and if any indorser of such bill shall pay to the holder, or the person or persons, company, society, or corporation, entitled to the same, the value of the principal, and the damages and interest as aforesaid, such indorser shall have a right to receive and recover the sum paid, with legal interest upon the same, from the drawer, or any other person or persons, company, society, or corporation, liable to such indorser upon such bill of exchange."

The court, after instructing the jury that the case was to be governed, in respect to the set-off or credit claimed by defendants, by the enactments of the said statute of Maryland: and that if they had been the holders of the said bill at the time of its protest, they would, under the said statute, have been entitled to the set-off or credit claimed—the damages being, in such case, made by the provisions of the said statute a part of the debt as much as

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the principal, to which they were admitted to 718*] be entitled—proceeded further *to instruct the jury, that by the indorsements and protest given in evidence, defendants did not appear to have been such holders of said bill at the time of its protest; that their position was that of indorsers, who had taken it up or paid it; and that whether they had so paid it in the place where it was payable or elsewhere, they could not sustain their claim to the damages in question, unless by proof that they had themselves paid such damages to the holder of the bill; and that the verdict on this point ought to be in favor of the plaintiff.

Whereupon the counsel for the defendants excepted to the opinion of the court.

The jury found for the plaintiffs, and assessed the damages at $251,243.54.

The case came up to this court upon the exception just recited, and was argued by *Messrs. Cadwallader* and *Sergeant* for the plaintiffs in error, and *Mr. Nelson* (Attorney-General) for the defendant in error.

Mr. Cadwallader, for the plaintiffs in error:

Since the bill was drawn, and even since the suit was brought, this court has settled many of the questions intended originally to be raised on the trial.

The last of these decisions was that in 15 Peters, 391, which took place in the interval between the institution of the suit and the trial, where the court decided that "where the United States became a party to drafts, they were under all the liabilities of private individuals."

The only two questions in the case are, therefore,

1. Whether, under the statute of Maryland, a private drawer would be answerable on the bill in question; and,

2. Whether, if so, there is anything in the relation existing between the parties to devest this responsibility.

1. We contend that the defendants below were within the description of "owner or holder of the bill or party entitled to it," mentioned in the first clause of the statute, and not within that of indorser, in the latter clause. To entitle a party to the benefit of the first clause, it is not necessary that he should have been holder at the time of protest; but, nevertheless, the defendants below were, in fact, holders of the bill at the time of protest, through the intervention of their agent, who, at that time, interposed, for their account, and took up the bill at the place where it was payable. 719*] *The fifteen per cent. is not well named when it is called "damages." It is not a penalty, but as much a part of the transaction as re-exchange, certainly not unliquidated because it can be easily calculated. It was described, in the court below, as a penalty to punish delinquency or insure punctuality; but is really intended to mitigate the rigor of law against a drawer. Re-exchange would often be ruinous, and particularly with the colonies. The explanation of re-exchange is given in Story on Bills, 401. The holder has a right to draw for the amount of the bill, and must do it in the same way that the bill came. It is often circuitous. The general course of exchange is often so between two countries, and sometimes the circuity is casual. All the colonial statutes were to limit the amount for which a drawer should be held responsible, and did not intend to inflict a penalty.

The rate of these damages varies; it is not the same between England and the West Indies that it is between England and the East Indies. (Chitty, 668; Story, sec. 408; Beawes on Bills, 610.)

Damages were fixed in lieu of re-exchange. (6 Cranch, 221; 6 Mass., 157, 161.)

The history of Maryland legislation shows that it was intended for the benefit of the drawer, by limiting the responsibility which he would have been otherwise under. Acts of 1676 and 1678 say "the party shall not be allowed more than," &c. So the Acts of 1692, 1699, 1704, 1708, and 1715. The Act of 1715 is found in Bacon's Laws, the others were read from MSS. copies.

The French Code of Commerce (183, art. 445, edition of 1814) says that damages are a compensation for the circuitous transmission of a bill. Great injury is sustained by taking funds provided for other purposes, and being obliged to take up a protested bill. (3 Marshall, 184; *John H. Piatt's* case, in 19 State Papers, 734.)

In the latter case, an Act of Congress of 1820 referred it to the second comptroller. In 1823 it came before Congress again, and a committee reported upon it. (pp. 894, 904.) The report says equitable principles require damages to follow protested bills. Piatt had not paid damages, "but this is a question never asked; the fact of protest is sufficient."

Damages cannot be sued for separately. (4 Harr. & Johns., 240.)

In Ambler, 672, Lord Camdem says, "the twenty per cent. is a part of the original contract." (See, also, 2 Campb., 445; 12 East, 420; *8 Watts, 546; Story, sec. 398, [*720 *note*; 1 Lutw., 885; 7 Term R., 570, 577; 4 Barn. & Cress., 445.)

The argument on the other side is, that the indorser who pays is not a holder under the statute; but this is contrary to the general law; and the object of the statute was to give indemnity to any sufferer.

If an indorser, or his agent for his honor, takes it up *supra protest*, he becomes the holder. Thus full effect is given to the whole act. The argument on the other side requires an interpolation of the words "time of protest." By providing for the case of an indorser who has paid damages, the statute intends an action on the bill; but it does not restrain an indorser who has become holder without paying damages, because the whole statute is enlarging. In this case the ownership was resumed at the time of protest.

An indorser who paid the bill could not, without the statute, recover anything except the amount of the bill and the damages; but the statute gives him interest also. It is, therefore, an enabling statute. At the time of the act it was doubtful what an indorser could recover. (2 Durnf. & East, 100.) Two years after the Maryland act says there had been doubt. (See, also, 1 H. Black., 640; 4 Durnf. & East, 714; 3 East, 82, 177; 6 Barn. & Cress., 489.)

According to the construction which the other side put upon the statute, the case of an

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indorser who pays the bill without damages is not provided for, unless by implication. And even the implication cannot stand unless by insertion of the words "time of protest."

But the bank had made provision abroad. If a former holder of the bill here, from alarm that it might not be paid, sends his money abroad, he is as much out of funds as a foreign holder would be.

A payment *supra protest*, for the honor of a name upon the bill, is an exception to the general law of agent or substitution, which is that one person cannot become agent for another without his consent. And this is not only a case of payment *supra protest*, but with funds. (See 5 Wharf., 189; Pothier, 171; Chitty on Bills, 543; French Code of Commerce, 158; 10 Merlin Repertoire Universelle de Jurisprudence, 74 *b*, tit. Lettre et billet de change; 1 Espinasse, 113, criticised and explained in Story on Bills, sec. 124, *note;* Beawes, 54, 570; 1 Lutw., 896, 899.)

A party, therefore, paying a bill, with or without funds, becomes a holder under the Maryland law.

The law of Maryland must govern this case. 721*] (6 Cranch, 224, *Story on Bills, sec. 153; Story on Conflict of Laws, 307–317; 12 Peters, 524.)

The United States must rest on the same obligations as a private drawer when a bill is drawn by an authorized agent. Congress calls this a bill. When they settle with the bank it is called a bill of exchange. (4 Story's Laws, 2556, Act of 3d March, 1837.

It is so on its face, and in its nature: subject to the same rules, because it was drawn to save freight, insurance, &c. The Secretary had a discretion under the act of Congress how to transfer the money. The bank was bound by its character to transfer the money of the government without exchange, within the United States; of course, on a foreign transaction, exchange would be charged. The Secretary sold the bill, and preferred that mode to having it collected. (5 Wheat., 288.)

The bank gave the government credit on its books, which is equivalent to payment. (1 Howard, 239; 3 Bro. Chan. Rep., 438.)

Mr. Nelson, Attorney-General, for the defendant in error:

The objection to the form of action, which was raised in the court below, is understood to be waived. It is unnecessary, therefore, to argue it.

The damages upon this bill were claimed by the bank by way of set-off, when sued by the government for the dividend due upon its stock; and were claimed, not upon general principles, but under the statute of Maryland. The only question is the construction of that act.

There are four objections to allowing the bank these damages.

1. That the bank, through its agent, having paid no damages, can receive none, and such was the opinion of the court below.

2. That the instrument is not a bill of exchange within the meaning of the Act of 1785.

3. Supposing the bank to have been the holder, and the instrument to be a bill, still the United States, as a sovereign power, are not bound by the penalties of the act.

4. That the relations existing between the parties, and understood by them, were such as to exclude the idea of damages.

1. By the general law merchant, the holder of a protested bill is entitled to re-imbursement or indemnity, the standard of which is interest, expenses, and re-exchange.

In many places, by statute or usage, damages are allowed, differing in amount; and given, in some cases, in lieu of re-exchange, *costs, and interest. The effect is, to [*722 dispense with proof of all these things and facilitate adjustment. Sometimes a penalty is superadded.

The statute says the holder shall receive as much money as will purchase a new bill. This is just the definition of re-exchange. (Story on Bills, sec. 400.) The Maryland bar was celebrated at the time when this statute was passed; and no doubt it was carefully prepared. The definition of re-exchange is "the purchase of a bill on the country where the drawer of the protested bill lives." The statute adopts this in effect, because, although it directs the new bill to be purchased in the country where the drawer of the old bill lives, instead of the country upon which the old bill was drawn, yet the same amount of money would have to be paid in both cases. The statute then provides for re-exchange, for costs, and for interest. But these together constitute indemnity. What is the fifteen per cent. which is then added? It must be a penalty.

The old statutes of Maryland which have been read show this. For example, the Act of 1704 says there shall not be allowed more than twenty per cent. more than the principal sum and costs. The Act of 1708 says ten per cent. more than the sum and costs. Under these statutes, the amount of damages was required to be proved, because it was left uncertain. The Act of 1785 adopts a new principle, by providing indemnity and fifteen per cent. damages. The amount of damages and the rules being thus fixed, a party who claims the one must bring himself within the other.

Rothschild was the holder of the bill. It was in his possession by regular indorsement. Suppose he had omitted to cause it to be protested. He could have recovered damages from nobody, because he would not have brought himself within the terms of the act. And the indorser must bring himself within its operation also. How? By paying the damages to the holder or some subsequent indorser, to whom he was responsible. The statute provides damages for this class of indorsers only. But the bank, having paid no damages, does not belong to this class, and is therefore not within the statute at all. At the time of protest, it is clear that the bank was not the "owner or holder" of the bill; nor was it at any time afterwards within the protected class of indorsers. The reason of the distinction is manifest. An indorser who had parted with the bill and received value for it was put to no inconvenience by the protest, and therefore had no claim upon the drawer for damages. *His claim only [*723 began, in reason, when he was himself called upon to pay damages.

It is said by the other side that the "owner or holder" means also an indorser. But the

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act does not say "those who may become entitled to the bill," but uses language indicating existing ownership; existing at the time of protest. The second clause of the act says, "and if any indorser of such bill shall pay to holder," &c., making a clear distinction between the two classes of persons. How, then, can they be confounded, and an indorser be allowed to claim as a holder? To sustain the construction of the other side, the word "indorser" must be interpolated in the first clause. That the ownership must exist at the time of protest is clear, from the language of the statute: "That upon all bills of exchange hereafter drawn in this State on any person, corporation, company, or society, in any foriegn country, and regularly protested, the owner or holder of such bill," &c. Such bill; what bill? One that is regularly protested. The ownership is placed in juxtaposition with the description. He must have been the owner or holder of the bill when it underwent this ceremony.

As to indorsers, the statute introduces no new principle. By the general law merchant, no indorser can receive damages from the drawer unless he has himself paid them. (3 Kent's Commentaries, 115; 3 Washington Rep., 310.)

It has been said that the object of the second clause was to provide a new remedy for an indorser. But was it? What were his rights before? If Jaudon had been sued in London on this bill, he would have been liable by the English law, for the bank was as much liable for damages as the drawer. If the bank had paid all this, the drawer would have been liable, independently of the statute, because the drawer would have to replace the bill and expenses.

The statute, therefore, gives the indorser no new remedy.

The bank was an indorser at the time of protest, and must remain so; it cannot shift its position and become a holder. The bill was paid for the honor of an indorser after protest; the only effect of which is to make the payer and indorsee of the bill, and protect the indorser, for whose credit it is taken up, from damages. (1 Espinasse Rep., 113.)

2. This is not a bill within the meaning of **724*]** the act, because it *was drawn upon a particular fund. (Story on Bills, sec. 55, 56.) A general bill must be drawn upon the general credit of the party. (2 Lord Raym., 1681; 2 Strange, 1211; 5 Espinasse Rep., 247; 2 Kent's Com., 74, 75, 76; 3 Wharton, 233.) The Act of 1785 only applies to general bills. Here it was drawn upon a particular fund and payable at the pleasure of the French government, because no appropriation had been made by that government for it. It was payable, too, out of the fund provided by the treaty.

3. The United States, as a sovereign power, are not bound by the penalties of an act.

It is settled in England that the government is not bound by a statute unless named. If the State of Maryland was not, then the United States are not. (5 Co. Rep., 14 *b*; 11 Co. Rep., 74.)

Is it possible that Maryland could have intended to provide against her drawing bills as a sovereign, which would not be paid? Her courts have uniformly construed her laws according to the position just laid down. (3 Harr. & McHenry, 171.)

The question in the above case was this: Under the Act of 1785 (chap. 80, sec. 7), no creditor was entitled to priority in the division of an intestate estate. But the State claimed a preference; and the court said she was entitled to *jura regalia*. Not being named, she was not embraced within the act. (1 Harr. & Johns., 417; 6 Gill & Johns., 226.)

4. The correspondence shows that the bank knew that the government was acting merely as an agent for the claimants under the French treaty; that it was but a trustee. The money to be received was not intended to belong to the Treasury of the United States, but to be distributed amongst its owners. The only object of all parties was to transfer the money from France to the United States.

Mr. Sergeant, in reply:

The bill, being drawn in Maryland, is to be governed by the law of Maryland, so far as concerns the drawer. The indorser might be subject to a different rule, having indorsed the bill in Pennsylvania, where the damages are twenty per cent. How the matter would have stood, if the bank had been compelled to pay the twenty per cent., it is not material to inquire.

What is the law of Maryland? There are six acts of Assembly prior to the Act of 1785, on the subject of damages. They all have one *title, and they are all restrictive in [**725** their terms, that is to say, they restrain or limit the amount of damages by negative words. The first act, made between 1676 and 1678, was nearly, if not exactly, the form of expression which is followed in the five subsequent acts.

The Act of 1785 is of the same character. They are *in pari materia*. Besides, the Act of 1785 has the same title, and being made to repeal and supply the prior acts, it must have the same purpose.

These acts assume, and conclusively show, that there was a right to damages before, which they restrain, and fix at a certain percentage. This per centage is not damages given; they existed before. The acts only furnish a rule for computing them. But they are still damages.

He then argued:

1. That damages were payable by the law merchant, in all cases of dishonored foreign bills of exchange.

2. That these damages were payable by contract, as a part of the contract, and were capable of being ascertained, but only in each particular case.

3. That they have been fixed in some places and trades by usage, and in others by law, but they are still due by contract, and in no respect different from the damages payable by the general law merchant, except that a rule is established for computing or "ascertaining" them.

1. He referred generally to the books and cases already cited, but especially to *Judge* Story's work on bills of exchange (466, 467), where the subject is fully explained. The damages are ascertained by the rate of re-exchange. What that is, and how it may operate, we well know (*De Tastet* v. *Baring*, 11 East, 265; *Mellish* v. *Simeon*, 2 H. Bl., 378); where the damages were fifty per cent. (*Pollard* v. *Herries*, 3 Bos. & Pull., 335); where they were upwards of two hundred per cent.

It is necessary to understand what "re-ex-

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change" means. It is the right to redraw, at the place where the bill is payable, upon the place where the bill is drawn, for such a sum as will pay the amount on the face of the bill, with costs and expenses, at the place where payable. The law is clearly laid down by *Judge* Story, in 8 Kent's Com., 115, and in Chitty. It is the right to redraw, and is exemplified in the two cases just cited.

We must distinguish between "exchange" 726*] and "re-exchange." *The Act of 1785 —framed with remarkable accuracy and fullness of knowledge—itself makes the distinction, for it gives the exchange, and then adds the fifteen per cent. The object is, to pay the bill at the time and place where payable, according to the terms of the contract. Messrs. Hottinguer, for example, would have had a right, by the law merchant, to draw upon the United States, or upon the bank of the United States, for as much money as would pay them in Paris the amount of the bill. The payment in Paris, therefore, at the time, included the damages. And so, the payment by the Bank of the United States to Messrs. Hottinguer included the damages.

2. They were payable by contract and capable of being ascertained. They were in no sense a penalty. They were a recompense, an equitable equivalent, or more exactly, a fulfillment of the contract, given by the law merchant, which does not deal in penalties, but looks to equity and substantial justice. This law of damages is founded in the plain equity of the contract, and has nothing in it that is vindictive or penal.

Still less, could they be said to be unliquidated. Where there was an established rate of re-exchange, the price of the day furnished the rule. The law does not require that there should be an actual redrawing. There is an immediate right to redraw, and whether the holder redraw or not, he is entitled to the amount. (*De Tastets* v. *Baring*.) Where there is no such rate established, or it is interrupted or disturbed, no matter how, resort may be had to circuitous drawing, and the actual cost settles it, at the expense of the party liable on the bill. (*Bangor Bank* v. *Hook*, 5 Greenl., 174; Chitty, 670.) These damages are part and parcel of the bill, though contingent, as is also the liability of the drawer and indorser. They are recovered in an action on the bill, as the principal is.

The payment, at the time and place where the bill is payable, therefore, includes the damages. Put the case of a party on the bill, thus paying after protest—he actually pays the damages. They are included in what he pays. In other words, he pays exactly the same as if he had been redrawn upon.

3. In lieu of the right to redraw, usage has in some places fixed a rate of re-exchange or damage, and law in others. Where not so fixed, they remain as they were before. But neither the law nor the usage professes to give the damages. They were payable by the contract, according to the law merchant. Neither does 727*] the law *or usage, in any case, intend to take them away. They have in view to avoid the fluctuations of exchange (Story on Bills, 480); to mitigate the occasional rigor of the law merchant. (Chitty, 665.) The acts of the Maryland Legislature had chiefly in view this latter object. It would seem that the rule of the law merchant had proved very burdensome, which will easily be understood when we consider that there never has been, and is not now, any regular re-exchange between England or the continent of Europe and the United States, and, therefore, recourse was necessary to costly expedients. They have all one title, "an act ascertaining what damages shall be allowed on protested bills of exchange." The usage, in some instances, has passed into law. Neither the usage nor the law altered the nature of the contract, that is, made it less a contract, as to its force or its comprehension. They had one single object only, and that for the benefit of the party liable. The damages are still due by contract; more precisely than before, because the rate is fixed and known, and therefore can be stipulated. But they rest upon the same equitable contract. Before, it was an undefined, now a fixed liability—that is, the amount is fixed, where there was already a liability; the redrawing is fifteen per cent., neither more nor less, since 1785. By the prior acts it was twenty per cent.

No such act can be presumed to mean any more. The remedy is applied to a given mischief, and the acts all indicate plainly what that mischief was. It was the same that has led elsewhere to usages and laws, that is, to substitute a fixed rate of damages for an uncertain one, but by no means to take away the right where it previously existed.

Proceeding, then, more particularly to examine the Act of 1785, under the view thus taken of it, he maintained,

1. That the Bank of the United States was the "owner or holder of such bill," and "entitled to the same," within the terms and meaning of the first part of the first section of the Act of 1785.

2. That the Bank of the United States had actually paid the damages, and was within the words of the second part of the section.

1. There is a radical error, as already intimated, in supposing the act gives the damages —that there would be none without it. This leads to error in the whole construction, by taking a wrong departure. The act leaves the right as found, but limits and fixes the amount. It professes to do nothing more. To this intent, it is to be liberally, *at least fairly, [*728 construed. It must be reconciled, if necessary, with the law merchant. It must not be brought into conflict with that law, by interpretation out of its own words and declared intention. His position was simply this: whoever by the law of the contract was entitled to damages, is entitled still; and the damages are fifteen per cent. Such is the exact effect of a usage. (*Grimshaw* v. *Bender*, 5 Mass., 157, 161, 162.) The right to damages attaches upon the protest of the bill. It is no more than this, to compel the drawer to pay the bill at the time and place stipulated. In favor of whom does it attach? Why, of the holder. Of what holder? Of any holder. For there always must be a holder, and there can be but one at a time, though there may be several persons united to make that one. The drawer is not to be put to the risk of paying twice. Therefore, the claim must be made by one who has the possession,

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with right, so as to be able to give up the bill, with a full and final discharge. The Bank of the United States was the holder to this full intent. It held the bill, with right, ready to hand it over and give an effectual release. What more could be requisite to make it a holder?

Now let us look at the Act of Assembly. It uses the words in the most general sense. It does not restrict them to the holder at the time of the protest, nor to any particular time. It could not so mean. The holder has a transferable right; not negotiable in the broadest meaning of that word, because, being overdue, which is notice, the assignee takes the bill, subject to the equities between the parties. In other respects it is negotiable. The holder may transfer it, as fully as he holds it, and his transferree becomes the holder, with all his rights, including the right to damages. If this be not so, the damages would be lost by the transfer, and the first holder would be the loser, as he would not be paid for the damages, if they could not be transferred, which would be unreasonable and unjust; or else, we should be obliged to consider this as a case not provided for by the act, and turn over the derivative holder to the law merchant for his rate of damages. But it is clear that the act meant to provide for every case. It applies, therefore, to every holder, and surely the Bank of the United States was a holder.

The right of the bank, however, as holder, is even stronger than has yet been stated, and in point of law sufficient to satisfy any construction of the words, as a moment's attention to the facts will show.

729*] *The bank was the original holder of the bill, by purchase from the United States. It indorsed the bill to Barings, and they indorsed it to Rothschild. The bill was dishonored, and protested for nonpayment. Hottinguer & Co., of Paris, strangers to the bill, paid it *supra protest*, for the honor of the Bank of the United States, the indorser. By this payment, Hottinguer & Co. became the holders, were substituted for the holders, with all their rights against the drawer and the first indorser. This is fully settled in France, in England, and in the United States, as may be seen by reference to Pothier, Pardessus, Beawes, Chitty, Story, and every book that treats upon the subject. The only restriction was, that as they paid for the honor of the first indorser, they could make no claim upon the subsequent parties on the bill. They became the holders, at the time of the protest, with full rights against the United States, and the Bank of the United States. These rights were, to redraw, that is, to claim damages, and to transfer their rights as holder. In this state of things, Hottinguers paid themselves, in Paris, the full amount, out of money of the Bank of the United States then in their hands. The bank ratified the payment—that is, the bank paid it to the holders, and the holders (Hottinguers) handed the bill, with all their rights, to the bank. The bank thus became the holder, and was remitted to its former character and rights. (Lutw., 896, 899; 7 Term R., 570.) They were the holders when the bill returned. They were holders, by relation, to the time of the protest. They became the holders, in law, at the time of the protest. They had therefore a right to redraw—that is, a right to damages.

The material fact here is, that the bank paid the full amount in Paris of what was due there. They actually, really, and legally paid the damages, for to pay the bill at the place where payable, after protest, is to pay the damages. It gives the right to recover damages. Suppose the case of circuitous redrawing. Each holder in succession becomes entitled. (*Mellish* v. *Simeon.*) The cases are to every intent the same; if there be a usage, that fixes the amount: and so, if there be a law. To redraw from Paris on Maryland is fifteen per cent. This, the Bank of the United States have therefore paid.

2. The Bank of the United States had actually paid the damages, and so was within the words of the second part of the first section of the Act of 1785.

It is proper here to notice the objection made on the part of the *United States, that [*730 the Bank of the United States was an indorser, and, therefore, could not recover damages, "unless it had paid them or was liable to pay them." This is urged, upon the authority of Chancellor Kent. (3 Kent's Com., 115.) That learned author refers, for his support, only to the case of *Kingston* v. *Wilson* (4 W. C. C. R., 310). He has been misled by the note at the beginning of the report, where from an error of the press, or some other cause, the point is stated as he has quoted it. But no such question arose in that case, and none such was decided. One of the claims there made was by the drawer of a bill of exchange upon the drawee, for not accepting his bill, and the learned judge who then presided in that court (*Judge* Washington) said, that in an action by the drawer against the drawee, he could not recover damages, unless he had paid them or was liable to pay them. (See 4 W. C. C. R., 316.) What the law would be in such a case it is not now material to inquire.

But waiving that question, and supposing (if it be possible) the bank not to have been a holder, how will the matter stand? The bank, it must be premised, no one doubts, is able to give a full discharge.

If being on the bill, and holding the bill, the bank had paid the damages, it would be entitled to recover them from any prior party, with interest. This is not disputed, and cannot be disputed. Had the bank not paid the damages? "The law does not insist upon an actual redrawing," &c. (3 Kent, 115.) Nor is the claim for re-exchange or damages confined to bills of exchange. (3 Bos. & Pull., 335; *Pollard* v. *Herries*, Chitty, 668.) It is the substance which is regarded. And so it is in the Maryland Act of 1785. The words of the act apply exactly. It does not require that the damages shall be paid *eo nomine*, but the "value" of the same paid to the party "entitled" to the same, as Hottinguer & Co. undoubtedly were here. What was the "value" of the same? Precisely the amount on the face of the bill, in Paris, at the time. That is exactly what they had a right to redraw for. There is nothing artificial or technical in the law merchant. (Chitty, 667.) Its principles and its methods are those of common sense and justice applied to the transactions of men. The confusion in this case has arisen from not distinguishing, as the law merchant does, between paying here and paying abroad. Paying abroad

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includes the damages, which the Act of Assembly fixes at fifteen per cent.

731[*]] *In every point of view, then, the bank has a clear right to the damages. If the United States were authorized to draw, and the government of France bound to accept, the United States will have their recourse over against France for the damages, after paying the bank.

Some minor objections have been made, not properly open upon this record, which may be disposed of in a few words; and a question has been suggested, entitled to attention.

1. It is said this is not a bill within the act, nor in a legal and commercial sense, being drawn on a particular fund.

This subject, of what is not a negotiable bill, is treated fully, and with reference to the authorities, by Mr. Chitty (pages 157, 158), and by *Judge* Story in section 40, page 54. The exceptions are, when there is a condition or contingency; here, there was neither condition nor contingency.

It has been settled, too, by the legislative authority. The Act of Congress of 3d March, 1837 (4 Story's Laws, 2556), styles it "the bill of exchange."

Again, it calls itself a "bill of exchange;" has always been termed a "bill of exchange;" went forth to the world, and was negotiated as such; has been so treated in all the correspondence; was protested as a bill of exchange, and claimed as such in the suit. It is too late in the day to question its character.

The use it was employed for—to remit or transfer funds—does not make it the less a bill of exchange. (5 Wheat., 288.) This is, and always has been, the appropriate purpose of bills of exchange, whether they were originally invented by the Jews of Lombardy, or, as Ranké supposes, in his History of the Popes of the 16th century, to collect the revenue in the Papal States.

2. The United States is a sovereign, not affected by penalties in an act of the Legislature.

If confined to penalties, the position is of no consequence here, the question not being of penalties. If it be extended to damages, it is authoriatively answered by *The United States* v. *Bank of Metropolis*. (15 Peters, 377, 392; see also, 3 Marsh., 184.)

Upon what principle can it be contended that a contract of the United States is different from that of an individual? A bill of exchange is a contract well understood, importing definite legal responsibilities. To what extent is it that

732*] the difference is to apply? *Will the United States be barred from claiming, as well as exempted from paying damages? They have always insisted upon, and received them, where they were the holders of protested bills. Such a one sided doctrine would be intolerable. And what would become of the credit of the United States? And the facilities they require in the receipt and disbursement of their revenue, if their bills were thus, as it were, outlawed? Such a doctrine has no countenance in any decision of this court, and it is quite safe to predict it never will have.

3. The relation between the parties—what is it? That of seller and buyer. The United States came into the market with a bill to sell. The Bank of the United States bought it. Nothing could be more simple. There is no mistification in this. (See Record, 16, 17, 18, 19.) The money being paid into the bank makes no difference. That was agreed (Record, p. 19); and without agreement was a thing of course, for the bank was the treasury, and when the money was so placed, it was immediately at the disposition of the government as its own.

But further, the United States have admitted their liability for principal, interest, protest, and expenses, according to the bill of exchange. If not a bill of exchange, why pay for protest? Why a protest or expenses, if not a bill of exchange? They only refuse to pay the damages, which is entirely arbitrary.

If it had not been a bill of exchange, it would still be a contract to pay a certain sum of money in Paris, on a given day. If broken, what would be the measure of damages? Not less, certainly, than upon a bill of exchange. (Chitty, 668; *Pollard* v. *Herries*, 3 Bos. & Pull., 335.)

The objections of the United States are thus disposed of. It is, in truth, a very plain case, now that it has been deliberately examined. The record and the history of the cause show that the principal point was suddenly started in the Circuit Court, and scarcely at all discussed.

The question suggested, and all that remains to be considered, is, what would be the effect of the payment being prohibited by the law of France?

The fact is, that the payment was not prohibited by law; but there was no appropriation by law for the payment. (See Protest, Record, 22, 26.) The treaty was a binding contract between the high *contracting parties [*733 from the exchange of ratifications; and by that treaty the money was due and ought to have been paid. It was impossible to prohibit the payment by a law of France without assuming the grave responsibility of a willful violation of the treaty, which is not to be presumed. A mere failure to supply the means, at the time appointed, was not of so serious a character. It might admit of explanation. But still it was a failure.

But neither the one nor the other, nor a prohibition in every respect lawful, as being clearly within the rightful authority of the Legislature, could vary the rights of the parties to this bill. This was directly and deliberately decided in *Mellish* v. *Simeon* (2 H. Bl., 378, 379), and in effect decided, also, in *Pollard* v. *Herries*, (3 Bos. & Pul., 335). The reasons are there fully set forth.

Mr. Justice McLEAN delivered the opinion of the court:

A writ of error brings this case before the court, from the Circuit Court for the Eastern District of Pennsylvania.

On the 7th of February, 1833, the Secretary of the Treasury of the United States drew the following bill on the minister and Secretary of State for the Department of Finance of the French government:

"SIR: I have the honor to request that at the sight of this my first bill of exchange (the second and third of the same tenor and date unpaid); you will be pleased to pay to the order of Samuel Jaudon, cashier of the Bank of the United States, the sum of 4,856,666 francs and

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66 centimes; which includes the sum of $3,916,666.66, being the amount of the first installment to be paid to the United States under the convention concluded between the United States and France, on the 4th of July, 1831 (after deducting the amount of the first installment to be reserved to France under the said convention), and the additional sum of 940,000 francs, being one year's interest at four per cent. on all the installments payable to the United States, from the day of the exchange of the ratification to the 2d of February, 1833."

This bill was purchased by the bank, and indorsed by it to Messrs. Baring, Brothers & Co., of London, and by them for value was indorsed, pay the order of N. M. Rothchild, Esq.; and by him it was directed to be paid to Messieurs De Rothschild Brothers, or order, of Paris, for value in account.

734*] *This bill on presentation not being paid, was protested, and was afterwards taken up on account of the first indorser by Hottinguer & Co., who also paid the costs, &c., and charged the whole sum to the Bank of the United States. Notice of the nonpayment of this bill was given, in due time, to the drawer; and also that the bank claimed of the government interest, costs, and fifteen per cent. damages on the bill. The government accounted to and paid the bank the principle of the bill and the costs, but refused to pay the damages.

Sometime after the protest, a dividend on the stock held by the United States having been declared by the bank, it retained a part of the dividend to cover the above damages. A suit being brought against the bank by the government, to recover the dividend thus withheld, the bank set up as an off-set the fifteen per cent. damages claimed on the above bill.

On the trial, the court held, and so instructed the jury, that the action was maintainable. That the set-off or credit claimed by the defendants was governed by the statute of Maryland. That if the bank had been the holder of the bill at the time of the protest, it would, under the statute, be entitled to the damages claimed; but that it must be viewed as indorser, and consequently could not recover such damages, unless upon proof that they had been actually paid by the bank. To this charge the defendant's counsel excepted, and this brings before the court the questions for consideration.

Before we consider the rulings of the court excepted to, it may not be improper to notice the structure of the bill, which has been much commented on by the counsel; though not having been excepted to by the government, it is not a matter for decision.

It is supposed not to be a bill of exchange, as it was drawn payable out of a particular fund. This seems not to be the character the bill. It was drawn for a certain sum, and the drawer then states on what account such sum was due from the French government. But there was no restriction as to what moneys or appropriation out of which the bill should be paid. This could in no sense restrain the negotiability of the instrument. It has the frame, character, and effect of a bill of exchange. It was so called and treated by the Secretary of the Treasury who drew it; by his successor who had some correspondence in regard to it; by the Attorney-General to whom it was submitted for his opinion, by Congress, and by the eminent *bankers in Europe through whom it [*735 was negotiated and paid.

That the United States can sustain an action against the bank, to recover a dividend declared in their favor, is undoubted. This seems to have been doubted by the counsel for the bank in the Circuit Court, but the objection has been abandoned in this court. Nor can there be any question of the right of the bank to set up, in this case, by way of offset, the damages in controversy, if the claim for damages be sustainable. This right is not contested by the Attorney-General.

The main point in the case depends upon the construction of the Maryland statute, which applies to this district. It is singular that this statute, which was enacted in 1795, in regard to the question now before us, has never been construed by the local courts. And the same may be said of other and prior statutes of Maryland, containing similar provisions.

The first section of the act provides, "that upon all bills of exchange hereafter drawn in this State, on any person, corporation, company, or society, in any foreign country, and regularly protested, the owner or holder of such bill, or the person or persons, company, society, or corporation, entitled to the same, shall have a right to receive and recover so much current money as will purchase a good bill of exchange of the same time of payment, and upon the same place, at the current exchange of such bills, and also fifteen per cent. damages upon the value of the principal sum mentioned in such bill, and costs of protest, together with legal interest upon the value of the principal sum mentioned in such bill from the time of protest until the principal and damages are paid and satisfied: and if any indorser of such bill shall pay to the holder, or the person or persons, company, society, or corporation, entitled to the same, the value of the principal, and the damages and interest as aforesaid, such indorser shall have a right to receive and recover the sum paid, with legal interest upon the same, from the drawer, or any other person or persons, company, society, or corporation, liable to such indorser upon such bill of exchange."

That the holder of a foreign bill, or other person entitled to it, may recover, under this statute, from the drawer, in case of protest, a sum that will purchase a similar bill of the same amount together with fifteen per cent. damages on the principal sum, is admitted. *But [*736 it is insisted that the bank paid the bill as indorser, and that as there is no proof that it paid the fifteen per cent. damages, they are not recoverable under the statute. The first part of the section gives to the holder of a protested bill its value at the place drawn, the fifteen per cent. damages, and interest upon the value of the principal sum. The latter part of the section gives to the indorser, who has paid to the holder the value of the principal, the damages and interest on the entire sum paid, with legal interest. So that while the holder of the bill recovers only interest upon the principal sum, the indorser is entitled to interest on the whole sum paid by him. And to give interest on this sum seems to have been the object of the latter clause of this section.

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Had the bank retained the bill until its presentation and protest, there could be no question of its right, as holder, to the damages claimed. It indorsed the bill to Baring, Brothers & Co., and they to Rothschild, who indorsed it to De Rothschild & Brothers. These last were the holders, and had not the bill been paid, *supra protest*, on account of the bank, as first indorser, they would have been entitled to the damages. Hottinguer & Co., having paid the bill for the honor of the bank, became the holders, and could recover the damages from it or the drawer. But they being the depositories of the bank, charged it with the amount they paid, by which the bank was remitted to its original character as payee and holder of the bill. In this light the bank was viewed and treated by the government, for it paid not only the principal sum and interest to the bank, but also the costs of protest and other expenses chargeable under the laws of France. But the damages allowed by the statute were refused.

It has been intiminated that these damages must be considered as a penalty, and not as a part of the bill. This is a mistaken view of the subject.

Had there been no statute, the bank, as the holder of the bill, would have been equally entitled to damages. They would have been claimed on a different principle, and might have been of a greater or less amount according to circumstances. The origin and character of a bill of exchange are found in the law merchant: that law which pervades the commercial world, and which, though founded on usage, has become as fixed and definite as any other branch of the law. Under this law the drawer [737*] of a bill in this country payable in *a foreign country is liable, should such bill be protested, not only for the costs of the protest and other incidental charges, but also to re-exchange on the bill. The exchange is sometimes direct, at other times circuitous, depending in some degree upon the commercial intercourse between the countries where the bill is drawn, and where it is made payable. Between this country and France, the exchange is often, if not generally, by the way of London.

The bill under consideration having been protested at Paris for nonpayment, the holder under the general commercial law was entitled to a bill drawn at that place, payable in this city, for such sum as would pay the original bill at Paris, including costs of protest and other legal charges. This is re-exchange, and it varies, as must be seen, with the fluctuations of commercial intercourse, influenced somewhat by local circumstances and the general state of the money market. In some instances, owing to peculiar circumstances, re-exchange has been found to exceed forty or even fifty per cent. To avoid so ruinous a charge, so uncertain a rule of damages, and one so difficult to establish by evidence, the State of Maryland, and almost all the other States of the Union, have fixed, by legislation, a certain amount of damages on protested foreign bills, in lieu of re-exchange. Experience has shown that this is a judicious regulation. It relieves the parties to the bill from great uncertainty, and promotes punctuality by showing the drawer what damages he must pay on the dishonor of his bill. Fifteen per cent. on the principal sum, which the statute adopts, may be greater than the actual re-exchange in the present case. But, whether this be so or not is not open for inquiry. It is believed that if this per cent. excluded the re-exchange, at the time this bill was protested, there are many other cases in which it would fall short of that charge. The statute has, probably, fixed an amount which would be an average charge for re-exchange. This being the basis of the act, the damages cannot be considered as a penalty. The damages given by the statute are as much a part of the contract as the interest. On this point there is believed to be no difference of opinion among enlightened courts or commercial men.

The doctrine of re exchange is founded upon equitable principles. A bill is drawn in this country, payable at Paris, in France. The payee gives a premium for it under the expectation of receiving the amount at the time and place where the bill is made payable. It is *protested for nonpayment. Now the [*738 payee and holder is entitled to the amount of the bill in Paris. The same sum paid in this country, including costs of protest and other charges, is not an indemnity. The holder can only be remunerated by paying to him, at Paris, the principal, with costs and charges; or by paying to him in this country those sums, together with the difference in value between the whole sum at Paris, and the same amount in this country. And this difference in value is ascertained by the premium on a bill drawn in Paris and payable in this country, which should sell at Paris for the sum claimed. The statute of Maryland, then, is founded on equitable considerations, although the rule of damages may be considered arbitrary, as it does not yield to circumstances.

In this case the bank purchased the bill from the government and paid for it. It was sold and transferred by the bank. But the bill not being paid to the holder, the bank paid the amount of it, including the costs of protest and other charges, to Hottinguer & Co., at Paris, who had taken it up *supra protest*, for the honor of the first indorser. The bank, in this manner, came again into possession of the bill, the indorsements, in effect, being stricken out. In a commercial and legal sense, then, the bank is the holder of the bill, and has the same claim for damages as if it had never been indorsed. Had the government been suable by the bank, it must have declared and recovered as payee and holder, and not as indorser of the bill.

No objection is taken, in the bill of exceptions, as to the liability of the government to damages, on a protested bill of exchange drawn by it, the same as an individual. No such question, therefore, arises in this case. As the holder of a protested bill, the government exacts damages; it would seem to be equitable, therefore, that as drawer under like circumstances, it should pay them.

Upon the whole, we think, that in view of the circumstances of this case, the bank is entitled to the fifteen per cent. damages, under the Maryland statute, and that, consequently, the instructions of the Circuit Court were erroneous. The judgment of that court is therefore reversed, and the cause is remanded to that court, and a *venire de novo* is awarded, &c.

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Mr. Justice CATRON:

By the instructions given by the Circuit Court, the controversy is made to turn on the construction of the statute of Maryland; nor 739*] does *the record raise any question on the transaction growing out of the fact that it was one between governments, to obtain a sum of money due from the one to the other; in which the corporation acted as an instrument and agent, in a form suggested by itself, to obtain the money. For instance: if it be true that the United States, in fact, received no money from the bank for the bill, it not having been charged to the bank; this being found, with the additional fact that the parties intended to await the event of payment, or refusal, on the part of France, and let the bank hold and use the money awaiting the event, then the question on the equity of the case may arise. But the jury did not pass on any such facts, the instruction given rendering the inquiry unnecessary; and so it cut off every other question the plaintiff might have raised in opposition to the offset claimed.

The foregoing is given merely as an instance, to show that no question arises on the record, but on the construction of the Act of 1785.

The statute provides for two classes of cases: 1st. "The owner or holder of the protested bill, or the person or persons, company, society, or corporation entitled to the same;" and 2d. "Any indorser of the bill who should pay to the holder, or the person or persons, company, society, or corporation entitled to the same, the value of the principal and the damages and interest."

In the first class, the "owner or holder," &c., shall have a right to receive and recover so much current money as will purchase a good bill of exchange of the same time of payment, and upon the same place, at the current exchange of such bills, and also fifteen per cent. damages upon the value of the principal sum mentioned in such bill, and costs of protest, together with legal interest upon the value of the principal sum mentioned in such bill, from the time of protest, until the principal and damages are paid and satisfied.

In the second class, the indorser who has paid the principal, damages, and interest, shall have a right to receive and recover the sum paid, with legal interest upon the same, from the drawer or any other person or persons, company, society, or corporation, liable to such indorser upon such bill of exchange.

It is not necessary to inquire whether this statute includes all possible cases, and if it does not, by what law the cases so unprovided for would be governed, because the bank is seek- 740*] ing, in this instance, *to bring itself within the statute; unless it does so, the precise claim of fifteen per cent. cannot be sustained. The charge of the court below was twofold.

1. That the case was governed by the law of Maryland; and,

2. Construing that law.

The bill of exceptions includes both points; but this court has proceeded to examine and decide the cause on the second only, passing over the first.

The bank must then bring itself within one of the two classes above described; let us examine them in order.

Was the bank at the time when its prese rights accrued, the "owner or holder of t bill?" I say at the time its present rights a crued, because this general proposition includ the rights acquired at the time of protest, acquired subsequently—each of which branch must be separately examined.

The bill was indorsed to Messrs. Bari Brothers & Co., of London, on some day whi the record does not state: that it was sold to t Barings, and not sent over for collection, is n controverted, or open to question.

It was then passed by indorsement to N. Rothschild, and from him to the Messrs. Roth child, in Paris, in whose possession it is foun on the day that it became due. It was at the request that a demand was made by the nota for payment, and upon refusal, that the b was protested. So far, they appear to ha been, and no doubt were, both the "owne and holders of the bill," and the only "perso entitled to the same at the time of the protest

Hottinguer & Co. intervened immediate after protest, and paid the bill for the honor the bank. What rights were then acquired?

It will not be necessary to examine and c cide whether they acquired a right to fifte per cent. damages or not; or to comment up the want of harmony in the law, if it were allow to a volunteer, who had no right to co plain of anybody, the same damages which gives to a disappointed and suffering party e pressly because he has been put to great inco venience and to hazard of discredit, by t omission of the drawer to provide the necessa funds to meet the bill. The books and ca all recognize the right of such a volunteer principal, interest, and costs. If Hottinguer Co. were the parties to this suit, it would b come necessary to examine *the ques- [*74 tion of their claim to damages; but we are no investigating the rights of the bank.

Granting that the Messrs. Rothschild, i mediately upon protest, became vested with t right, under the statute, to "receive and reco er" from the drawer fifteen per cent. damag in addition to the other sum pointed out in t law; and granting, also, for the sake of the a gument, that all these rights passed to M. H tinguer, with the delivery of the bill, it is cle that he was vested with a right that he cou exercise or not at his pleasure. If he forbore claim the damages, he mutilated the rights a tached to the bill, supposing all the rights the parties to be transferred with the bill fro one to another. His right to relinquish t damages cannot well be disputed. It was pro erty, and could be given away. It is not o province to inquire into his reasons; we c deal only with facts. It appears from the re ord, that instead of charging fifteen per cen damages, he contented himself with chargi a commission of one half per cent., amounti to 24,283 francs and 33 centimes; less th $5,000. This commission may have been pa to him by the bank, and it appears from a repo from the first auditor's office, dated July 2 1837, that this commission would be paid by t United States to the bank upon presentation a proper voucher.

There is nothing in the record to show th Hottinger & Co., even up to this time, sancti this claim of fifteen per cent., or that the ban

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intends to pay it over to Hottinguer & Co., if it shall succeed in compelling the United States to pay it. On the contrary, the claim of the bank appears to be prosecuted for its own benefit; and the result will be that the bank, if it succeeds in this suit, will pay to Hottinguer & Co. less than $5,000, and keep $165,000 for itself.

At the time of the protest, and immediately afterwards, comprehending the payment *supra protest*, and protest itself, either Rothschild or Hottinguer & Co. were the "owners or holders" of the bill, as described in the first class of the statute, and of course no rights whatever accrued to the bank. Did it subsequently acquire any?

In what particular manner the bill was transferred by Hottinguer & Co. to the bank after protest and payment—whether by general or special indorsement, or by a receipt upon the bill—the record does not show. It only says that "the bill of exchange and protest were 742*]*transmitted to the bank, which thereby, and by reason of the premises, became and were again holders and owners of the same." But the claim for fifteen per cent. damages had been voluntarily waived, as we have seen, by Hottinguer & Co., and it is not easy to see how any person claiming under them could have any more rights than those which the assignors chose to insist upon. The mere possession of the bill is not sufficient, because that possession was accompanied by a cotemporaneous declaration that Hottinguer & Co. intended to claim nothing more than one half per cent. commission.

It is not perceived, then, how the bank can bring itself within the class of cases provided for in the first branch of the statute. Is it within the second?

This depends entirely upon the answer to the question, has it, as indorser, paid the damages to the owner and holder of the bill, or to anyone? If it has, the record does not show it. On the contrary, all that it has paid was the commission of a half per cent. to Hottinguer & Co., if indeed it has paid that, for there is no evidence of it. The propriety of the statute is not the subject of examination; but it may be remarked that it appears to be founded on reason and justice. Every successive indorser, as he transfers a bill of exchange, receives from the indorsee its full value; and being thus re-imbursed for his outlay in the purchase of the bill, the inconvenience which falls upon somebody when the bill is protested does not touch him. His account is already balanced. The reason, therefore, for allowing damages utterly ceases as to him. He has no fresh bill to purchase, either by re-exchange or in any other manner. But when he is made responsible, as he may be, to the holder, for the amount of the bill and damages, it is fair and reasonable that the same liability should travel upward until it is ultimately fastened upon the drawer; each indorser being obliged to refund to the one below him exactly what that one has been compelled to pay. But the bank has not paid these damages, and consequently is not within the second class of cases.

Being not within the statute at all, the claim for damages cannot be sustained.

The argument that the fifteen per cent. is not damages, but exchange, is entirely unsound, as I conceive, in this case. The statute gives exchange from the place of drawing interest, costs of protest, *and fifteen per cent. dam- [*743 ages, in addition. The first is indemnity; the second a penalty. By commercial men the first is construed liberally, as within the general rule governing bills of exchange, with the difference of estimating the exchange from the place of drawing, instead of re-exchange; the right to the penalty is strictly construed, according to the words of the statute. Its plain meaning must govern the merchant and business man; for him it was made. He is told that the owner of a bill, at the time of its protest, shall be entitled to fifteen per cent. damages from the drawer, or indorser, in every case; and that the indorser shall be entitled to the same (from the drawer, or a prior indorser), provided the owner makes him pay the fifteen per cent.; not otherwise. And this I understand to have been the uniform mode of proceeding under the statute by the merchants of Maryland, under the 1st and 3d sections of the act; nor does it appear by the books of reports of that State, that this interpretation by business men has ever been questioned in the courts of justice there. For the reasons stated, I think the instruction given to the jury in the Circuit Court was proper, and that the judgment ought to be affirmed.

Mr. Justice WAYNE:

I concur in the opinion that the judgment of the court below ought to be reversed, but not for the reasons given in the opinion of the court.

ORDER.

This cause came on to be heard on the transcript of the record from the Circuit Court of the United States for the Eastern District of Pennsylvania, and was argued by counsel; on consideration whereof, it is now here ordered and adjudged by this court, that the judgment of said Circuit Court in this cause be, and the same is hereby reversed; and that this cause be, and the same is hereby remanded to the said Circuit Court, to award a *venire facias de novo*.

S. C., 5 How., 382.
Cited—5 How., 395, 401; 6 Otto, 36; 1 Wood. & M., 81.

Note by the reporter.—The Chief Justice did not sit in this case, and his opinion is therefore placed in an appendix.

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APPENDIX.

745*] *Sir: I will thank you to publish the accompanying opinion in the case of *The Bank of the United States* v. *The United States*, in the appendix to your second volume. The opinion itself will show why I have deemed it proper to publish it in the manner proposed.

I am, very respectfully, your obedient servant, R. B. TANEY.

Benjamin C. Howard, Esq.
Reporter to the Supreme Court of the United States.

THE BANK OF THE UNITED STATES v. THE UNITED STATES. } Supreme Court, January Term, 1844.

THE question in this case is, whether the Bank of the United States is entitled to fifteen per cent. damages on the bill drawn by the Secretary of the Treasury of the United States, upon the French minister and Secretary of State for the Department of Finance, for the first installment due from France to the United States, under the convention of July 4, 1831. This bill was protested for nonpayment; and the bank thereupon gave notice of the protest, and claimed these damages in addition to the re-exchange and to all costs and damages actually sustained, except only the commissions charged by Hottinguer & Co., which according to its statement were considered as included in the fifteen per cent. The claim for these damages was resisted by the executive department of the government, which offered to pay the re-exchange and all costs and charges actually incurred, and to give the bank a full indemnity. This was refused; and as the sum in controversy was a very large one, amounting, I believe, to about $150,000, it attracted a good deal of attention at the time, and has been the subject of much public discussion.

When this dispute arose I was the Attorney-General of the United States, and my opinion was called for by the Secretary of the Treasury; and was against the claim set up by the 746*] bank. Having thus been *consulted as the counsel of the United States, and given the advice upon which the government acted, it seemed proper for me to withdraw from the bench, when the subject was judicially disposed of; and I should not therefore have taken any part in the decision, even if the State of my health had permitted me to be in Washington when the question came before the court.

The opinion I originally gave was a very brief one, without stating any of the reasons upon which it was founded. Some time afterwards, at the request of the gentleman who succeeded me in the office of Secretary of the Treasury, I stated some of the grounds upon which I had formed my opinion, but without intending to go into a full discussion of the subject; and indeed without having all the papers within my reach at the time. I have not seen that opinion since it was written. And as the subject is now brought up for decision in the Supreme Court; and as upon a more full consideration of the case I still entertain the opinion I originally expressed, it is due to myself, and to the official station I now hold, that the reasons should be fully understood upon which, in my judgment, the claim of the bank had no foundation in law or equity. No place appears to be so proper for such a publication as the volume of the Reports which contains the case. But as I did not sit in the cause I cannot with propriety insert my opinion in the body of the report, and therefore place it in the appendix.

I must here remark that a letter from Mr. Biddle to Mr. Duane, then Secretary of the Treasury, dated August 24, 1833, is inserted in the record, in which it is said that I had declined communicating to the Secretary my reasons for the opinion I had given. The statement as there made is calculated to create an impression which is not correct. The letter, as printed in the record, is, by some mistake, represented as an answer to one from Mr. Duane of June 27, which is also given. But that letter certainly does not authorize the statement; and Mr. Biddle's was, I presume, an answer to one from Mr. Duane of the 17th of August. And in a letter addressed by me to the Secretary on the 16th of that month, in answer to one from him informing me of Mr. Biddle's wish to know the reasons for my opinion, I said: "It is no doubt due to the public, and to the executive branch of the government, which has acted on my opinion, and also to myself, that I should in due time place on file in your department the reasons which in my judgment justify the government in its refusal to pay this demand;" and after telling the Secretary that I must *exercise my own dis- [*747 cretion as to the time, I concluded by saying: "I cannot therefore imagine that it is the duty of the counsel for the United States to argue this question for the satisfaction of the president and directors of the bank whenever they may think proper to call on him to do so." My refusal, therefore, was to answer the call of the bank, which I then thought, and still think, it had no right to make.

I give these extracts from my letter, because Mr. Biddle's would see. to have been introduced in the record for the purpose of proving that I had refused to give the Secretary of the Treasury any reasons for the opinion I had expressed. If the circumstance of my giving or refusing to give reasons was deemed to be a matter sufficiently material and important to be

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offered in evidence at the trial, and spread upon the record, I can see no just reason why Mr. Biddle's statement should have been selected as the testimony to be offered, and my own letters upon the subject withheld. They are upon file in the Treasury Department as well as Mr. Biddle's, and copies of them could have been as easily furnished.

In examining the questions of law which arise in this case, it is necessary in the first place that all the material facts should be well and clearly understood. I proceed to state them. In doing this, however, I shall have occasion to refer to some papers which, although material to the controversy, are not in the record. But they are on the public files of the departments in Washington; and as I shall give their dates, there will be no difficulty in verifying the correctness of the references.

By the Treaty between the United States and France, of July 4, 1831, article 2d, it was stipulated that twenty-five millions of francs, which the latter agreed to pay to the United States in discharge of the claims of sundry American citizens upon the French government, should "be paid at Paris in six annual installments of four millions one hundred and sixty-six thousand six hundred and sixty-six francs, and sixty-six centimes each, into the hands of such person or persons as should be authorized by the government of the United States to receive it;" and by the same article, the first of these installments was to be paid at the expiration of one year, from the exchange of the ratification of the treaty; and the others annually thereafter until the whole should be paid. The exchange of the ratification took place on the 2d of February, 1832; and the first installment therefore became due on the 2d of February, 1833.

748*] *By an Act of Congress passed July 13, 1832, it was made the duty of the Secretary of the Treasury to cause the several installments, with interest thereon, to be received from the French government, and transferred to the United States in such manner as he might deem best. The difficulty between the bank and the government has arisen out of this act of Congress, and the manner in which it was carried into execution.

On the 31st of October, 1832, Mr. McLane, then Secretary of the Treasury, addressed a letter to the president of the bank, referring him to the act of Congress, and expressing his desire to transfer the money to the United States, in a manner "most beneficial to the interests of the claimants," and suggesting that a bill drawn on the French government might be an advisable mode. He concludes his letter with the following request: "I shall be happy to receive your views on the whole subject; and if, as I presume, an arrangement for the transfer may be best made with the bank, I will thank you to state the terms."

On the 5th of November following the president of the bank replied to this letter, and after stating his willingness to offer such suggestions as occured to him "in regard to the transfer of the first installment payable by the French government," proceeded to recomend a bill upon the French government, which he advised the Secretary not to offer in the market, as it would depress the price; and proposed that he should give to the Bank of the United States a bill for the whole amount, at a certain rate mentioned in his letter. He states that he advises this, because it is believed to be "the best operation for the government;" that the bank is purchasing from individuals on better terms; and that the offer is made from "an anxiety to make the transfer on such terms as would merely prevent a loss to the bank; and concludes by saying that in making the offer the bank was "influenced exclusively by the belief that any other arrangement would be less advantageous to the treasury."

No further correspondence appears to have taken place between the parties until the 26th of January, 1833, when the Secretary again wrote to the president of the bank, stating that the department was then ready to draw on the French government for the first installment; that he presumed the bank was still disposed to purchase on the terms it had before offered; and that as the installment would be due before the bill could possibly arrive in France, it would be made payable on demand, and it was desirable that credit should be given to the treasurer by the bank on receiving the bill.

*This letter was answered by the [***749** president of the bank on the 30th of the same month, and he stated in his reply that exchange had fallen since the former offer, and proposes new terms, which he represents as made by the bank "without looking to any profit in the operation, but merely in the expectation of incurring no loss upon it;" and that if this offer is accepted, the bank would, upon the receipt of the bill, pass the amount to the credit of the treasurer.

On the 6th of February, the Secretary informed the bank that the last mentioned proposition was accepted, and that the bill would be forwarded the next day. It was accordingly so transmitted, and the letter of Mr. McLane, which accompanied the bill, stated that he sent with it a communication from the Secretary of State to the French government, advising of the drawing of the bill, in order that the said communication might accompany the bill; and on the 9th of the same month he again wrote to Mr. Biddle, sending him "duplicates and triplicates of the act of the President, and a letter of advice to the American Chargé d'Affaires at Paris, intended to accompany the bills drawn by the department on the French government." The bill forwarded was in the following words:

"TREASURY DEPARTMENT OF THE UNITED STATES, WASHINGTON, Feb. 7. 1833.

"SIR: I have the honor to request that at the sight of this my first bill of exchange (the second and third of the same tenor and date unpaid) you will be pleased to pay to the order of Samuel Jaudon, cashier of the Bank of the United States, the sum of four millions eight hundred and fifty-six thousand six hundred and sixty-six francs and sixty-six centimes; which includes the sum of $3,916,666.66, being the amount of the first installment to be paid to the United States under the convention concluded between the United States and France on the 4th of July, 1831 (after deducting the amount of the first installment to be reserved to France under the said convention), and the additional sum of nine hundred and forty

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thousand francs, being one year's interest at four per cent. on all the installments payable by the United States, from the day of the exchange of the ratification to the 2d of February, 1833."

This bill was signed by Mr. McLane as Secretary of the Treasury, and directed to "Mr. Humann, minister and Secretary of State for the Department of Finance, Paris." Upon the back was indorsed a particular account, certified by the register of the treasury, showing [750* *that the amount claimed to be due to the United States under the treaty was the same with that for which the bill was drawn.

The paper which accompanied the bill, and which is described in Mr. McLane's letter of the 7th as "a communication from the Secretary of State to the French government," and in his letter of the 9th as "the act of the President," was an instrument under the seal of the United States, signed by the President and countersigned by the Secretary of State, bearing the same date with the bill, and which, after reciting the article of the convention, herein before mentioned, and that the first installment became due on the 2d of that month—and reciting also the act of Congress by which the Secretary of the Treasury was directed to cause it to be transferred to the United States, and that in virtue of the power vested in him, he had drawn the bill above mentioned for the first installment under the convention, proceeded to declare that the President of the United States ratified and confirmed the drawing of the said bill, and authorized "the said Samuel Jaudon or his assignee of the said bill to receive the amount thereof, and on the receipt of the sum therein mentioned to give full receipt and acquittance to the government of France for the said first installment, and the interest due on all the installments, payable on the said second day of February, by virtue of the said convention."

The letter of advice to the American Chargè d'Affaires at Paris, transmitted with the bill, was one from Mr. Livingston to Mr. Niles, then chargè at Paris, informing him of what had been done in this business, and directing him to "take an early opportunity therefore to apprise the French government of this arrangement."

On the 11th of February, Mr. Biddle acknowledged the receipt of the bill, and informed the Secretary that he had passed the amount of it to the credit of the treasury. And after explaining the reasons for receding from the first offer made by the bank, he says, "the purchase of the bill is not in the least desirable to the bank, nor would the rate now allowed have been given to any other drawer than the government."

This bill, it appears, was afterwards indorsed to the Barings by the bank, and by them to Rothschild, and was presented to the French minister of finance for payment. But no appropriation having been made by the French Chambers, Mr. Humann was unable to pay it. It was therefore protested, and was paid by Hottinguer & Co., for the honor of the bank—and the bank gave notice of the protest to the Secretary of the Treasury, and demanded not only the [751* costs and expenses *sustained, and re-exchange, but also fifteen per cent: damages on the principal amount of the bill.

Upon the receipt of this notice, the money which had been transferred to the government on the books of the bank in payment of the bill, was immediately re-transferred to the bank—it not having been used by the government, nor even brought into the treasury. And the government offered to indemnify the bank for all costs, expenses and damages it had actually sustained, by the nonpayment of the bill; but refused to pay the fifteen per cent. damages, upon the ground that the bank was not entitled to them.

These damages are claimed under an Act of Assembly of Maryland passed in 1785, which provides "That upon all bills of exchange hereafter drawn in this State, on any person, corporation, company, or society, in any foreign country, and regularly protested, the owner or holder of such bill, or the person or persons, company, society, or corporation entitled to the same, shall have a right to receive and recover so much current money as will purchase a good bill of exchange of the same time of payment, and upon the same place, at the current exchange of such bills, and also fifteen per cent. damages upon the value of the principal sum mentioned in such bill, and costs of protest, together with legal interest upon the value of the principal sum mentioned in such bill from the time of the protest until the principal and damages are paid and satisfied:" and then comes a provision that if any indorser shall pay the holder the principal, damages, and interest above mentioned, he shall be entitled to recover the sum paid by him, with interest, from the drawer.

This act of assembly was in force at the time Congress assumed jurisdiction over the District of Columbia, and was of course embraced by the act of Congress, which declared the laws of Maryland in force in that part of the district which had been ceded to the United States by Maryland.

The fifteen per cent. damages is the only point in controversy, and if the bank succeeds in establishing its demand, it will make a clear profit of about $150,000, without having run any risk or suffered any inconvenience, and without having rendered any service to the public; and the treasury of the United States will be subjected to this heavy loss without any fault on the part of its officers, unless it be regarded as a fault to have consulted the bank and relied upon its counsel.

*It is indeed impossible to read the [*752 statement of the case without being strongly impressed with the utter want of anything like equity or justice on the part of the bank in making this demand. The Secretary of the Treasury, it appears, being charged by law with transferring this money to the United States, and regarding the bank as the great fiscal agent of the government, which, from its extensive monetary transactions was best able to judge in what mode the transfer could most advantageously be made, very naturally consulted with its officers before he took any step in the business; and it is evident by his letter that he addressed himself to the president of the bank not merely as to a person with whom he proposed to bargain for the sale of a bill of exchange, but as one who stood in such a relation to the public that the Secretary supposed

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he had a right to ask his counsel upon this subject, and might safely act upon it when given.

The answer of the president of the bank represented the officers of that institution as receiving the application of the Secretary in a corresponding spirit; and as advising and acting in the business altogether from public and patriotic motives, without any view whatever to their own profit. The Secretary is advised that the simplest form would be the sale of a bill on Paris; but reasons are stated (no doubt good ones) why this operation should not be attempted, and why it would be advisable to deliver a bill to the bank at a rate which he mentions; and the Secretary is assured, that in making its proposal the bank is not governed by the market price for which bills on Paris are then selling, and that in its offer it is not governed by any selfish considerations, but "is influenced exclusively by the belief that any other arrangement would be less advantageous to the treasury." It was upon the faith of these statements that the offer of the bank was accepted, and it obtained possession of the bill for the whole amount of the installment upon its own terms, without any competition in the market with others. It needs no commentary upon the letter to show how little the present demand corresponds with the assurances contained in it, or with the motives upon which the bank professed to be acting.

But this letter proves still more. It shows that the parties were not dealing with one another for the sale and purchase of a bill of exchange, in the commercial and legal sense of those terms, where the rights and responsibilities of the drawer and drawee, and of all the parties to the instrument, depend upon the bill [*753] itself, and are determined *by the law merchant and the usages of trade; but that the proposition made by the bank and accepted by the Secretary was an offer to act as the agent of the United States in transferring this fund, upon the terms and for the considerations therein mentioned—and that the bill, together with the other instruments executed at the same time, were delivered to the bank in order to enable it to perform this service. If such was the contract between the parties, there is no color for the claim now made; and that such was its real character, and that it was so regarded at the time, is evident when we take into consideration in connection with this correspondence the object which both parties intended to accomplish, and the other instruments executed and delivered with the bill, and making, therefore, a part of the contract.

It must be borne in mind that both parties had the same knowledge of the situation of this fund and of the circumstances connected with it, and both had the same object in view—that is, to transfer it to the United States, upon terms most advantageous to the treasury. And it is evident from the papers executed and delivered at the time, that neither party supposed that a bill of exchange would enable the bank to accomplish the object contemplated. The form of a bill was indeed given to one of the instruments, and it is spoken of in the correspondence referred to as the sale of a bill of exchange, and very naturally so spoken of from the shape given to the contract, and the manner in which the compensation to the bank was arranged. But the question is, was the contract upon which this instrument was delivered in substance and in truth a sale and purchase of a bill of exchange, according to the usages of trade, and the legal meaning of the terms? Or was it given to the bank merely to enable it, more conveniently, to execute an agency it had undertaken?

Now, it is manifest that this bill would not give the indorsee or holder the right to demand this money of the drawee; and so the parties to it understood the matter; and the bank therefore took the power of attorney to Mr. Jaudon, without which it would have been unable to transfer this fund, even if the money had been in the hands of the French minister of finance, ready to be paid.

Undoubtedly so far as our government was concerned a bill of exchange would of itself have been all-sufficient. The act of Congress authorized the Secretary to adopt any mode he thought proper, to transfer this money to the United States; and the President and other officers of the government were bound to cooperate with the Secretary, *and to assist him as far as their assistance might be necessary to carry into effect any mode he might adopt. [*754]

But the act of Congress could create no obligation on the French government, nor impose upon it the duty of making the payment in any other mode but the one prescribed by the convention, and sanctioned by the usages of nations in their intercourse with one another. France had not agreed to pay a bill of exchange drawn by the Secretary of the Treasury upon the French minister of finance; nor was she bound to take upon herself the risk of deciding whether the signature to a bill presented by a private individual as indorsee was the proper handwriting of the Secretary of the Treasury; nor whether the indorsements upon it were genuine or not. By the convention she engaged to pay this money "into the hands of such person or persons as should be authorized by the government of the United States to receive it." And the only authority which she was bound to recognize, was one from the Executive Department of the government, which in its foreign intercourse is regarded as representing the nation. France did not stipulate, that in carrying this convention into execution the established usages of nations should be put aside, and her Department of Finance treated as a mercantile house, and subjected to the usages of trade and the custom of merchants, instead of the laws and usages of nations. She bound herself to pay this money to any one who produced an authority from that department of the government of the United States with which she had negotiated, with which she had made her contract, and which, in its foreign intercourse, is always understood to represent the nation, provided the authority thus given was made known and authenticated, according to the established usages of diplomatic intercourse to that department of the French government which is charged with its foreign relations. This is the real and substantial meaning of this convention. She did not agree to accept a bill of exchange.

Whatever duties, therefore, the Act of Con-

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gress imposed upon the officers of this government, and whatever authority it conferred upon the Secretary of the Treasury, it did not and could not alter the obligations of France. So far as she was concerned, the bill of the Secretary of the Treasury in favor of the cashier of the Bank of the United States, gave him no authority to demand the money, and created no obligation on France to pay it. Standing by itself, it would have been useless and ineffectual; and in this light it was evidently regarded by all the parties to the contract—by the Presi-
755*] dent of the *United States, by the Secretary of State, by the Secretary of the Treasury, and by the officers of the bank. The other instruments executed and delivered at the same time show that such were the impressions under which they were acting. The power of attorney in favor of Mr. Jaudon, certified under the seal of the United States, was the real authority relied on by all of the parties to enable the bank to receive the money; and the only effect of the bill was to make this power negotiable and transferable, and therefore I presume more convenient to the bank. It was convenient also to the United States, because it enabled the Secretary to ascertain at once the sum that the treasury would realize from this installment. And even this power of attorney, carefully as it is drawn and attested, was not deemed sufficient under the treaty, without adding to it an original letter from the Department of State to the American chargè, which was to accompany both the bill and the power of attorney, in order that he might, by an official communication to the proper department of the French government, assure them of the authenticity of the power and the bill.

Now, it seems to me to be confounding things which are essentially unlike, to apply to such a transaction between nations the commercial usages in relation to bills of exchange, merely because one of the instruments executed between the parties is in that form and called by that name.

The instrument of writing acknowledged in commerce as a bill of exchange, and to which the law merchant applies, is one which, of itself, without any other aid, gives the payee or his indorsee the right to demand and receive the amount specified in it; and the payee and indorsee is presumed to buy it upon the faith that the drawee, upon the authority of the bill itself, will pay the money. But if the bank in this case supposed that it was entering into such a contract with the government, and purchasing such a bill, why did it take the power of attorney to Mr. Jaudon, bearing the same date with the bill? Why take the letter from the Secretary of State to the American chargè? It had no occasion whatever for these papers, if it meant merely to buy a bill. It had nothing to do with them, and no business with them; and the acceptance of these instruments, delivered with the bill, to bear it company in all its transfers, and to be presented with it to the French government, is utterly inconsistent with the pretension now set up of being nothing more than the purchaser of a bill. But they are in
756*] perfect accord with the letter of *Mr. Biddle, in which he proffers the agency of the bank to transfer the fund.

The subsequent proceedings in this business conform in every respect to the view I have taken, and prove that it was regarded in the same light not only by the parties originally concerned, but by those also who afterwards became interested in it. For, before the bill was presented for payment to Mr. Humann, the letter of the Secretary of State to the American chargè, hereinbefore mentioned, was delivered by the assignee and holder of the bill to Mr. Niles, the chargè of the United States at Paris, who, pursuant to the instructions therein contained, on the 21st of March, 1833, addressed a letter to the Duc de Broglie, the French minister of foreign affairs, apprising him of the contents of the dispatch from the State Department, and informing him that the bill would probably be presented in a day or two at the Department of Finance, and assuring him that the assignee had full power from the President of the United States to give the necessary receipt and acquittance to the French government, according to the treaty.

Now, if this had been the purchase of the mercantile instrument recognized as a bill of exchange, and to be treated as such by the holder, he would have believed, and would have had a right to believe, that the bill itself authorized him to receive the money and give an acquittance. And if as a matter of courtesy (the bill being payable at sight), he chose to give notice of the time when it would be presented for payment, that notice would naturally and properly have been given to the drawee. But here the notice was not given by the holder to the person from whom he was to ask payment, nor to any officer of the French government, but he delivers the letter from the Department of State to the American chargè, in order that he may, by an official communication from the government of the United States, apprise the French government of the assignee's right to receive the money and give the acquittance; and this notice was not given, and could not with propriety have been given, by Mr. Niles to Mr. Humann, the drawee, but was necessarily and properly given to the minister for foreign affairs. In other words, this letter from the State Department was placed in the hands of the chargè in order that he might demand the money, in behalf of the holder of the bill, from the French minister of foreign affairs, and through him obtain an authority to the drawee to pay it. For this is the real meaning and object of those communications.

*Here, then, is a paper in the form [*757
of a bill of exchange; which the parties to it know gives no right to demand the money mentioned in it, because that money is due from one nation to another, and the mode of payment is particularly specified in a treaty; and that mode is not by a bill of exchange drawn by the Secretary of the Treasury upon the French minister of finance. The payment is to be made to an agent appointed by the government of the United States. No person would be recognized as such unless his appointment was authenticated by the President of the United States, nor unless that appointment was regularly notified to the French minister of foreign affairs. Then, and not before, it was the duty of the French government to order the payment to be made; and then, and not before, the holder of the bill, according to the

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treaty, was entitled to demand and receive the money. This was all known and agreed to, and acted upon by the parties originally or subsequently interested in the contract, and indeed appeared on the face of the papers. Now, it seems to me impossible to treat such a transaction as an ordinary mercantile operation, and to apply to it the rules and principles of the law merchant. It is impossible, with any show of reason, to treat the Secretary of the Treasury of the United States and the French minister of finance as if they were mere trading houses, which might lawfully deal with one another, and draw bills upon each other whenever they pleased. The American Secretary acted under a special law of Congress in this instance, and in execution of a treaty, and we might as well apply the rules of the law merchant and the doctrine of private partnerships to a treaty of alliance between nations, as subject this transaction to the usages of trade.

It is, moreover, worthy of remark, that the Duc de Broglie, in his answer to the note of Mr. Niles, complains of the course adopted by the American government, guarded as it was, and says that in his opinion they had gone out of the natural course, which the treaty itself pointed out, and which was supported by so many precedents. (*Vide* 2d vol. Exec. Doc., 2d sess. 23d Cong., Doc. 40, page 22, 23.) I do not, however, mean to admit the justice of this remark, because in the power given by the President, and the official notification of it, according to the usual forms of diplomatic intercourse, the stipulation in the treaty was complied with, and the only office of the bill of which he complained was to designate the person authorized to act under the power executed by the President and certified under the seal of the United States.

758*] *Nobody will imagine for a moment, that if the United States are compelled to pay these damages, the French government can be called on to re-imburse them. For, if the United States superadded any other instrument to the one pointed out by the treaty, or adopted a different mode of communication from the one which the treaty authorized, and thereby subjected themselves to the payment of damages, they have no right to throw the loss thus sustained upon France. And, certainly, France did not agree by the treaty that a bill might be drawn for this installment upon their minister of finance, nor that our Secretary of the Treasury might hold any communication with him on the subject. The refusal, therefore, of Mr. Humann to accept or pay the bill was not a breach of the treaty stipulation; and, consequently, our government can have no claim to compensation on that account. The breach consisted in not paying the money to the agent duly appointed by the government of the United States, whose appointment was sufficiently authenticated to the proper department of the French government, according to the usages of diplomatic intercourse—that is to say, to the minister of foreign affairs. And the omission to pay when this had been done, undoubtedly entitled the United States to demand the interest provided for by the treaty until the money was paid But there is no clause in the treaty subjecting the French government to fifteen per cent. damages, if the money was not paid on demand. Yet the money was due; and, unquestionably, if this case is to be treated as a bill transaction in the usual course of business, the drawee would be responsible to the drawer for all the damages he might sustain by the protest of the bill. Is the transaction to be regarded as the sale and purchase of a bill of exchange, in order to charge the United States with the payment of these large damages to the bank, but for no other purpose? I cannot assent to the justice of such a decision, nor to the principles on which it is founded.

In discussing this question, I have so far taken into consideration the letters of the parties, and the other instruments of writing executed and delivered at the same time with the bill, in order to determine the true character of the contract. Unquestionably, upon well settled legal principles, this is the only mode in which the intention of the parties can be ascertained, and their respective rights and liabilities decided. But if we are to throw aside everything but the bill, and regard that as the only evidence before us, still it will be found that the act of assembly of Maryland does not apply to the *case. And if [*759 it does not, then it is very clear that the damages claimed cannot be recovered.

It cannot be necessary to cite authorities, to prove that by the general law merchant the holder of a protested bill of exchange is entitled to nothing more than costs, expenses, and re-exchange. In other words, he has a right to be indemnified from loss; but beyond this he has no claim to damages.

In many places, indeed, damages are given by established local usage, or by express statute. But these damages not only differ in amount in different places, but they differ also in the purpose for which they are given. In some instances they are allowed in lieu of expenses and re-exchange, and in that case they stand in the place of such allowances, and are regarded as a just equivalent for them: a general rule or fixed sum being adopted as a matter of convenience, to save the difficulty and inconvenience of proving, in every case, the reasonable costs and expenses actually incurred, and the price of the re-exchange at the time.

But in other places damages are superadded to these allowances, and are given to the holder over and above the usual indemnity. In such cases the damages are not given for the loss supposed to have been sustained. They are imposed upon the drawer as a penalty. And the right to recover them is given to the holder in order to prevent persons from selling exchange without having provided funds to answer it.

The damage given by the Maryland Act of Assembly are of the latter description. The law gives the usual compensation allowed by the general commercial code—that is, costs, interest, and re-exchange—the re-exchange being measured by the price of the new bill in Maryland, instead of the country in which it is payable. It also gives fifteen per cent. damages over and above these allowances. The damages, therefore, are, in effect, a penalty imposed upon the drawer, in case his bill is protested. And the question arises, whether this provision of the statute extends to the United

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es, and embraces bills drawn on behalf of government, by an officer authorized by to draw them.

such be the construction of this law, and construed to embrace bills drawn by the , it is the first instance in the history of ns in which a sovereignty has imposed a y upon itself in order to compel it to be in its dealings with individuals. A eignty is always presumed to act upon] principles of justice, *and if, from mis- or oversight, it does injury to a nation or dividual, it is always supposed to be ready willing to repair it. It is bound to com- te the party injured, and to make the in- ity a full and ample one. But it is bound hing more. And it ought not to be sup- to have made a provision so unusual as e now contended for, unless very clear were used to indicate that intention.

does it matter whether this fifteen per is technically to be regarded as a penalty not. It is, at all events, a new provision, rafted upon the general law merchant. It new charge imposed upon the drawer of a tested bill, beyond that to which he was be- e subject. The question still recurs, does s statute include bills drawn by the State? England it is well settled that the king is embraced by the provisions of an act of rliament, however broad and general the ms of it may be, unless he is expressly med, or the language of the statute and the ture of its enactments imply that it was in- ded to operate on the rights of the sovereign well as upon those of individuals. (5 Co. p., 14 *b;* 11 Co. Rep., 70; 8 Mod., 8; 1 Str., 6.) The same doctrine has been long since nly established in Maryland. (*Murray and ylor* v. *Ridley, adm'r,* 3 Harr. & McHenry, 1; *Contee* v. *Chews' ex'r,* 1 Harr. & Johns., 7; *The State* v. *The Bank of Maryland,* 6 Gill Johns., 226.) And if the State of Maryland ould not have been liable to this demand un- r the Act of 1785, it follows that the United tates are not responsible. For the adoption y Congress of the Maryland law, certainly did othing more than place the general govern- ent, in relation to this contract, upon the ame ground that the State would have occu- ied before the cession of the district.

Now, in this law there are certainly no ex- press words including the State; nor is there nything in its language or its object to lead to hat conclusion. And it appears to me that no one who reads the act can for a moment imag- ine that the State intended to impose upon itself this fifteen per cent. damages, in case one of its foreign bills, from some unforeseen cause or other, should happen to be protested. It is no answer to this argument, to refer to cases de- cided or usages adopted, where certain fixed damages are given as a substitute for the charges recognized by the general mercantile law. Such decisions and usages rest upon dif- ferent principles from the present case, and the reasons upon which they are allowed would undoubtedly apply to government bills as well [*761] as to those of individuals. Neither *is it sufficient to say that the government, if it was the holder of a protested bill, would be entitled to these damages from an individual, and that it is therefore just that it should pay them in return. If such a rule be a sound one, and if it ought to be followed by the Legisla- ture, yet it would not authorize the court to repeal a statute, and make a regulation differ- ent from that enacted by the legitimate author- ity. It would be difficult, however, for any- one to maintain that there is any foundation in justice or fair dealing for applying such a rule against the United States in this instance, and in favor of the bank. The justice of the case is most manifestly on the same side with the law.

And, indeed, the law of the case would be the same, even if the contract had been noth- ing more than the sale of this bill, and the lia- bilities of the United States were to be deter- mined by the rules which govern similar con- tracts between two individuals.

The bill, upon the face of it, is drawn upon a particular fund. And such a bill, although usually spoken of as a bill of exchange, is yet not recognized as such in the commercial code. Nor is it subject to the rules and usages which have been established in relation to bills of ex- change. It cannot be declared on as such, nor is the drawer answerable to the indorsee or holder upon protest for costs, charges, or re- exchange; nor for any fixed sum in lieu of them. The Act of 1785, therefore, does not apply to it; for that statute manifestly intended to embrace those instruments only which are rec- ognized by law as bills of exchange.

The general rule as to what constitutes a bill of exchange, in the legal sense of these terms, is given in Story on Bills of Exchange, sec. 46; where, after stating that bills payable out of a particular fund only, or upon an event which is contingent, are not in contemplation of law bills of exchange, the definition of that instru- ment is given in the following words:

"And hence the general rule is, that a bill of exchange always implies a personal credit not limited or applicable to particular circumstances and events, which cannot be known to the holder of the bill in the general course of its negotiation; and if the bill wants, upon the face of it, this essential quality or character, the defect is fatal."

The cases which establish and illustrate this principle, and show what bills are regarded as drawn upon a particular fund, are all referred to in the section above mentioned, and in the one succeeding *it, and may, indeed, [*762 be found in any of the standard works on bills and notes. It would be useless to cite here the multitude of cases on the subject. A single one will show the application of the principle, as settled by the current of authorities. In *Jenney* v. *Herle* (2 Ld. Raym., 1361), the bill was in the following words: "Sir, you are to pay to Mr. Herle £1,945, out of the money in your hands belonging to the proprietors of the Devonshire mines, being part of the considera- tion money for the purchase of the manor of West Buckland." It will be observed that the lan- guage of this bill assumes that the money was in the hands of the drawee; that the fund out of which it was payable had already been received by the party upon whom the bill was drawn. Yet this was held to be no bill of exchange, in the legal sense of the words, it being payable out of a particular fund. So, too, an order from the owner of a ship to the freighter, to pay

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money on account of freight, is no bill, because the *quantum* due on the freight may be open to litigation. (Chitty on Bills, 58; 2 Str., 1211, *Banbury* v. *Lissett*, so held by Lee, *Chief Justice*.)

And so firmly have the principles decided in these early cases been since adhered to, that it is now greatly doubted whether the cases of *Andrews* v. *Franklin* (1 Str., 24), and *Evans* v. *Underwood* (1 Wils., 262), which seemed in some degree to relax the rule, would at this day be held to be law. (See Story on Bills, page 60, *note*.)

Now, can anyone read the bill in question, and distinguish it in principle from the case of *Jenney* v. *Herle*? Or bring it within the definition of a bill of exchange, as given in Story on Bills? Upon the face of the bill, it is drawn by the American Secretary in his official and not in his private character. It is drawn upon Mr. Humann, not for any money he was expected to pay to the American Secretary in his private capacity, but upon a particular fund which was due from the French nation, and which was presumed to be in his hands as the minister of finance. It is upon the credit to which the Secretary supposed himself to be officially entitled, on account of this particular fund, that he draws the bill. This is carefully and distinctly set out in the bill itself. It does not in its terms imply a personal or official credit, not limited or applicable to particular circumstances. On the contrary, it claims the credit, and requests the payment, on account of the particular circumstance that the money was due from the French government, and the funds to pay it presumed to be in the hands of the minister of finance.

Moreover, the Secretary knew, and the bank **763*]** knew, that France *was a constitutional monarchy, under which no money could be raised, or applied to any particular purpose, without the sanction of the legislative body. And that the money due from France could not be paid by Mr. Humann, unless money was placed in his hands, and by law appropriated for that purpose: the payment of the bill, therefore, depended upon that circumstance. If that event had not happened—that is to say, if the money had not been provided by the Legislature, and the payment authorized out of the fund thus provided, then, upon the face of the bill, it was evident that Mr. Humann would not and could not pay it. It is true that the bill assumes that the money was in his hands. But that was the case, also, in *Jenney* v. *Herle*. Indeed, the bill there expressly stated the fund to be in the hands of the drawee; yet it was held not to be a bill of exchange.

It will hardly be said that this bill is to be treated as if drawn by the United States against France. But, even if that view of the subject could be maintained, it would not affect the argument. The bill claims no general credit for the United States with France that would give them a right to draw independently of the money due by the treaty. In any aspect of the case, the credit upon which the bill is drawn is expressly confined to this particular sum. And I cannot imagine how this instrument can be dealt with as a bill of exchange, if the rule is to stand, that no instrument is a bill of exchange, in contemplation of law, unless it implies a personal credit not limited or app cable to particular circumstances and even which cannot be known to the holder of t bill in the general course of its negotiation.

But if none of these objections stood in t way of this claim, and if the transaction we regarded as one between individuals for t purchase of a bill of exchange, in the leg meaning of the terms, and therefore to be go erned by the Act of 1785, yet the bank wou have no claim to the damages in question.

The first clause of the first section of th law gives the fifteen per cent. damages, in a dition to the re exchange, costs, and interest, the person who is the owner or holder of t bill protested. The second clause of the sam section provides, that any indorser who sha have paid to the holder, or other person en tled, the value of the principal, damages, an interest, shall have a right to recover the sam from the drawer or other person liable to such i dorser on the bill. The plain language of t law gives the fifteen per cent. damages to th party who is the holder of the bill at the tim of the protest; and *gives to the in- [*76 dorser the right to recover from the drawer, other person liable, so much only as he shall b compelled to pay on account of the protes The indorser is entitled to nothing—neither t principal, costs, re-exchange, nor damages until he has paid them, and then to so much he has actually paid, and to nothing more.

The policy of this law is as obvious and just as its words are plain. It conforms in it provisions to the general commercial code, nearly as the situation of Maryland would that time permit.

By the general mercantile law, the holder a protested bill is entitled to redraw from th place where it was dishonored, upon the draw er or indorser, in the country where they reside for an amount that will produce, by its sale, the existing market price of such bills, a sum exactly equal to the amount of the orignal bi at the time when it ought to have been paid or when he is able to draw the re-exchange together with his necessary expenses, and inter est. He is not, however, obliged to redraw but is entitled to recover what would be th price of such a bill, with interest, and the nec essary expenses and charges. This is th amount of the holder's damages. But the in dorser is not entitled to recover of the drawe the damages incurred by the nonpayment of bill, unless he has paid them or is liable to pay them. (3 Kent's Com., 115, 116, 4th edition Story on Bills, 470, and notes; Chitty on Bills 470, 8th ed.)

The reason of the difference made betwee the holder at the time of the protest, and th indorser, who may afterwards by taking up the bill become the holder, is evident. The holder by purchasing the bill and presenting it fo payment, shows that he desires funds to tha amount, at that place, at the time when the bill becomes due, and that he has counted upon obtaining them by means of the bill which he holds. His disappointment may subject him to serious loss and embarrassment in his busi ness, and the law therefore authorizes him to raise the same sum immediately by re-exchange on the drawer or indorser, in the country in which they reside. And if he cannot or does

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not redraw, the price of the re-exchange to which he was entitled, together with his costs and expenses, is, of course, the measure of his damages.

But the indorser stands on different ground. He has already sold the bill, and received the consideration for it, at the time and place where it suited his convenience. And, having by his indorsement guarantied the safety of the bill to any subsequent holder, if, in consequence of this engagement, he is compelled to [765*] pay it, the natural and just *measure of his damages against a party answerable over to him is the precise sum he is compelled to pay, with interest upon it. This is the uniform rule, where one person is obliged to pay money, for which he has his remedy against another; and it is daily and familiarly acted upon, where a surety pays money for his principal.

Now, the Maryland statute differs from the general mercantile code only in this—that in relation to the holder, it gives him the price of the re-exchange from the place where the bill was drawn, instead of the place where it was payable; and superadds the fifteen per cent. to the usual allowances; and the reason of this difference is readily understood, when we advert to the situation of Maryland at the time this law was passed. The State was then just renewing her commerce with England, which had been broken up by the revolutionary war; and she was for the first time about to open a trade with the other nations of the world; and when that law was passed, there was most probably not a place in Europe (certainly not one out of England), at which there was any market rate of exchange for bills upon Maryland, by which damages could be measured in the case of a protested bill; and if such a rate happened to exist at any place, it would in the then state of navigation have produced ruinous delays and expenses to procure the testimony to prove it. The price of re-exchange in Maryland upon the same place was, therefore, from necessity substituted for the re-exchange in the foreign country. Because, here the proof of the sum for which a new bill could be brought could be easily obtained, and would always be within the reach of the party. But as the holder of a bill payable in a foreign country could hardly at that time be expected to find a purchaser for his re-exchange upon Maryland, and the injury and inconvenience produced by the protest could not, therefore, be repaired immediately on the spot, by the sale of a re-exchange upon the drawer or indorser, the act of assembly imposed the penalty of fifteen per cent., in addition to the established allowances of the general mercantile law, in order to insure, as far as practicable, caution and prudence on the part of drawers and indorsers; and to deter the unprincipled and greedy from attempting to create for themselves a fictitious capital, by giving currency to bills which they knew would be dishonored. The second clause of this section, in relation to indorsers, conforms entirely with the general law merchant. They are entitled to recover over only what they are compelled to pay.

Upon what ground, then, can the bank [766*] claim the fifteen per cent. *damages under this law? It was not the holder of the bill at the time it was protested. It appears by the record that the bank had indorsed it to Baring, Brothers & Co.; they to Rothschild, and he had indorsed it to Rothschild & Brothers, who presented it for payment, and were the holders at the time of the protest; and Hottinguer & Co. paid it, *supra protest*, for the honor, as they declared, "of the signature and account of Mr. Samuel Jaudon, cashier of the Bank of the United States, the first indorser." It also appears by the statement in the record, that, although Hottinguer & Co. said they had funds of the bank in their hands, and were apprised that the bill would not be paid by Mr. Humann, they yet declined taking it up until it should be protested. They did not, therefore, pay it as agents of the bank, but paid it *supra protest;* and they thereby, upon established and indisputable principles of commercial law, became the holders of the bill in their own right, and not as agents of the party for whose honor it was paid. Rothschild & Brothers, having received the amount due them, had certainly no claim to these damages; and they have made none. I shall not stop to inquire whether Hottinguer & Co., who voluntarily intervened in this business, could have claimed of the bank, or of the United States, either re exchange or damages of any kind. It is sufficient for the decision of this controversy, that they neither claimed nor received them. They demanded what they were entitled to by the general law merchant, and nothing more—that is to say, the principal, the costs and charges, and usual commissions. They had a right to make this demand directly upon the United States, as drawers, or upon the bank as indorser, both being responsible to them. (*Ex parte Lambert*, 13 Ves., 129.) They made their demand upon the bank, as indorser, and as such it paid it. Can the bank enlarge the claim of Hottinguer & Co.? Or can it, under and by virtue of the Act of 1785, recover from the United States more than it has paid, or is liable to pay as indorser? It will scarcely be said that the bank has become the owner and holder, by paying Hottinguer & Co., and taking up the bill, and are therefore entitled to all the rights given to the owner and holder by the first clause of the first section of the act of Assembly. This clause evidently applies to the holder at the time of the protest, and it is the second clause in the same section which defines the rights and of indorsers who become holders afterwards by discharging the claim against them; and this clause gives them a right to recover so much as they have paid, and nothing more. If *this claim is to [*767 be allowed to the bank, what is to be done with this clause in the act of the Assembly? It is plain and unambiguous in its words; it is consistent with the other provisions of the law; its policy is evident, and it is in perfect conformity to the general commercial code, which has always been celebrated for the justice and equity of its principles; and this claim of the bank cannot be maintained, unless this clause is blotted out of the statute. Can this be done by judicial authority, upon any known rule for the construction of statutes? I think not. There have been many decisions upon the construction of many statutes, but it will be difficult to find a precedent anywhere, or of any time, that would sanction such a decision on

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an act of Assembly like this. Certainly there never has been any practice in Maryland, nor any decision under this law, to warrant such a construction. Upon the whole case, therefore, the following conclusions appear to me to be irresistible:

1. That the contract with the bank, according to its true construction and meaning, was not for the sale of a bill of exchange, in the legal sense of these terms; but an agreement by which the bank undertook, as agent for the government, to transfer to the United States the first installment due under the treaty with France; and that the bill in question was used as one of the instruments for carrying that contract into execution, for the greater convenience of the parties.

2. That if the contract be even considered as one merely for the purchase of a bill of exchange, in the strict legal meaning of the words, yet the bank is not entitled to these damages, because the Maryland Act of 1785, under which alone they are claimed, does not extend to bills drawn by the United States.

3. But if the law of 1785 is construed to embrace bills of exchange drawn by the government, and this case is to be decided by the same rules which apply to similar contracts between individuals, still the United States are not responsible for these damages, because the bill in question is drawn upon a particular fund, and, therefore, not a bill of exchange in the legal meaning of the terms, and, consequently, not within the statute.

4. And if the claim were free from the three preceding objections, and to be decided under and according to the provisions of Act of 1785, yet the bank being an indorse the bill, and not the holder or owner at time of the protest, it is not by that act enti to recover these damages, since it has not them.

*Upon each of these grounds, I [*7 think the bank has no claim in law or in eq to the damages in question.

Note. When this subject was before me Attorney-General of the United States (if recollection is correct), I was under the impr sion, from the evidence, that Hottinguer & had paid the bill out of the money of the b in their hands, and as agents of the bank. that view of the subject there could, I presu be no foundation for the claim of fifteen cent. damages; because the bank being agent of the government, with public money its possession sufficient to take up the bill. payment by the agents of the bank out of money ought to be regarded as a payment the government, and would in substance effect be a payment out of the public funds the hands of the bank. But, upon the fac as now presented in the record, upon the ev dence offered by the bank, it appears that Ho tinguer & Co. declined paying the bill befo protest; and that they paid it *supra prote* reserving their remedy on the bill against t bank as well as the United States. The therefore, according to the proofs, as no stated, became the holders of the bill on the own account; and it is upon this view of th facts that the foregoing opinion is formed.

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REPORTS

OF

CASES

ARGUED AND ADJUDGED IN

THE

Supreme Court of the United States,

IN JANUARY TERM, 1845.

BY BENJAMIN C. HOWARD,

Counselor at Law and Reporter of the Decisions of the Supreme Court of the United States.

VOL. III.

U. S., Book 11. 30

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JUDGES

OF THE

SUPREME COURT OF THE UNITED STATES

DURING THE TIME OF THESE REPORTS.

The Hon. ROGER B. TANEY, *Chief Justice.*
The Hon. JOSEPH STORY, *Associate Justice.*
The Hon. JOHN M'LEAN, *Associate Justice.*
The Hon. JAMES M. WAYNE, *Associate Justice.*
The Hon. JOHN CATRON, *Associate Justice.*
The Hon. JOHN M'KINLEY, *Associate Justice.*
The Hon. PETER V. DANIEL, *Associate Justice.*
The Hon. SAMUEL NELSON, *Associate Justice.*

JOHN Y. MASON, Esq., *Attorney-General.*
WILLIAM T. CARROLL, Esq., *Clerk.*
BENJAMIN C. HOWARD, Esq., *Reporter.*
ALEXANDER HUNTER, Esq., *Marshal.*

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RULES AND ORDERS

ORDER OF COURT.

Allotment of Judges.

There having been an Associate Justice of this court appointed during the present ter ordered that the following allotment be made, of the Chief Justice and the Associate J of said court, among the circuits, agreeably to the act of Congress in such case made a vided; and that such allotment be entered of record, viz.:

For the first circuit, the Hon. JOSEPH STORY.
For the second circuit, the Hon. SAMUEL NELSON.
For the third circuit,
For the fourth circuit, the Hon. ROGER B. TANEY, *Chief Justice.*
For the fifth circuit, the Hon. JOHN MCKINLEY.
For the sixth circuit, the Hon. JAMES M. WAYNE.
For the seventh circuit, the Hon. JOHN MCLEAN.
For the eighth circuit, the Hon. JOHN CATRON.
For the ninth circuit, the Hon. PETER V. DANIEL.
March 5th, 1845.

NOTE, by the Reporter. The Honorable SAMUEL NELSON produced his commission, and too upon the bench, on the 3d of March, 1845.

ORDER OF COURT.

ORDERED, That the court will not hear arguments on Saturday (unless for specia shall order to the contrary), but will devote that day to the other business of the court on Friday in each week, during the sitting of the court, motions in cases not requir rules of the court to be put on the docket, shall be entitled to preference, if such mo be made before the court shall have entered on the hearing of a cause upon the dock rule No. 84, adopted at February Term, 1824, be, and the same is hereby rescinded.
December 4th.

ORDER OF COURT.

ORDERED, That no printed or written argument be hereafter received, unless the be signed by an attorney or counselor of this court.
December 18th.

ORDER OF COURT.

ORDERED, That printed arguments, under the 40th rule, will be received herea the present term, until the first Monday in February, in each and every term, while t Court continues to meet on the first Monday in December; and that the 49th rule adopted at January Term, 1842, be, and the same is hereby rescinded.

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THE DECISIONS

OF THE

Supreme Court of the United States,

AT

JANUARY TERM, 1845.

9*] *ANDREW ALDRIDGE ET AL., *Plaintiffs in Error,*

v.

NATHANIEL F. WILLIAMS.

Compromise Act regulating duties on imports—construction of—in construing an act court will look to public history.

The Act of Congress of March 2d, 1833, commonly called the Compromise Act, did not, prospectively, repeal all duties upon imports after the 30th of June, 1842.

Repealing only such parts of previous acts as were inconsistent with itself, it left in force, after the 30th of June, 1842, the same duties which were levied on the 1st of June, 1842.

Duties were directed by the Act of 1833 to be levied according to a home valuation, "under such regulations as may be prescribed by law." This phrase embraces all regulations lawfully existing at the time the home valuation went into operation, whether made before or after the passage of the Act of 1833.

And the regulations established in the 7th and 8th sections of the Act of 1832 are sufficient for the correct performance of the duty.

The regulations perscribed by the Secretary of the Treasury, under a power given to him by the 8th section of the Act of 1832, are also "regulations prescribed by law."

The court, in construing an act, will not consider the motives, or reasons, or opinions, expressed by individual members of Congress, in debate; but will look, if necessary, to the public history of the times in which it was passed.

THIS case was brought up by writ of error from the Circuit Court of the United States for the District of Maryland, and involved the construction of the Act of Congress of March 2d, 1833, commonly called the Compromise Act. Williams was the collector of the port of Baltimore, and the plaintiffs in error were importing merchants, who sued to recover duties paid under protest.

The title of the act was "An Act to modify the Act of the 14th of July, 1832, and all other acts imposing duties on imports."

The 1st section provided that from and after the 31st of December, 1833, in all cases where duties shall exceed twenty per centum on the value thereof, one tenth part of such excess shall be deducted; from and after the 31st of December, 1835, another tenth part; from and 10*] *after the 31st of December, 1837, another tenth part; from and after the 31st of December, 1839, another tenth part; from and after the 31st of December, 1841, one half of the residue of such excess shall be deducted; and from and after the 30th of June, 1842, the other half thereof shall be deducted.

The 2d section raised the duty upon certain woolens from five to fifty per centum.

The 3d section was as follows:

"That, until the 30th day of June, 1842, the duties imposed by existing laws, as modified by this act, shall remain and continue to be collected. And from and after the day last aforesaid, all duties upon imports shall be collected in ready money; and all credits, not allowed by law, in the payment of duties, shall be, and hereby are abolished; and such duties shall be laid for the purpose of raising such revenue as may be necessary to an economical administration of the government; and from and after the day last aforesaid, the duties required to be paid by law on goods, wares, and merchandise, shall be assessed upon the value thereof at the port where the same shall be entered, under such regulations as may be prescribed by law."

The 4th section exempted certain articles from duty during the interval between the 31st of December, 1833, and the 30th of June, 1842.

The 5th section exempted certain articles from duty after the 30th of June, 1842, and concluded as follows: "And all imports on which the first section of this act may operate, and all articles now admitted to entry free from duty, or paying a less rate of duty than twenty per centum, *ad valorem*, before the said 30th day of June, 1842, from and after that day may be admitted to entry, subject to such duty, not exceeding twenty per centum, *ad valorem*, as shall be provided for by law."

The 6th and last section was as follows:

"That so much of the Act of the 14th of July, 1832, or of any other act as is inconsistent with this act, shall be, and the same is hereby repealed: Provided, That nothing herein contained shall be so construed as to prevent the passage, prior or subsequent to the said 30th day of June, 1842, of any act or acts, from time to time, that may be necessary to detect, prevent, or punish evasions of the duties on imports imposed by law, nor to prevent the passage of any act prior to the 30th day of June, 1842, in the contingency either of excess or deficiency of revenue, altering the rates of duties

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on articles which, by the aforesaid Act of 14th of July, 1832, are subject to a less rate of duty than twenty per centum, *ad valorem*, in such manner as not to exceed that rate, and so as to adjust the revenue to either of the said contingencies."

The statement of facts agreed upon in the court below was as follows:

11*] *"In this case it is admitted that, on the 20th August, 1842, the plaintiffs in this cause imported into the port of Baltimore, from Liverpool, in England, a large quantity of goods, wares, and merchandise, and on the same day entered the same at the custom-house in the port of Baltimore; that the following is a true entry and list of said goods, their quality, character, and value.

(Here followed a list of the goods, with their value, amounting to £8,254 16*s.*)

Adjustment.

Value at Baltimore per appraisement	$44,346.00
20 per cent.—am't duties paid collector under protest	8,869.20
Value per invoice, £ str. 8,254 16 0, or	$36,651.00
20 per cent.	7,330.20
Duty per home valuation	$8,869.20
Per invoice value	7,330.20
	$1,539.00

"That, on their entry, the defendant exacted and required of the plaintiffs to pay, as and for duties on said goods, the sum of eight thousand eight hundred and sixty-nine dollars and two cents, which the plaintiffs first refused to pay, but not being able to get their goods without paying the same, they did pay the same under protest; that the value of the goods, by the true invoice cost, adding freight and other charges, was thirty-six thousand six-hundred and fifty-one dollars ($36,651); that the home valuation in Baltimore, as fixed by the appraisers, was forty-four thousand three hundred and forty-six dollars ($44,346); that the duties upon the invoice cost and charges would have been seven thousand three hundred and thirty dollars and twenty cents ($7,330.20).

"It is further agreed, that the duties, so collected as aforesaid by the defendant, were exacted under, and in pursuance of orders and regulations from the Treasurer Department of the government of the United States, and with the approbation, and sanction and direction of the President of the United States.

"And it is also admitted that the amount exacted as aforesaid by defendant of plaintiffs, and by them paid him as aforesaid, was deposited by the defendant in the Merchants' Bank of Baltimore, to the credit of the Treasurer of the United States, on the 29th August, 1842.

"It is also agreed that the court may infer, from the facts hereinbefore agreed upon, whatever a jury might infer.

"If, upon the foregoing statement of facts, the court shall be of opinion that the plaintiffs are entitled to recover the above sum of eight thousand eight hundred and sixty-nine dollars

12*] and twenty *cents ($8,869.20), or any part thereof, then judgment to be entered for the plaintiffs for the amount so determined to be due, with interest; if they should be of opinion that the plaintiffs are not entitled to recover at all, then judgment to be entered for defendant.

"It is further agreed, that this court enter up a judgment upon the aforegoing case stated, for the defendant, and that the plaintiffs be at liberty to appeal, or prosecute a writ of error to the like effect and purport as if the above facts were stated in a bill of exceptions, and judgment rendered upon them for the defendant.

"And it is further agreed, that either party shall be at liberty, in the Supreme Court, to raise and argue, in that court, any points or questions which it may appear to that court could be raised upon the foregoing facts.

REVERDY JOHNSON for plaintiffs,
Z. COLLINS LEE, U. S. Attorney."
29th November, 1842.

The court below gave judgment for the defendant, and a writ of error brought the proceedings up to this court.

Mr. R. Johnson for the plaintiffs in error.

Mr. Nelson, Attorney-General, for the defendant.

Mr. R. Johnson made three points:

1. That when the duties were exacted of the plaintiff by the defendant, there was no law imposing any duties upon such an importation.

2. That if there was, there was no law authorizing their being levied on the home valuation, and that the plaintiff is entitled to recover the difference stated in the record of $1,539.

3. That if such duties were in whole, or in part, exacted without law, the amount may be recovered in an action for money had and received, upon the facts of this case.

He said that the judgment below was *pro forma*, and the question raised by the first point was now for the first time brought before any court. The amount in all the cases is about a million and a half. Before 1842 all duties were levied upon foreign valuation. There are two constructions of the Constitution; one, that under it there is a power to collect revenue for the sake of the revenue only; the other, for protection. The Act of 1833 was a compromise between these two. Each class was supposed to surrender something. The law was intended to terminate at a certain period, viz., 30th June, 1842, and the question is, what was the condition of the revenue system after that day? Was there any law to impose duties? We say not. From the history of the act and the act itself, we infer that it was the intention of its framers to leave the subject wholly to Congress after 1842. The former Attorney-General decided otherwise, and gave two opinions; but, upon examining them, we do not *find [*13 that clearness of conviction which he always had when clearness was attainable. He evidently doubted upon the subject. The Secretary of the Treasury differed from him in opinion. The committee of the House of Representatives reported unanimously that there was no authority to collect duties at all after the 30th of June, 1842. What is the construction of the act, taken by itself, apart from its

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history? The title is, "An Act to modify," &c., showing an intention to change the entire system, and make it just what this law would leave it, as if all other acts were specially repealed. The first two sections provide for the period anterior to June, 1842, without saying what shall be done afterwards; the third says, that, until that day, other laws, as modified by this act, shall continue in force. Congress, therefore, was not content with leaving the collection of duties as a matter of inference, but gave an explicit direction that they should be colleted, showing its opinion to be that unless there was an express authority granted to the executive power to collect the modified duty, that branch of the government would not have it all. The remainder of the section applies to a time after June, 1842, and says that credits shall be abolished. But upon what is the payment to be calculated, or how much is it to be? This part of the act is silent. "Duties shall be laid only sufficient for an economical administration of the government." But the amount wanted from year to year can only be determined when the year comes, and could not be foreseen in 1833. There is a constant reference in the act to the discretion of future Congresses. Who was always to decide upon the amount which would be consistent with an economical administration? Not the executive, nor the judiciary, but the framers of the law well knew that Congress alone could settle the annually recurring question. What might be economy at one time might not at another. The act says "such duties shall be laid, &c.," using prospective terms. Again, the phrase "duties required to be paid by law" implies that the law is to be passed thereafter. So the phrase "shall be assessed, &c., under such regulations as may be prescribed by law." The object of the law is quite apparent. It was to give quiet to the country for nine years, and then the government was to go on under an economical administration, the amount of expenditure being settled by the then Congress. The only mode of assessing the duties then known was to take the foreign valuation; but frauds were practiced under that method, and in order further to protect domestic industry a home valuation was substituted. But as this would be different in the respective cities, the mode of producing uniformity was left to the legislative and not the executive power.

The 4th section enlarges the list of free articles.

The 5th provides also for free articles, and then says that "all imports, &c., may be admitted at such duty as shall be provided for by law." Why was that clause put in? The 14*] previous part of the *law substitutes cash for credit, and home for foreign valuation. Supposing these to be positive enactments, what does the clause in question enact? No one knew better than the framers of the law that it contained nothing which could be enforced by the judiciary. But it was a time when all parties united for great objects; and though they knew that it would be idle to attempt to trammel and tie up future Congresses, yet they could chalk out a broad line, and rely upon the same patriotism which animated them for its being followed out. The limit was, that only such an amount of revenue should be raised as was necessary for an economical administration of the government, and the duties were to be collected "under such regulations as may be prescribed by law." Could they suppose, when they used this language, that the regulations already existed upon the statute book? In the latter part of this section it is said that importations may be admitted upon such duties not exceeding twenty per cent. "as may be provided by law." What does the government say? That twenty per cent. must be paid, and the discretion as to a lesser amount is gone. The result of the argument will be that the free articles must pay twenty per cent. also, because the government says this is the duty. If there was any duty at all after June, 1842, the executive must deduce his right to collect it from the 5th section, for no preceding section fixes the amount. But the 5th section includes more articles than those paying upwards of twenty per cent., and there is no process of reasoning by which one class can be taken out and the other left. How, then, are free articles to get in? The act shows that it was to be done by subsequent legislation. But if any articles can be considered as free, by the operation of the act itself, the same reading will include protected articles and bring them in free also. The words "as shall be provided for by law" ride over the whole section. If the Attorney-General supposes that these words mean such regulations as the executive might make under prior laws, it appears to me that he confounds the mode of assessing the duty with the power to assess it. The opinion of the late Attorney-General takes this ground. Suppose there was a prior law giving to the Treasury Department the power of making regulations for the collection of the tax; this only reaches one of the two things that must be done, viz., 1st, a tax is to be imposed, and, 2d, the mode of collecting it is to be pointed out. But a power to carry out the second branch of the proposition does not give to the executive an authority to name the amount of the tax nor the articles upon which it shall be levied. The imposition of a tax is a high exercise of legislative power, and Congress could not vest the executive with it. The act states twenty per cent. as a maximum, but, within that, there is a discretion to be exercised by Congress. There are three classes of articles recognized in the bill; one paying more than twenty per cent. duty, one less, and the third entirely free. Are all these to be taxed equally *with twenty per cent.? If so, the lan- [*15 guage of the 1st section would have been different from what it is.

2. As to the history of the act, derived from the Journal of the Senate and Register of Debates.

The 3d section now has the "domestic valuation under regulations to be prescribed by law." It was so in the original bill. (9 Vol. Reg. Deb., part 1, pages 711–713.)

Mr. Dickinson proposed to strike out "by law," and insert "the Secretary of the Treasury, with the approbation of the President." Mr. Clay said, "leave it to a future Congress to legislate on the subject of the amendment." He "doubted the constitutional power to leave it to the executive;" and again, "he would

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not give them the power, for if they were opposed to protection," &c.

The amendment was rejected by nearly an unanimous vote. This court has a right to look at the history of the bill. In the discussion of the power to create a bank of the United States, the history of the county has constantly been referred to; and so with regard to the power of States to make insolvent laws. If the executive had the power now contended for, it is because Congress failed to keep it away when it intended so to do. If the ground had been taken during the discussion of the bill which is now assumed on the part of the government, would the Senate have acted as they did?

2d point. If we are not entitled to the whole, we are to the difference between the home and foreign valuation. Suppose the twenty per cent. duty is to stand; if Congress were to regulate the mode of assessment, and there is no law pointing out the manner of adopting the home valuation, the invoice must be the guide. The Secretary of the Treasury issued two different regulations. 1. That the appraisers should ascertain the current market value of the articles, and charge twenty per cent. upon it. This, of course, included the first cost, duty, charges, and profit. All these enter into the cash value, and a duty upon the aggregate compelled the importer to pay a duty upon the very duty itself. 2. The Secretary directed that the amount of duty should be deducted from the aggregate, and twenty per cent. charged upon the residue. This plan might or might not have been just to the government. The Secretary seems to have found so much difficulty in supplying the want of legislation, that this court can scarcely feel itself warranted in saying that legislation existed.

3d point. It is contended by the other side that, even allowing that this money was improperly exacted, an action for money had and received will not lie against the collector. The record says that the plaintiffs could not get their goods without paying, and did accordingly pay, under a protest. This protest was notice to the collector not to pay over to the Treasury. That he was bound to pay over begs the whole question; because, if the government had no right to exact it, the collector was only an ordinary agent, and bound by the same rules. The suit was brought on the day 16*] after the money *was paid over, and this circumstance is thought by the opposite counsel to make a difference, and to free the collector from responsibility. But if the pendency of a suit would protect the collector, the existence of a notice would do the same thing. An action for "money had and received" is the proper one in all cases like this. If the other side are right, all that the collector has to do is to pay over the money immediately to the treasury, and we must then fight it out with the government. But this is not the intention of the law. The moment that the collector received our money, our right of action commenced, and nothing that he can do can devest us of the right which has accrued.

Mr. Nelson, Attorney-General, for defendant, made the two following points:

1. That the amount of duties as aforesaid, paid by the plaintiffs in error upon the goods, wares, and merchandise imported by them into the port of Baltimore, was properly demanded by the defendant in error, under the provisions of the Act of the 2d of March, 1833, entitled "An Act to modify the Act of the 14th of July, one thousand eight hundred and thirty-two, and all other acts imposing duties on imports."

2. That, even assuming the same to have been demanded without authority of law, the action for money had and received, instituted by the plaintiffs against the defendant in error in the court below, was not maintainable.

The first proposition involves two inquiries:

1st. Whether any duties were collectable under the Act of the 2d of March, 1833.

2d. If so collectable, by what rule were they to be ascertained and assessed.

1st. It is admitted that prior to the Act of March, 1833, the goods in question were subject to a duty of more than twenty per cent., by virtue of the Act of 14th July, 1832, to be assessed according to the rules prescribed by that act. The question then is, how far have the provisions of the Act of 1832 been changed by that of 1833? All are familiar with the nature and cause of the Compromise Act. It bears upon its face marks of a friendly spirit between the advocates of two very different classes of opinions. As a statute it is singularly constructed. It states political propositions, promises money, prohibits money, but enacts few things. But the only question before us is, to what extent has it changed the law of 1832? It consists of six sections, the 2d and 4th of which are not material to the present inquiry.

The 1st section carries out the purpose indicated in the preamble, and provides that from and after the 30th of June, 1842, a duty of twenty per cent. is to be collected upon all goods imported into the United States and embraced within its terms. It deals only with the *excess above twenty per cent., and [*17 provides for its gradual diminution; but the duty, then existing, of twenty per cent., is nowhere repealed. Reducing it to twenty is not repealing the twenty. The section is therefore equivalent to a fresh and positive enactment that a duty of twenty per cent. should be collected after June, 1842. But it is thought that this effect of the 1st section is controlled by the subsequent sections. Let us examine them *seriatim*.

The 3d contains five distinct propositions, viz.:

1. That until the 30th day of June, 1842, the duties imposed by the 1st section shall remain and continue to be collected.

2. That all duties thereafter shall be collected in ready money, and all credits abolished.

3. That all duties shall be laid for the purpose of raising revenue necessary to an economical administration of the government.

4. That a home valuation shall be adopted.

5. That the regulations for the assessment shall be provided by law.

It is said that the first of these propositions limits the duration of the act to 30th June, 1842, and then repeals it. But it is merely declaratory of the existing law, and provides that the mode and manner of collecting the

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duties should continue the same until June, 1842, when a new mode and manner of collection was to be pursued. It does not repeal the 1st section either expressly or by implication; because, if such had been the intention of the Legislature, the expressions used would have been co-extensive with those of the 1st section; and the language of the 1st section provides for the state of things after June, 1842, whereas that of the clause which is said to repeal it stops short at that day. Besides, the provision is merely affirmative in regard to the Act of 1832, which was in its terms a perpetual act. An affirmative provision never repeals where a permanent law is re-enacted for a time. (Sir Thos. Raymond, 397.)

2d proposition. This clause is operative by the mere force of its terms—*proprio vigore*. It establishes the system of cash, and abolishes credit duties, but the duties upon which it is to operate are those provided for in the 1st and 3d sections. It does not profess to change them in amount, but merely the mode in which they shall be paid; and can be read in connection with the 1st section so as to be perfectly consistent with it, except that it repeals the credit system.

3d proposition. This is a mere declaration or promise of what should be done by future Legislatures—of itself inoperative. It varies no duty; abolishes none; establishes none. It therefore leaves the 1st section in full operation.

4th proposition. This establishes a principle and enacts a law, viz.: that the duty shall be calculated on the value of the goods at the place of importation after 30th of June, 1842. Its effect is to repeal the mode of ascertainment provided in the Act of 1832. It was a strong provision for the protection of home industry, 18*] and jeoparded *the bill. But does it repeal the 1st section? Or does it not rather recognize the continued existence of the duties laid in that section? The duties are to be collected in cash. What duties? Not those thereafter to be laid, but those then imposed.

5th proposition. This points to the mode in which such home valuation shall be established, by directing that the "regulations shall be prescribed by law." It is said that the existence of these regulations is a prerequisite to the power of collecting. Assuming this to be so, what would be the legal effect? Only to leave the duties to be ascertained as they were by the Act of 1832. If this clause should become inoperative by legislative omission, it cannot repeal the other provisions of the act. This will be considered more particularly hereafter. The result is, that the third section of the act, when analyzed into its five propositions, modified the Act of 1832 in but two particulars, viz.: by introducing cash duties and a home valuation.

The 4th section, as has already been stated, can have no bearing upon the question, as it is temporary in its character.

Let us proceed to the 5th section of the act. Does it repeal the 1st section? It provides only that Congress may reduce the whole duties below twenty per cent., in case there should be a redundancy of money in the treasury, or raise them to twenty upon free articles, in case there should be a deficiency. How is this inconsistent with the 1st section? It made no change in it, but only reserves a power which existed without such reservation. We must harmonize these sections, if possible. The rule which requires us to do so is so well known that it is useless to cite authorities in support of it. A reservation of power to legislate is not legislation. It would be extraordinary that in a case of mutual concession all duties should be repealed, and the manufacturing interest left without any protection at all.

The 6th section provides "that so much of the Act of 1832, or of any other act, as is inconsistent with this act, is hereby repealed."

The rate of duties differing from the Act of 1833; the credit on duties; the duties on articles made free by the Act of 1833, are inconsistent with this act, and necessarily repealed by it. But the provisions of the act which merely contemplate future legislation, and yet enact nothing in themselves, such as that "duties shall be laid for the purpose of raising necessary revenue only;" that goods paying less than twenty per cent. *ad valorem* may be admitted at such duty, not exceeding twenty per cent., as may be provided by law;" that "the duties shall be assessed upon the value thereof at the port of entry, under such regulations as may be prescribed by law" (under the assumption before stated), are inconsistent with no previously existing law.

A promise to pass a law to change the rate of duty is not inconsistent with an existing law, so as to repeal it before the promise is executed. The future legislation contemplated has not been had; *the only thing done is by the [*19 Act of the 11th of September, 1841, which provided that all articles imported after the 30th of September, 1841, which paid less than twenty per cent. or came free, should be subject to a duty of twenty per cent., with certain exceptions.

Let us now return to the consideration of the fourth proposition of the 3d section, respecting the home valuation, and inquire whether the power to collect duties upon it did not exist under the Acts of 1832 and 1833, notwithstanding the omission of Congress to legislate as to regulations.

Omitting the qualification of the clause, was it not susceptible of execution under the Act of 1832?

1. The 7th section of the Act of 1832 contains a principle which is as applicable to home as to foreign valuation. It directs the actual value to be appraised by the collector, and provides for duties then or thereafter imposed. Value is what a thing is worth in the market, and the law that provides for ascertaining it by the judgment of appraisers in one place lays down a principle by which it may be ascertained everywhere.

2. By the 15th section a rule of ascertainment is prescribed by adding insurance.

3. But supposing these sections insufficient, still the 9th section of the act vests the Secretary of the Treasury, under the direction of the President, with power to prescribe regulations, &c. (Doc., 261, pp. 6, 7; Executive Doc., 27th Cong., 2d sess., Vol. V., opinion of Mr. Legaré.)

But suppose that regulations by Congress were necessary, instead of being made by the Secretary. They would only be directory to govern the officers of the customs. The prin-

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ciple is established by the law. Regulations are not wanted to settle the rights of merchants or the amount of the tax, for the amount is fixed at twenty per cent., and this court decided in *Wood's* case that merchants must pay the amount of duty whether the custom-house officers acted rightly or not. The record admits that twenty per cent. was fairly paid on home valuation. A duty thus imposed by the law becomes a personal debt. (13 Peters, 498.) The government could recover the amount although the officers gave up the goods without any bond; and money thus properly paid cannot be recovered back. (1 T. R., 286.)

But it has been said that the statute in question may be explained by extrinsic parol evidence of the meaning of the Legislature which passed it. Now, I hold, 1st. That you cannot look, in interpreting an act, beyond the terms of the act itself and the particular historical circumstances out of which it grew, and 2d. That if you can, the evidence which has been invoked proves nothing.

As to the first proposition, see Dwarris on Statutes, 48; 15 Johns., 380, 395; 2 Peters, 662; 1 Kent's Com., 461; Opinions of Attorneys-General, Mr. Wirt's opinion, 444, 445.

20*] *If every member of the Legislature had preferred that the regulations under the Act of 1832 should not have been sanctioned by that of 1833, it would not have been effective to repeal the Act of 1832, unless they had expressed their wish in a legislative form. But 2d, what does the debate prove? Mr. Dickinson's proposition was to strike out the paragraph respecting a future law and insert an adoption of that of 1832. Upon what principle was it rejected? Merely because Congress intended to reserve the power instead of giving it to the executive. Even supposing that you knew the meaning of the Senate, would it follow that the House of Representatives understood the law so? At page 715 Mr. Robbins proposed an amendment, that if Congress should omit to make a regulation, the law should cease; and this was rejected. Mr. Wilkins, in his speech, said that the law was not to be expounded by the declaration of any senator.

But suppose I am wrong in all this, still I say that the collector is not personally responsible. I concede that if an agent exacts money illegally, and has notice, he is liable. But there is a distinction between voluntary and involuntary payments. (10 Peters, 137; 13 Peters, 297.) These cases were before the Act of 1839, and under them Mr. Hoyt claimed a right to retain money in his hands to meet protests. The Act of 3d March, 1839, was passed to prevent this practice, and was founded upon Mr. Grundy's opinion, reported in Opinions of Attorneys-General, p. 1287. This act says that moneys paid to collectors shall not be held by them, but shall be placed to the credit of the Treasurer of the United States. It contains two provisions.

1. That the collector shall pay over to the Treasurer.

2. It creates a remedy for the party by authorizing the Secretary of the Treasury to draw his warrant upon the Treasurer for the amount to be refunded. How can an importer, since this act, bring a personal action against the collector? This action of *assumpsit* is founded on an implied promise. But will the law imply a promise in the face of the Act of 1839, which directs all moneys, whether received properly or improperly by the collector, to be paid immediately over to the treasurer? The case in 10 Peters, 154, sanctions a collector's retaining money if it is paid under a protest, but this was before the Act of 1839. If he had given a bond not to pay it over, the bond would have been void. If, then, he cannot retain the money without violating the laws, how can a promise to retain it be implied?

If an agent, acting in the execution of a duty, indorses a bill, he is not personally liable. (5 Price, 564.) Nor will a suit lie against an agent who pays over. (4 Cowen, 456.)

And a case in Wheaton carries the doctrine further still, that an officer of government is not personally responsible for torts. (3 Wheat. 246.)

**Mr. Johnson*, in reply and conclusion:[*21

Let us consider in the first place the point just raised, viz., that we cannot recover because the collector has paid the money over to the government. We say:

1. That there is no such general principle.

2. That the Act of 1839 did not establish it.

3. That if it did, the act would be unconstitutional and void.

1. The original cases establish that when payment has been made to an agent, who has paid it over without notice, the agent is not responsible. But if there be notice he his. (10 Peters, 154; 13 Peters, 267; 3 Wheat., 246; 4 Cowen, 456–458; 9 Johns., 201.)

2. It is said, however, that the Act of 1839 has changed the law in this respect. It is probable that collectors sometimes retained to much and if so, the act was right. But it only makes a rule between the government and its officers without interfering with the rights of the merchant. The 2d section says, "paid under protest against the rate of duty," but does not include cases in which it is alleged that there is no duty at all. If the argument on the other side be correct, there can be no suit at all against any collector, and the President has only to instruct him to seize upon any man's goods that he chooses.

3. Would such a law be constitutional?

It is unnecessary to enlarge upon the doctrines that the government has only limited powers, and that its fundamental principal is the sacredness of private property, which is not to be taken without law. The true construction of the Act of 1839 must be that the Secretary of the Treasury is to draw his warrant for whatever amount may be recovered against the collector, and not, that he is vested with discretionary power whether to refund or not. It would not be justice to turn a citizen over for redress to the very government which has injured him.

But, to pursue the argument.

1. Were we bound to pay anything at all?

2. If so, how much, on the home or foreign valuation?

The first point turns on the Act of March 1833, which it is desirable to construe by its own terms only, but if this is difficult, we have a right to resort to its history. The 1st section provides for reductions until June, 1842. After that time was there any law for the collection

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of duties? We say not. Up to that day there can be no doubt of the existence of a duty, or that it was levied on the foreign valuation. It is true, that if the law had stopped there the duty would have continued. But that is not all the law. It intended to provide also for a time subsequent to June, 1842, in some particulars, as, for example, payment in ready money and a home valuation.

The 3d section says, that until June, 1842, 22*]the duties shall remain *and be collected. If they could already be collected by existing laws, these words are superfluous. It must be read as if the words "and no longer" were inserted. After June, 1842, the act says, that only such an amount of revenue shall be raised as is necessary for an economical administration of the government. Was this a twenty per cent. duty? Who can tell? It was impossible to say, nine years in advance, what sum would be necessary. It was to be collected, too, in a different mode; a home valuation was introduced for the first time. The Act of 1832 directed appraisers to ascertain the foreign valuation. It is said by the other side that it is easy to add charges, &c., and then you ascertain the home valuation. But this is not so, because the value at home fluctuates from a variety of causes. There is a great difficulty in carrying out this principle of home valuation, because the Constitution requires duties to be uniform in all the ports. This very subject was the great objection to the Compromise Act. Ought it to have been left to the executive? It is said that the Act of 1832 had so referred it. But not so. That act only authorized the executive to guard against fraud. Knowing the difficulty of executing the duty, Congress would not have so left it. There is little or no difference between giving the executive power to impose a tax and power to direct the mode of levying it. In fact, the Secretary of the Treasury issued three different regulations on the subject. If previous laws gave the power to the executive, why were the words inserted "under such regulations as may be prescribed by law." Mr. Legaré says, it means "may or may not be prescribed;" and that "may" is not imperative.

The 4th section of the act is said to have no bearing upon the present point; but I do not so consider it. It provides for free articles until June, 1842; after that time they fall back into their former class. But the section contemplates fresh legislation, when it says that goods shall be admitted on such terms as shall be prescribed by law. Why put this in, unless it was thought that there would be no law, unless one were passed? The last part of the 3d section ought to be read as if it were part of the 1st. If you put them together, the sense is clear: and their meaning is, that there is no duty after 1842, unless by the passage of another law.

What will you do with the articles enumerated in the 4th section? After 1842 they must go back to their former class. But this would interfere with the basis of the compromise. If the other side is right, these articles must be taxed again, and, not being included within the 1st section, might be taxed more than twenty per cent. But this was not the meaning. The Compromise Act was more like a treaty of peace than a law; but the parties could not see as far as 1842. One thought that free trade, and the other, protection, would by that time be the settled policy of the county, and therefore both agreed in referring the whole matter to future legislation. They intended *to lay [*23 down certain general rules, which they expected to have a commanding influence.

The 5th section was not in the bill when originally reported. Why was it put in? (See Mr. Clay's speech, Reg. Deb., Vol. IX., part 1, p. 463.) The original bill provided that after 1842 the duty should be twenty per cent.; but this was stricken out, and a clause inserted that Congress should provide, &c. Temporary systems of legislation have often been adopted.

As to "regulations to be prescribed by law": The debates show that a proposition was distinctly made, by Mr. Dickinson, to leave them to the executive, and rejected, because it was doubted whether it was a power appropriate to the executive. The action of the 27th Congress shows its opinion. A bill passed with much unanimity to continue duties, but failed to become a law in consequence of one controverted point. But the message of the President admitted that a law was desirable. Taxation should be clearly imposed and only by law, not by the discretion of the executive.

Ought the duty to have been levied on a home valuation? There was no law for this, even if the 1st section continued a duty of twenty per cent. It was to be carried out under regulations to be prescribed by law, and none were prescribed. The friends of protection refused to pass the law, unless a home valuation were inserted, and they were unwilling to leave the matter to the executive, because, if hostile to protection, he might destroy it. The difference in this small invoice is $1,500.

Mr. Chief Justice TANEY delivered the opinion of the court:

This suit comes before the court upon a case stated, and is brought here by writ of error from the Circuit Court for the District of Maryland.

The case in its material circumstances is this:

On the 20th of August, 1842, the plaintiffs in error imported into the port of Baltimore, from Liverpool, certain merchandise particularly set forth in the record, which, at the port of Baltimore, was of the value of $44,346, as ascertained by appraisement at the custom-house. Upon these goods the defendant in error, who was at that time the collector, acting in pursuance of orders and regulations made by the Treasury Department under the direction of the President, demanded for duties twenty per cent. upon the value so ascertained; which amount was paid by the plaintiffs in error under protest; and this action instituted against the collector for the purpose of recovering back the money. There are some other circumstances mentioned in the case stated, but in the view which the court takes of the subject it is unnecessary to recapitulate them. The judgment of the Circuit Court was in favor of the defendant.

The great question intended to be tried is, whether, under the Act of Congress of March 2, 1833, the government was authorized to collect *any duties upon goods imported after [*24 the 30th of June, 1842, without the aid of further legislation by Congress?

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In expounding this law the judgment of the court cannot, in any degree, be influenced by the construction placed upon it by individual members of Congress in the debate which took place on its passage, nor by the motives or reasons assigned by them for supporting or opposing amendments that were offered. The law as it passed is the will of the majority of both houses, and the only mode in which that will is spoken is in the act itself; and we must gather their intention from the language there used, comparing it, when any ambiguity exists, with the laws upon the same subject, and looking, if necessary, to the public history of the times in which it was passed.

The act in question is certainly not free from difficulty; and this difficulty arises from its peculiar character. It is commonly called the Compromise Act; and upon the face of it, it is evident that something was intended beyond the ordinary scope of legislation. Provisions are introduced in relation to the future action of Congress upon the tariff, which can only be accounted for by regarding the act as a compromise of conflicting opinions on that subject, whereby a certain scale of duties was fixed upon and established until June 30, 1842, and certain leading principles agreed upon, by which, after that time, it was proposed to regulate the action of Congress, and the latter, as well as the former, inserted in the law in the forms of legislation. That this was the case is abundantly manifested by several clauses in the act, and particularly in the 6th and last section, which provides that nothing contained in the act shall be construed to prevent the passage, prior or subsequent to the 30th of June, 1842, of laws to prevent and punish evasions of the duties imposed by law, nor to prevent the passage of any act prior to the day last mentioned, in the contingency of either excess or deficiency of the revenue, altering the rates of duties on articles which, under the Act of July 14, 1832, were subject to a less rate of duty than twenty per cent., in such manner an not to exceed that rate, and so as to adjust the revenue to either of the aforesaid contingencies. Now, it is impossible to suppose that Congress could have doubted its power to repeal, or modify afterwards, the duties imposed by this act, in such manner as the public exigencies might require, or its power to pass laws to secure the collection of the revenue, and to punish anyone who might attempt to evade the duties imposed by an act of Congress. If there had been nothing in this law out of the ordinary course of legislative action, it would hardly have been deemed necessary to encumber it with these reservations of power, which nobody doubted, and which Congress was continually exercising upon every other subject. These provisions strongly mark its peculiar character. And this association of positive and imperative enactments, with agreements for future action, has perhaps unavoidably occasioned some obscurity, and, as to some 25*] of the clauses, made it difficult at *first sight to say whether the language was mandatory, or merely declared the principles by which it was proposed that the legislation of Congress should afterwards be governed.

Taking this view of its general character and objects, the very large sum ultimately involved in the controversy makes it the duty of the court to proceed to a closer and more careful examination of its different provisions. It is evidently supplementary to the Act of July 14, 1832, and repeals only so much of that act, and of other previous acts, as are inconsistent with it. All of the duties, therefore, imposed by the Act of 1832, or any other law, and all the rules and regulations provided for their collection, remain in full force, unless they are inconsistent with the act in question.

The point to be determined, then, is whether, after the 30th of June, 1842, the collection of duties imposed by the Act of 1832, or by any other law as modified by the Act of 1833, is inconsistent with the last mentioned act. In other words, whether it repeals all previous laws imposing duties after the time above mentioned; and if it does not, whether it has failed to provide the necessary rules and regulations to enable the proper officers to collect them.

The 1st section declares that all duties above twenty per cent. *ad valorem*, imposed by the Act of 1832, or any previous laws, shall be reduced annually, at the rate therein mentioned, until the 31st of December, 1841; and that after that time the one half of the excess above twenty per cent. shall be deducted; and from and after the 30th of June, 1842, the other half shall be deducted. Here the section stops; and so far, therefore, from repealing the whole duties, it by necessary implication continues a duty of twenty per cent. after the 30th of June, 1842; for the direction to deduct the excess above that sum presupposes that a duty to that amount is imposed and to be collected. The language used is equivalent to a positive enactment, that from and after the 30th of June, 1842, the goods therein mentioned shall be charged with that duty.

The 2d section is to the same effect. For after modifying the duties imposed by the Act of 1832, in regard to the articles mentioned in that section, it is declared that these duties shall be liable to the same deductions as are prescribed in the 1st section—that is to say, the excess over twenty per cent. remaining on the 30th of June, 1842, is to be deducted; and consequently very clearly implying that twenty per cent. is to be charged and collected after that period.

The 3d section provides that the duties imposed by existing laws, as modified by that act shall remain and continue to be collected until the 30th of June, 1842; that after that time all duties shall be collected in ready money; and that such duties shall be laid as are necessary to an economical administration of the government, and shall be assessed upon the value of the goods at the port where they are entered "under such regulations as may be prescribed by law."

The latter words of this section relate merely to the regulations *by which the duties [*26 were to be collected after the time specified, and that part of the controversy will be hereafter considered. The points to which our attention is now directed is, whether, under this and the preceding acts of Congress, any duties continue to be imposed; in other words, whether they were not all repealed by this act after the 30th of June, 1842. Certainly the provision that they shall be paid in cash, and assessed upon the home valuation, is no repeal. Can the pro-

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vision, that such duties should be laid after the time above mentioned, as were necessary to an economical administration of the government, be construed to repeal all the duties existing at that time? We think not. The court are not authorized to decide upon the amount of revenue necessary to an economical administration of the government. It is a question for the Legislature. And the provision in this clause of the section addresses itself to future legislative bodies, and not to the tribunals and officers whose duty it is to carry into execution the laws of Congress. And we should hardly be justified, by any rule for the judicial interpretation of statutes, in pronouncing terms like these to be an implied repeal of all duties after the time specified, when that construction would make the law inconsistent with itself, by repealing, in the 3d section, the duties it had continued in force in the 1st and 2d. On the contrary, the true judicial inference would rather seem to be, that it was supposed, at the time of the passage of the act, that the modified duties remaining imposed on the 30th of June, 1842, might produce the proper amount of revenue to be levied with a view to the economical administration of the government; but leaving it to Congress, when the time arrived, to alter and modify them in the manner and for the purposes specified in this act.

The 4th section merely provides that certain enumerated articles shall be admitted to entry free from duty from December 31st, 1833, until the 30th of June, 1842, and therefore contains nothing that can influence the decision of the court.

The 5th section declares certain articles free after the 30th of June, 1842, and then provides that all imports on which the 1st section operates, and all articles, which were at the time of the passage of the law admitted to entry free from duty, or paying a less rate of duty than twenty per cent. *ad valorem*, before the 30th day of June, 1842, may be admitted to entry subject to such duty, not exceeding twenty per cent. as shall be provided for by law; and this section, as well as the 3d, has been much relied on in opposition to the duty claimed by the government. But is it not like the clause in the 3d, of which we have already spoken, the language of compromise and agreement, and addressed to those who should be afterwards called upon to legislate on the subject, rather than to be administrative tribunals and officers of the country? It reserves to Congress the right to reduce the duties continued by the 1st section below twenty per cent,; to impose du- [*27] ties on free articles, and to *raise duties which were below twenty per cent. up to that amount. Yet nobody could have supposed that Congress would not have the power to do all this, if it thought proper to exercise it, without any reservation of this description. The clause obviously was not introduced to reserve power, but with a view to the manner in which it should afterwards be exercised. As a mere question of power, Congress undoubtedly had authority, after the 30th of June, 1842, as well as before, to impose any duties it saw fit upon the articles referred to, or upon any other imports. And it cannot be supposed that the Congress of 1833 intended to restrict, by force of law, the rights of a future Congress. Yet if we lose sight of the compromise character of the act, and treat it as an ordinary acto f legislation, we should be bound to say, from the language used, that the Congress from 1833 supposed that the modifications of the revenue made by them could not be altered by a subsequent Legislature, unless the right to do so was expressly reserved. No one would think of placing such a construction upon the section in question; and the difficulty is removed when we look at it in what we doubt not is its true light, and regard it as a compromise of conflicting opinions, which it was believed would be afterwards respected, when it had been thus solemnly set forth in a law. In this view of the subject, it is not repugnant to the 1st and 2d sections, and leaves the duties retained by them in full force after the 30th of June, 1842, until they should be altered by subsequent legislation.

The 6th and last section, the contents of which have been already stated, still more clearly marks the character of the act; and upon a view of the whole law, the court are of opinion that the duties which were in force on the first of July, 1842, continued in force until they were afterwards changed by act of Congress.

This brings us to the remaining inquiry, whether, after the 30th of June, 1842, there were any regulations in force by which the officers of the revenue were authorized to collect the duties which had not been repealed by the Act of 1833; and this question may be disposed of in a few words, as it rests altogether upon the 3d section, the material parts of which have been already stated.

Before the passage of the Act of 1833, there were certainly regulations prescribed by law, abundantly sufficient for the collection of the revenue. The clause at the close of the 3d section, which directs that after the time so often referred to the duties shall be assessed upon the value at the port where the goods are entered, "under such regulations as may be prescribed by law," can scarcely be considered as an implied repeal of all previous regulations; for it does not confine the regulations spoken of to such as might afterwards be enacted, but uses the ordinary legislative language appropriate to the subject, which naturally and evidently embraces all regulations lawfully existing at the time the home duties went into operation, whether made before or afterwards. They can by *no just rule of construction be held [*28] to repeal pre-existing ones; nor to require any new legislation upon the subject, unless it should turn out that those already in force were insufficient for the purpose.

But it has been urged that this clause, taken in connection with the new rule of home valuation, then for the first time established, and to which they refer, shows that new regulations were contemplated, inasmuch as the existing legislation upon that subject had been directed altogether to the value at the place of export. This argument would undoubtedly be entitled to great weight, if the subsisting rules and regulations could not be applied to this new mode of assessing the duties. But if the regulations already in force were applicable to this new state of things, there is no reason for concluding that there was any intention to repeal them, even although it should appear that they had

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been framed with a view to the foreign value, and should be found more difficult of execution, and less satisfactory in the result, when applied to the value at the port of entry.

The most important regulations in relation to this part of the case are contained in the 7th, 8th and 9th sections of the Act of July 14th, 1832. It is true that these regulations point to the value of the goods at the place of export; and many of the powers particularly conferred on the appraisers would not assist them in ascertaining the value at the place of import, and could not be used for that purpose. But the substantial and manifest object of these regulations is to enable the proper officers to determine the amount upon which the rate of impost fixed by law is chargeable; and if the place, with reference to which the valuation is to be made, is changed, it does not by any means follow that the powers before given to the officers, and the duties imposed upon them, are not still to be exercised and performed so far as they are applicable to the new state of things. The object and intention of the valuation is still the same. It is to execute the law, and to assess and collect the duty prescribed. Thus, for example, the 7th section of the Act of 1832 declares, among other things, that it shall be the duty of the appraisers, and of every person acting as such, by all reasonable ways or means in his power, to ascertain, estimate, and appraise the true and actual value of the goods, at the time purchased and the place from which they were imported. The place of valuation is afterwards changed by the Act of 1833, and the duty imposed according to the value at the home port. It would be a most unreasonable interpretation of the law to say that the appraisers must still go through the ceremony of estimating the value at the foreign port; or, that the mere change of place repealed the authority to value at all. In both cases the only object of the appraisement is to ascertain the sum upon which the duty is to be calculated; and the value of the goods at the foreign port, or at the home port, is of no 29*] importance to the public except in *so far as it fixes the sum upon which the collector is to levy the rate of duty directed by law.

The 9th section makes it the duty of the Secretary of the Treasury, under the direction of the President, from time to time to establish such rules and regulations, not inconsistent with the laws of the United States, as the President shall think proper, to secure a just, faithful, and impartial appraisal of all goods, wares, and merchandises, as aforesaid imported into the United States, and just and proper entries of such actual value thereof, and of the square yards, parcels, or other quantities, as the case may require, and of such actual value of every of them; and it is made the duty of the Secretary of the Treasury to report all such rules and regulations, with the reasons therefor, to the next session of Congress. It is very clear that any regulations within the authority thus given are regulations prescribed by law. And although this section, as well as the others before mentioned, undoubtedly contemplated the value at the foreign port, yet when the valuation is transferred to a home port, it was still the duty of the Secretary of the Treasury to frame rules and regulations to ascertain the value upon which the law directed that the duty should be assessed. For this is the only object of the appraisement, and the only purpose for which rules and regulations are to be framed.

Indeed, when it is evident that under the Act of 1833 certain duties, as therein modified, were continued after the 30th of June, 1842, it would scarcely consist with judicial duty to give an over-technical construction to doubtful words, which would make the Legislature inconsistent with itself, by imposing a duty on goods imported, and at the same time repealing all laws by which that duty could be collected. For it cannot be supposed that Congress, in one and the same law, could so have intended; and such an intention ought not to be implied, unless it was apparent from unequivocal language. We think that there are no words in the Act of 1833 from which such a design can fairly be inferred.

It appears from the case stated that the goods in question were subject to a duty of twenty per cent. under the 1st section of the last mentioned act; and that the duties in this case were assessed accordingly upon the value of the goods at the port at which they entered, as ascertained and appraised under the rules and regulations established by the Secretary of the Treasury under the direction of the President. In the opinion of the court, they were lawfully assessed and collected, and the judgment of the Circuit Court is therefore affirmed.

We forbear to express an opinion upon the construction of the Act of 1839, which was argued in this case, because it is understood that other cases are standing for argument, in which that question alone is involved; and it is proper to give the parties an opportunity of being heard before the point is decided.

Mr. Justice McLEAN: [*30

The decision of this case turns upon the construction of the Act of 1833, and, as I differ from the opinion of a majority of the judges, I will state, in a few words, my views upon the subject.

The 1st section of the act provides that ten per cent. on the existing duties shall be deducted annually, until the duties shall be reduced to twenty per cent.

The 3d section declares, "that until the 30th day of June, 1842, the duties imposed by existing laws, as modified by this act, shall remain and continue to be collected. And from and after the day last aforesaid, all duties upon imports shall be collected in ready money; and all credits now allowed by law, in the payment of duties, shall be, and are hereby abolished; and such duties shall be laid for the purpose of raising such revenue as may be necessary to an economical administration of the government; and from and after the day last aforesaid, the duties required to be paid by law on goods, wares, and merchandise, shall be assessed upon the value thereof, at the port where the same shall be entered, under such regulations as may be provided by law."

The above sections can scarcely be misapprehended by anyone. The 1st section reduces existing duties, in a time and manner stated, to twenty per cent. And the 3d section provides, "that until the 30th of June, 1842, the

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duties imposed by existing laws, as modified by that act, shall remain and continue to be collected." Now, the inference is irresistible, that after the above date, the duties shall not be collected under those laws. And this is shown conclusively by the 5th section, which provides "that all imports on which the 1st section of the act may operate, and all articles then admitted to entry free from duty, or paying a less rate of duty than twenty per centum, *ad valorem*, before the said 30th day of June, 1842, from and after that day, may be admitted to entry subject to such duty, not exceeding twenty per centum, *ad valorem*, as shall be provided by law."

Now, these are not terms of compromise, but of enactment. After the day specified, the law declares that the duties shall not exceed twenty per cent. This, like all other laws, was liable to be repealed, expressly or by implication. But it is law until so repealed. The duties are not to exceed twenty per cent., but that does not establish them at twenty per cent.

The 6th section of the act repeals all laws inconsistent with it. The twenty per cent. duties, by this act, were to be continued only to the 30th of July, 1842. After that, by the same act, the duties were not to exceed twenty per cent. Here is no repugnancy in the law, because the one provision is to cease at the same time that the other begins to operate. It is impossible that both enactments can be in force at the same time. They are inconsistent with each other. The one provision fixes a definite amount of duties, the other an indefinite amount. Not to exceed twenty per cent., is not 31*] twenty *per cent. To give effect to this provision future legislation was necessary. But is it the less binding on that account? Can it be disregarded on the ground that it was a mere matter of compromise? It has the form and solemnity of law, and it shows that the act imposing duties expired on the 30th of July, 1842.

That this was the view of Congress is manifest from the fact that in due time they passed an act regulating the duties, to take effect from the above date, which did not receive the signature of the executive. But this is no reason why we, by construction, should continue in force a law which Congress had repealed. After the above date such duties were to be imposed "as shall be provided by law." Now, this language cannot be mistaken; and it is inconsistent with the idea that the law imposing duties prior to that date should, after it, continue in force. Such a construction is unwarranted by the 3d section and the whole tenor of the act.

It is not for this court to determine whether Congress, in this respect, acted wisely or unwisely; whether their motive was to compromise great and conflicting interests or not; but what have they declared to be law. It would be a restriction on the legislative power, hitherto unknown, to say that Congress cannot repeal a law unless they substitute another law in its place.

If the duty law in force prior to the 30th of July, 1842, be inconsistent with the provisions of the act under consideration, then the prior law is repealed. And it is no answer to this to say that the prior law, in its modified form, is in force by virtue of the Act of 1833. The plain and unequivocal enactments of that act repudiate such an inference. In its modified form, the prior law, by that act, expired in 1842. And after that, a new enactment, in my judgment, was essential, not only to continue duties upon foreign merchandise, but also to give effect to all the important provisions of the Act of 1833.

The 3d section, after July, 1842, abolishes all credits for duties, and requires them "to be paid in ready money;" and it further provides "that duties shall be laid for the raising of such revenue as may be necessary to an economical administration of the government;" and that the duties "required to be paid by law," "shall be assessed upon the value of the goods at the port where the same shall be entered, under such regulations as may be prescribed by law."

Now, every one of these provisions was adopted with reference to its taking effect from and after the 30th of July, 1842. They all belong to the same class. The credit for duties was to be then abolished, and prompt payment required. From and after that day duties were to be laid to meet the expenditure of an economical administration of the government. And after that day "the duties required to be paid by law" were to be assessed on the value of the goods at the port of entry; and this assessment is required to be made "under such regulations as may be prescribed by law." *These provisions cannot, by any known [*32 rule of construction, be made to refer to laws or regulations existing at the time of their enactment. They all refer to the future; to future laws, and regulations prescribed by those laws.

The existing laws made no provision to carry into effect the changes in the system, introduced by the Act of 1833. Appraisers were appointed under former acts, but there was no law or regulation as to the home valuation. This was a most important matter, under the new system. And it is perceived, from the explicit provision of the Act of 1833, that Congress did not intend to leave an arrangement of so much importance to the discretion of the Secretary of the Treasury or of the President. They declare that the duties shall be assessed "under such regulations as may be prescribed by law." This is not to be met by argument. It is matter of law.

No one can doubt that laws in relation to duties, not inconsistent with the Act of 1833, may be considered in giving a construction to that act. But I am yet to learn that such laws, by any construction, can suspend or modify the positive enactments of the Act of 1833. Such a power belongs not to the executive nor the judiciary, but to Congress.

Cited—22 How., 311; 1 Otto, 79; 5 Otto, 196; 2 Blatchf., 320, 390; 7 Bank. Reg., 19.

JAMES BARRY, *Plaintiff in Error*,
v.
HAMILTON R. GAMBLE.

New Madrid certificate, location of—filing evidence of incomplete claim—date of claim—bar

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—what is incomplete claim—New Madrid claim located while bar continued protected by Acts of 1824 and 1828.

Under the Act of 1815, a New Madrid certificate could be located upon lands before they were offered at public sale under a proclamation of the President, or even surveyed by the public surveyor.

The Act of 1822 recognized locations of this kind, although they disregarded the sectional lines by which the surveys were afterwards made.

Under the Acts of 1805, 1806, and 1807, it was necessary to file the evidences of an incomplete claim under French or Spanish authority, which bore date anterior to the 1st of October, 1800, as well as those which were dated subsequent to that day: and in case of neglect, the bar provided in the acts applied to both classes.

A title resting on a permit to settle and warrant of survey, dated before the 1st of October, 1800, without any settlement or survey having been made, was an incomplete title and within these acts.

And although the acts of 1824 and 1828 removed the bar as it respected the United States, yet, having excepted such lands as had been sold or otherwise disposed of by the United States, and saved the rights or title of adverse claimants, these acts protected a New Madrid claim which had been located whilst the bar continued.

THIS case was brought up from the Supreme Court of Missouri, by a writ of error issued under the 25th section of the Judiciary Act of 1789.

It was an ejectment brought by Gamble, the defendant in error, against Barry, to recover possession of a tract of land in St. Louis County, Missouri.

33*] *The question was one of title. Gamble, the plaintiff below, claimed under a grant issued to Baptiste Lafleur in conformity with the New Madrid Act passed in 1815, and Barry, under the title of Mackay, which was before the Supreme Court of the United States in 1836, and is reported in 10 Peters, 340. In the court below the parties entered an agreement upon record, in the following words: "It is agreed that the title of the plaintiff (Gamble) to the land in the declaration mentioned, is the title under the patent issued to Baptiste Lafleur, or his legal representatives, and that the title of the defendant (Barry) is the title under the confirmation to the legal representatives of James Mackay; and if it shall be adjudged that the patent is a better title than the confirmation, then the plaintiff shall recover the land in the declaration mentioned; and if the confirmation shall be adjudged the better title, then the defendant shall have judgment."

On the 18th of September, 1799, Mackay presented the following petition:

"To Charles Dehault Delassus, Lieutenant-Colonel attached to the First Regiment of Louisiana, and Commander-in-Chief of Upper Louisiana.

"James Mackay, Commandant of St. Andre, of Missouri, being established at the said village of St. Andre, on the bank of the Missouri, but having the intention of establishing a habitation in the neighborhood of Mr. Papin, between St. Louis and the river Des Peres, he prays you to grant him, in entire property, 800 arpents of land, in superfices, bounded on the south by land of Mr. Papin and Madame (widow) Chouteau; on the east by the lands of the common field of Kiercereau, l'Anglois Taillon, and others, at the Great Marais; on the west by James McDaniel; and on the north and northeast by the land of Mr. Chouteau and the domain of the king. Knowing the zeal and fidelity of the suppliant in the service, he hopes this grace of your justice.

JAMES MACKAY.

"St. Louis, 13th September, 1799."

On the next day, the following order was issued:

"ST. LOUIS, OF ILLINOIS, 14th Sept., 1799.

"The surveyor, Don Antonio Soulard, will put the interested party in possession of the tract of land which he solicits by his memorial; which having done, he shall form a plat delivering it to this party; and a certificate, in order that it may serve to obtain the concession and title in form from the senior intendant-general of these provinces, to whom, by order of his majesty, belongs particularly the distributing and granting of every class of vacant lands.

"CHARLES DEHAULT DELASSUS."

In January, 1800, a grant was made to Chouteau for the land referred to in the preceding papers. This circumstance is commented *upon by the Supreme Court of [*34 the United States in the decision upon *Mackay's* case (10 Peters, 341).

On the 2d of March, 1805, Congress passed an act "for ascertaining and adjusting the titles and claims to land within the territory of Orleans and the district of Louisiana," the general purport of which was to recognize all existing complete grants. It provided for the appointment of three persons who should examine, and decide on, all claims submitted to them, and report the result to the Secretary of the Treasury, who was directed to communicate it to Congress. It further provided that all papers relating to claims should be delivered to the register or recorder, on or before the 1st of March, 1806, for the purpose of being recorded, and declared that, with regard to incomplete titles, any person who should neglect to deliver notice of his claim, or to cause the written evidence of it to be recorded, should lose his right, and his claim should forever thereafter be barred.

On the 21st of April, 1806, Congress passed an act supplementary to the above, the 3d section of which extended the time for filing written evidences of claims to the 1st of January, 1807. It further enacted that "the rights of such persons as should neglect so doing, within the time then limited, should be barred, and the evidences of their claims never after admitted as evidence."

Neither the concession or claim of Mackay was presented to or filed with the recorder or board of commissioners, under either of these acts.

On the 17th of February, 1815, Congress passed an act declaring that any person or persons owning lands in the County of New Madrid, in the Missouri territory, with the exception of the said county had on the 10th day of November, 1812, and whose lands had been materially injured by earthquakes, should be, and they were thereby authorized to locate the like quantity of land on any of the public lands in said territory, the sale of which was authorized by law.

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On the 30th of November, 1815, a certificate was issued to Lafleur, by the United States Recorder, Frederick Bates, authorizing him to locate 640 acres on any of the public land of the territory of Missouri, the sale of which was authorized by law.

On the 7th of July, 1817, Theodore Hunt filed a notice of location under said certificate, with the Surveyor-General.

In the fall of 1817 (as it appeared upon the trial from the deposition of Joseph C. Brown, deputy-surveyor of the United States), the district embracing the land in question was surveyed under the authority of the United States, but the survey was not closed until the spring of 1818. The impression of the witness was that the return of the surveyor was made to the general land office in 1820.

In April, 1818, the survey of Hunt's location was made by the said Brown, who placed it in township No. 45 north, range No. 6 and 7 east. It called to begin at the northeast corner of 35*] Papin's *survey, and ran round several courses and distances, disregarding the cardinal points, in a square form, and calling for the lines of other tracts as boundaries.

On the 26th of April, 1822, Congress passed an act directing "that the locations heretofore made of warrants issued under the Act of the 15th February, 1815 (the New Madrid law), if made in pursuance of the provisions of that act in other respects, shall be perfected into grants, in like manner as if they had conformed to the sectional or quarter sectional lines of the public surveys." The second section directed that those who located such warrants thereafter should conform to the sectional and quarter sectional lines of the public surveys, as nearly as the quantities would admit.

On the 13th of June, 1823, the President of the United States issued a proclamation directing the public lands in township No. 45 north, range No. 6 and 7 east (amongst other lands) to be sold on the third Monday of the ensuing November. These ranges included the land in controversy.

On the 20th of May, 1824, Congress passed an act "enabling the claimants to lands within the limits of the State of Missouri and territory of Arkansas to institute proceedings to try the validity of their claims." It allowed any persons claiming lands under old concessions or surveys, under certain circumstances, to present a petition to the District Court of the State of Missouri, which court was authorized to give a decree in the matter, reviewable, if need be by the Supreme Court of the United States. The 5th section provided that a claim not brought before the District Court in two years, or not prosecuted to final judgment in three years, should be forever barred both at law and in equity. The eleventh section enacted, "that if in any case it should so happen that the lands, tenements, or hereditaments, decreed to any claimant under the provisions of this act, shall have been sold by the United States, or otherwise disposed of, or if the same shall not have been heretofore located, in each and every such case it shall and may be lawful for the party interested to enter, after the same shall have been offered at public sale, the like quantity of lands, in parcels conformable to sectional divisions and subdivisions, in any land office in the State of Missouri," &c., &c.

On the 26th of May, 1826, an act was passed continuing the above act in force for two years.

On the 13th of June, 1827, a patent was issued to Lafleur and his legal representatives for the land included in the New Madrid certificate, location, and survey.

On the 24th of May, 1828, another act of Congress was passed, by which the Act of 1824 was continued in force, for the purpose of filing petitions, until the 26th day of May, 1829, and for the purpose of adjudicating upon the claims until the 26th day of May, 1830.

On the 25th of May, 1829, Isabella Mackay, widow, and the children* and heirs of [*36 James Mackay, deceased, filed their petition in the District Court of Missouri, praying for the confirmation of eight hundred arpents of land, referring to the petition of Mackay, the concession and order, above set forth, as the foundation of the claim.

In February, 1830, the District Court decided against the claim.

In January, 1831, the heirs of Mackay filed a petition in the Supreme Court of the United States, stating that by the Act of 1824 they were allowed a year from the rendition of the decree to appeal from it, that the District Court of Missouri was closed on the 26th of May, 1830, and praying to be allowed the benefit of an appeal. The prayer was granted, and the cause came on for hearing in 1836. The decision is reported, as before stated, in 10 Peters, 240, by which the decree of the District Court was reversed.

In 1837, Gamble, claiming title under Lafleur, brought an ejectment in the Circuit Court of the State of Missouri, for the County of St. Louis, against Barry. The venue was changed to the County of St. Charles, and afterwards to the County of Lincoln, where it was tried, and on the 2d of September, 1840, the jury found a verdict for the plaintiff.

In the meantime, to wit, on the 31st of March, 1840, Mackay's representatives had obtained a patent from the United States for the land in controversy.

During the trial of the cause the plaintiff asked court to give to the jury the following instructions:

"That the title to the premises, in the declaration mentioned, under the patent to Baptiste Lafleur, or his legal representatives, is a better title in law than the title under the confirmation to the legal representatives of James Mackay, deceased; and, therefore, the plaintiff in this case is entitled, under the agreement of the parties, to recover the possession of the land in the declaration mentioned;" which instruction was given by the court, and excepted to by the counsel of the defendant.

The defendant, by his counsel, then asked the court to give the following instructions:

"That inasmuch as the confirmation and patent given in evidence by the defendant show the legal estate in the premise to be vested in the widow and heirs of Mackay; and, inasmuch as the plaintiff had not shown any title under said Mackay, or his representatives, the defendant is entitled to a verdict;" which instructions the court refused to give, and the defendant excepted to such refusal.

The case was carried to the Supreme Court

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of the State of Missouri, which, in September, 1842, affirmed the judgment of the court below; and, to review that opinion, a writ of error brought the case before the Supreme Court of the United States.

The cause was submitted upon printed arguments, by *Mr. Lawless* for the plaintiff in error, and *Mr. Spaulding* for the defendant in error. **37*]** *These arguments occupy nearly fifty pages in print, and the reporter regrets that his limits will not permit their insertion *in extenso*.

Mr. Lawless argued that the power of the government of the United States, after the cession of Louisiana, was not as great over incomplete titles to land as that of the King of Spain: and although it might be true that the latter possessed the power of recalling the title and granting the land to another person, yet the government of the United States was controlled by the treaty of cession, by the law of nations, and by the Constitution and laws of the United States. The question presented to the officers of the United States was not whether the King of Spain could have arbitrarily annulled the grant to Mackay, but whether, at the date of the treaty, it was not entitled, under the laws and usages of the Spanish government, to be consummated and clothed with the forms of a complete title. He then proceeded thus:

"But it was not merely complete titles that consituted property, and proof of property, in land, under the French and Spanish government in Louisiana. Those grants and orders of survey, made by the Lieutenant-Governor of Upper Louisiana, of which the Supreme Court of Missouri speaks with such contempt, constituted property, and imparted a right of property just as much as a complete title could do. This has been specifically laid down as law by the Supreme Court of the United States. In every case, on appeal from the United States District Court of Missouri, under the Act of 1824, in which the decree of that court was reversed, and the claim confirmed, the Supreme Court of the United States based their confirmation on the ground that such a title created property, and, as such, was protected by the treaty. In the case of *Delassus* v. *The United States*, and in this very case of *Mackay's Widow and Heirs* v. *The United States*, *Chief Justice* Marshall, who delivered the opinion of the court, on this head is unambiguous and peremptory. 'In *Delassus'* case,' says the Chief Justice, 'the language of the treaty excludes every idea of interfering with property—of transferring lands which had been severed from the royal domain.' In *Mackay's* case the Chief Justice reiterates this doctrine; indeed, not only the reasoned opinion of the Supreme Court of the United States in this case, as reported in 9 Peters, treats the grant to Mackay as having constituted property, and a title to the land described in it at the date of the treaty, but the formal decree of the court, as the same is set out on the present transcript, exhibits this ground of confirmation. The court, on turning to this decree, as spread on the transcript, will find these words: 'It is further ordered, adjudged and decreed, that the title of the petitioners to the land described in this petition to the District Court is valid by the laws and treaty aforesaid, and the same is hereby confirmed as therein described, and that the surveyor of the public lands in Missouri be and is hereby *directed to survey the [*38 quantity of land claimed in the place described in the petition and grant, or concession.'

"It is manifest, from the terms of this forma decree, that the Supreme Court of the United States took a very different view of the origina title of Mackay from that which the Supreme Court of Missouri has presented. It is difficul to conceive how the Supreme Court of Missouri with those opinions and the decree in favor o Mackay before them, could have attributed t the grant to Mackay such an unsubstantial an shadowy character, as not only to be liable t be annulled by the order of an absolute king but by the arbitrary fiat of an intendant-gener at New Orleans; and it is still more difficult t conceive how, with the treaty before them, an the decree of the Supreme Court based upo that treaty, they could have come to the con clusion that Mackay had no property in th land described in his petition and concession a the date of the treaty.

"It is submitted, therefore, that the Suprem Court of Missouri, when they treat the grant t Mackay, and his title under it to the land whic it describes, as a something which Congres might, or might not, as it best pleased them annul or acknowledge, do not sufficiently r spect the decisions of this high court, or do n understand them.

"We have already observed that whatev might have been the power of the Spanish kin over the grant to Mackay, previous to its bein perfected into a complete title at New Orlean the treaty of cession, and transfer of the pro ince of Louisiana, forever protected the grant from its arbitrary exercise, and that no pow was imparted to Congress, other than that confirming the grant if the treaty protected i and which power has had its final action.

"But we must deny, with all due respect the Supreme Court of Missouri, that, previo to the treaty of cession, the grant to Macka and his right and title to the land described that grant, were so entirely at the mercy of t government, be that government Spanish French, as the opinion of the Supreme Cou would intimate.

"The established fact that Mackay's gra created a right of property, repels such a do trine. It is true that the King of Spain was, a political sense, and as contradistinguish from constitutional sovereigns, an absolu monarch; but it is no less true that in Spa and her colonies the rights of property we religiously respected and protected. The 'R copilacion, the '*siete partidas*' under Spain; t custom of Paris, under the kings of Franc were as protective of private rights as Engli or American law could be, and perhaps mo so. When it is considered that grants a orders of survey in Upper Louisiana were d posed of and adjudicated upon as propert when the records of that province abundant prove that property of this description was so and transferred *inter vivos*, and descended, a became distributable *ab intestato*, and was t subject matter of last wills and testaments, would seem to be a necessary *conse- [*3 quence that such property was protected law, and that the title to it was not at the mer either of the King of Spain or the First Cons

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of France, and still less of the intendant-general at New Orleans.

"In every case (and few can be cited) in which land, previously granted by the authorities of Louisiana, has been conceded to a third person, it will be found, either that the first grant was forfeited by the nonperformance of a condition, or that the land included in it was formally re-united to the royal domain. It will be seen by reference to all the concessions and grants, even those which have been consummated by the signature of the Governor-General previous to 1798, or that of the intendant-general and assessor subsequent to that year, that, so cautious was the government, and careful in their protection of private vested rights, there was uniformly a proviso or saving clause in each grant, declaring that it should prejudice nobody."

Mr. Lawless then argued that Congress had never intended to annul the grant to Mackay; that the 4th section of the Act of 1805, and 5th section of the Act of 1807 did not include it, because they referred to, and operated upon only such grants or incomplete titles as bore date subsequent to the 1st of October, 1800, whereas the grant to Mackay was in September, 1799. And admitting, for the sake of argument, that it was affected by those acts, yet the forfeiture was waived by the United States, and his claim placed on a perfect level with every other by the Acts of 1824, 1826, and 1828.

With regard to the opposing titles, under the New Madrid location, *Mr. Lawless* contended that it was void, because laid upon land which was not "public land," because it belonged to Mackay; or, if it was public land, it was not land "the sale of which had been authorized by law," and referred to the opinions of Mr. Wirt and Mr. Butler in the "Opinions of the Attorneys-General of the United States," edited by Gilpin (pp. 263, 273, 1199); and then proceeded thus:

We have endeavored to demonstrate, that the very first element, the subject matter itself, of Lafleur's location, was wanting; that the land covered by his location was not public land, and never has been since the date of the grant of it to James Mackay, in 1799.

As to the second requisite, that the location should be made on land, the sale of which was authorized by law, the question presents itself, by what law? The only law that regulated, at that time, the sale of public land, was the Act of February 15th, 1811. (2 Story's Laws, p. 1178.)

By the 10th section of that act, the President of the United States is authorized to direct such of the public lands as shall have been surveyed to be offered for sale, with the exception,

1. Of section No. 16 in each township.

2. Of a tract reserved for the support of a seminary of learning.

40*] *3. Of all salt springs, lead mines, and lands contiguous thereto.

4. Of all tracts of land, the claim to which has been filed in due time, and according to law presented to the recorder, for the purpose of being investigated by the commissioners appointed for ascertaining the right of persons claiming lands in the territory of Louisiana (by the Act of Congress, June 4th, 1812, styled under the new organization, the Territory of Missouri).

It must be conceded that, under this 10th section of the Act of 1811, the President had no authority to direct that any land should be offered for sale until after the survey thereof.

The object of this inhibition was, manifestly, that the system of surveys should be fully established, and the sales and entries in the land offices should conform to the sectional divisions and subdivisions.

It is no less manifest, that another object in thus restricting the power of the President was to ascertain the precise location of the salt springs and lead mines in the territory of Missouri, and the quantity of land contiguous thereto, and which, for the working of those mines, ought to be reserved from public sale.

It is equally clear that a respect for vested rights, and for the treaty of cession, dictated the reservation of lands included in claims filed, under the requirements of the acts of Congress, in the office of the United States Recorder.

Now, it really seems difficult to comprehend on what principle a New Madrid locator could treat as land authorized to be sold, and as public land, that very land which the President of the United States was forbidden so to treat.

The counsel for the plaintiff in error respectfully contends (with all deference to the Supreme Court of Missouri) that the exceptions and reservations, and conditions as to surveys in the 10th section of the Act of 1811 are, and were, very good and wise provisions, and that a location, such as that under Baptiste Lafleur, being made in total disregard and violation of those enactments, is not an irregularity merely, but an absolute nullity.

The effort by the Supreme Court of Missouri to cure the original defects of the location by the operation of the Act of 1822 has been already commented on, and the fallacy of the reasoning, it is hoped, established. That act certainly did not cure the defect of a location on a salt spring, or a lead mine, or a sixteenth section, still less upon private property.

It may be that the Act of 1822 was concocted and intended to effect such impolitic and iniquitous results, but, fortunately, the terms of that act do not justify such an application of its provisions, and certainly the intention of those who applied for and obtained its passage is entitled to no consideration.

A proclamation by the President of the United States was not issued until 1823, and of course no sale of lands till that year took *place in Missouri. The surveys were not [*41 returned till 1822. It was impossible that the President could have known what lands he should direct to be sold until those surveys were returned and examined, and approved at Washington city.

It was under the 3d section of the Act of 17th of February, 1818, and the President directed the lands in the district of St. Louis to be offered for sale. The law did not, in any respect, affect the exceptions and reservations in the 10th section of the Act of 1811. The 3d section of the above Act of 1818 provides that whenever a land office shall have been established in any of the "districts for the land office" created by the 1st section, the President

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shall be authorized to direct so much of the lands lying in such district as shall have been surveyed according to law, to be offered for sale, with the same reservations and exceptions, and on the same terms and conditions, in every respect, as was provided by the 10th section of the Act of 1811.

Thus, it may not only be contended that, notwithstanding the Act of 1811, the President was not empowered to direct a sale until after the passage of the Act of 1818, which created the machinery of sale, and portioned out Missouri into "land districts."

There was no law for the sale of the land in the St. Louis district at all in force at the date of the location by Hunt, under Lafleur, to wit, on the 17th of July, 1817. There was, at that time, in existence, neither a St. Louis land district, nor a St. Louis land office, nor, as has been shown, any public survey made according to law. The land in Missouri (at least in that region of it in which Mackay's grant is located) was, on the 17th of July, 1817, in the same state as on the date of the last private survey made under the Spanish and American governments respectively.

How, then, can it be successfully argued that a location thus premature—thus, not only not authorized, but in direct violation of two acts of Congress—was only an "irregularity"? The case of *Lindsay et al.* v. *Lessee of Miller* (6 Peters, 672), and the case of *Jackson* v. *Clark, et al.* (1 Peters, 628), have, it is submitted, no bearing or analogy to the case now before the court. In those cases the question arose on a survey which was manifestly only irregular from the want of certain technical formalities.

The surveys, when made, were made on land which lawfully could have been surveyed. The surveys were not absolutely void, and the Supreme Court of the United States therefore decided that the Act of 1807 protected them, and that no location of a Virginia military warrant under that act could lawfully be made upon land which had previously been so surveyed.

If there had been a law specifically prohibiting such surveys, or if they had been made on land not by law susceptible of such surveys, no doubt they would have been void, and the Virginia military warrant would have been well laid upon them.

42*] *It may be observed, also, that those surveys, though irregular, were made officially, and were based on a substantial legal right in the person for whom they were made; whereas the New Madrid location in the present case was, as has been shown, an *ex-parte* private act of an interested individual, who had no other color of claim to the land, and was entirely at his own risk. If such a location be declared valid, the locator must necessarily have exercised, in his own case, a high judicial function, namely, the construction of an act of Congress, and not only that, but the functions of a jury of twelve men on a question of fact, and of a witness to prove the fact.

1st. The "locator" construed the words in the Act of 1815, "public land, the sale of which is authorized by law," to mean land which, though not at the date of his location authorized, as public land, to be sold, might, thereafter, by possibility, be "authorized to be sold."

2d. The locator assumed the fact that land which his location called for was "public land."

3d. The locator assumed the fact that the land located by him contained neither salt spring nor lead mine, nor was "contiguous" to a salt spring or lead mine.

4th. The locator assumed the fact that when the public surveys should be made the land would certainly not include, or interfere with the sixteenth section.

5th. That it would not interfere with seminary land.

6th. That his location would cover no land included in a Spanish or French grant, or order of survey.

This would have been a portentous power, indeed, to vest even in the New Madrid sufferer; how much more productive of injustice and spoliation, if imparted to a New Madrid speculator!

The counsel for the plaintiff in error, therefore, in conclusion, submits:

1st. That the title to the specific land in dispute is protected by the treaty of cession, and could only be affected or devested by judicial action.

2d. That the title of James Mackay and his heirs has been confirmed by the Supreme Court, because of its original validity, and its being protected and guarantied by the treaty of cession.

3d. That previous to the confirmation of the grant to Mackay, the land included in it has never been re-annexed to the royal domain, or to the public land of the United States.

4th. That the location by Hunt and Lafleur, on the 17th July, 1817, was not merely "irregular," but was absolutely void.

5th. That Congress has not given, nor could give, by any retroactive law, validity as against a vested right to a location void *ab initio*.

6th. That the acts of Congress of 2d March, 1805, section 4, and of March 3d, 1807, section 5, have no operation on the grant to *Mac- [*43
kay, inasmuch as this grant bears date previous to the 1st October, 1800.

7th. That, even if the Acts of 1805 and 1807 bore on the grant to James Mackay, the acts of Congress of 1824, and the acts in amendment and continuation of that, have remitted Mackay and his heirs to all their original right and title.

8th. That the patent, given in evidence by the defendant in error, having been shown to be based on a void location, is itself void at law and in equity.

9th. That the patent having been issued in the year 1827, and pending the protective action of the law of 1824, as respects French and Spanish claimants and grantees, the patentee and his assigns are bound to that act as by a *lis pendens*.

10th. That the protest filed in the office of the Surveyor-General at St. Louis, by the agent of the widow and heirs of James Mackay, being three years before the date of the patent under Lafleur, is notice to Lafleur and his legal representatives of the claim and grant of Mackay.

11th. That the confirmation, by the Supreme Court, of the grant to James Mackay, and the patent in pursuance of that decree, which has

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been issued to the confirmees, constitute a full and conclusive proof of title to the land in dispute, and therefore ought to prevail against the location under Lafleur, and the patent issued and based upon it. And,

12th. That the judgment and opinion of the Supreme Court of Missouri, being against a right and title protected by treaty, and specially set up and claimed under a treaty and a decree of the Supreme Court of the United States, ought to be reversed.

Mr. Spaulding, for the defendant in error, stated the case, commented on the nature of an incomplete title, with the power of the government over it, and proceeded thus:

The position, then, which I assume in relation to the title set up by the plaintiff in error, is that under the operation of different acts of Congress, the negligence of Mackay, the holder, has extinguished the claim. Applying the provisions of these acts of Congress to the title set up by the plaintiff in error, it is manifest that Mackay's claim was barred, by his own negligence, when the title of Lafleur was initiated, and up to the time it was completed by the patent.

The 1st section of the Act of 1805 (2 Story's Laws United States, 966) provides for the confirmation of incomplete titles bearing date prior to the 1st of October, 1800; the 2d section makes grants to settlers who had made improvements by permission of the Spanish officers; the 4th section authorizes those who held land by complete titles, and requires every person who claimed land, either by the 1st section of the act, under an order of survey, dated prior to October, 1800, or under the 2d section, by a 44*] settlement under permission of *the Spanish officers, or by any incomplete title dated subsequent to the 1st day of October, 1800, to file, before the 1st day of March, 1806, with the recorder, a notice in writing, stating the nature and extent of his claim, together with a plat of the tract claimed; and further required that he should, on or before that day, deliver to the said recorder, for the purpose of being recorded, every grant, order of survey, deed, conveyance, or other written evidence of his claim: then, by the proviso to this section, a failure to give the notice, or to record the evidence of title, is made a bar to the claim, and the documents which should have been recorded are never to be received in evidence against a grant from the United States.

The 4th section of the Act of 1807 (2 Story's Laws United States, 1060) extends the jurisdiction of the commissioners to all claims to land in their district, where the claim is made by a person who was an inhabitant of Louisiana, &c., and authorizes the commissioners to decide according to the laws and established usages and customs of the French and Spanish governments, upon all such claims. This section extends the time for filing notices of the claims, and written evidences of claims, to the 1st day of July, 1808, and declares that the rights of such persons as shall neglect to do so within the time limited by the act, shall, so far as they are derived from or founded upon any act of Congress, ever after be barred, and become void, and the evidences of their claims shall never after be admitted as evidence in any court of law or equity whatever.

This last section extends the jurisdiction to all descriptions of claims, and gives the utmost latitude to the commissioners in seeking the rule by which the claims are to be confirmed, while, at the same time, it is just as imperative as the former law, in requiring the exhibition of the claim and the recording of the written evidence of title. So, the 7th section of the Act of 13th June, 1812 (2 Story's Laws, 1260), contains provisions which have the same effect upon claims and evidences of title not filed and recorded before the 1st of December of that year, declaring that the evidence of the claims shall never be admitted against any grant from the United States.

This court has fully considered these acts in the case of *Strother* v. *Lucas* (12 Peters, 448), and, remarking generally upon their provisions, the court says: "Congress, well aware of the state of the country and villages, wisely and justly went to the extent, perhaps, of their powers in providing for the security of private rights, by directing all claimants to file their claims before a board especially appointed to adjust and settle all conflicting claims to lands. They had in view another important object—to ascertain what belonged to the United States, so that sales could be safely made, the country settled in peace, and dormant titles not to be permitted either to disturb ancient possessions, or to give to their holders the valuable improvements made by purchasers, or the sites of cities which had been built up by their enterprise. Accordingly, we find that, by *various [*45 acts, the time of filing such claims is limited, after which they are declared void, as far as they depend on any act of Congress, and shall not be received in evidence in any court against any person claiming by a grant from the United States.

"These are laws analogous to acts of limitation for recording deeds, or giving effect to the awards of commissioners, for settling claims to land under the laws of the States; the time and manner of their operation, and the exceptions to them, depend on the sound discretion of the Legislature, according to the nature of the titles, the situation of the country, and the emergency which calls for their enactment. Reasons of sound policy have led to the general adoption of laws of both descriptions, and their validity cannot be questioned. Cases may occur where the provisions of a law may be such as to call for the interposition of the courts, but these under consideration do not. They have been uniformly approved by this court, and ought to be considered as settled rules of decision in all cases to which they apply."*

The court, then, in applying these laws to a title as old as 1787, at page 454, says: "We must, then, take the defendant as one holding the premises in controversy by a grant from the United States, and, as their grantee, entitled to all the protection of the laws appropriate to the case." "The plaintiff, therefore, is brought within the two provisions of the laws; that by Madame Chancellier not having filed her claim within the time limited by law, she could not set up any claim, under any act of Congress, or be permitted to give any evidence thereof in any court, against a person having a grant from the United States, under the confirmation of the commissioners and the Act of 1812."

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In the case now before the court we have an exemplification of the very evils which the court, in the case of *Strother* v. *Lucas*, considered these acts of Congress designed to prevent. We have a man pointing out a portion of unoccupied waste land as public land, liable to be appropriated by the location of a New Madrid certificate; and after it had been so appropriated and patented by the government, we have a claim set up, by the heirs of that man, under a dormant title, which had been held back, notwithstanding the imperative provisions of these acts of Congress, and stating, on the face of their petition, that it had never been presented to any of the tribunals established for the investigation of such titles.

Had the claim of Mackay been exhibited and recorded as the acts of Congress required, then the 10th section of the Act of 3d March, 1811 (2 Story, 1200), would have expressly reserved the land from sale until the final action of Congress upon the claim, and a person attempting to appropriate it, by the location of a New Madrid certificate, would have acted with notice that such claim existed; but, as it was not so recorded, there was no evidence upon any land record of the country that such claim **46*]** existed; and the land now *claimed appeared to every person who could have access to these records to be vacant public land, subject to any disposition which could lawfully be made of any part of the public domain.

Mr. Spaulding then proceeded to comment upon the Acts of 1824 and 1828, and particularly upon the clauses which saved the rights of adverse parties; after which he took up the title of Lafleur under the New Madrid grant, and argued thus:

The plaintiff in error, having given in evidence a notice or application made by Theodore Hunt, for the location of the certificate of Lafleur upon the land in question, dated in July, 1817, and a survey made by a deputy-surveyor in April, 1818, with the proclamation of the President for the sale of the land in the township, to take place in October, 1823, objects to the title of the defendant in error on the following grounds: 1st. That, at the time of the location, the land was not public land. 2d. That, if it was public land, the sale of it was not authorized by law, and therefore it was not subject to location.

The first objection of the plaintiff in error, that, at the time of the location, the land located was not public land, subject to be located, is based upon the assumption that it was Mackay's land, and involves the consideration of the argument made against the title of Mackay. If, by the operation of the different acts of Congress, Mackay's negligence had barred his claim, and shut out his evidence of title from the consideration of courts of justice, the land was in every sense public land, subject to such disposition as the government might think proper to make of it. To say it was still his land, as against the government and the grantees of the government, is to assert that his title remained valid, notwithstanding enactments which annulled it, on account of his neglect to comply with the requirements of law. It is unnecessary further to pursue the answer to this objection of the plaintiff in error.

The second objection, upon which most stress is laid, is, that at the time of the location this land was not of the description liable to location—that is, land the sale of which was authorized by law.

It may be of importance to determine, if we can, from the evidence in this case, when the location was made.

The plaintiff in error has fallen into the mistake of supposing that the notice or application for the location, made in July, 1817, is the location itself. This error might have been avoided by an examination of the decision made by this court in *Bagnell et al.* v. *Broderick* (13 Peters, 436). In that case the court held, that this notice or application forms no part of the title, and is not part of the evidence on which the general land office acted, but the patent issued on the plat and certificate of the surveyor, returned to the recorder's office, and which was by him reported to the general land office. Again, the court says: "The only evidence of the location recognized *by the [*47 government as an appropriation, was the plat and certificate of the surveyor."

As the notice or application is not the location, we next look to the survey spread on the record: this is dated in April, 1818, as the time when the deputy-surveyor of the United States made the survey on the ground, but when this survey was returned to the office of the Surveyor-General, or when it was approved in that office, does not appear, and especially it does not anywhere appear on the record when the Surveyor-General returned to the recorder of land titles the plat with the notice, designating the tract located, as required by the 2d section of the act, nor when the recorder issued the patent certificate under the 3d section.

In this State of the evidence it cannot be known whether the survey made by the deputy surveyor, although dated in April, 1818, was returned, or, if returned, was approved in the office of the Surveyor General at any time anterior to the proclamation by the President for the sale of the land in the township.

It appears, by inspection of the survey given in evidence, that it was made after the public surveys had established the townships, &c., as it describes the land as situated in two townships. The question, therefore, which the plaintiff in error has attempted to raise, is not presented by the record. But it is not my purpose to avoid the discussion of the question, if we can really get it into a tangible form.

The question, if I have understood the argument made in behalf of the plaintiff in error, is whether the patent issued to Lafleur is not void because the survey was made for him at a time when the sale of the land was not authorized by law.

If we turn again to the language of the act we find that the words upon which most stress is laid—"the sale of which is authorized by law"—are used as descriptive of the land to be located, and have no reference to time. If there were, then, classes of land which, by law, were reserved from sale so that no officer of the government could, without a violation of law, attempt to sell them, and there were other public lands in relation to which the executive of the United States was already intrusted, by law, with the power to direct the survey and sale so that no farther authority was needed, we

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have the key to the right understanding of the words employed in the Act of 1815.

The Act of 3d March, 1811 (2 Story, 1197), is that which directs the sale of the public lands, and makes the reservations from sale. It is upon this act, and upon those which establish land offices in different parts of Missouri, and refer to this for the direction of the different offices, that the sales of land in Missouri have taken place.

The 8th section of this act empowers the President to direct the Surveyor-General to cause the public lands in the territory of Louisiana to be surveyed.

The 10th section empowers the President to direct the land, when surveyed, to be offered for sale, and prescribes the duties of the differ-
48*] ent *officers, when the President has designated the days of sale. This section reserves from sale: 1st, section number 16 in each township; 2d, a tract for the support of a seminary of learning; 3d, salt springs and lead mines, and lands contiguous thereto; 4th, by the proviso to the section, "no tract shall be offered for sale, the claim to which has been in due time, and according to law, presented to the recorder of land titles in the district of Louisiana, and filed in his office, for the purpose of being investigated by the commissioners appointed for ascertaining the rights of persons claiming lands in the territory of Louisiana." This section authorizes the sale of the mass of public land, and forbids the sale of particular descriptions of land: we have, then, the division of the land into the two classes—those the sale of which is authorized, and those the sale of which is not authorized; and the Act 1815 authorizes locations to be made on lands of one class, and not on lands of the other.

This construction is further sustained by the designation of land, subject to the location, in the present tense: "the sale of which is authorized by law." In 1815, when this law was passed, a very large portion of the land in the territory of Missouri had not been surveyed, so that if the intention of Congress was to make a survey of the public lands a prerequisite to legal locations, by the use of these words, then, as it was evidently designed to give a range for these locations as extensive as the territory, the language employed, instead of being "the sale of which is authorized by law," would have been, the sale of which is or hereafter shall be authorized by law.

As the act speaks of the authority then existing by law for the sale of public land, it evidently excludes the idea that the sale was only authorized when the President had issued his proclamation for the sale: for at that time the President had never issued any proclamation for any sale in the territory of Missouri.

The other interpretation of these words will, as I believe, be considered as expressing the meaning of Congress; that is, that they refer to the two classes of land, one of which was then authorized by law to be sold, and the other was expressly by law reserved from sale.

I am aware that great reliance has been placed on the official opinions of Mr. Wirt, when he was Attorney-General, given in relation to these locations, and also upon the opinion of Mr. Butler, given upon this very claim of Mackay, after its confirmation, and upon the opposing claim. These were, certainly, gentlemen eminent in the profession, whose opinions are entitled to high consideration, but still they are not conclusive authority.

I have but a single remark to make upon Mr. Butler's opinion, and that is, that he is totally mistaken as to a cardinal fact in the case. He assumes that Mackay's claim was filed and recorded according to law, so that the land was expressly reserved from sale by *the 10th [*49 section of the Act of 1811, and that therefore it was not subject to location. Now, if Mr. Butler had read the petition on which the confirmation was procured, he would have seen it there stated that the claim had never been filed nor recorded according to law, and that, therefore, the land was not only by law public land, but that it was not, and never had been, reserved from sale.

On the opinion of Mr. Wirt I have to remark, that he appears to have fallen into the mistake of supposing that the notice or application of the party for a location was the location itself, and to have directed his arguments chiefly against that instrument. It is true that Mr. Wirt argues against surveys made under New Madrid certificates which did not conform to the lines of the public surveys; but it is to be observed that this conformity to the public surveys is nowhere required in the law which regulates these locations; and although it may be very convenient, and be very consistent with the general purposes of the government, in maintaining regular subdivisions of the public lands, it is nowhere required as necessary to the validity of a location.

The effect produced by the opinions of Mr. Wirt was the passage of the Act of 26th April, 1822 (3 Story, 1841), which directed that locations made under these certificates, if made in pursuance of the provisions of the Act of 1815 in other respects, should be perfected into grants, in like manner as if they had conformed to the sectional or quarter-sectional lines of the public surveys, and the sales of the fractions made by such locations should be as valid against the United States as if the fractions had been made by rivers or natural obstructions.

The great argument of Mr. Wirt against the locations which were made before the public surveys was, that they would not conform to the legal subdivision of the public lands when they should be surveyed, and thus confusion would be introduced into the system. Now, this Act of 1822 takes the location as made, and the confusion as existing; and directs the issuing of patents, notwithstanding this want of conformity to the lines of sections.

Yet it is argued, that because this act ratifies the locations which do not conform to the public surveys, only when they are, in other respects, in pursuance to the Act of 1815, the objection still is to be made, that they were made on land which was not surveyed, and the sale of which was consequently not authorized by law.

This is only coming back again to the discussion of what lands were authorized to be sold; which, I think I have shown, was all not reserved from sale. It is beyond dispute that the land in controversy was not reserved from sale.

But what is the real extent of the objection

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we are considering? It is this: applications were made to locate portions of the public lands before the public surveys; locations have been so made, and they do not conform to the 50*] sectional lines when they have been *afterwards run. The act of Congress declares that this shall be no objection to the locations, yet it is agreed now, that although the act has waived all objections to the result produced, it still retains the objection to the cause which produced it; so that, substantially, the act has accomplished nothing, and the United States, although they have sold the surrounding fractions, and have waived all objection to the want of conformity in the location to sectional lines, and have patented the land as located, may still, in all cases where the applications were made before the public surveys, come in and claim the land; or, that an intruder or trespasser on the land which the government has thus patented may show that the application for the location of the land was thus made before the public surveys, and set up the pretense that the patent is void,

This case would present some most remarkable features if such an objection could prevail.

Here is an application for the location of a tract of land, bounded on three sides by known Spanish surveys, and to run to a point in the line of another Spanish survey. The only new line to be run is that on one side, which is necessary to fix the quantity. A survey is made under that application calling for the townships and ranges, which shows that the survey was not made before the United States surveys. A patent is issued by the government, and in a suit brought by a purchaser under that patent it is objected, not that the land was reserved from sale; not that location could have been differently made if the government surveys had been a thousand times run; not that it does not conform to boundaries which would have fixed its limits whenever it might have been made (seeing that it is bounded on three sides by established Spanish surveys); but that the application was made prior to the public surveys, therefore the application was void, and the survey was void, and the location was void, and the patent was void, and but for Mackay's confirmation, the land would be mere vacant, unappropriated land; and though an owner of part of the land, under the Lafleur patent, has been more than twenty years in possession under the title of Lafleur, he has all the time been a mere trespasser!

The case in which the validity of patents have been examined in suits at law, are too familiar to the court to need any extended remark from the counsel. From the case of *Polk's Lessee* v. *Wendal*, to the present time, the principles upon which patents have been adjudged void have been where the State has not had title to the land granted; where the officer had no authority to issue it; where the land has been appropriated by a species of title which could not by law appropriate it; where the patent has issued against some express prohibition of law, or for land reserved from the disposition of it attempted by the patent. The patent by Lafleur is within neither of these classes. The whole of the objections now made to it would be answered to the satisfaction of the plaintiff in error, if the deputy *sur- [*51 veyor in 1823 had run around the same lines which were run in 1818, and then had sat down and made precisely the some plat and the same field-notes. And how is it known that he did not? The purchaser under Lafleur gave no evidence about a survey. The survey of 1818 was given in evidence to impeach the patent; the patent itself implies that all was done which was necessary to its being regularly issued.

I really feel that I would be trifling with the court to make a more extended argument in the case.

The propositions I maintain are the following:

1. That upon this record the Mackay title commences, as against the defendant in error, with the confirmation, as no document is shown anterior to that confirmation; and the confirmation does not, as against the defendant in error, establish the existence of any prior claim.

2. That if the existence of a genuine Spanish order of survey should be assumed, as against the defendant in error, all claim under it was barred by the acts of Congress.

3. That if the existence of such order of survey should be assumed, whether the claim under it were barred or not, the confirmation of the claim is, by the act under which it was obtained, expressly postponed to the Lafleur title.

4. That the patent of Lafleur is the better legal title, unless there is some defect that renders the patent void.

5. That the Lafleur title is above exception, regular and effectual.

Mr. Justice CATRON delivered the opinion of the court:

The first question in order is, whether the patent to Lafleur is a valid title as against the United States when standing alone.

By the certificate of the recorder of land titles at St. Louis, Lafleur was entitled to 640 acres of land in compensation for lands of his injured by the earthquake in New Madrid County. On this the survey of April, 1815, is founded. Its return by the surveyor, with a notice of location, to the office of the recorder, was the first appropriation of the land; and not the notice to the Surveyor-General's office, requesting the survey to be made, as this court held in *Bagnell* v. *Broderick* (13 Peters, 450.)

Township 45, in which the land granted to Lafleur lies, was laid off into sections in 1817 and 1818; and we suppose before the survey for Lafleur was made, as his patent, and the survey on which the patent is founded, both refer to the township by number as including the land. When the return of the township survey was made to the Surveyor-General's office does not distinctly appear, although it is probable it was after Lafleur's location had been made with the recorder.

The location was in irregular form, and altogether disregarded the *section lines, and [*52 ordinary modes of entry under the laws of the United States. This circumstance lies at the bottom of the controversy. The general land office at Washington refused to issue a patent on New Madrid locations thus surveyed. The Secretary of the Treasury on the 11th of May, 1820, and again on the 19th of June, 1820,

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called on the Attorney-General for his opinion on the validity of such locations (2 Land Laws and Opinions, 9, 10); this officer replied: "That the authority given is to make these locations on any of the public lands of the territory the sale of which is authorized by law; but the sale is not authorized by law until the sectional lines are run, and consequently all locations previously made by these sufferers are unauthorized."

To cure this defect, the Act of 1822 was passed, which provides that locations made before that time, under the Act of 1815, if made in pursuance of the act in other respects, should be perfected into grants in like manner as if they had conformed to the sectional and quarter sectional lines of the public surveys; and that the fractions previously created by locations should be deemed legal fractions, subject to sale. But that after the passing of the act (26th April, 1822), no location of a New Madrid claim should be permitted that did not conform to the sectional and quarier-sectional lines. The opinion of the Attorney-General appears to have been favorable to locations in conformity to the public surveys actually made before their return; until returned, however, and received at the Surveyor-General's office, they could not be recognized as legal public surveys; and in this sense Congress obviously acted on the opinion, and course of the general land office in pursuance of it.

The principal difficulties standing in the way of issuing patents seem to have been the following: There were New Madrid locations made on lands not then surveyed; locations made after the lands had been surveyed, but before the surveys were returned; and locations made on lands surveyed, and the surveys returned; in each case disregardful of the section lines. But all of them were on lands that had been surveyed, and the surveys duly returned and sanctioned, when the Act of 1822 was passed. On this state of facts Congress acted. No distinction was made among the claimants; all fractions created by prior locations, in existing public surveys, were declared legal and subject to sale; the fractions produced could not be legal unless the locations producing them were equally so. In this respect, therefore, such locations were binding on the United States from the date of the act. It is insisted, however, that until section No. 45 had been offered for sale by the proclamation of the President no entry could be made on it by a New Madrid warrant; and in this respect Lafleur's location was void before, and not cured by the Act of 1822, but expressly excepted: that Congress only acted on one defect, that of disregarding the sectional lines, and excluded all others. Township No. 45 was first advertised for sale in 1823.

53*] *In addition to what has been said in answer to the argument, it may be remarked that the New Madrid sufferers were preferred claimants; like others having a legal preference, they had a right to buy so soon as the officers of the government had by law the power to sell, and sales could be made founded on public surveys. It could not have been intended by Congress that the sufferer should surrender his injured claim, get his warrant from the recorder, and then be compelled to wait until after the public sale, which might sweep all the lands out of which he could obtain a new home. And so the Act of 1815 was construed and acted on at the general land office. No objection seems to have been made there on the ground that these claims had been entered on lands not previously offered for sale at auction; as the President might or might not order the sale. We think this plainly inferable from the following order. On the 9th of April, 1818, an act was passed limiting applications to the recorder, for New Madrid warrants of survey to the 1st of January, 1819. The commissioner of the land office here wrote to the recorder at St. Louis, inclosing a copy of the act, a few days after it was passed, saying:

"This act authorizes the reception of claims to the 1st of January next; but, as several public sales will take place previous to that day, you must not issue any patent certificates to those claimants after the commencement of such sales, unless the claimant produces a certificate from the register of the land office, to show that the land has not been sold. Should you issue any patent certificate to those claimants previous to the public sales, you will furnish the register of the land office for the district in which the lands lie with a list of the tracts for which you have issued patent certificates, that he may reserve them for sale."

The 3d section of the Act of 1815 makes it the duty of the recorder to deliver to the claimant a certificate stating the circumstances of the case: that is, that the claim had been allowed, surveyed, and recorded in due form, and that he was entitled to a patent for the tract designated: this was to be filed with the recorder if satisfactory to the claimant. Then the recorder was bound to issue the "patent certificate," above spoken of, in favor of the party, which, being transmitted to the commissioner of the general land office, entitled the claimant to a patent from the United States.

By the foregoing instructions, patent certificates, previous to the public sales, were contemplated as due to claimants for lands entered but not previously offered for sale; and we cannot doubt did exist in large numbers. They, of course, were sanctioned at the land office. Nor is the consideration of this question presented to this court for the first time. Pettier's claim, in the case of *Stoddard* v. *Chambers* (2 How. R., 317), was like this in all its features except one. It had been located on the same land, covered by Bell's concession made by the Spanish government, which had been filed and *recorded in 1808, but not recom- [*54 mended for confirmation by the commissioners at St. Louis, for want of occupation and cultivation. By the Act of 1811, until the decision of Congress was had, the land covered by the Spanish claim could not be offered for sale, and this restriction was continued. Pettier's New Madrid location was made in 1818, on the land reserved from sale in favor of Bell's concession, and this court held the New Madrid location, and the patent founded on it, void, because the sale of the land "was not authorized by law," and the title of Pettier in violation of the Act of 1815. But the court says: "Had the entry been made or the patent issued after the 20th of May, 1829, when the reservation ceased, and

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before it was revived by the Act of 1832, the title of the defendant could not be contested.

For the reasons assigned, the court was of opinion Pettier's claim would have been valid had Stoddard's not been interposed. It also lies in Township No. 45. So our opinion is that Lafleur's claim was rendered valid by the Act of 1822, unless it can be overthrown by the interposition of Mackay's.

2. This raises the inquiry into its validity in opposition to Lafleur's. That, standing alone, Mackay's was valid against the United States, is in effect decided by this court in *Pollard* v. *Kibbe* (14 Peters, 355), and *Pollard* v. *Files* (2 How., 601), and is free from doubt.

Lafleur's location was made in 1818, and his patent issued in 1827. Mackay's claim was first filed for adjudication before the District Court (U. S.) of Missouri in 1829. Up to this date it had stood as an incomplete claim, requiring confirmation by this government before the title could pass from the United States; to accomplish which a decree in its favor was sought in the District Court, and finally obtained here on appeal; in confirmity to which a patent was obtained.

As the proceeding under the Act of 1824 was *ex-parte*, Lafleur was not bound by it any further than the legislation of Congress affected his rights; and the question is, how far were they protected as against incomplete titles brought before the District Court.

By the Act of March 2d, 1805, sec. 4, certain French and Spanish claimants were directed, on or before the 1st day of March, 1806, to deliver to the register of the land office, or recorder of land titles, within whose district the land might lie, every grant, order of survey, deed, conveyance, or other written evidence of claim, to be recorded in books kept for the purpose. "And if," says the act, "such person shall neglect to deliver such notice in writing of his claim, or cause to be recorded such written evidence of the same, all his right, so far as the same is derived from the two first sections of this act, shall become void, and forever thereafter be barred; nor shall any incomplete grant, warrant, order of survey, deed of conveyance, or other written evidence; which shall not be recorded, as above directed, ever after be considered or admitted as evidence, in any **55*]** *court of the United States, against any grant derived from the United States."

By the Act of April 21, 1806, sec. 3, supplemental to the Act of 1805, the time for filing notices of claims and the evidence thereof was extended to the first day of January, 1807; but the rights of such persons as shall neglect so doing within the time limited by the act, it was declared should be barred, and the evidence of their claims never after be admitted as evidence, in the same manner as had been provided by the 4th section of the act to which that was a supplement.

By the 5th section of the Act of March 3, 1807, further time for filing notices and evidences of claims was given till the 1st day of July, 1808. But all benefit was cut off from the claimant if he failed to give notice of his claim and file his title papers; so far as the acts of Congress operated in giving the title any sanction through the agency of commissioners and ever after the first of July, 1808, the claim was barred.

It is insisted, however, Mackay's claim is not embraced by the Act of 1805, and to which the Acts of 1806 and 1807 refer. The Act of 1805 does govern the future legislation, interposing a bar. By section 4, French or Spanish grants made and completed before the 1st day of October, 1800, might, or might not, be filed; as the treaty of 1803 confirmed them, they needed no further aid. But complete grants issued after the 1st day of October, 1800, and incomplete titles, bearing date after that time, "shall be filed," says the act. Mackay's claim is of neither description; it was an incomplete title, being a permit to settle and warrant of survey, without any settlement or survey having been made, but dated before the 1st of October, 1800.

The Act of 1805, section 4, further provides that every person claiming lands by virtue of the two first sections of that act, should, by the 1st day of March, 1806, file his notice of claim, title papers, &c., otherwise the claim should be barred. Mackay's claim "was a duly registered warrant of survey," within the words of the 1st section of the act. That the United States had the power to pass such a law we think free from doubt; it being analogous to an ordinary act of limitation, as this court held in *Strother* v. *Lucas* (12 Peters, 448), to which nothing need be added here.

As to the United States, and all persons claiming under them, Mackay's claim stood barred from the 1st of July, 1808, until the passing of the Act of May 26, 1824, by which the bar was removed, so far as the government was concerned. The time for filing claims under this act was extended by another passed in 1826, and again by that of May 24, 1828, to the 26th day of May, 1829; before the expiration of which time Mackay's claim was filed in the District Court (U. S.) of Missouri, and eventually confirmed in this court on appeal. And the question is, did the Acts of 1824 and 1828, and *the proceeding had under [*56 them, affect Dafleur's title? By the 11th section of the Act of 1824 it is provided, "That if in any case it shall so happen that the lands, tenements, or hereditaments decreed to any claimant under the provisions of this act, shall have been sold by the United States, or otherwise disposed of, it shall be lawful for the party interested to enter the like quantity of lands, in parcels conformable to sectional divisions and subdivisions, in any land office in the State of Missouri."

The Act of 1828, to continue in force the Act of 1824 for a limited time, and to amend the same, declares (in section 2): "That the confirmations had by virtue of said act, and the patents issued thereon, shall operate only as a relinquishment of title on part of the United States, and shall nowise affect the right or title, either in law or equity, of adverse claimants of the same land."

The foregoing are the conditions on which the bar was removed; these Congress certainly had right to impose, and thereby give a preference to an intervening title acquired during the existence of the bar.

Lafleur was a claimant, with a good title in equity, when the Act of 1824 was passed; this

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he well might perfect into a patent, as his equity was expressly protected by the Act of 1828, and by implication in that of 1824 (section 11); neither the patent or entry was affected by the proceedings had on Mackay's claim in the District Court of Missouri and in this court; nor by his patent issued pursuant thereto. It follows Lafleur's is the better title, and that the decision of the Supreme Court of Missouri must be affirmed.

Mr. Justice McKINLEY:

I dissent from the opinion of the majority of the court, in this case, for the following reasons:

First. According to the Act of the 17th of February, 1815, chap. 198, "persons owning lands in the County of New Madrid, in the Missouri territory, with the extent the said county had on the 10th day of November, 1812, and whose lands have been materially injured by earthquakes, shall be, and they are hereby authorized to locate the like quantity of land on any of the public lands of said territory, the sale of which is authorized by law." The section lines of the land had not been run on the 7th of July, 1817, when the location on the New Madrid certificate, under which Gamble claims, was made. The sale of the land, including this location, was not authorized by law until the year 1823. The 1st section of the Act of the 26th April, 1822, chap. 40, could not have legalized the location, because the land was not then subject to sale; and because that section only authorized grants to issue in like manner as if the location had conformed to the sectional or quarter-sectional lines of the public surveys, if made in other respects, in pursuance of the Act of the 17th of February, 1815. Now, as the location had not been [57] *made in pursuance of that act; and, as the 2.1 section of the Act of the 26th of April, 1822, declared "That hereafter the holders and locators of such warrants shall be bound in locating them, to conform to the sectional and quarter-sectional lines of the public surveys, as nearly as the respective quantities of the warrants will admit, and all such warrants shall be located within one year after the passage of this act; in default whereof the same shall be null and void;" and as no location and survey were made in conformity with the 2d section, the warrant, survey, and patent, are utterly void. (See *Lindsey* v. *Miller*, 6 Peters, 675.)

Second. The decree confirming the claim of Mackay's heirs, by the Supreme Court of the United States, under the treaty, was a full and ample admission that the United States had no right to the land covered by that claim. The title which they acquired to this land, under the treaty, was therefore held by them in trust for Mackay's heirs, or any other person having a better title under the treaty. The decree of confirmation related back to the date of the concession, by the Spanish government, to Mackay, and made the title as complete as if it had been completed by that government before the treaty, notwithstanding the several intervening acts of limitation passed by Congress.

Third. The location, survey, and patent, under which Gamble claimed, being void, the 11th section of the Act of the 26th of May, 1824, chap. 173, did not apply to this case. Because, in the language of the section, it did not "so happen that the land" had been sold or otherwise disposed of by the United States. Therefore, Mackay's heirs, or those claiming under them, were not authorized, and much less bound to enter other land in lieu of that confirmed and granted to them by the decree and patent.

Mr. Justice STORY and *Mr. Justice* WAYNE concur in these reasons.

Cited—4 How., 458; 8 How., 382; 12 How., 75; 6 Wall., 150; 9 Wall., 197; 13 Wall., 102; 19 Wall., 633; 2 Otto, 712, 713.

JAMES N. AND LEVI DICKSON, *Plaintiffs*,

v.

WILLIAM H. WILKINSON, Administrator of JOHN T. WILKINSON, Deceased.

After judgment against administrator, execution, return and sci. fa. *to show cause against execution* de bonis propriis, *too late to plead defects in first* sci. fa.—*judgment by default is admission of assets—matter in bar to original action cannot be pleaded in a* sci. fa.—*demurrer reaches no further back than proceedings* in fieri.

There was a judgment against an administrator of assets *quando acciderint*.

Upon this judgment a *scire facias* was issued, containing an averment that goods, chattels, and assets had come to the hands of the defendant.

Upon this *scire facias* there was a judgment by default; execution was issued, and returned *nulla bona*.

A *scire facias* was then accorded against the administrator to show cause why the plaintiffs should not have execution *de bonis propriis*.

It was then too late to plead that the averment in the first *scire facias* did not state that the assets had come into the hands of the administrator subsequent to the judgment *quando*.

A judgment by default against an executor or administrator is an admission of assets to the extent charged in the proceeding against him.

*If a party fail to plead matter in bar to the [*58 original action, and judgment pass against him, he cannot afterwards plead it in another action founded on that judgment; nor in a *scire facias*.

A demurrer reaches no further back than the proceedings remain in *fieri*, or under the control of the court.

THIS case came up from the Circuit Court of the United States for the Middle District of Tennessee, upon a certificate of division in opinion between the judges.

All the facts which are necessary to an understanding of the point are stated in the certificate, as follows:

The plaintiffs, at September Term, 1837, with the defendant's consent, had a judgment of assets *quando acciderint*. On the 2d of October, 1838, upon their suggestion of assets come to the defendant's hands, a *scire facias* was

NOTE.—*When a judgment against an administrator is an admission of assets—when execution can issue against his property for debts of the deceased.*

A judgment by default against an executor or administrator is an admission of assets to the extent charged in the proceedings against him, and binds his own personal and real estate as fully as if the debt were his own. *In re* Higgins, 2 Gif., 562, 8. C., 7 Jur. (N. S.), 402; Mason v. Peter, 1 Munf. (Va.), 437; Platt v. Robbins, 1 Johns. Cas., 276; Dickson v.

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accorded them to be made known to the defendant to show cause why they should not have execution of those assets. This *scire facias* was issued on the 10th of January, 1839, and after reciting the judgment *quando*, it contained the following, and no other, averment of the coming of assets to the defendant's hands: "And whereas, afterwards, to wit, on the 2d day of October, 1838, it was suggested to the said court, on behalf of the said plaintiffs, that goods, chattels, and assets had come to the hands of the defendant, sufficient to satisfy the said judgment; and it was thereupon ordered by said court that a *scire facias* issue, and we therefore hereby command you, &c." This writ was made known to the defendant, and the plaintiffs thereupon, by his default, at September Term, 1839, had judgment of execution of the intestate's goods in the defendant's hands to be administered, if so much, and if not, then the costs *de bonis propriis*. On the 9th of October, 1839, execution was issued accordingly, and returned to March rules, 1840, *nulla bona*, except as to the costs, which were levied *de bonis propriis*. A *scire facias* was now accorded against the defendant to show cause why the plaintiffs should not have execution of their demand *de bonis propriis:* and this writ was issued, made known to the defendant, and returned to September Term, 1840, when he appeared, and pleaded to it fully administered, and a special plea, that the insolvency of the intestate's estate had been suggested to the proper Tennessee authority, and a bill in equity filed in a State court to administer his effects according to the laws of Tennessee. To these pleas the plaintiffs demurred, and on the argument of the demurrer the defendant's counsel, against awarding execution *de bonis propriis*, showed for cause that the judgment by default upon the first *scire facias* did not establish the fact that any goods, &c., had come to the defendant's hands since the judgment of assets *quando acciderint*, because the said first *scire facias* did not aver that goods, &c., had come to the defendant's hands since the said judgment *quando*, but only that those goods had come to his hands, without saying when, and a judgment by default only admits such facts as are alleged; *that unless the record [*59 showed that assets had come to his hands since the said judgment *quando*, and that such assets had been eloigned and wasted, no execution could issue against the defendant to be levied *de bonis propriis*. And the counsel for the plaintiffs insisted that advantage should have been taken of the alleged defect in the first *scire facias* at the term to which it was returnable, and returned, by plea or demurrer; that the judgment by default was a waiver of errors in the process, and so that the said error, if it be one, could not be reached by the demurrer aforesaid.

"And upon said point, whether advantage could be taken of the aforesaid defective averment in the first *scire facias*, upon the plaintiff's demurrer to the defendant's pleas to the second *scire facias*, the opinions of the judges are opposed.

"And it is thereupon ordered that the foregoing statement of facts, involving said point, upon which said disagreement occurs, made under the direction of the judges, and at the request of the plaintiffs by their attorney, be certified to the Supreme Court for their opinion upon said point, according to the act of Congress in that case made and provided."

The case was argued by *Mr. Francis Brinley* for the plaintiffs, who made the following points:

1. The first *scire facias* was sufficiently accurate as to form. It avers that on the 4th of September, 1837, judgment was rendered for the plaintiffs against the assets *quando acciderint*. It then avers that afterwards, on the 2d of October, 1838 (more than a year), the plaintiffs suggested that assets had come into the hands of the defendant, sufficient to satisfy the

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Wilkinson, 3 How., 57; Moore v. Martindale, 2 Blatchf. (Ind.), 353; Erving v. Peters, 3 Term R., 685.

So a confession of judgment. Ruggles v. Sherman, 14 Johns., 446: People v. Judges of Erie, 4 Cow., 445.

And if the assets be not found, the officer may return a *devastavit*, and the plaintiff may at once issue execution *de bonis propriis*. *Id.*

But see, *contra*, Moore v. Kerr, 10 Serg. & R., 348; Hussey v. White, *Id.*, 346.

But where an administrator gives judgment by confession, which judgment is afterward reversed, he is not precluded from showing afterward a want of assets at that time. Green v. Stone, 1 Harr. & J. (Md.), 405.

In a suit against an executor or administrator in his representative capacity, the judgment must be *de bonis testatoris*, except when he pleads *ne unques executor*, or a release to himself, and the pleas are found against him. Justices, &c., v. Sloan, 7 Ga., 31; Siglar v. Haywood, 8 Wheat., 675; Jamesson v. Martin, 3 J. J. Marsh. (Ky.), 330; Stone v. Kaufman, 25 Ark., 186.

But an action at law by a legatee, against an executor, for a legacy, on the executor's promise to pay it, must be brought against the executor in his individual, not in his representative character; and the judgment in such case must be *de bonis propriis*. Kayser v. Disher, 9 Leigh (Va.), 357; Pettigrew v. Pettigrew, 1 Stew. (Ala.), 580.

So an administrator who gives an obligation, signing as administrator, is personally bound, and judgment is properly rendered against him *de bonis propriis*. Carter v. Thomas, 3 Ind., 213; Ellis v. Merriman, 5 B. Mon. (Ky.), 296.

And so, where a cause of action is alleged to have accrued after the decease of the testator, and the executor might sue in his own right. Moulton v. Wendell, 37 N. H., 406.

A judgment in a common law action against an executor or administrator is only a judgment against the estate and does not bind him personally. Burd v. McGregor, 2 Grant's Cas. (Penn.), 358.

And while such a judgment is conclusive as to the personal estate, it is only *prima facie* as to the realty. The only importance of a judgment against the administrator, so far as an interest in the realty is concerned, is that it is *prima facie* evidence of a debt due by the estate, and the foundation for a proceeding to try whether or not the realty is chargeable with it. Steele v. Limberger, 59 Penn. St., 308; Estate of Schroeder, 46 Cal., 304; Hopkins v. Stout, 6 Bush. (Ky.), 375; Longston v. Abney, 43 Miss., 161; Packwood v. Elliott, *Id.*, 504.

A judgment against an administrator or executor is never conclusive against the heirs or devisees. Alston v. Munford, 1 Brock., 266; Walthaur v. Gossar, 32 Penn. St., 259; Sargent v. Davis, 3 La. Ann., 353; Duvall v. Green, 4 Harr. & J. (Md.), 270; McCoy v. Nichols, 5 Miss. (4 How.), 31; Robertson v. Wright, 17 Gratt. (Va.), 534.

A judgment against an administrator is conclusive only as to personalty. Walthaur v. Gossar, 32 Penn. St., 259.

And it is a lien only upon the property in the hands of the administrator, and not upon the real estate of the ancestor. Treadwell v. Herndon, 41 Miss., 38.

It is *prima facie* evidence against the realty. Hopkins v. McCann, 19 Ill., 113; Sergeant v. Ewing, 36 Penn. St., 156.

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judgment. These two facts together form the connected proposition, that assets had come into the hands of the defendant since the judgment *quando*. In the case of *Platt* v. *Robins et al.* (1 Johns. C., 276) there is no better averment; yet no objection was taken to the form. "Diverse goods and chattels which were of the intestate, to the amount of the damages recovered, had come to the hands of the defendants," is the language in that case.

2. If the averment in the first *scire facias* be imperfect, the objection cannot now be taken; it should have been made by plea when that writ was returnable. The general rule is, that if a party do not avail himself of the opportunity of pleading matter in bar to the original action, he cannot afterwards plead it, either in another action founded on it, or in a *scire facias*. (*Cook* v. *Jones*, 2 Cowper, 727; *Wheatley* v. *Lane*, 1 Saunders, 216, *note* 8, by Williams.)

3. The defendant cannot plead any plea to the second *scire facias* which puts his defense upon the want of assets; for such plea would be contrary to what is admitted by his default in the first *scire facias*. The default is an admission of assets. (*Treil* v. *Edwards*, 6 Modern, 308; *Rock* v. *Leighton*, 1 Salk., 310; *Platt* v. *Robins et al.*, 1 Johns. Cas., 276; *Skelton* v. *Hawling*, 1 Wilson, 258; *Ruggles et al.* v. *Sherman*, 60*] *14 Johns., 446; *The People* v. *The Judges of Erie County*, 4 Cowen, 446.) This last case shows the practice to be to issue execution *de bonis propriis*, whether *nulla bona* or *devastavit* be returned by the sheriff. (*Iglehart* v. *Slate, for the use of Mackabin*, 2 Gill & Johns., 235; *Griffith* v. *Chew*, 8 Serg. & Rawle, 17.) A *cognovit actionem*, by executor, is an admission of assets. (*Den* v. *De Hart*, 1 Halstead, 450.)

4. The point raised by the special plea is as to the effect of the proceedings in insolvency in the local courts. If the proceeding be in the nature of a commission of insolvency, then the pendency of such commission is no bar to a *scire facias* against the administrator, in a judgment had against him. (*Hatch* v. *Eustis*, 1 Gall., 160.)

Mr. Justice MCKINLEY delivered the opinion of the court:

This case is brought before this court upon a certificate of division of opinion of the Circuit Court for the Middle District of Tennessee.

The plaintiffs had judgment against the defendant for $1,169.88 debt, and $110.94 damages. "And it appearing to the satisfaction of the court, by the admission of the plaintiffs, that no assets of the intestate had come to the hands of the defendant," it was adjudged that the plaintiffs have "execution to be levied of the goods and chattels, and assets, which might thereafter come to the hands of the defendant to be administered." Upon this judgment a *fi. fa.* issued to be levied of the assets of the testator, which might thereafter come to the hands of the defendant to be administered: which *fi. fa.* was returned by the marshal *nulla bona*. On the 10th day of January, 1839, a *scire facias* issued against the defendant, upon suggestion that assets of the intestate, sufficient to satisfy the judgment, had come to the hands of the defendant. Upon this *scire facias* there was judgment against the defendant by default, to be levied of the goods and chattels of the intestate, in his hands to be administered. A *fi. fa.* issued upon this judgment, which was also returned *nulla bona*.

And thereupon another *scire facias* issued against the defendant to have judgment against him *de bonis propriis*, to which he pleaded, first, *plene administravit;* second, that no assets ever came to his hands; and third, that the estate of the intestate was insolvent at the time the letters of administration were granted; and that in pursuance of the act of the General Assembly in such case made and provided, he had suggested, to the clerk of the County Court, the insolvency of said estate, &c. To these pleas the plaintiffs demurred, and in argument the counsel for the defendant insisted "that the judgment by default upon the first *scire facias* did not establish the fact that any goods, &c., had come to the hands of the defendant since the judgment of assets *quando acciderint;* because the said first *scire facias* did not aver that goods, &c., had come to the defendant's hands since the said judgment *quando;* but only, that said *goods, &c., had come to his hands, [*61 without saying when; and a judgment by default only admits such facts as are alleged. That unless the record showed that assets had come to his hands since the judgment *quando*, and that such assets had been wasted, no execution could issue against the defendant to be levied *de bonis propriis*." And the counsel for the plaintiffs insisted "that the alleged defect, in the first *scire facias*, should have been taken advantage of at the first term to which it was returnable, by plea or demurrer; that the judgment by default was a waiver of errors in the process; and so the error, if it be one, could not be reached by the demurrer."

"And upon said point, whether advantage could be taken of the aforesaid defective averment in the first *scire facias*, upon the plaintiff's demurrer to the defendant's pleas to the second *scire facias*, the opinions of the judges were opposed."

A *scire facias* is an action to which the defendant may plead any legal matter of defense. And in this case the defendant might have pleaded the same matter in bar to the first *scire facias*, which he offered to plead to the second. Or if he considered the first *scire facias* insufficient in law, he might have demurred to it. Having done neither, judgment by default was properly taken against him. And it is well settled, that a judgment by default against an executor, or administrator, is an admission of assets to the extent charged in the proceeding against him, whether it be by action on the original judgment or by *scire facias*. (*Ewing's Executors* v. *Peters*, 3 Term R., 685; *The People* v. *The Judges of Erie County*, 4 Cowen, 446.) Failing to make the money out of the assets of the intestate, on the first *scire facias*, the plaintiffs prosecuted the second to have judgment against the defendant, to be levied of his own proper goods, &c. To this he pleaded the three pleas before mentioned.

It is a universal rule of law, that if the party fail to plead matter in bar to the original action, and judgment pass against him, that he cannot afterwards plead it in another action founded on that judgment; nor in a *scire facias* (see the authorities above cited). The demurrer of the plaintiffs to the defendant's pleas was therefore

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well taken. And although either party may, on a demurrer, take advantage of any defect or fault in pleading, in the previous proceedings in the suit, the demurrer can reach no further back than the proceedings remain *in fieri*, and under the control of the court. The judgment on the first *scire facias*, although ancillary to the original judgment, and the foundation of the proceeding on the second *scire facias*, was, nevertheless, a final judgment, and, in that count, conclusive upon the parties; and opposed an insuperable bar to any plea of either party, whether of law or of fact, designed to go beyond it.

It is the opinion of this court, therefore, that advantage could not be taken of any defective averment in the first *scire facias*, upon the demurrer of the plaintiffs to the pleas of the defendant; which is ordered to be certified to said Circuit Court.

62*] *JOHN WALKER, *Plaintiff in Error*,

v.

THE PRESIDENT AND DIRECTORS OF THE BANK OF WASHINGTON, *Defendants in Error*.

Usury—subsequent security given for loan originally usurious void—discount may relate back, where checks are drawn on account of note before discount—question of usury in written contract, for the court.

Every subsequent security, given for a loan originally usurious, however remote or often renewed, is void.

Where there was an application to a bank for a discount upon a note, to be secured collaterally, and the party applying drew checks upon the bank, which were paid before the note was actually discounted; and the bank treated the note, when discounted as having been so on the day of its date instead of a subsequent day on which its proceeds were carried to the credit of the party, it was held not to be usury.

The court below was right in refusing an instruction to the jury that, upon such evidence, they might presume usury as a fact.

In cases of a written contract, the question of usury is exclusively for the decision of the court.

THIS case was brought up by writ of error from the Circuit Court of the United States for the District of Columbia, in the County of Washington.

The facts were these:

On the 30th of January, 1840, Walker, the plaintiff in error, addressed the following letter to the bank:

"GENTLEMEN: I am desirous of obtaining a loan of twenty-five thousand dollars, to purchase cattle for fulfilling my contract with the government, for N. York station, say 2,000 barrels, and amounting to nearly $27,000.

"In security for the above money I'll assign all my right and title to the beef now on hand, say barreled and salted, and all that I may have (reserving a prior right of $3,000, already given for Norfolk station) at the warehouse on Bradley's wharf, to be subject to your control.

"I'll deposit an accepted draft of E. Kane, Esq., navy agent, for the payment of my contract for N. Y. Station.

"Y'rs resp'y, JNO. WALKER."

On the 6th of February, 1840, John Walker executed a promissory note in favor of Henry Walker or order, for $10,000, payable ninety days after date, negotiable and payable at the Bank of Washington. This note was delivered to the bank under the circumstances stated in the first bill of exceptions. The note upon which the suit was brought was a renewal of it, dated on the 9th of May, 1840, the maturity of the above.

On the 19th of February, 1840, the following draft was drawn:

"ELIAS KANE, Esq., navy agent, Washington, D. C.

"Sir: Please pay to James Adams, Esq., cashier of the Bank of Washington, or order, the sum of ten thousand dollars, out of the delivery of navy beef, to be made by me at the navy yard, Brooklyn, New York, under my contract, dated 30th September, 1839.

"And oblige, sir, very respectfully, &c.,
your ob't servant, JNO. WALKER.

"Washington, D. C., February 19, 1840."

*On the face of the aforegoing draft was [*63 the following acceptance, to wit:

"Accepted, to be paid by me, when the bill shall have been received and duly approved by the commmandant of the navy yard.

"ELIAS KANE."

On the 20th of February, 1840, Walker executed to the bank a bill of sale of all the beef which he had then on hand or should put up, reciting that he (Walker) stood largely indebted to the bank on loans and discounts obtained from it, and was anxious to secure the payment of notes that had been drawn or given, or might thereafter be drawn or given, &c., &c.

On the 2d of April, 1840, the following draft was drawn, which is referred to in one of the exceptions:

"ELIAS KANE, Esq., navy agent, Washington, D. C.

"SIR: Please pay to James Adams, Esq. or order, the amount due me for delivery o

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NOTE.—*Usury, taking interest in advance is not.* See note to Fleckner v. Bank of United States, 8 Wheat., 338.

As to usury generally, see note to Levy v. Gadsby, 3 Cranch, 180.

As to lex loci in determining the question of usury, see note to Slocum v. Pomery, 6 Cranch, 221; and note to Bell v. Bruen, 1 How., 169.

As to who may set up the defense of usury and who cannot, see note to DeWolf v. Johnson, 10 Wheat., 367.

As to usury in purchase of obligations, see note to Nichols v. Peirson, 7 Pet., 103.

New securities for usurious loans, when valid, or not.

Every subsequent security given for a loan originally usurious, however remote or often renewed is void. Walker v. B'k of Wash., 3 How., 62; Stuart v. Mays, 54 Ga., 554; Price v. Lyons B'k, 23 N. Y. (6 Tiff.), 55; Campbell v. McHarg, 9 Iowa, 354.

If a promissory note be made on an usurious contract, it will be void, even in the hands of a *bona fide* holder for a valuable consideration. Church v. Suter, 4 Mass., 156; Payne v. Treasurer, 2 Bay, 23; Powell v. Waters, 8 Cow., 669; Young v. Berkley, 2 N. H., 410.

And when new securities are taken for an usurious loan, it is immaterial that they are obligations or mortgages of a stranger; he may avoid it for the original usury. Vickery v. Dickson, 23 Barb., 158; Garth v. Cooper, 12 Iowa, 364.

But where parties who have actually paid usu

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navy beef, to be delivered by me, under my contract, at the navy yard, Brooklyn, New York.

"And oblige, sir, very respectfully, your ob't serv't, JNO. WALKER.

"April 2d, 1840."

On the face of the above was the following acceptance, to wit:

"Accepted, to be paid by me, when the bills shall have been received and duly approved by the commandant of the navy yard, Brooklyn, New York. ELIAS KANE, Navy Agent."

On the 9th of May, 1840, the following note was executed upon which the suit was brought:

"[$10,000.]

CITY OF WASHINGTON, May 9, 1840.

"Thirty days after date I promise to pay to Henry Walker, or order, ten thousand dollars, for value received. Negotiable and payable at the Bank of Washington. JNO. WALKER."

"Credit the drawer."

It was indorsed by Henry Walker, Lewis Walker, and John Walker.

Not being paid at maturity, suit was brought upon it in May, 1840, and in 1841 the case came on for trial, when the following exceptions were taken, on the part of the defendant:

First Bill of Exceptions.

"At the trial of the above cause, the plaintiffs having given evidence tending to prove the handwriting of the defendant to the promissory note declared upon, read it in evidence, and then rested.

"Whereupon the defendant then gave evidence, tending to show that the note dated on the 9th of May, 1840, was given in renewal of a previous note dated on the 6th of February, 1840, similarly signed and indorsed, payable 64*] ninety days after date; which said *note, of the 6th of February, 1840, was discounted by the plaintiffs, at the request of the defendant, for his accommodation, as a loan, on the 18th February, 1840, but not passed to his credit until the 22d February, 1840; at which time, last aforesaid, an officer of the plaintiffs deducted from the proceeds of said note the interest on the same, computed from the date of said note (the 6th February, 1840), for the period of ninety-four days, and that said note nowhere appeared on the books of the plaintiffs until the 18th February, 1840; that the whole amount credited by plaintiffs to the defendant, as the consideration of said note dated upon the 6th February, 1840, and discounted only upon the 18th February, 1840, and passed to defendant upon the 22d of same month, was the sum of $9,843.33; and that the sum of $156.67 was taken by said plaintiffs, as the interest upon said note, for the time the same was discounted. And further gave evidence tending to show that the said note of the 6th of February, 1840, was surrendered to the defendant upon the execution of the said note of the 9th of May, 1840 (the said last mentioned note being but a renewal of the former), and that the said plaintiffs credited the defendant, on account of the said note of the 9th of May, 1840, only the sum of $9,943.33, and took, as interest upon said last named note, the sum of $56.67, which was exacted from said defendant.

"Whereupon the plaintiffs gave evidence tending to prove that on the 20th of January, 1840, the defendant had checked out of plaintiffs' bank $1,224.93; that on the 6th of February, 1840, he had checked out of plaintiffs' bank $2,500; and on the 21st of February, 1840, he had checked out of said bank to the amount of upwards of $7,000; all of which last named sums of money were charged to defendant on the books of the plaintiffs, and no moneys or funds appeared to his credit at the time of drawing out said last mentioned sums of money; and that on the 22d day of February, 1840, the plaintiffs credited said defendant with $9,843.33, as the proceeds of said note dated the 6th February, 1840; and the balance then appearing to be due to defendant on the books of the plaintiffs, after charging him with the several amounts so as aforesaid drawn out of bank by him previous to the 22d of February, 1840, was $997.86; which balance was shown to the defendant, and assented to by him.

"The defendant then gave evidence tending to show that the said note, dated 6th February, 1840, was brought, on or after the 11th February, 1840 (it being a discount day), by the president of the plaintiffs, or a book-keeper of said plaintiffs, to the discount clerk (the witness), and given to him as a note not done, or not passed by the board of directors; and that said note remained in the hands of such discount clerk until the 18th February, 1840, when it was passed by the said board; and on the 22d February, 1840, the sum of $9,843.33 was passed to defendant's credit as the net proceeds of *said note, and that interest, at the rate [*65 of six per centum per annum on $10,000, computed from the date of said note, for ninety-four days, was reserved at the time of entering such credit, by direction of some officer of the plaintiffs; and that it was the usual practice of plaintiffs to take interest on discounts only from the time of making the discount; and that it does not appear that defendant was credited on plaintiffs' books with the interest computed from the 6th of February aforesaid.

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ous interest, afterward make a *bona fide* settlement and take new securities, including only an actual loan, act not meant as a mere evasion, the new contract is neither usurious in itself, nor based upon an usurious consideration. Smith v. Stoddard, 10 Mich., 148.

Where an usurious security is taken for a valid debt, the avoidance of the security revives the debt, and the assignment of the usurious security carries with it the right to resort to and enforce the original debt. Gerwig v. Sitterly, 56 N. Y. (11 Sick.), 214; Patterson v. Birdsall, 64 N. Y. (19 Sick.), 294; 2 Am. Rep., 609; Church v. Maloy, 70 N. Y., 63; Richards v. Kountze, 4 Neb., 201.

Although a contract of loan is void for usury, yet the moral obligation of the borrower to repay the amount loaned and interest, may, if no positive law forbids, be a good consideration for a new promise to make such payment. Houser v. Planters' B'k of Fort Valley, 57 Ga., 95.

Upon a renewal of an existing loan by giving new notes payable at the same place as the former, no question of exchage can arise. Any exaction beyond interest in such a case is usury. Price v. Lyons B'k, 33 N. Y. (6 Tiff.), 55; Loveland v. Ritter, 50 Ill., 54; Berlin v. Mapes, 38 How. (N. Y.) Pr., 288; Campbell v. Sloan, 62 Penn. St., 481.

But if the maker of the note sets up the defense of usury, the plaintiff may recover on the original note, if that be not infected by usury. Farmers', &c., B'k v. Joslyn, 37 N. Y. (10 Tiff.), 353; Campbell v. Sloan, 62 Penn. St., 481.

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"The defendant then asked the cashier of the plaintiffs, who was sworn as a witness in said cause, whether the amounts drawn out of bank by the defendant previous to 22d February, 1840, as aforesaid, were not charged on the books of the plaintiffs as overdrafts and were not allowed as the personal credit of the defendant.

"Whereupon the said cashier answered, that he had no doubt but that the defendant was allowed to check upon said note of 6th February, 1840, before the same was entered to his credit on the books of the bank. And being further asked for the reasons of this opinion by the defendant's counsel, he stated that he had no recollection of said note's being in bank previous to the 18th February, 1840, or of its existence, or of any arrangement with reference to it previous to that date; and that the said amounts, so checked out previous to 22d February, 1840, would not have been paid on defendant's checks, but for the knowledge, on the part of the said cashier, that he (defendant) had a large contract with the Navy Department for the supply of beef, and that for antecedent liabilities the defendant had given to plaintiffs good collateral security; from which, however, no surplus resulted after paying said liabilities; and that the said advances made to the defendant after the 6th February, 1840, and previous to the 22d February, 1840, were made on security given, or to be given; but he does not know of any security given during that time, except the defendant's letter of 30th January, 1840, a bill of sale, by defendant to plaintiffs, of his barreled beef, dated 20th February, 1840, and the two acceptances of the navy agent, dated 19th February, 1840, and 2d April, 1840, and the note dated 6th of February, 1840, of which the said cashier has no recollection until the 18th of February, 1840; and that he is satisfied that said advances were not made on the personal credit of defendant. And, from all the above circumstances, he has no doubt that said note of 6th February, 1840, was in bank from the time of its date, and that defendant was allowed to check on said note from the day of its date.

"Whereupon the defendant moved the court to instruct the jury that the facts mentioned by said cashier are evidence in said cause, but the inferences or opinions of said cashier are not evidence; but the court refused to give such instructions as prayed, but instructed the jury that the inferences or opinions of said witness are not of themselves evidence of the facts so 66*] inferred, but that the facts stated *by the witness, as the ground of his inference or opinion, are competent to be given in evidence to the jury, together with the inference or opinion of the said witness; from which facts the jury are to judge whether such inferences and opinion are justified by the facts thus stated. Whereupon the defendant excepts to the said refusal and to the instructions so given, and this, his bill of exceptions, is signed, sealed, and enrolled, this 24th day of December, 1841."

Defendant's Second Bill of Exceptions.

"After the evidence contained in the aforegoing bill of exceptions had been given, the defendant prayed the court to instruct the jury that, 'if the jury believe, from the evidence aforesaid, that the advances to defendant named in the evidence were not made upon the note of 6th February, 1840, and that the plaintiffs upon discounting said note, received or reserved more than at the rate of six per centum per annum, then the jury may infer usury, from the whole evidence aforesaid, in said note of 6th February, 1840.' And 'if the jury believe, from the evidence aforesaid, that the note of the 9th of May, 1840, named in the evidence, was given in renewal of a former note of the defendant, dated on the 6th of February, 1840, payable in ninety days after date, and which last note was discounted by the plaintiffs, as a loan to the defendant, on the 18th day of February, 1840, but was not passed to the credit of the defendant until the 22d February, 1840, and that the said plaintiffs then charged and received interest upon the same from the date of the said note, to wit, from the 6th day of February, 1840, it is the taking above six per centum per annum for the loan of the money made to the defendant upon said note, and is usury; and the defendant is entitled to a verdict in his favor upon said note, notwithstanding the jury may find, from the evidence, that the defendant had overdrawn his account, as stated in the evidence, unless they further find that the said interest, reserved as aforesaid, was credited to defendant's account as a credit to take effect from the 6th February, 1840.' But the court refused to grant each of said prayers, though presented *seriatim*. Whereupon the defendant excepts to the said refusal; and this, his bill of exceptions, is signed, sealed, and ordered to be enrolled, this 24th of December, 1841."

Defendant's Third Bill of Exceptions.

"In addition to the evidence contained in the foregoing bill of exceptions, which is made part hereof, the defendant gave evidence tending to show that in October, 1839, the plaintiffs suspended specie payments, and have not since that time paid their notes in specie or its equivalent until July, 1841; and further gave evidence tending to prove that the paying teller of the plaintiffs, according to his impression, would not have paid the checks of the defendant for the amounts credited to defendant as aforesaid, on the 22d and 28th *Febru- [*67 ary, 1840, if drawn for the entire amounts in district bank paper or in the plaintiffs' paper, unless he had received special instructions to that effect from the president, or unless he, the paying teller, knew that the plaintiffs were at that time desirous of increasing the circulation of their own notes; that he considered he had a discretion on that subject, in absence of instructions, and has no recollection of having received any instructions in regard to the discounts to defendant, or any general instructions as to the mode of paying discounts at that time, though it is his impression that he would not have paid discounts to so large an amount in district bank paper or plaintiffs' paper at that time; nor would they, at the date of said notes, have received on deposit paper of Virginia banks (they having also suspended at the same time) in large amounts, or to the amount of either of said notes, unless for the accommodation of a regular customer of the plaintiffs,

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and only in that case upon the understanding that he would receive back the said deposit in the same kind of funds; and that the plaintiffs would not, by their officers, have received payment of the notes in suit, in case their amounts had been tendered at the time of maturity, in the paper of Virginia banks (all of which were in a state of suspension of specie payments), and that the market value of Virginia bank notes, in the months of February, March, April, and May, 1840, in the city of Washington (where the plaintiffs did business), was from one half to one per cent. less than the notes of the banks in said district, or the notes of banks in Baltimore, Maryland.

"And the defendant farther gave evidence to show that on the 30th January, 1840, he sent to the plaintiffs his written application for a loan, in these words (see statement). That he afterwards executed the note of the 6th February, 1840, named in the first bill of exceptions, and the note of the 25th February, 1840, now in suit; and then was passed to his credit, on the 22d February, 1840, on the books of the plaintiffs, the sum of $9,843.33, as the proceeds of the discount of said above named note of the 6th February, 1840; and on the 28th February, 1840, the further sum of $5,939 was passed to his credit on the books of the plaintiffs, as the proceeds of the discount of the note dated 25th February, 1840. That the defendant checked out of the plaintiffs' bank the said several amounts so credited to him, and he gave evidence to show that some of his checks for said amounts were specially made payable in Virginia notes, and were in that form paid by the plaintiffs. That a check for upwards of $900, drawn by the defendant on plaintiffs on the 29th February, 1840, for part of the proceeds of the note of 25th February, 1840, passed to his credit as aforesaid, was also made payable in Virginia money on its face, but the plaintiffs, through their officers, refused to pay even Virginia money on said check, but against the wishes and request of the bearer, one Sinclair (to whom the said check was given for value by said defendant) paid the said check [*68] in notes of *suspended banks in Delaware, Pennsylvania, and Ohio, being notes more depreciated in value than Virginia paper in said District of Columbia; and that said Sinclair had to pay on $260 of said money paid to him on said check a discount of $10, to obtain the equivalent of Virginia notes, and the balance of said proceeds of said check the said Sinclair could not pass at all, and he required the defendant to take it from him, which he did. And further gave evidence tending to prove that at the time of the dates of said note, and of the proceeds thereof, being credited to defendant as aforesaid, it was the practice of the plaintiffs, through their officers, not to pay out the accommodations or discounts made by the plaintiffs, to such large amounts as either of said notes, in the local bank paper of said district, or in specie, but in paper more depreciated than that of the said banks in said district. And further gave evidence tending to show that in February, March, April, and May, 1840, notes of the Virginia banks were not considered bankable money, and that the plaintiffs had a notice posted up in their bank that they would not receive the paper of the Virginia banks on deposit or payment of debts; and that the defendant did receive the proceeds of the loans stated as aforesaid in Virginia paper, and some in Pennsylvania paper.

"And the plaintiffs, in cross-examining the said witness in said cause, further proved that said Walker always drew out personally, and on his checks, either the Virginia money or the other money, as he desired or directed, and generally such as he asked for, and never at any time made any objection to the moneys he was paid in; and further, that he declared that Virginia money was as good to him as any funds in which he could be paid, and that he preferred it to any other. And further proved that the state of the bank, and its business, and the notes they usually paid out, at the date of said defendant's letter, and at the date of the notes and the times of their being discounted, were well known to the customers of the bank; and that the defendant was then, and had been before, a considerable customer; and that all the notes of Virginia banks, or of other banks, paid out to defendant or other dealers, were received by the bank in the way of its business at par; and notwithstanding the notice aforesaid, the bank took such notes in small payments, or when mixed with others in large payments, or on deposit by customers whose business was such as induced the officers to expect that they would take the same sort of notes in payment from the bank.

"And the plaintiffs further proved, on the cross-examination of said witness, the cashier of said bank, that, at the time of the dates and discounting the said notes, it was the custom of the bank to pay out, for the proceeds of its discounts, its own notes, or the notes of other banks, as desired by the parties receiving such discounts; that when the parties required it, they paid out their own notes, and when no particular paper was required, they paid out such as had most accumulated, and it was most convenient for the bank to pay out; and that *said Walker, if he had insisted on it, [*69 would, at the time of payment to him of said proceeds of said notes, according to their then practice, have had paid to him the same in their own notes.

"Whereupon the defendant prayed the court to instruct the jury as follows, to wit:

"Prayer No. 4:

"That if the jury believe, from the evidence aforesaid, that at the time the plaintiffs advanced the amounts of the notes in question, after deducting the discounts on the same, it was well understood and arranged between the plaintiffs and defendant that the said amount should be advanced and loaned by plaintiffs to defendant, on condition that defendant should draw such amounts from said bank in Virginia bank notes, or in notes of other State banks in a state of suspension of specie payments—all which notes were depreciated in the market, and commonly passed below the current value of the notes of the said bank, and notes of other suspended banks in this District, and all without exception, as well the notes of the said bank as of other suspended banks of this district, were considerably depreciated, and commonly passed below the current money of the United States; and that defendant did, in pursuance of the terms and conditions of said loan,

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in fact, receive the amount of said loans from the plaintiffs in the bank notes of Virginia and of other States, which, at the time the same were so received by defendant, were depreciated considerably below the current value of the bank notes of this district, and still more considerably depreciated below the standard and current value of the current money of the United States, without any allowance for the depreciation of the same; and that such depreciation was well known to plaintiffs at the time and times of such loans; and that defendant would not have been permitted, and in fact was not permitted by the plaintiffs or the officers of said bank, to draw out the amounts of such loans from the said bank, either in the notes of said bank, or of other solvent though suspended banks of this district, or in the current money of the United States; and that the plaintiffs were to have received, and expected to receive, in repayment of said advances and loans, current money of the United States, out of the said drafts on the navy agent, and would not have received, in repayment of said loans, the whole amount of either loan or note, the bank notes of Virginia or of other State banks in a state of suspension; and that such current money of the United States was then at a premium very considerably over and in exchange for the notes of any of the suspended State banks, and of any of the banks in this district: then the jury should conclude from said facts that the said loans were usurious, and the said notes void.

"Prayer No. 5:

"If the jury believe, from the evidence aforesaid, that there was an application by the defendant to the plaintiffs for a loan of a large sum of money, and that the defendant being in 70*] want of such sum *of money, the plaintiffs agreed with him to loan him the amounts of the notes in suit, provided he would take the said amounts (after deducting therefrom the rate of six per centum on the same for the time the said notes had to run) in notes of Virginia banks in a state of suspension, or some other State banks in a state of suspension, at their nominal amount; which said suspended bank notes were then depreciated in value below the value of the district bank notes, and much more depreciated below the value of specie; and that defendant would previously execute his notes to the plaintiffs for the nominal amounts so to be advanced to him, superadding thereto the interest on the amount mentioned in each of said notes for the time said note had to run; and that the defendant, in pursuance of said agreement, did afterwards receive the said notes of suspended banks in Virginia and other suspended State banks: And that if the jury further find that the bank reserved, on the respective nominal amounts of money so loaned to the defendant, interest thereon at the rate of six per centum per annum, paying him the balance of said loans in the depreciated paper aforesaid, and that the plaintiffs, according to the agreement between them and defendant, expected and intended to receive the amount of the notes in suit, with interest thereon, in specie, or in funds of greater value than the money so paid, as the proceeds of said notes as aforesaid: then the said facts, if believed by the jury, constitute an usurious agreement, and all contracts founded thereon are null and void.

"Prayer No. 6:

"If, from the evidence aforesaid, the jury shall find an agreement between the plaintiffs and the defendant, by which the defendant borrowed from the said plaintiffs the amounts of money mentioned in said notes, deducting interest on said amounts at the rate of six per centum per year, and that the proceeds of said loans were paid to the defendant by the plaintiffs in depreciated bank notes, as a device, and with intent to evade the statute of usury, and that the said notes were founded on such agreement, and made in pursuance thereof, then the jury ought to find the said agreement to be usurious.

"Prayer No. 7:

"If the jury believe, from the evidence aforesaid, that the notes in suit were given in consideration of a loan or loans of money made by plaintiffs to defendant, and that by the terms of the agreement on which said loan or loans were made, the defendant was compelled to take the same in depreciated paper (well known to the plaintiffs to be depreciated), whereby the defendant not only paid the legal interest on the nominal amount of said loans, but sustained a loss on the depreciated paper with which the plaintiff paid him, then it is competent for the jury to infer usury from the whole circumstances in evidence.

"Prayer No. 8:

"It is competent for the jury, from all the circumstances in evidence, *to infer usury [*71 in the agreement or agreements on which the notes in suit were founded.

"But the court refused each of said prayers though presented *seriatim*, and the defendant excepts to such refusal, and claims the same benefit of exception as if each refusal aforesaid was separately excepted to. And this his bill of exceptions is signed, sealed, and ordered to be enrolled, this 24th day of December, 1841.

Mr. Brent for the plaintiff in error.

Mr. Hellen for the defendants in error.

Mr. Justice WAYNE delivered the opinion of the court:

This suit is brought upon a promissory note given in renewal of a former note, which had been discounted by the defendants in error. The defendants in the court below deny that the plaintiffs have any right of action upon the note sued on, on the ground that the first note was tainted with usury.

Such is the law in such a case. The mere change of securities for the same usurious loan to the same party who received the usury, or to a person having notice of the usury, does not purge the original illegal consideration, so as to give a right of action on the new security. Every subsequent security given for a loan originally usurious, however remote or often renewed, is void. *Tuthill* v. *Davis* (20 J. R., 285); *Root* v. *Smith* (9 Cow., 647), and the cases of *Sanderwein* v. *Brunner* (1 Harr. & Gill, 477); *Thomas* v. *Catheral* (5 Gill & Johns., 23), decided in the courts of appeal in Maryland, under the statute of which State, it is said, the note now sued upon is void. But such is not the case before us. The defendant (Walker) had entered into a contract with the United States to supply the

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navy with beef, and to enable himself to do it, he applied to the bank, by letter dated the 30th January, for a loan of $25,000, and offered as a security a draft upon E. Kane, the navy agent, and also to assign to the bank the beef which he might put up. The bank accepted his offer, but before Walker gave the draft upon Mr. Kane, or made the assignment, he drew his note on the 6th day of February, seven days after he had written his letter asking for a loan, for $10,000, at ninety days, and handed it into bank; which note, at maturity, was renewed by the note of the 9th May, now in suit. This note, however, was not discounted until the 18th February, and when then done the proceeds were not passed to his credit until the 22d. The cause of the delay, in both particulars, the proof in the case shows, was, that Walker did not, until the 19th of February, draw his draft upon the navy agent, as he had proposed to do, or make an assignment of the beef to the bank until the 20th. He may or may not have passed the navy agent's acceptance to the bank on the day it is dated, or have delivered his deed for the beef the day after; but between those days and the 22d inclusive, he did so, and the bank's security being then in its possession as he had 72*] offered it, the proceeds *of his $10,000 note was, on the last mentioned day, passed to his credit. But, in the meantime, Walker had drawn out of the bank, upon his checks, more than seven thousand dollars, with which he was debited when the proceeds of his note were carried to his credit; which sum and the interest upon it, computed for ninety-four days, from the date of the note, left a balance to his credit of $997.86. The computation of the interest from the 6th February, instead of from the day when the proceeds were carried to his credit, is the usury complained of. The letter of the defendant of the 30th January, asking for the loan of $25,000 the acceptances of his drafts upon the navy agent by that officer, and the defendant's assignment to the bank of certain portions of the beef which he had on hand, and which he might put up under his contract with the United States, and which assignment was not executed until the 20th February, were in evidence before the court below. The assignment recites the defendant's contract with the United States, so far as it was necessary to introduce the contract which he was about to make in it with the bank; then his indebtment to the bank for loans and discounts, his intention to secure the payment of the money due by him, and all drafts, note or notes that have been given for the same, or might be afterwards given by way of substitution or renewal of such drafts or notes, or any of them, &c., &c., and then states that the money which had already been advanced or loaned, or which might afterwards be advanced or loaned by the bank to the defendant, being for the purpose of enabling him to fulfill his contract with the United States. Now, the proof is positive, on both sides, that the note sued on was given in renewal of the note of the 6th February, which had first been given under his proposal for a loan, and that it was intended to be the note, the payment of which was to be secured by the assignment. Such being the evidence, the court correctly refused every instruction which was asked to refer the question of usury to the jury as a fact. It was a case of a written contract, in which the court had the exclusive power of deciding whether it was usurious or not. (*Levy* v. *Gadsby*, 3 Cranch, 180.) But, if it were not so, we think the instructions, as they were asked, could not have been given by the court to the jury. Each of them called upon the court to give an opinion upon the sufficiency of the evidence, and in all of them, except the eighth, there was a separation of the facts from the entire evidence, so as to bring them under the cases of *Scott* v. *Lloyd* (9 Peters, 418), *Greenleaf* v. *Birth* (9 Peters, 292); and that *The Chesapeake and Ohio Canal Co.* v. *Knapp* (9 Peters, 541.) Nor do we think that there was any error in the instruction given by the court to the jury under the defendant's first prayer. The court sufficiently distinguish between the facts of the cashier's evidence and his belief, and tell the jury that they are to determine by the facts whether the cashier's inferences were justified.

The judgment of the court is affirmed.

Cited—7 Otto, 24; 4 McLean, 248; 1 Biss., 445.

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*WILLIAM HENDERSON, *Plaintiff* [*73
in Error,
v.
JOHN ANDERSON.

Testimony of party to note cannot be allowed to impeach its consideration.

This court adheres to the rule laid down in Walton v. Shelly (1 T. R., 296), sustained as it has been by the decisions of this court in The Bank of the United States v. Dunn (6 Peters, 57), The Bank of the Metropolis v. Jones (8 Peters, 12), and Scott v. Lloyd, viz., that a party to a negotiable paper, having given it value and currency by the sanction of his name, shall not afterwards invalidate it by showing, upon his own testimony, that the consideration on which it was executed was illegal.

THIS case was brought up by writ of error from the Circuit Court of the United States in and for the Eastern District of Louisiana.

Anderson was a citizen of Kentucky, and William Henderson of Louisiana. Henderson was a partner in the commercial house of John Henderson & Co., carrying on business in the town of Warrenton, Warren County, Mississippi.

On the 3d of February, 1837, Thomas J. Green drew the following inland bill:

"WARRENTON, February 3d, 1837.

"Exchange for $3,795.00.

"Twelve months after date of this my first of exchange (second of the same tenor and date unpaid), pay to the order of Messrs. John Henderson & Co. thirty-seven hundred and ninety-five dollars, value received, and charge the same to account of

"Your obedient servant,

"THOS. J. GREEN.

"To Messrs. Briggs Lacoste & Co., Natchez."

It was indorsed by John Henderson & Co. and D. G. Barlow & Co., and passed into the hands of Anderson. Being protested for non-acceptance and nonpayment, Anderson instituted suit against William Henderson, the partner,

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by way of petition, according to the practice in Louisiana, as follows:

"That the petitioner is holder and owner of a certain bill of exchange, for the sum of thirty-seven hundred and ninety-five dollars, drawn by Thomas J. Green, indorsed and directed to Messrs. Briggs, Lacoste & Co., Natchez, which said bill was drawn to the order, and was indorsed by John Henderson & Co., dated at Warrenton, in the State of Mississippi, on the 3d February, 1837, payable twelve months after date, which said bill of exchange, on the 8th of February, 1837, was protested for non-acceptance, and on the 6th day of February, 1838, the day of maturity, was duly protested for nonpayment by James B. Cook, a notary public, in the city of Natchez, duly commissioned and qualified, and that said John Henderson & Co. was, by said notary, duly notified of said protest for non-acceptance, and for nonpayment by, all of which will appear by reference to said bill of exchange and protest thereof, and said bill of exchange annexed is made a part thereof.

"At the time said bill was indorsed, petitioner avers that said William Henderson was a mem-
74*] ber of the late commercial firm of *John Henderson & Co., formerly doing business at Warrenton, under the said style and firm of John Henderson & Co., and as a member of the said firm, he is now liable *in solido* to pay to petitioner the amount of said bill of exchange, with interest, cost, and damages, and by the laws of the State of Mississippi, petitioner is entitled to five per cent. damages on the amount of said bill.

"Petitioner alleges further, that the said William Henderson, though amicably requested, has neglected to pay the amount, or any part thereof, for which he is indebted as aforesaid."

This petition was answered as follows:

"Now comes the defendant in the above entitled cause, and, by way of exception, says that he is not bound to answer thereto, because he has not received, nor been served with, a true and exact copy of the petition, which by law he is entitled to, and that he has not been legally cited to appear and answer herein. Wherefore he prays judgment, to be dismissed hence with his costs, &c.

"And if the foregoing exception be overruled, he pleads the general denial. He denies that he is in any manner liable to pay the bill of exchange sued on. He avers, specially, that he neither signed and indorsed said bill himself, nor in any way authorized the name of said firm of John Henderson & Co. to be signed and indorsed on the same; that it was so signed and indorsed as aforesaid by one John Henderson, without the knowledge and consent of defendant, and without any authority whatever; that such indorsement was made neither for the benefit, nor for any debt or liability, of the defendant or of said firm, nor was it made within the scope of the partnership powers, or on account of said firm; but without any due authority, and without the knowledge and consent of the defendant, the said bill was signed and indorsed as aforesaid by said John Henderson, purely for the benefit and accommodation of the drawer, the said Thomas J. Green; of all which the parties to said bill, and the holders thereof, before and after maturity, had due notice. Defendant requires strict proof of every allegation in the petition.

"Wherefore he prays judgment, with his costs, &c."

After sundry proceedings, a commission was issued to take the testimony of John Henderson, the acting partner and indorser of the bill, and the cause came on for trial in February, 1842. At the trial, the court excluded the evidence thus taken, and there was a judgment for the plaintiff; but the following bill of exceptions being taken to the ruling of the court, the decision came up for review:

"Be it remembered, that on the trial of the above entitled cause, the defendant's counsel, in order to prove the allegations set fourth by the defendant in his answer, offered in evidence the deposition of one John Henderson, who, at the time of the drawing and indorsement of the bill of exchange sued on, was a copartner with *defendant, the firm doing business under [*75
the name and style of John Henderson & Co.; and especially in order to prove that said John Henderson indorsed upon said bill the partnership name, without any authority whatever, without the knowledge or consent of defendant, and contrary to their articles of copartnership, and the course of dealing of said firm; that it was so indorsed in the presence of the plaintiff, purely for the accommodation of the drawer, Thomas J. Green, in discharge of a promissory note held by the plaintiff against said Green; that said bill was not indorsed as aforesaid, for the accommodation, or on account of the said firm of John Henderson & Co., nor in any manner for the benefit of said firm of John Henderson & Co., nor in any matter in which said firm was interested; and that the plaintiff, when said bill was so drawn, and indorsed, and delivered to him, was fully cognizant of all the above facts. The plaintiff's counsel objected to the reception of said deposition, on the ground that the said John Henderson was incompetent to testify to any fact tending to invalidate the said bill, policy for the protection of commerce and the public morals requiring the rejection of such evidence. The court, after taking time to consider, sustained the objection, and rejected the deposition, on the ground taken, as aforesaid, by the plaintiff's counsel.

"To this decision of the court, the defendant takes this his bill of exceptions, and prays that the same be allowed and signed by the court."

Mr. Conrad, for the plaintiff in error:

This is an action by the holder of a bill of exchange against one of the members of a commercial firm by which it purports to have been indorsed.

The indorsement is admitted, but the defense is, that it was made by one member of the firm, without the knowledge or consent of his copartner, the defendant, solely for the accommodation of the drawer, and in a matter in which the partnership had no interest or concern whatever.

To prove these facts, the partner who made the indorsement of the firm on the bill was examined under a commission, and his deposition (to be found at page 17 of the record) does fully establish them.

This deposition, however, was objected to on

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the ground that, being a party to the bill, he could not impeach it by his testimony. The objection was sustained by the court, and the deposition excluded. To this decision a bill of exceptions was taken (page 13 of the record), and the only question presented is as to the correctness of this decision.

As Henderson had no interest in the event of the suit, his general competency is not denied; but it is said, on the authority of the doctrine first distinctly laid down in *Walton* v. *Shelly*, 76*] that his testimony *is inadmissible so far as it goes to establish that the indorsement made by him was not binding on his copartners.

Apart from the sanction which the doctrine, that a witness will not be permitted to impeach his own acts, derives from judicial decisions, it is difficult to perceive on what rational grounds it can rest. In either a moral or a legal point of view it seems equally untenable. In a moral aspect, to confess a fault, is in some degree to atone for it; and what is under all circumstances a merit, becomes an imperative duty, when the concealment of a fault by the one who had committed it would involve an innocent person in its consequences.

In a legal point of view, the doctrine appears equally unsound. The civil law maxim *nemo allegans turpitudinem suam est audiendus*, invoked by Lord Mansfield in its support, is manifestly misapplied. Its proper application is to parties to the suit, not to witnesses. Its meaning is, that no man shall allege his own turpitude as the foundation of a claim or a right. It is equivalent to another axiom in that system, *ex turpi causâ non nascitur actio*, and is analogous to the common law principle that "no one shall take advantage of his own wrong."

In fact, in all other cases, courts of justice have adopted the opposite principle. The general rule is, not only that a man may confess his own turpitude, but that he is bound to do so, whenever his confession will not subject him to a criminal prosecution; and even this exception, being established solely for the protection of the witness, may be waived by him. In criminal trials witnesses are every day allowed to prove crimes in the commission of which they aided and abetted. In chancery (which has borrowed the practice from the civil law), even parties may be compelled to disclose acts of fraud and moral turpitude.

It was no doubt a conviction on the part of the English courts that the rule was erroneous in principle and inconvenient in practice, that induced them first to limit its application to negotiable instruments, and finally to abandon it altogether. (*Jordaine* v. *Lashbrook*, 7 Term Rep., 601.)

In this country, in some of the States the rule has never been followed. In others, where it had been originally adopted, the courts have been gradually receding from it. (*Stafford* v. *Rice*, 5 Cowen, 23; *Powell* v. *Waters*, 8 Cowen, 673; *Williams* v. *Walbridge*, 3 Wendell, 415.)

The rule is now universally held to apply only to negotiable paper.

This limitation of the rules is a virtual abandonment of the ground on which it was originally founded, inasmuch as the impropriety or indecency of allowing a man to contradict his own acts, can in no manner depend on the form or character of the instrument thus sought to be impeached.

The rule thus restricted must rest, therefore, on another principle, to wit, the public policy of protecting negotiable paper. Now, on this *point, I will observe, first, that if the [*77 holder received the paper in good faith, he is sufficiently secured by the principle which protects such paper in the hands of a *bona fide* holder against all equities that may exist between the original parties. If, on the contrary, he took the paper *mala fide*, there can be no good reason why he should be protected. In the first hypothesis, the evidence would be irrelevant; in the second, the reason for its exclusion does not exist.

There are, it is true, two exceptions to this remark, to wit, where the defense set up is that the note or bill originated in a gaming or usurious consideration. In these cases the instrument, even in the hands of a *bona fide* holder, is tainted with the illegality of its origin. But is not this exception founded on considerations of public policy? If so, how can a rule which excludes the evidence of the facts be also founded on public policy? How can it be at the same time politic to allow the consideration of negotiable paper to be inquired into in these cases, and at the same time impolitic to prevent the introduction of the only evidence by which, in the great majority of the cases, the facts can be established?

At all events, if the object of the rule be to protect negotiable paper in the hands of *bona fide* holders for a valuable consideration (and we apprehend it can hardly be desirable to protect any other), then the rule itself should be co extensive with the object sought to be attained. As the only cases, therefore, where the consideration can in such cases be inquired into are those in which usury or gaming is set up as a defense, it would be sufficient for all the public policy of the rule to say, that a party to a negotiable instrument should not be permitted to prove that it originated in a gambling or usurious consideration.

I have ventured on these general remarks in relation to the origin of this rule, because the rule itself is of recent origin, and the jurisprudence in regard to it, both in England and in this country, is so fluctuating that I do not consider it as firmly established.

But we contend that the rule, even when carried as far as it has ever been by this court, does not apply to the present case.

1. In the first place, for it to be applicable, the paper sought to be attacked must not only be negotiable, but have been actually negotiated. (*United States* v. *Dunn*, 5 Peters, 51; *Same* v. *Liffler*, 11 Peters, 91; *Blagg* v. *Phœnix Ins. Co.*, 8 Wash. C. C. R., 7; *Baird* v. *Cochrane*, 4 Serg. & Rawle, 397.)

Now, the draft in the present case is still in the hands of a party to the original transaction. In point of form, it is true that the present holder is the assignee of the payee and indorser, but in point of fact he was a party to the transaction in which it originated, and had full knowledge of the purposes for which it was executed. It was only a mode whereby the indorsers undertook to become sureties for a debt due by the drawers to the plaintiff. (*Powell* v. *Waters*, 8 Cowen, 692.)

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78*] *2. Even supposing that the draft can be considered in a technical sense, as having been negotiated, the indorsee certainly took it *mala fide*, and with a full knowledge that Henderson, in indorsing on it the signature of his firm, was committing a fraud on his copartners. Now, it is well settled that the rule does not apply to cases of fraud or misconduct to which the holder was a party. (*Peterson* v. *Willing*, 3 Dallas, 506; *Langer* v. *Felton*, 1 Rawle, 141; *McPherson* v. *Powers*, 1 Serg. & Rawle, 102.)

3. The draft was drawn and payable in the State of Mississippi. Its nature and effect must therefore be tested by the laws of that State. Now, the law of that State provides, in substance, that in all cases where a promissory note or other obligation in writing has been assigned, the defendant shall be allowed the benefit of all want of lawful consideration, failure of consideration, payments, discounts, and setoffs made, had, or possessed against the same, previous to notice of the assignment, any law, usage, or custom in any wise to the contrary notwithstanding, in the same manner as if the same had been sued and prosecuted by the obligee or payee therein. (Law of June 25, 1822, sec. 12; see Howard & Hutchinson's Dig., p. 372.)

By this law negotiable instruments are placed precisely on the same footing with all other securities, and therefore the distinction on which alone the principle which prevents a party to an instrument from impeaching it by his testimony rests, is unknown in that State. The defense, in the present case, is want of consideration. Had the suit been brought by the assignee of an instrument not negotiable, the witness would unquestionably have been competent to prove this fact. But by the laws of Mississippi the assignee of a note or bill of exchange has no other or greater rights than the assignee of a bond or other instrument not negotiable in its character. The witness is therefore as competent in the one as in the other. The case is similar to that of *Baring* v. *Shippen* (2 Binney, 165).

4. The *lex fori* must regulate the competency of witnesses (Story's Conflict of Laws, 526, sec. 635); and by the law of Louisiana the witness was competent. (Louisiana Code, art. 2260.)

Mr. Justice DANIEL delivered the opinion of the court:

Upon a writ of error to the Circuit Court of the United States for the Eastern District of Louisiana.

This was an action instituted at law in the Circuit Court for the Eastern District in the State above mentioned, by petition, according to the modes of proceeding in the courts of that State, in the name of the defendant in error, as indorsee and holder of a bill of exchange for $3,795, against the plaintiff in error, as an indorser of that bill.

The petition sets forth the facts following: That the petitioner is the holder and owner of the bill in question, which was drawn by one Thomas J. Green, at Warrenton, Mississippi, 79*] on the 3d of February, *1837, directed to Briggs, Lacoste & Co., at Natchez, payable, twelve months after date, to John Henderson & Co., by whom it was indorsed. That on the 8th day of February, 1837, this bill was protested for non-acceptance, and on the 6th day of February, 1838, was duly protested for nonpayment in the city of Natchez, and that John Henderson & Co. were regularly notified of said protest for non-acceptance and nonpayment. That at the time at which the said bill was so indorsed, the plaintiff in error was a member of the firm of John Henderson & Co., then doing business at Warrenton in Mississippi, and as a member of that firm is liable to the petitioner for the amount of the bill of exchange, with interest, costs, and damages. That the petitioner is a citizen and resident of the State of Kentucky, and the said William Henderson, a citizen and inhabitant of the parish of Carroll, in the State of Louisiana. Upon the aforegoing petition the plaintiff below prayed judgment, with his costs, &c.

The defendant below, in the first place, took an exception to the petition on the ground that he had not been served with a true copy thereof, according to law, nor had been legally cited to appear, and therefore prayed to be dismissed; second, he interposed what is there styled "the general denial," corresponding with the general issue; and, third, he averred specially that he neither signed nor indorsed the said bill himself, nor in any way authorized the name of the firm of John Henderson & Co. to be signed and indorsed on the same; that it was so signed and indorsed by one John Henderson without the knowledge and consent of the defendant, and without any authority whatsoever; and that such indorsement was made neither for the benefit, nor for any debt or liability of the defendant, nor of the said firm; nor was it made within the scope of the partnership powers, or on account of the firm; but that without any due authority, and without the knowledge and consent of the defendant, the bill was signed and indorsed by said John Henderson purely for the benefit of the said Thomas J. Green, the drawer, of all which the parties to the said bill, and the holders thereof, before and after the maturity thereof, had notice.

At a subsequent day the exception first taken for the alleged want of regular service of the petition, was waived by the defendant, and the cause was continued; afterwards, upon the trial thereof, the defendant, in order to prove the allegations in his answer to the petition, offered in evidence the deposition of John Henderson, who, at the time of the drawing and indorsement of the bill of exchange sued on, was a copartner with the defendant in the firm, doing business under the name and style of John Henderson & Co.: this evidence being designed to show that John Henderson indorsed the partnership name upon the bill without authority, without the knowledge or consent of the defendant, and contrary to their articles of copartnership and to the course of their dealings; and that it was so *indorsed, in the [*80 presence of the plaintiff, purely for the accommodation of the drawer, Thomas J. Green, and not for the accommodation, nor on account of, nor in any manner for the benefit of the firm of John Henderson & Co. The reception of this deposition was objected to on the ground that John Henderson, as a member of the firm by whom and at the time the indorsement was made, was incompetent to testify to facts tend-

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ing to invalidate the bill; the court sustained this objection, and rejected the deposition of John Henderson. To the ruling of the court on this point the defendant took an exception, which was reserved to him.

The exception thus taken presents the whole controversy in this case, which, controlled by principles heretofore ruled by this court, would seem to be limited within a very narrow compass. The inquiry how far a party to a negotiable instrument may be heard in a court of law to impeach or invalidate that instrument in the hands of another, is one which has led to considerable discussion and to different conclusions in the courts both of England and in this country. In the case of *Walton, Assignee, &c., v. Shelly* (1 T. R., 296) the Court of King's Bench decided that a party to a negotiable paper, having given it value and currency by the sanction of his name, shall not afterwards invalidate it by showing, upon his own testimony, that the consideration on which it was executed was illegal. Subsequently, by the same court, this rule was so far relaxed or abrogated as to permit the impeachment of such an instrument by persons standing in the same relation to it. (*Vide Jordaine v. Lashbrook*, 7 T. R., 601.) Amongst the different States of our Union the decisions of the court of King's Bench on either side of this question have been adopted. In this court the rule laid down in case of *Walton v. Shelly* has been admitted and adhered to with a uniformity which establishes it as the law of the court. Thus in the case of *The Bank of the United States v. Dunn* (6 Peters, 51), it was enforced in an action by the holder of a note against an indorser, in which an attempt was made to impeach the note upon the testimony of a subsequent indorser; in the case of *The Bank of the Metropolis v. Jones* (8 Peters, 12), in which the maker of a note was deemed an incompetent witness, in an action by the holder, to testify to facts in discharge of the liability of the indorser; and in the case of *Scott v. Lloyd*, the decision of this court, though not directly upon the same point, may be regarded as approving the rule established by the cases previously adjudicated. The judgment of the Circuit Court for the Eastern District of Louisiana now under review being fully sustained by these authorities, that judgment is hereby affirmed.

Cited—1 Wall., 173.

81*] *EMILY POULTNEY ET AL., *Appellants,*

v.

THE CITY OF LAFAYETTE, ISAAC T. PRESTON ET AL., *Defendants.*

Equity practice—21st rule—dismissal of case—when.

Before a case can be dismissed under the 21st rule, regulating equity practice, there must exist, in the technical sense, a plea or demurrer on the part of the defendant, which the plaintiff shall not have replied to or set down for hearing before the second term of the court after filing the same.

The complainant, if he chooses, may go to the hearing on bill and answer.

THIS was an appeal from the Circuit Court of the United States for East Louisiana, sitting as a court of equity.

The heirs of Poultney filed a bill in chancery against the City of Lafayette and upwards of two hundred individuals.

It alleged that Poultney had purchased from the Widow Rousseau a tract of land about a mile and a half above the city of New Orleans in May, 1818; and that to secure the payment of part of the purchase money, he had mortgaged the same land to her for $80,000, payable in five annual installments of $16,000 each; that Poultney died in October, 1819, leaving minor children, and that the defendants were in possession of the property, which the complainants claimed a right to redeem.

The proceedings which took place in court after this are exceedingly complicated. Some of the defendants answered, using this expression, "the said answer to serve and be instead of a demurrer and pleas to the said bill of complaint." Objections were made to the jurisdiction of the court on account of the residence of the complainants, and a rule granted to try the fact of residence, which rule was afterwards set aside.

The bill was taken *pro confesso* as to many of the defendants, who were afterwards allowed to answer; numerous persons were vouched in warranty by the defendants, and afterwards the proceedings stricken out; demurrers were filed and overruled; the case was put upon the rule docket and then brought back again; three more defendants were brought in.

The answers, amongst other matters, averred that Poultney, at the time of his death, was insolvent, and that the property in question had been subjected to the operation of the laws in Louisiana and sold to its present possessors.

In 1842 the following proceedings took place:

On this first Monday of January, 1842, appeared Isaac T. Preston and C. M. Conrad, Esquires, for defendants, and filed in evidence with the clerk and master the following exhibits marked A, B, C, D, E, F, G, I, M, N, O, P; and, on further motion of said counsel, this cause is set for trial for hearing on the merits, for Friday, the 14th January, 1842.

And afterwards, to wit, on the 9th day of February, one thousand eight hundred and forty-two, the following entry was made of record, to wit:

*Wednesday, February 9, 1842. [*82

"The court met, pursuant to adjournment. Present, the Honorable Theodore H. McCaleb, district judge; the Honorable John McKinley, presiding judge, absent.

Heirs of Poultney
v.
The City of Lafayette et al. } No. 37.

"On motion of Isaac T. Preston, Esq., this cause was called on the docket and fixed for trial for Wednesday, the 23d February, 1842."

And afterwards, to wit, on the 23d of February, 1842, the following order of court was entered of record, to wit:

"Wednesday, February 23, 1842.

"The court met, pursuant to adjournment. Present, the Honorable Theodore H. McCaleb, district judge; the Honorable John McKinley, presiding judge, absent.

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Heirs of Poultney
v.
The City of Layfayette et al. } No. 37.

"On the 23d day of February, 1842, this case was called for trial; whereupon the complainants, by their counsel, objected, upon the ground that the cause was improperly put on the issue docket, and set down for trial; that no replication had been filed, and that, since the last term of the court, some of the defendants had died, and their heirs or representatives had not been made parties to the suit; and moved the court to remand this cause to the rule docket, that an issue might be formed. On the other hand, the defendants insisted that the case should proceed immediately to trial, or be dismissed under the rules of practice presented by the Supreme Court in equity cases. These motions were all fully argued together, and, after argument thereof, the court took time to consider."

And afterwards, to wit, on the 24th day of February, one thousand eight hundred and forty-two, the following entry and decree were entered of record, to wit:

"Thursday, February 24, 1842.

"The court met, pursuant to adjournment. Present, Honorable Theodore H. McCaleb, district judge; Honorable John McKinley, presiding judge, absent.

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"On this day the court proceeded to deliver its opinion on the motions argued and submitted yesterday in this cause. When the court had announced it was about to deliver its opinion, the counsel for the complainants moved to be allowed to file the documents A and B, but the court refused to receive them, stating that **83*]** it was *about to deliver an opinion on the cause; upon [which] the counsel for the complainants handed them to the clerk, the court considering that the complainants' application to file a bill of revivor or exceptions came too late.

DECREE OF THE COURT.

"The defendants having moved to dismiss the bill of complaint in this cause, under the 21st of the rules in equity cases, and it appearing to the court that the complainants had not set for trial the pleas filed in this case, nor filed replication to the answers, although more than two terms of the court had elapsed since the filing of the same, it is ordered and adjudged and decreed, that the bill of complaint in this case be dismissed as to all the defendants, and the complainants pay the costs of suit."

From which decree the complainants appealed to this court.

The case was argued by *Mr. Chinn* (in writing) for the appellants, and *Mr. Coxe* for the appellees.

The following is an extract from *Mr. Chinn's* argument:

The bill in this cause was dismissed under the 21st rule of this court, prescribed for the inferior courts in chancery causes, because "the plaintiffs had not set for trial the pleas filed, nor filed replications to the answers, although two terms of the court had elapsed since filing the same." To all this it is confidently responded, that there were no pleas filed in the cause. Some of the defendants, availing themselves of the 23d rule of practice, instead of filing a formal demurrer or plea, did insist on some special matter in the answers, which they left with the clerk of the court, and claimed to have the benefit thereof, as though they had pleaded the same matter. They commence "The several answer of," &c. "The said answer also to serve and be instead of a demurrer and pleas to the said bill of complaint." Was there, then, a plea in the cause? Surely not. There was something else; there was an answer to serve and be instead of a plea, and of which the party claimed the advantage, as under the answer and not under a plea; and so it was regarded by the court when an application was made to it to try the question of citizenship; and, although the party could avail himself of all the matter, by way of answer, the plaintiff could not otherwise regard it than as an answer, and could do no otherwise towards forming an issue, without leave of court, than file a general replication to it as an answer.

It is said, in the order dismissing the bill, that more than two terms had elapsed since filing the pleas. Now, if the most rigid and technical interpretation of the rules are to be had, and they shall be conformed to to the letter, it becomes important to ascertain when the pleas of the defendant were filed. The answers of some of the defendants appear to have been lodged with the clerk of the court in his office, on the —— day of ——; there was no *notice [***84** taken of them upon the rule docket or in the minutes of the court, and consequently they were not parts of the record; the defendants were not bound by them, and the complainants were not notified of their being on file. On the 24th, 30th, and 31st of December, 1839, and on the 19th February, 1840, notes are made upon the rule docket of the filing of answers upon those days, but nothing is said about the filing of pleas. Neither of those days were or could have been rule days; consequently the act was nugatory. On the 24th of December, 1839, a motion was sustained to set aside the decree *nisi*, and leave was given the defendants to file answers, which does not appear from the minutes then to have been done; and the complainants were, by order of the court, protected in their right thereafter to file any exception to the answers that might be filed. Let it be borne in mind that the decree *nisi* was set aside without putting the parties defendant upon any terms whatever; they were not even compelled to pay costs.

In the answers various record and documents are properly referred to as exhibits, and constitute parts of the answers—the most material and only important parts, and without the filing of which the plaintiff could not safely proceed in making up an issue in the cause. At the January rules, 1842, these exhibits were for the first time filed, and noted upon the rule docket—they never having been before even lodged with the clerk. Up to that time the filing of answers was not complete; then for the first time the cause stood upon bill and answer—and at the same time the cause was set for hearing by the defendants, on the merits, for Friday, the 14th January, 1842; at the same time they suggested the death of Layton, and the names of his heirs, and took an order

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at the rules that they be parties. There was then clearly a misconception by the court, that more than two terms had elapsed since the filing of the pleas and before the order dismissing the bill.

It doth clearly appear, from the 17th rule, that issues are to be formed, and causes are to be prepared for trial at the rules and upon the rule days, and that neither party is bound to notice the proceedings of his adversary except they be then entered in the rule book, or they be had in open court.

The court below predicated its order dismissing the bill somewhat upon the failure of the plaintiffs to file replications to the answers, and suffering two terms to expire.

Pending a motion made by the complainants to set aside the rule for hearing of the cause upon its merits, and to remand the cause to the rule docket, that an issue might be had, and during the argument of that motion, the defendants moved to dismiss the bill under the 21st rule, without any previous rule therefor, without any previous notice thereof, and in direct conflict with their rule for a trial of the cause upon its merits, which they had taken. The court, in pronouncing the order, says: 85*] "The defendants having moved to *dismiss under the 21st rule, and it appearing to the court that the complainants had not set for trial the pleas filed, nor filed replications to the answers, although two terms of the court had elapsed since the filing the same, it is ordered and adjudged and decreed, that the suit be dismissed" as to all of the defendants." In response, therefore, to an application to remand the cause to the rules, and in response to an application to dismiss under the 21st rule, he does dismiss under that rule; and because the plaintiff had not replied to the answers.

The plaintiffs were not bound to notice or reply to the answers until two calendar months after they were put in, filed at the rules, or in open court; and upon their failure to reply, or file exceptions, they might be ruled to reply; and upon the expiration of that rule, and no replication or exceptions filed, the suit might be dismissed; but even then, in the discretion of the court, the cause might be retained upon the payment of cost. (Rule 18th.) But in this case there had been no rule for replication. No pains of dismissal could be inflicted upon the plaintiff for failing to reply, until he was ruled to do so. It was then a vain invocation of the 18th rule to sanction a dismissal moved for under the 21st.

After filing a replication it would be too late to except to an answer; but the courts, in the exercise of a sound discretion, and for the attainment of justice, would suffer the replication to be withdrawn and exceptions had. But, at any time before replication, it is the right of the plaintiff, at the rules or in open court, to file exceptions to the defendants' answers; and this right was particularly secured to the plaintiffs, without limitation as to time, upon setting aside the decree *nisi*. The court will not ordinarily set aside a decree *nisi*, until the coming in of a sufficient answer. In this case the rule was *ex gratia* departed from; reserving the right of the plaintiffs to reply to the answers when they should come in.

Upon the trial of the plaintiffs' motion, and before the decision thereof (when there had been no rule for replication, and the party's right to file exceptions to the defendant's answers would appear to have been unquestionable), they offered to do so, but the court refused them permission; and, inasmuch as Robert Layton had subsequently to the preceding term departed this life, and his heirs were not properly before the court, the plaintiffs offered to file a bill of revivor against them, which the court refused to permit; and without accepting any terms, or putting the plaintiff upon any terms to speed the cause, put an end to the cause by pronouncing a final decree; and did not, even in that, reserve to the plaintiffs the right to commence *de novo*.

It is supposed that the decretal order dismissing the plaintiffs' bill is erroneous for its ambiguity, and want of reasonable judicial certainty. After dismissing the bill as to all the defendants—which applies to all who had been served with process, or who had been made *defendants in the bill, and who had not [*86 answered—the decree proceeds: "And the complainants pay the costs of suit with regard to such of the defendants as had filed pleas of demurrers—the complainant having failed to reply to or set for hearing such pleas or demurrers before the second term of the court after filing the same, agreeably to the 21st of the rules of practice for the courts of equity of the United States, as prescribed by the Supreme Court of the United States."

Proctor filed the only demurrer that was filed in the cause. An issue was had speedily. It was set for hearing, and inasmuch as Layton and others relied upon the same matters, they were all heard. The demurrers were overruled, and the defendants ordered to answer over, which Proctor has never done, notwithstanding which he has succeeded in turning the plaintiff out of court. Now, can this court ascertain from the decree which of the persons named as defendants in the complainants' bill are entitled to their costs? &c., &c.

We therefore conclude that the inferior court erred:

1. In deciding that the defendants, or any of them, had filed pleas in the cause.
2. That the failure of the plaintiffs to set such pleas down for trial should be visited with the pains of dismissal of their bill.
3. That the plaintiffs were in default in not replying to the defendants' answers.
4. In refusing leave to the plaintiffs to file exceptions to the answers, and a bill of revivor against the heirs of a deceased party.
5. In dismissing the plaintiffs' bill as to all or any of the parties.
6. In awarding costs to the defendants, or any of them, and not defining to whom.
7. In refusing to award a rehearing of the case upon the petition and affidavit filed.

Mr. Coxe, for appellees, said that after the case was argued in the court below, and when the court was about to deliver its opinion, some papers were presented, but the court very properly said it was too late. The printed argument refers to the position of the case when the judge decided it; and there was nothing in this position to prevent the complainants from filing a replication. The record shows that they endeavored to excuse themselves for this

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omission by filing a petition for a rehearing; and it is, in fact, from the refusal of the court to grant this that the appeal was taken.

Mr. Justice McLEAN delivered the opinion of the court:

This is an appeal from the decree of the Circuit Court for the Eastern District of Louisiana.

To determine the point brought up by the appeal, it is unnecessary to state the substance of the bill or answers. On motion, the Circuit Court dismissed the bill, under the 21st rule, 87*] because the *"complainants had not set down for hearing the pleas filed in this case, nor filed replication to the answers, although more than two terms of the court had elapsed since filing of the same."

The rule referred to is, "if the plaintiff shall not reply to, or set for hearing any plea or demurrer before the second term of the court after filing the same, the bill may be dismissed, with costs." No plea had been filed in the case, and the demurrer filed had been overruled, so that the rule did not apply to the case as it stood at the time of the dismissal. The rule can only apply to demurrers and pleas technically so called. And there is no other rule of proceeding which authorized the decree of the court. The complainant may, if he choose, go to the hearing on the bill and answer.

The decree of the Circuit Court is reversed, and the cause is remanded for further proceedings.

AMOS KENDALL, *Plaintiff in Error,*
v.
WILLIAM B. STOKES, LUCIUS W. STOCKTON, AND DANIEL MOORE, Survivors of RICHARD C. STOCKTON, *Defendants in Error.*

Postmaster-General, official act of — reference, award and payment on mandamus — Costs — action for other damages — public officer in exercise of discretion not liable for error in judgment — selection of one of two remedies, bar as to other — mandamus. Evidence of special damage.

[The reader is referred to a former case between these parties, reported in 12 Peters, 524. The decision of the court in the present case is so intimately connected with the facts in both, that it is impossible to give a clear account of the principles established, without a reference to those facts.]

After the decision in the former case, Stokes, &c., brought a suit against Kendall, which rested ultimately on two counts, viz., the first and fifth. The first claimed damages for the suspension, by Kendall, on the books of the Postoffice Department, of certain credits which had been entered by his predecessor. The fifth, for the refusal, by Kendall, to credit Stokes, &c., with the amount awarded in their favor by the solicitor of the treasury.

The damages claimed in the first count constituted a part of the reference to the solicitor, as shown by the plaintiffs below in their own evidence.

After a reference, an award, and the reception of the money awarded, another suit cannot be maintained on the original cause of action, upon the ground that the party had not proved, before the referee, all the damages he had sustained, or that his damage exceeded the amount which the arbitrator awarded.

The acts complained of were not ministerial, but were official acts, done by Kendall in his character of Postmaster-General. A public officer, acting from a sense of duty, in a matter where he is required to exercise discretion, is not liable to an action for an error of judgment.

With regard to the fifth count, the application for the *mandamus* covered the same ground as that taken in this count. Both rested on the refusal of Kendall to pay a sum of money to which Stokes, &c., were lawfully entitled.

But where a party has a choice of remedies for a wrong done, selects one, proceeds to judgment, and reaps the fruits of his judgment, he cannot afterwards proceed in another suit for the same cause of action.

This is especially true where the party has resorted to a *mandamus*, because it is not issued where the law affords a party any other adequate mode of redress. To allow him to maintain another suit for the same cause of action *would be inconsist- [*88 ent with the decision of the court which awarded the *mandamus*.

Evidence of special damage was improperly admitted, under the circumstances of the case in the court below.

THIS case was brought up, by writ of error, from the Circuit Court of the United States for the District of Columbia, sitting for the County of Washington.

The Supreme Court of the United States having affirmed (12 Peters, 524) the decision of the Circuit Court, awarding a *mandamus* against Amos Kendall, application was made by Stokes, &c., to Kendall, that the sum of money mentioned in the proceedings should be carried to their credit on the books of the department. Kendall declined to interfere in the matter, upon the ground that the "auditor" had charge of the books, and that he himself had no power to settle claims, and no money to pay them

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NOTE.—*As to arbitrament and award*, see note to United States v. Dandridge, 12 Wheat., 448.

As to mandamus, see note to McCluny v. Silliman, 2 Wheat., 369.

When public officer is liable for error in judgment, or for neglect or refusal to perform judicial or ministerial duties, or for torts, or breach of trust.

Judicial officers are exempt from liability in a civil action, for judicial acts done within their jurisdiction, and judges of courts of general authority are exempt from such liability, even where their judicial acts are in excess of their jurisdiction unless the acts in excess of their jurisdiction are done maliciously or corruptly. Randall v. Brigham, 7 Wall., 523; Lange v. Benedict, 18 Alb. L. J., 11.

When duties which are purely ministerial are cast upon officers whose chief functions are judicial, and the ministerial duty is violated, the officer, although for most purposes a judge, is still civilly responsible for such misconduct. *Ibid.* And the rule is the same where judicial functions are cast upon a ministerial officer. But to render a judge acting in a ministerial capacity, or a ministerial officer acting in a capacity in its nature judicial, liable, it must be shown that his decisions were not only erroneous, but that he acted from a spirit of willfulness, corruption and malice. Pike v. Megoun, 44 Mo., 491; Walker v. Hallock, 32 Ind., 239; Fausler v. Parsons, 6 W. Va., 486; 20 Am. Rep., 431.

Although an action cannot be maintained against a judicial officer, for a mistake committed in the discharge of his duties, yet his jurisdiction, if not of record, must affirmatively appear on the face of the proceedings. Wall v. Trumbull, 16 Mich., 228.

A ministerial officer who, by neglecting to perform a duty imposed upon him by law, injures a person who has a right to the discharge of the duty, is liable in damages to such person. Kendall v. Stokes, 3 How., 87 (*supra*); Connors v. Adams, 13 Hun (N. Y.), 427; DeGrauw v. Queens County, *Id.*, 381; Adset v. Brady, 4 Hill., 630.

It will be no excuse that he intrusted the duty to some one else, who neglected it. Pickard v. Smith, 10 C. B. (N. S.), 470.

Although the chief functions of an officer are judicial, yet if he is charged with ministerial duties which he neglects to perform, he will be liable. Smith v. Trawl, 1 Root, 165; Wilson v. Mayor of

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with. On the 30th of March, 1838, a peremptory *mandamus* was issued by the Circuit Court, commanding him to obey and execute the act of Congress immediately upon the receipt of the writ, and certify perfect obedience to it on the 3d of April next.

On the 3d of April, Mr. Kendall addressed a letter to the court, saying that he had communicated the award of the solicitor of the treasury to the auditor, and received from him official information that the balance of said award had been entered to the credit of the claimants, on the books.

In October, 1839, Stokes, &c., brought a suit against Kendall. The declaration consisted of five counts, three of which were abandoned after a verdict and motion in arrest of judgment. The two remaining were the first and fifth.

The first count averred, in substance, that the plaintiffs, with Richard C. Stockton, deceased, under and in the name of said Richard, were contractors for the transportation of the mails of the United States, by virtue of certain contracts entered into between them and the late William T. Barry, then Postmaster-General of the United States. That the said William T. Barry, as Postmaster-General, did cause certain credits to be given, allowed, and entered in the books, accounts, and proper papers in the Post-office Department, in favor of the plaintiffs and said Richard, as such mail contractors, under and in the name of said Richard. That the defendant, on succeeding Mr. Barry in the office of Postmaster-General, wrongfully, illegally, maliciously, and oppressively caused said items of account, so entered, and credited, and allowed, and upon which payments had been made, to be suspended on the books, accounts, and papers of the Postoffice Department; and did cause said plaintiffs and said Richard, under and in the name of said Richard, to be charged on said books, papers and accounts, with said several items and sums of money, amounting to $122,000.

The fifth count averred the passage of a 80*] private act of Congress, *entitled "An Act for the relief of Wm. B. Stokes, Richard C. Stockton, Lucius W. Stockton, and Daniel Moore," by which the solicitor of the treasury was authorized and required to determine on the equity of the claims of them, or any of them, growing out of certain alleged contracts between them and Mr. Barry, and by which the Postmaster-General was directed to credit them with such amounts as might be awarded, pursuant to the act. This count also averred the actual rendition of an award by Virgil Maxcy, then solicitor of the treasury, for the sum of $162,727.05, in favor of Richard C. Stockton, as the representative of himself and the plaintiffs below, and the refusal of Mr. Kendall to comply fully with the terms of the award, by crediting them with the full amount awarded.

The cause came on for trial at November Term, 1841, which resulted in a verdict for the plaintiffs.

After the rendition of the verdict aforesaid, the defendant produced the following certificate by the said jurors, and prayed the court to be permitted to have the same entered on the minutes of the court, to which the court assented:

"We, the jurors, impaneled in the case of *William B. Stokes et al.*, v. *Amos Kendall*, and in which case we have this day rendered our verdict for the plaintiffs for $11,000, do hereby certify that said verdict was not founded on any idea that the defendant performed the acts complained of by the plaintiffs, and for which we gave damages as above stated, with any intent other than a desire faithfully to perform the duties of his office of Postmaster-General, and protect the public interests committed to his charge; but the said damages were given by us on the grounds that the acts complained of were illegal, and that the said sum of $11,000 was the amount of actual damage to plaintiffs estimated by us to have resulted from said illegal acts."

Upon the trial the defendant took three bills of exceptions.

The 1st exception was to the competency of the evidence to sustain the action. The evidence offered by the plaintiffs was:

1. A transcript from the record in the *mandamus* case.
2. The report of Virgil Maxcy, solicitor of the treasury.
3. Sundry letters and documents.
4. Oral testimony relating to the partnership.

The defendant offered four prayers to the court, praying instructions to the jury that the defendant was not responsible to the plaintiffs in the right in which they then sued under the

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New York, 1 Denio, 595; Stone v. Augusta, 46 Me., 127.

But where an officer has discretionary power to do or omit to do a certain act, he cannot be made liable for not doing it, however erroneously he may have judged. Weightman v. Washington, 1 Black., 39.

A sheriff is liable for the negligence or omissions of his deputy. Sawyer v. Corse, 17 Gratt., 230; Abrams v. Ervin, 9 Iowa, 87.

Where a statute imposes a duty upon a ministerial officer in the performance of which an individual is specially interested, the officer is liable to an action for a refusal to perform the duty although he honestly believed that the statute was unconstitutional. Clark v. Miller, 54 N. Y. (9 Sick.), 528.

The neglect of officers to perform duties with which they are charged, may, under peculiar circumstances, amount to a refusal to do so. People v. Supervisors of New York, 3 N. Y. Ct. App. Decs., 566; 2 Keyes, 288; Case v. Dean, 16 Mich., 12; Harrold, *Ex-parte*, 47 Cal., 149.

A ministerial officer is bound to obey the law without questioning it. He has no right to decide upon its validity, in order to relieve himself from responsibility for disobeying a preremptory *mandamus*. People v. Solomon, 54 Ill., 39.

A sheriff is liable for loss to a creditor through the carelessness or unreasonable delay in the execution of process. Dorrance v. Com., 13 Penn. St., 160; Pierce v. Partridge, 3 Metc., 44; Tucker v. Bradley, 15 Conn., 46.

The clerk of a court is liable to a party for a loss occurring through his failure to take security for costs or by accepting an insufficient bond when he thereby violates an official duty, or by not issuing citation. McNutt v. Livingston, 7 Sm. & Marsh., 641; Anderson v. Jobett, 14 La. Ann., 614.

Or by not entering a cause on the docket which prevented the plaintiff from obtaining judgment until another term, the defendant in the interval having become insolvent. Brown v. Lester, 13 Sm. & Marsh., 392.

Or by failure to record a deed. Welles v. Hutchinson, 2 Root, 85.

Or by incorrectly certifying to the validity a bond which caused the lien of a judgment to be lost. Williams v. Hart, 17 Ala. (N. S.), 108.

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1st count; that he was not liable under the 5th count for refusing to comply with so much of the award of the solicitor as he, on the ground of want of jurisdiction in the said solicitor, refused to comply with; that he was not liable for consequential damages; and that the plaintiffs had no joint right of action.

All of which prayers were refused by the court, to which refusal the defendant excepted.

90*] *Second bill of exceptions.

The defendant then offered in evidence sundry depositions and papers:

1. The depositions of Andrew Jackson, Martin Van Buren, and B. T. Butler.

2. Correspondence between Mr. Kendall and the Attorney-General.

3. The Attorney-General's opinion (Document No. 123, 26th Congress, 2d session, House of Rep. Ex. Doc., page 1010).

4. Letter from the solicitor of the treasury.

5. Reports of postoffice committees of Senate and House.

6. The evidence of Francis S. Key, Esq.

Upon all which evidence the defendant founded four prayers:

1. That plaintiffs were not contractors.

2. That defendant was not liable if he acted from a conviction that it was his official duty to set aside the extra allowances.

3. That he was not liable if he acted from a conviction that the solicitor had no lawful jurisdiction to audit and adjust the items, &c.

4. That he was not liable for any of his acts, if the jury believe that he acted with the *bona fide* intention to perform duly the duties of his office, and without malice or intention to injure and oppress the plaintiffs.

All of which prayers the court refused to grant, and to the refusal the defendant excepted.

Third Bill of Exceptions.

The plaintiffs offered evidence to prove their special expenses and losses, such as counsel fees, tavern bills, discounts, &c.; to the admission of which evidence the defendant objected; but the court overruled the objection and allowed it to be given. To which overruling the defendant excepted.

The case came up upon all these grounds.

Messrs. Dent and *Jones* for the plaintiff in error.

Mr. Coxe for defendants.

Mr. Dent laid down the following propositions:

1. That the official acts complained of in the declaration amount to nothing more than a breach of contract, and a refusal to pa money due by contract and award.

2. That these acts, with what motives, a gravations, or consequences soever accomp nied, lay no ground for an action, soundi in damages, as for an official or personal to or misdemeanor.

3. But as the case is now presented by t record, it is a *concessum*, that the defendan motives for the acts complained of were cle of all malice, self-interest, and intention to ve harass, injure, or oppress the plaintiffs, a proceeded from no other intent than a desi faithfully to perform the duties of his offic and to protect the public interest committed his charge; and that if the acts complained were in truth illegal, or in any way a tran gression of his *public duties (which is [*9 altogether denied), they resulted from an ho est mistake and misapprehension of the autho ity and duties of his office; consequently, t broad question is now presented, whether honest misapprehension of the rights of t plaintiffs below, and a contestation of tho rights, under the influence of honest mistak and in the manner and form appearing by t declaration and evidence in the cause, be official or personal tort or misdemeanor. W maintain the negative of this question.

4. If the plaintiffs have shown, either pleading or in evidence, any cause of actio still we except to all the evidence of spec damage pretended to have been sustained the plaintiffs, in consequence of the defen ant's refusal to allow and pay them the seve sums of money pretended to be due under th contract—such as discounts and usury pa by them for money borrowed, expenses travel, large fees to counsel, tavern bil and other expenses incurred in pursuit their claim against the Postoffice Depa ment. We maintain that the only mea ure of damages for withholding money d (whether on public or private account) the legal interest on the sum due.

5. That all right of action (if any such ev existed, which is denied) for the pretend misfeasance complained of in the first cou was completely extinguished and barred by t act of Congress authorizing the solicitor of t treasury to settle and adjust the claims of t plaintiffs and R. C. Stockton, or any of the for the extra services, &c., in the act mentione and by the full and final settlement and a justment of the same by the solicitor, as show by the plaintiffs.

Liability for torts.

An officer, if he seize under execution, or attach property which is legally exempt from seizure and sale, he will be a trespasser. Fose v. Stewart, 14 Me., 312; Kiff v. Old Colony, &c., Railway, 117 Mass., 591; S. C., 19 Am. Rep., 429.

And the same is true of an officer who, after attaching goods, remains in possession of the defendant's house or keeps the goods there an unreasonable length of time. Reed v. Harrison, 2 W. Blk., 1219.

Or who seizes goods belonging to A and in A's possession upon a writ against B. Com. v. Kennard, 8 Pick., 133.

Where an officer sells the entire property in goods owned by two persons jointly under an execution against one of them, he is liable as trespasser. Smyth v. Tankersley, 20 Ala., 212.

If officer gives to a prisoner liberty not authorized by law, it constitutes an escape, and the officer is liable therefor. Clapp v. Hayward, 15 Mass., 27 Steere v. Field, 2 Mason, 486; Vilas v. Barker, Vt., 603; Riley v. Whittiker, 49 N. H., 145; 6 A Rep., 474.

Collectors of taxes who seize person or prope to enforce the payment of an illegal tax are tr passers. Thompson v. Currier, 24 N. H., 257; We more v. Campbell, 2 Sandf., 341; Shaw v. Pecke 25 Vt., 423.

An officer does not commit a misdemeanor, receiving pay for services which his official du does not require him to perform. Dutton v. Ci 9 Phil., 597.

The officers of a corporation in their character trustees may be held liable in a court of equity f a fraudulent breach of trust. Colquitt v. Howar 11 Ga., 556.

That one acted in aid of an officer is no defens if the officer himself was a trespasser. 123 Mass., 2 Smith v. Colby, 67 Me., 169.

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6. That all right of action (if any such ever existed, which is denied) for the pretended misfeasance complained of in the 5th count to wit, the nonpayment of a certain portion of the solicitor's award), was extinguished and barred by the plaintiffs' election of their remedy by *mandamus*, and the result of the procedure on such *mandamus*, as shown by the plaintiffs.

7. That the defendant, as Postmaster-General, had authority, and was *prima facie* justified, by the circumstances of the case, for both the acts of pretended misfeasance and nonfeasance complained of: 1st, for originally contesting their claims for the pretended extra services afterwards referred to the solicitor of the treasury; and 2d, for maintaining that the solicitor of the treasury had exceeded the scope of the authority committed to him by the act of Congress, in allowing certain claims not with in the terms of the submission to his award, as defined in the act of Congress; and, consequently, for refusing to pay so much of the solicitor's award as allowed such inadmissible claims.

8. That there is a fatal misjoinder of parties in this action; inasmuch as the plaintiffs, by their own showing, both in pleading and in evidence, have no such joint rights of contract or action as they have sued on in this case.

[92*] *9. That from their own exhibit of the original contracts, under which all the plaintiffs' claims arise, taken in connection with the acts of Congress relating to the premises, the plaintiffs' own case, upon their own showing, absolutely concludes against any such joint rights of contract and action as are asserted in the first count.

10. That from their own exhibit of the awards of the solicitor of the treasury, referred to in their 5th count, their case, upon their own showing, equally concludes against such joint rights of action as are asserted in the 5th count.

Consequently, the evidence of O. B. Brown ought to have been rejected, as incompetent and inadmissible; and the court ought to have allowed the several instructions asked by the defendant in regard to such joint rights.

11. We maintain generally, and without exception, that the points of evidence, and of law, raised by the defendant in the course of the trial, and in arrest of judgment (as set forth in the several bills of exceptions and motions in arrest of judgment, already referred to), ought to have been sustained by the Circuit Court, and were erroneously overruled by that court.

Mr. Dent went largely into the history of the case, referring to many of the public documents which have been mentioned. He then took up the points and contended that the Act of 1825 (3 Story, 1985) made the Postmaster-General a disbursing officer of all the revenue of the department. (See, also, 3 Story, 1680, the 4th section of the Act of March 3d, 1817; 3 Story, 1091, 5th section of the Act of April 21st, 1808; *Gidley* v. *Palmerston*, 7 J. B. Moore, 91, 108; 3 Brod. & Bingh., 275; 7 Com. Law Rep., 434.)

On the third point he cited 1 East, 555, 558, and 564, *note;* 11 Johns., 114.

The fourth point he thought too clear to be discussed.

On the fifth and sixth points he contended that the plaintiffs were precluded from this action, by having already elected their remedy. (2 Wm. Black., edition of 1828, 779, 827; 4 Rawle, 287–299; 17 Pickering, 7–14; 6 Wheat., 109; 1 Salk., 11; 2 Bos. & Pull., 71; 7 Johns., 21; 8 Johns., 384.)

The evidence which the plaintiffs introduced in this case is the same which they brought before the solicitor to obtain his award, and also in the *mandamus* case; and this may be shown under a plea of the general issue as well as under a plea in bar. (*Young* v. *Black*, 7 Cranch, 565.)

Mr. Coxe, for defendants in error, referred to numerous documents to show that there was no misjoinder of parties; that they had all been recognized as joint contractors. He denied that it was a *concessum* that there was no malice; on the contrary, it is averred in the declaration. He denied also that the merits of this case had ever been settled. They were not by the solicitor of the treasury, whose province it was to decide on the legality or illegality [*93 of Mr. Kendall's conduct in suspending the payments. They were not settled in the *mandamus* case, which related to an entry which Mr. Kendall refused to make. The Circuit Court directed him to make it, and the Supreme Court affirmed the decision. (12 Peters, 699.)

Having disposed of some preliminary objections, *Mr. Coxe* proceeded to discuss the liability of public officers to pay money withheld, and cited 6 T. R., 443; 3 Wils., 443; 2 Kane, 312; 6 Mun., 271; 11 Mass., 350; 3 Wheat., 346; 2 Cranch, 175; 1 T.R., 493; 7 Mass., 282; 2 Wm. Black., 1141; 5 Johns., 282; 9 Johns., 395; 18 Johns., 141; 1 Cranch, 137; 10 Peters, *Swartwout's* case.

The defendants' conduct was illegal. (See 15 Peters, case of *Bank of Metropolis;* 9 Clarke & Finnelly Rep., 251, 278, 283; Lyndhurst's opinion, 284; Ld. Brougham's opinion, 287–303, as to malice; 310, Ld. Campbell's opinion.)

Mr. Jones, in reply and conclusion, referred to several parts of the record to show that there was not such a partnership as would enable the plaintiffs to sue, and to other parts to show that malice in Mr. Kendall was wholly out of the case. This destroyed all claim for consequential damages.

He then discussed what constitutes an illegal act in a public officer, so as to make him liable in damages for withholding money, and referred to Story on Agency, 308, sec. 305; 1 Cranch, 345.

Upon what grounds actions *ex delicto* have been maintained against a public officer, he referred to 1 East, 562, 568; and to show what description and quality of officers are liable to this action, he referred to the case of *Gidley* v. *Ld. Palmerston*, 111.

If the action be really founded upon a form of contract, yet, being mixed up with tort, every defense, good against the form *ex contractu*, is good against the tort. (1 Espinasse, 172; 8 Durn. & East, 335.)

An action will lie against a public officer only when the duty to be performed is wholly ministerial, and never in a case where judgment is to be exercised. (*The United States* v. *Bank of Metropolis*, 15 Peters, 403.)

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As to the *mandamus* case, Mr. Kendall did not disobey, for the extra allowance extended only to the end of the first quarter of 1835.

Mr. Chief Justice TANEY delivered the opinion of the court:

The record in this case is very voluminous, and contains a great mass of testimony, and also many incidental questions of law not involving the merits of the case, which were raised and decided in the Circuit Court, and to which exceptions were taken by the plaintiff in error. But both parties have expressed their desire that the controversy should now be terminated by the judgment of this court; and that the leading principles which must ultimately decide the rights of the parties should now 94*] be settled; and that the case should *not be disposed of upon any technical or other objections which would leave it open to further ligitation. In this view of the subject it is unnecessary to give a detailed statement of the proceedings in the court below. Such a statement would render this opinion needlessly tedious and complicated. We shall be better understood by a brief summary of the pleadings and evidence, together with the particular points upon which our decision turns; leaving unnoticed those parts of the record which can have no influence on the judgment we are about to give, nor vary in any degree the ultimate rights of the parties.

At the time of the trial and verdict in the Circuit Court the declaration contained five counts. But after the verdict was rendered, the plaintiffs in that court, with the leave of the court entered a *nolle prosequi* upon the second, third, and fourth, and the judgment was entered on the first and the fifth. It is only of these two last mentioned counts, therefore, that it is necessary to speak. The verdict was a general one for the plaintiffs, and their damages assessed at $11,000.

The first count states that by virtue of certain contracts made with William T. Barry, while he was Postmaster-General, and services performed under them, the plaintiffs on the 1st of May, 1835, were entitled to receive and have allowed to them the sum of $122,000, and that that sum was accordingly credited to them on the books of the Postoffice Department; and that Amos Kendall, the defendant in the court below, afterwards became Postmaster-General, and as such illegally and maliciously caused the items composing the said amount to be suspended on the books of the department, and the plaintiffs to be charged therewith: whereby they were greatly injured, and put to great expenses, and suffered in their business and credit.

The fifth count recites the Act of Congress of July 2d, 1836, by which the solicitor of the treasury was authorized to settle and adjust the claims of the plaintiffs for services rendered by them under contracts with William T. Barry, while he was Postmaster-General, and which had been suspended by Amos Kendall, then Postmaster-General, and to make them such allowances therefor as upon a full examation of all the evidence might seem right and according to principles of equity; and the Postmaster-General directed to credit them with whatever sum or sums of money the solicitor should decide to be due to them, for on account of such service or contract; and after this recital of the act of Congress, the plaintiffs proceed to aver that services had been performed by them under contracts with William T. Barry, while he was Postmaster-General, on which their pay had been suspended by Amos Kendall, then Postmaster-General, and that for these claims the solicitor of the treasury allowed the plaintiffs large sums of money amounting to $162,727.05; that the defendant had notice of the premises, and that it became his *duty as Postmaster-General to credit [*95 the plaintiffs with this sum; but that he illegally and maliciously refused to give the credit by reason whereof the plaintiffs were subjected to great loss, their credit impaired, and they were obliged to incur heavy expenses in prosecuting their rights, to their damage in the sum of $100,000.

The defendant pleaded not guilty; upon which issue was joined.

At the trial, the plaintiffs offered in evidence the record of the proceedings in the *mandamus* which issued from the Circuit Court upon the relation on the 7th day of June, 1837, commanding the said Amos Kendall to enter the credit for the sum awarded by the solicitor. It is needless to state at large the proceedings in that suit, as they are sufficiently set forth in the report of the case in 12 Peters, 524; the judgment of the Circuit Court awarding a peremptory *mandamus* having been brought by writ of error before the Supreme Court, and there affirmed at January Term, 1838. Various papers and letters were also offered in evidence by the plaintiffs to show that the allowance mentioned in the declaration had been suspended by the defendant; and that after the award of the solicitor, and before the original *mandamus* issued, he had refused to credit $39,472.47 part of the sum awarded, upon the ground that the items composing it were not a part of the subject matter referred; and upon which, as the defendant insisted, the solicitor had no right to award. Other papers and letters were also offered showing that after the judgment of the Circuit Court awarding a peremptory *mandamus* had been affirmed in the Supreme Court the plaintiffs demanded a credit for the above mentioned balance on the 23d of March, 1838 that the defendant declined entering the credit alleging that a recent change in the postoffice law had placed the books and accounts of the department in the custody of the auditor; and some difficulty having arisen on this point, the Circuit Court, on the 30th of March, 1838 issued a *mandamus* commanding the Postmaster-General to enter the credit on the books of the department; and to this writ the defendant made return on the 3d of April, 1838, that the said credit had been entered by the auditor who had the legal custody of the books.

The whole of this evidence was objected to by the defendant, but the objection was overruled and the testimony given to the jury. And upon the evidence so offered by the plaintiffs, before any evidence was produced on his part, the defendant moved for the following instruction from the court:

"The defendant, upon each and every of the plaintiffs' said counts, severally and successively prayed the opinion of the court, and their

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instruction to the jury that the evidence so as aforesaid produced and given on the part of the plaintiffs, so far as the same is competent to sustain such count, is not competent and sufficient to be left to the jury as evidence of any act or acts done or omitted or refused to be done by the defendant, which legally laid him 96*] liable *to the plaintiffs in this action, under such count, for the consequential damages claimed by the plaintiffs in such count." This instruction was refused and the defendant excepted.

The question presented to the court by this motion in substance was this: Had the plaintiffs upon the evidence adduced by them shown themselves entitled in point of law to maintain their action for the causes stated in their declaration upon the breaches therein assigned, assuming that the jury believed the testimony to be true?

The instruction asked for was in the nature of a demurrer to the evidence, and in modern practice has, in some of the States, taken the place of it. In the Maryland courts, from which the Circuit Court borrowed its practice, a prayer of this description at the time of the cession of the district and for a long time before, was a familiar proceeding, and a demurrer to evidence seldom, if ever, resorted to. And the refusal of the court was equivalent to an instruction that the plaintiffs had shown such a cause of action as would authorize the jury, if they believed in the evidence, to find a verdict in favor of the plaintiffs, and to assess damages against the defendant for the causes of action stated in the declaration.

Now, the cause of action stated in the first count is the suspension, by the defendant, of the allowances made by his predecessor in office; and of the recharge of sums with which the plaintiffs had been credited by Mr. Barry when he was the Postmaster-General. And it appeared in evidence, by the proceedings in the *mandamus*, that the plaintiffs being unable to settle with the defendant the dispute between them on the subject, they applied to Congress for relief; that upon this application a law was passed referring the matter to the solicitor of the treasury, with directions that he should inquire into, and determine the equity of these claims, and make them such allowances therefor as might seem right according to the principles of equity; and that the Postmaster-General should credit them with whatever sums of money, if any, the solicitor should decide to be due; that the plaintiffs assented to this reference, and offered evidence before the solicitor that they were entitled to the allowances and credits claimed by them; and that, from the conduct of the Postmaster General, in suspending and recharging these allowances and credits, they had been compelled to pay a large amount in discounts and interests, in order to carry on their business; and that the solicitor had finally determined in favor of their claims, and awarded to them the sum hereinbefore mentioned, giving them, as appears in his report to Congress, interest on the money withheld from them; and also that, before this suit was brought, they had obtained a credit on the books of the department for the whole sum awarded by the solicitor.

Assuming, for the sake of the argument, that an action might in the first instance have been sustained against the Postmaster-General, can the plaintiffs still support a suit upon the original cause of *action? It was not a [*97 controversy between the plaintiffs and Amos Kendall as a private individual, but between them and a public officer acting for and on behalf of the United States. If they had sustained damage, it was the consequence of his act, and the question of damages was necessarily referred with the subject matter in controversy, out of which that question arose. It was an incident to the principal matters referred, and therefore within the scope of the reference; and it is not material to inquire whether damages for the detention of the money were claimed or not, or allowed or not. In point of fact, however, the plaintiffs did claim interest on the money withheld as a damage sustained from the conduct of the Postmaster-General, and offered proof before the solicitor of the amount of discounts and interest they had been compelled to pay; and, moreover, were allowed, in the award, a large sum on that account, which was paid to them as well as the principal sum. The question, then, on the first count is, can a party, after a reference, an award, and the receipt of the money awarded, maintain a suit on the original cause of action upon the ground that he had not proved, before the referee, all the damages he had sustained; or that his damage exceeded the amount which the arbitrator awarded? We think not. The rule on that subject is well settled. It has been decided in many cases, and is clearly stated in *Dunn* v. *Murray* (9 B. & C., 780.) The plaintiffs, upon their own showing, therefore, were not entitled to maintain their action on the first count, and the Circuit Court ought so to have directed the jury.

The judgment upon this count is also liable to another objection equally fatal. The acts complained of were not what the law terms ministerial, but were official acts done by the defendant in his character of Postmaster-General. The declaration, it is true, charges that they were maliciously done, but that was not the ground upon which the Circuit Court sustained the action either on this count or the fifth. For, among other instructions moved for on behalf of the defendant, the court were requested to direct the jury:

"That, if they found from the evidence that the Postmaster-General acted from the conviction that he had lawful power and authority as Postmaster-General to set aside the extra allowances made by his predecessor, and to suspend and recharge the same, and from a conviction that it was his official duty to do so; and if the plaintiffs suffered no injury from such official act, but the inconveniences necessarily resulting therefrom, that the defendant was not liable."

This instruction was refused; the court thereby in effect giving the jury to understand that however correct and praiseworthy the motives of the officer might be, he was still liable to the action, and chargeable with damages.

We are not aware of any case in England or in this country in which it has been held that a public officer, acting to the best of his judg-

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98*] ment *and from a sense of duty, in a matter of account with an individual, has been held liable to an action for an error of judgment. The Postmaster-General had undoubtedly the right to examine into this account, in order to ascertain whether there were any errors in it which he was authorized to correct, and whether the allowances had in fact been made by Mr. Barry; and he had a right to suspend these items until he made his examination and formed his judgment. It repeatedly and unavoidably happens, in transactions with the government, that money due to an individual is withheld from him for a time, and payment suspended in order to afford an opportunity for a more thorough examination. Sometimes erroneous constructions of the law may lead to a final rejection of a claim in cases where it ought to be allowed. But a public officer is not liable to an action if he falls into error in a case where the act to be done is not merely a ministerial one, but is one in relation to which it is his duty to exercise judgment and discretion: even although an individual may suffer by his mistake. A contrary principle would, indeed, be pregnant with the greatest mischiefs. It is unnecessay, we think, to refer to the many cases by which this doctrine has been established. It was fully recognized in the case of *Gidley, Exec. of Holland*, v. *Ld. Palmerston* (J. B. Moore, 91; 3 B. & B., 275.)

The case in 9 Clark & Finnelly, 251, recently decided in England, in the House of Lords, has been much relied on in the argument for the defendant in error. But upon an examination of that case it will be found that it had been decided by the Court of Session in Scotland, in a former suit between the same parties, that the act complained of was a mere ministerial act which the party was bound to perform; and that this judgment had been affirmed in the House of Lords. And the action against the party, for refusing to do the act, was maintained, not upon the ground only that it was ministerial, but because it had been decided to be such by the highest judicial tribunal known to the laws of Great Britain. The refusal for which the suit was brought took place after this decision; and the learned Lords, by whom the case was decided, held that the act of refusal, under such circumstances, was to be regarded as willful, and with knowledge; that the refusal to obey the lawful decree of a court of justice was a wrong for which the party, who had sustained injury by it, might maintain an action, and recover damages against the wrong-doer. This case, therefore, is in no respect in conflict with the principles above stated; nor with the rule laid down in the case of *Gidley* v. *Ld. Palmerston*.

In the case before us the settlement of the accounts of the plaintiffs properly belonged to the Postoffice Department, of which the defendant was the head. As the law then stood it was his duty to exercise his judgment upon them. He committed an error in supposing that he had a right to set aside allowances for services rendered upon which his predecessor in office had finally decided. But as the case 99*] *admits that he acted from a sense of public duty and without malice, his mistake in a matter properly belonging to the department over which he presided can give no cause of action against him.

We proceed to the fifth count. But before we examine the cause of action there stated, it will be proper to advert to the principles settled by this court in the case of the *mandamus* hereinbefore referred to. The court in that case, speaking of the nature and character of the proceeding by *mandamus*, which had been fully argued at the bar, said that it was an action or suit brought in a court of justice, asserting a right, and prosecuted according to the forms of judicial proceeding; and that a party was entitled to it when there was no other adequate remedy; and that, although in the case then before them the plaintiffs in the court below might have brought their action against the defendant for damages on account of his refusal to give the credit directed by the act of Congress, yet as that remedy might not be adequate to afford redress, they were, as a matter of right, entitled to pursue the remedy by *mandamus*.

Now, the former case was between these same parties, and the wrong then complained of by the plaintiffs, as well as in the case before us on the fifth count, was the refusal of the defendant to enter a credit on the books of the Postoffice Department for the amount awarded by the solicitor. In other words, it was for the refusal to pay them a sum of money to which they were lawfully entitled. The credit on the books was nothing more than the form in which the act of Congress, referring the dispute to the solicitor, directed the payment to be made. For the object and effect of that entry was to discharge the plaintiffs from so much money, if on other accounts they were debtors to that amount; and if no other debt was due from them to the United States, the credit entitled them to receive at once from the government the amount credited. The action of *mandamus* was brought to recover it, and the plaintiffs show by their evidence that they did recover it in that suit. The gist of the action in that case was the breach of duty in not entering the credit, and it was assigned by the plaintiffs as their cause of action. The cause of action in the present case is the same; and the breach here assigned, as well as in the former case, is the refusal of the defendant to enter this credit. The evidence to prove the plaintiffs' cause of action is also identical in both actions. Indeed, the record of the proceedings in the *mandamus* is the testimony relied on to show the refusal of the Postmaster-General, and the circumstances under which he refused, and the reasons he assigned for it. But where a party has a choice of remedies for a wrong done to him, and he elects one, and proceeds to judgment, and obtains the fruits of his judgment, can he, in any case, afterwards proceed in another suit for the same cause of action? It is true that in the suit by *mandamus* the plaintiffs could recover nothing beyond the amount awarded. But they knew that, when they elected the remedy. If the goods of a *party are forcibly [*100 taken away under circumstances of violence and aggravation, he may bring trespass, and in that form of action recover not only the value of the property, but also what are called vindictive damages—that is, such damages as

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the jury may think proper to give to punish the wrong-doer. But if instead of an action of trespass he elects to bring trover, where he can recover only the value of the property, it never has been supposed that, after having prosecuted the suit to judgment and received the damages awarded him, he can then bring trespass upon the ground that he could not in the action of trover give evidence of the circumstance of aggravation, which entitled him to demand vindictive damages.

The same principle is involved here. The plaintiffs show that they have sued for and recovered in the *mandamus* suit the full amount of the award; and having recovered the debt they now bring another suit upon the same cause of action, because in the former one they could not recover damages for the detention of the money. The law does not permit a party to be twice harassed for the same cause of action; nor suffer a plaintiff to proceed in one suit to recover the principal sum of money, and then support another to recover damages for the detention. This principle will be found to be fully recognized in 2 Bl. Rep., 830, 831; 5 Co. 61 (*Sparry's* case); Com. Dig., tit. *Action*, K. 3. And in the case of *Moses* v. *Macfarlan* (2 Burr., 1010) Ld. Mansfield held that the plaintiff having a right to bring an action of *assumpsit* for money had and received to his use on a special action on the case of an agreement, and having made his election by bringing *assumpsit*, a recovery in that action would bar one on the agreement, although in the latter he could not only recover the money claimed in the action of *assumpsit*, but also the costs and expenses he had been put to. The case before us falls directly within the rule stated by Ld. Mansfield.

This objection applies with still more force, when, as in this instance, the party has proceeded by *mandamus*. The remedy in that form, originally, was not regarded as an action by the party, but as a prerogative writ commanding the execution of an act, where otherwise justice would be obstructed; and issuing only in cases relating to the public and the government; and it was never issued when the party had any other remedy. It is now regarded as an action by the party on whose relation it is granted, but subject still to this restriction, that it cannot be granted to a party where the law affords him any other adequate means of redress. Whenever, therefore, a *mandamus* is applied for, it is upon the ground that he cannot obtain redress in any other form of proceeding. And to allow him to bring another action for the very same cause after he has obtained the benefit of the *mandamus*, would not only be harassing the defendant with two suits for the same thing, but would be inconsistent with the grounds upon which he asked for the *mandamus*, and inconsistent also with the decision of the court which awarded it. If he had 101*] *another remedy, which was incomplete and inadequate, he abandoned it by applying for and obtaining the *mandamus*. It is treated both by him and the court as no remedy. Such was obviously the meaning of the Supreme Court in the opinion delivered in the former suit between these parties, where they speak of the action on the case, and give him the *mandamus*, because the other form of action was inadequate to redress the injury, and they would not therefore require the plaintiffs to pursue it. And they speak of the action on the case as an alternative remedy; not as accumulative and in addition to the *mandamus*. In the case in 9 Clark & Finnelly, 251, hereinbefore mentioned upon another point, the Attorney-General in his argument said that no other action would lie in any case where the party was entitled to a *mandamus*. And Ld. Campbell, in giving his judgment, said that this proposition was not universally true; and at any rate applied only to the original grant of the *mandamus*, and not to the remedy for disobeying it; and that no case had been cited to show that an action would not lie for disobedience to the judgment of the court. This remark upon the proposition stated by the Attorney-General shows clearly that in his judgment you could not resort to a *mandamus* and to an action on the case also for the same thing. If the Postmaster-General had refused to obey the *mandamus*, then, indeed, an action on the case might have been maintained against him. But the present suit is not brought on that ground. No question is presented here as to the necessity of pleading a former recovery in bar, nor as to the right to offer it in evidence upon the general issue. The point in the Circuit Court did not arise upon the pleading of the defendant, nor upon evidence offered by him; but upon the case made by the plaintiffs, in which, by the same evidence that proved their original cause of action, they also proved that they had already sued the defendant upon it, and recovered a judgment, which had been satisfied before this suit was brought. And we think upon such evidence the instruction first above mentioned ought to have been given on this (the fifth) count, as it appeared by the plaintiffs' own showing that they had already recovered satisfaction for the injury complained of in their declaration.

The case before us is altogether unlike the cases referred to in the argument, where, after a party has been admitted or restored to an office, he has maintained an action of *assumpsit* or case to recover the emoluments which had been received by another, or of which he had been deprived during the time of his exclusion. In those cases the cause of action in the *mandamus* was the exclusion from office; and the suit afterwards brought was to recover the emoluments and profits to which his admission or restoration to office showed him to have been legally entitled. The action of *assumpsit* or case would not have restored him to the office, nor have secured his right to the profits. But in the case before the court, if this action had been resorted to in the first instance, instead of the *mandamus*, the plaintiffs *could [*102 have recovered the amount due on the award, and the damages arising from its unlawful detention must have been assessed and recovered in the same verdict. Clearly, they could not have maintained one action on the case for the amount due, and then brought another to recover the damages; and this, not because both were actions on the case, but because they could not be permitted to harass the defendant with two suits for the same thing, no matter

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by what name the actions may be technically called, nor whether both are actions on the case, or one of them called a *mandamus*.

But if this action could have been maintained, we think that most of the evidence admitted by the Circuit Court to enhance the damages ought not to have been received. It consisted chiefly of discounts and interests paid by the plaintiffs before the award of the solicitor, and of expenses on journeys and tavern bills, and fees paid to counsel for prosecuting their claim before Congress and the courts. It appears by the record that before this evidence was offered the court had instructed the jury, that malice on the part of the defendant was not necessary to support the action; and it appears, also, that the jury, which found the verdict and assessed the damages, declared that their verdict was not founded on any idea that the defendant did the acts complained of, and for which they gave the damages of $11,000, with any intent other than a desire faithfully to perform the duties of his office of Postmaster-General, and to protect the public interests committed to his charge, and that the damages were given on the ground that his acts were illegal, and that the sum given was the amount of the actual damage estimated to have resulted from his illegal acts.

We have already said that although this action is in form for a tort, yet in substance and in truth it is an action for the nonpayment of money. And upon the principles upon which it was supported by the court, and decided by the jury, if there had been no proceeding by *mandamus* to bar the action, the legal measure of damages upon the fifth count would undoubtedly have been the amount due on the award, with interest upon it.

The testimony, however, appears to have been offered chiefly under the first count, because the items for interest paid, and traveling and tavern expenses, for the most part, bear dates before the award, and also a portion of the fees of counsel. The evidence was certainly inadmissible under this count, since, for the reasons already given, no action could be maintained upon it, if there had been no previous proceeding by *mandamus*, and consequently no damages could be recovered upon it. But independently of this consideration, and even if the action could have been sustained, there are insuperable objections to the admission of this testimony. In the first place, no special damages are laid in the declaration; and in that form of pleading no damages are recoverable, but such as the law implies to have accrued from the wrong complained of (1 Chit. Pl., 103*] 385); and *certainly the law does not imply damages of the description above stated. But we think the evidence was not admissible in any form of pleading. In the case of *Hathaway* v. *Barrow* (1 Camp., 151), in an action on the case for a conspiracy to prevent the plaintiff from obtaining his certificate under a commission of bankruptcy, the court refused to receive evidence of extra costs incurred by the plaintiff in a petition before the Chancellor. In the case *Jenkins* v. *Beddulph* (4 Bingh., 160), in an action against a sheriff for a false return, the court said they were clearly of opinion that the plaintiff was not entitled to recover the extra costs he had paid; that, as between the attorneys and their clients, the case might be different, because the attorney might have special instructions, which may warrant him in incurring the extra costs, but that in a case like the one before them the plaintiff could only claim such costs as the prothonotary had taxed. And in the case of *Grace* v. *Morgan* (2 Bingh. N. C. 534), in an action for a vexatious and excessive distress, the plaintiff was not allowed to recover as damages the extra costs in an action of replevin which the plaintiff had brought for the goods distrained; and the case in 1 Stark., 306 in which a contrary principle had been adopted was overruled.

These were stronger cases for extra costs than the one before us. The admission of the testimony in relation to the largest item in these charges, that is, for interest paid by the plaintiffs, amounting to more than $9,000, is still more objectionable. For it appears from the statement in the exception that the very same account had been laid before the solicitor, and had induced him, as he states in his report to Congress, to make the plaintiffs an allowance in his award for interest, amounting to $6,893 93. And to admit this evidence again in this suit was to enable the plaintiffs to recover twice for the same thing; and after having received from the United States what was deemed by the referee a just compensation for this item of damage, to recover it over again from the defendant.

There are several other questions stated in the record, but it is needless to remark upon them, as the opinions already expressed dispose of the whole case.

The judgment of the Circuit Court must be reversed.

[For the dissenting opinion of *Mr. Justice* McLEAN, see App., p. 800.]

S. C., 12 Pet., 524, which affirms 5 Cranch C. C., 27; 13 Pet., 607; *Post*, 103.
Cited—4 How., 149; 12 How., 291; 24 How., 97; 1 Wall., 386; 12 Otto, 395, 675; McAll., 287, 288.

Ex-Parte DORR.

No U. S. Court or judge can issue habeas corpus to bring up prisoner under State court execution as a witness—writ of error without authority of party concerned denied.

Neither the Supreme Court, nor any other court of the United States, or judge thereof, can issue a *habeas corpus* to bring up a prisoner, who is in custody under a sentence or execution of a State court for any other purpose than to be used as a witness.

An application for a writ of error, prayed for without the authority of the party concerned, but at the request of his friends, cannot be granted.

*MR. TREADWELL moved for a writ [*104] of *habeas corpus* to bring up Thomas W. Dorr, of Rhode Island, under the following circumstances:

NOTE.—*As to habeas corpus, when it may issue and when it may not, and from what courts and judges and what may be inquired into on,* see note to United States v. Hamilton, 3 Dall., 17.

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He stated that Dorr was charged with levying war against the State of Rhode Island, and sentenced to the State prison for life, in June, 1844; that upon the trial a point of law was raised, whether treason could be committed against a State, but the court would not permit counsel to argue it; that a motion was made to suspend the sentence until a writ of error could be sued out to bring the case before the Supreme Court of the United States, but the court refused to suspend it. He then read affidavits to show that personal access to Dorr was denied, in consequence of which his authority could not be obtained for an application for such a writ. The present motion for a *habeas corpus* was based upon this fact. There was no other mode of ascertaining whether or not it was Dorr's wish that his case should be brought up to this court. Under the 14th section of the Judiciary Act, the power to issue writs of *habeas corpus* was vested in the judges of the United States courts. (3 Story's Com., on *Jurisdiction*, 588, 590, 594, 595, 603, 608, 624, 625.)

The case was in itself proper to be brought up under the 25th section of the Judiciary Act, if the decision of the State court was thought to be inconsistent with the Constitution of the United States.

Mr. Justice McLEAN delivered the opinion of the court:

Thomas W. Dorr was convicted before the Supreme Court of Rhode Island, at March term, 1844, of treason against the State of Rhode Island, and sentenced to the State prison for life. And it appears from the affidavits of Francis C. Treadwell, a counselor at law of this court, and others, that personal access to Dorr, in his confinement, to ascertain whether he desires a writ of error to remove the record of his conviction to this court, has been refused. On this ground the above application has been made.

Have the court power to issue a writ of *habeas corpus* in this case? This is a preliminary question, and must be first considered.

The original jurisdiction of this court is limited by the Constitution to cases affecting ambassadors, other public ministers, and consuls, and where a State is a party. Its appellate jurisdiction is regulated by acts of Congress. Under the common law, it can exercise no jurisdiction.

As this case cannot be brought under the head of original jurisdiction; if sustainable, it must be under the appellate power.

The 14th section of the Judiciary Act of 1789 provides, "that the courts of the United States shall have power to issue writs of *scire facias*, *habeas corpus*, and all other writs not specially provided for by statute, which may be necessary for the exercise of their respective jurisdictions, and agreeable to the principles and usages of law. And that either of the justices of the Supreme Court, as well as judges of the [*105] *district courts, shall have power to grant writs of *habeas corpus* for the purpose of an inquiry into the cause of commitment: Provided that writs of *habeas corpus* shall in no case extend to prisoners in jail, unless where they are in custody under or by color of the authority of the United States, or are committed for trial before some court of the same, or are necessary to be brought into court to testify."

In the trial of Dorr, it was insisted that the law of the State under which he was prosecuted was repugnant to the Constitution of the United States. And on this ground a writ of error is desired, under the 25th section of the Judiciary Act above named. That, as the prayer for this writ can only be made by Dorr or by some one under his authority, and as access to him in prison is denied, it is insisted that the writ to bring him before the court is the only means through which this court can exercise jurisdiction in his case by a writ of error. Even if this were admitted, yet the question recurs, whether this court has power to issue the writ to bring him before it. That it has no such power under the common law is clear. And it is equally clear that the power nowhere exists, unless it be found in the 14th section above cited.

The power given to the courts, in this section, to issue writs of *scire facias*, *habeas corpus*, &c., as regards the writ of *habeas corpus*, is restricted by the proviso to cases where a prisoner is "in custody under or by color of the authority of the United States, or has been committed for trial before some court of the same, or is necessary to be brought into court to testify." This is so clear, from the language of the section, that any illustration of it would seem to be unnecessary. The words of the proviso are unambiguous. They admit of but one construction. And that they qualify and restrict the preceding provisions of the section is indisputable.

Neither this nor any other court of the United States, or judge thereof, can issue a *habeas corpus* to bring up a prisoner, who is in custody under a sentence or execution of a State court, for any other purpose than to be used as a witness. And it is immaterial whether the imprisonment be under civil or criminal process. As the law now stands, an individual, who may be indicted in a circuit court for treason against the United States, is beyond the power of federal courts and judges, if he be in custody under the authority of a State.

Dorr is in confinement under the sentence of the Supreme Court of Rhode Island, consequently this court has no power to issue a *habeas corpus* to bring him before it. His presence here is not required as a witness, but to signify to the court whether he desires a writ of error to bring before this tribunal the record of his conviction.

The counsel in this application prays for a writ of error, but as it appears from his own admission that he does not act under the authority of Dorr, but at the request of [*106 his friends, the prayer cannot be granted. In this view it is unnecessary to decide whether the counsel has stated a case, which, with the authority of his client, entitles him to a writ of error.

The motion for a habeas corpus *is overruled.*

Cited—3 How., 323; 5 How., 191; 14 How., 132; 20 How., 597; 1 Biss., 12; Deady, 314, 315; 1 Dill., 411; Woolw., 328; 1 Wood. & M., 448; 8 Bank. Reg., 535.

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EDWARD CURTIS, *Plaintiff in Error*,
v.
WILLIAM MARTIN AND CHARLES A. COE, *Defendants.*

Duties upon imports—descriptive terms used in act construed according to commercial usage at time.

An act of Congress imposing a duty upon imports must be construed to describe the article upon which the duty is imposed, according to the commercial understanding of the terms used in the law in our own markets at the time when the law was passed.

The duty, therefore, imposed by the Act of 1832 upon cotton bagging, cannot properly be levied upon an article which was not known in the market as cotton bagging in 1832, although it may subsequently be called so.

THIS case was brought up by a writ of error from the Circuit Court of the United States for the Southern District of New York.

It was an action brought in the court below by Martin & Co. against Curtis, the collector, for return of duties upon certain importations of gunny cloth, from Dundee, in Scotland, from April to September, 1841.

The facts in the case are clearly stated in the following brief of *Mr. Nelson*, Attorney-General, who argued the case on behalf of Curtis, the plaintiff in Error:

This was an action brought by the defendants in error against Curtis, as collector of the port of New York, to recover back the sum of $4,543.17 of duties, levied by him on a certain article as cotton bagging, which, they contended, was gunny bagging, a non-enumerated article in the tariff of 1832, and therefore duty free; and the question in the cause was, whether this kind of bagging was cotton bagging within the meaning of the revenue laws. The duties were paid under written protest annexed to each entry.

By the tariff of 1832 it is enacted, that "on cotton bagging three and a half cents a square yard, without regard to the weight or width of the article," of duty shall be collected. This duty, modified by the Compromise Act, was chargeable when the goods were imported.

The imported article, used as bagging for the packing of cotton, is principally manufactured in the town of Dundee, in Scotland, and, like the bagging of Kentucky, was made of hemp, until the material of which the gunny cloth of India is manufactured began to be used. Bagging for cotton has also been made of cotton.

Gunny (Bengalee Gúni) is a coarse, strong
107*] sackcloth, manufactured *in Bengal, for making into bags, sacks, and packing generally, the material being the fibre of two plants, natives of India, as hemp originally was. (See article "Gunny," in McCulloch's Dictionary of Commerce, American edition, Vol. I., p. 722.)

Gunny bagging is now manufactured in Scotland, as well as in India; and it was admitted, on the part of the defendants in error, that the importations in question came from Dundee, and were made into New York between the months of April and September, 1841.

It was established, by the testimony on both sides, that gunny cloth was imported largely into this country, solely for bagging for the packing of cotton, since 1835. In commercial language it has since been known as cotton ba
ging; but in 1832, at the time of the passing
the tariff of that year, it was not so know
The counsel for the collector contended, at t
the trial in the court below, that if the artic
was, in commercial understanding, known
cotton bagging at the time of its importation,
was subject to the duty, and that the term cott
bagging signified any fabric, without regard
the materials of which it is composed, that w
used to bale or cover cotton, and prayed t
court so to charge the jury, which his honor r
fused; but, on the contrary, charged that t
point upon which the case turned was, wheth
the article in question was known as cott
bagging in the year 1832, when the Tariff A
was passed. He further charged that it was
settled rule of construction of revenue laws, i
posing duties on articles of a specified denom
nation, to construe the article according to t
designation of such articles as understood a
known in commerce, and not with reference
the material of which they may be made, or t
use to which they might be applied; nor oug
such laws to be construed as embracing all ar
cles which might be applied to the same u
and purpose as the specific article. If it h
been the intention of Congress to impose t
duty upon all articles used for cotton baggin
the language of the act would have been diff
ent, and in terms prospective, adapted to su
purpose; that it had been argued on the part
the United States that the duty was intend
to be laid on all articles used for cotton baggi
because the duty is laid on cotton bagg
"without regard to weight or measure;"
that the terms "weight and measure" were
tended to apply to different materials then
use for bagging cotton, such as hemp, flax, a
sometimes cotton cloth, &c., and not to a
new articles that might thereafter be applied
that use; so that the whole question w
whether gunny cloth was, in commercial und
standing, known as cotton bagging when
law was passed laying the duty, in 1832.
was not, they would find for the plaintiffs;
was, they would find for the defendant.
which charge, in every respect, the defenda
counsel excepted.

The jury found for the plaintiffs, now
fendants in error.

*The cause now comes up on a writ [*1
of error to this court, and for error it is
signed:

That the judge ought to have charged
jury that the Act of 1832 was prospective;
that the Legislature, in using the term "co
bagging," without distinguishing the mate
of which it was made, meant that all artic
which thereafter should be imported for
purpose should be subject to duty; and
gunny bagging, being known among merch
as cotton bagging at the time of the importa
of the bagging in question, was subject
duty.

Mr. Lord, for defendants in error, said
the points in the case were the following:

1. That if gunny cloth was at the time of
passage of the Act of July 14th, 1832, in
mercial understanding, known as cotton
ging, it was liable to the duty demanded u
the 14th clause of the 2d section of the act.

2. But if not so known at the time of

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nage of such law, then it was not liable to duty on cotton bagging.

Whereupon he contended for the two following propositions, viz.:

1st. Under laws imposing duties, articles are to be charged solely according to their commercial designation at the time of the passage the law, and that whether the designation be a class or of individual articles. For this he ed 1 Story's R., 341 (*Bacon* v. *Bancroft*), , 642 (*Lee* v. *Lincoln*), 9 Wheat., 434, 438 *ited States* v. *200 chests of tea*), 8 Peters, 272 *ited States* v. —— *sugar*), 1 Sumner, 159 *ited States* v. *Breed*), 10 Peters, 272 (*Elliott Swartwout*).

2d. The construction claimed here by the orters is fully admitted by the government the Act of August 30th, 1842, whereby cotbagging and gunny cloth are subjected, as inct articles, to different rates of duty. (Acts 7th Congress, 2d session, p. 180, section 3, e 3.)

Mr. Chief Justice TANEY delivered the opinof the court:

This case comes before the court upon a writ ror directed to the Circuit Court for the thern District of New York. The action brought by the defendants in error against plaintiff, who was the collector of the port ew York, to recover back $4,500, which been paid, under protest, as duties upon in goods imported into the port of New k, in April, 1841. The goods in question gunny cloths, and were charged by the ctor as cotton bagging.

he defendants in error offered evidence to that, in 1832, when the law passed imng the duty on cotton bagging, the article estion was not used or known as cotton ging; that it was then only seen in the form gs for India goods; that the first importaof gunny cloth, to be used as cotton bagwas in 1834. It is made from the yute

he plaintiff in error proved that these goods, 0*] at the time of the *importation, were n in commerce as cotton bagging; that they made of the proper width for that purand for several years before this importa, gunny cloths had been imported and used otton bagging; and that the goods in ques were imported from Dundee, in Scotland. pon this evidence, the counsel for the deant contended that if the jury found that article gunny cloth was, in commercial rstanding, known as cotton bagging at the of its importation, it was subject to a duty; that the term "cotton bagging," according e commercial understanding of the phrase, ded any fabric, without regard to the ma of which it was made, that was used to or cover cotton, and prayed the court so to e the jury.

is honor the judge refused so to charge the ; but, on the contrary thereof, charged that point upon which this case turns is for the ion of the jury, viz.: whether the article estion in this case was known as cotton ging in the year 1832, when the Tariff Act passed. It has long been a settled rule of struction of revenue laws, imposing duties articles of a specified denomination, to construe the article according to the designation of such article, as understood and known in commerce, and not with reference to the materials of which they may be made, or the use to which they might be applied. Nor ought such laws to be construed as embracing all articles which might subsequently be applied to the same use and purpose as the specific article. If it had been the intention of Congress to impose the duty upon all articles used for bagging cotton, the language of the act would have been different, and in terms prospective, adapted to such purpose. It has been argued, on the part of the United States, that the duty was intended to be laid on all articles used for bagging cotton, because the duty is laid on cotton bagging "without regard to weight or measure." These terms, "weight or measure," were intended to apply to different materials then in use for bagging cotton, such as hemp, flax, and sometimes cotton cloth, &c., and not to any new articles that might thereafter be applied to that use. So that the whole question of fact for the jury is whether gunny cloth was, in commercial understanding, known as cotton bagging when the law was passed laying the duty, in 1832. If it was not, they will find for the plaintiffs; if it was, they will find for the defendant.

To this charge, in every respect, the defendant's counsel excepted.

The jury found a verdict for the plaintiffs for $4,543.17, and six cents costs.

The question brought up by this exception cannot now be considered as an open one. In the case of *The United States* v. *200 Chests of Tea* (9 Wheat., 438), the court decided that in imposing duties Congress must be understood as describing the article upon which the duty is imposed according to the commercial understanding of the terms used in the law, in our own markets. This doctrine *was re-af- [*110 firmed in the case of *The United States* v. *112 Casks of Sugar* (8 Peters, 277), and again in 10 Peters, 151, in the case of *Elliott* v. *Swartwout*. It follows that the duty upon cotton bagging must be considered as imposed upon those articles only which were known and understood as such in commerce in the year 1832, when the law was passed imposing the duty.

In the case before us, the Circuit Court followed the rule of construction above stated, and it has been followed also in every circuit where the question has arisen.

The judgment is therefore affirmed.

Cited—4 How., 334; 7 How., 797; 1 Otto, 363; 2 Otto, 470; 6 Otto, 111; 3 Blatchf., 394.

SAMUEL SWARTWOUT, *Plaintiff in Error*,

v.

JOHN GIHON ET AL.

Contesting payment of duties—Notice need not be in writing.

When an importer means to contest the payment of duties, it is not necessary for him to give a written notice thereof to the collector.

NOTE.—*As to voluntary payments, and payments under protest, and when money illegally exacted may be recovered back*, see note to Bank of United States v. Bank of Washington, 6 Pet., 8.

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The question of notice is a fact for the jury, and it makes no difference, for the purposes for which it is required, whether it is written or verbal.

THE facts in this case are sufficiently set forth in the following opinion.

Mr. Chief Justice TANEY delivered the opinion of the court:

This case comes before the court upon a writ of error directed to the Circuit Court for the Southern District of New York. The action was brought by the defendants in error against the plaintiff to recover back certain sums of money paid to him as duties on brown linens, imported into New York in 1836, of which port he was at that time the collector. Some of these duties were paid under protest in writing, and some without any written protest or notice, but evidence was offered for the purpose of showing that the defendants in error verbally notified the collector that the duties charged on all of these goods would be contested. The goods in question were unbleached linens, and had been charged with duty as colored; and the jury found a verdict against the collector for the amount claimed.

At the trial, the court instructed the jury that a written notice of the objections to pay the duties was not necessary, and that it was sufficient if a verbal notice was brought home to the collector; but that the jury must be satisfied that such notice was brought home to him. To this direction the plaintiff in error excepted; and it is upon this point only that the case comes before this court.

The only object of the notice was to warn the collector that the party meant to hold him personally responsible for the money, whether he paid it over or not. It was a question for the jury to decide whether notice was or was not given; and it could make no difference, for the purposes for which it was required, whether it was written or verbal.

We think the charge of the court was clearly right, and the judgment is therefore affirmed.

Cited—4 How., 332.

111*] *LESSEE OF HENRY WALLER, Assignee of the Bankrupt Estate of FRANCIS A. SAVAGE, *Plaintiff*,

v.

JAMES AND JOSEPH BEST.

Lien of Creditor in Kentucky attaches on delivery of a fi. fa. to sheriff.

In Kentucky, the creditor obtains a lien upon the property of his debtor by the delivery of a *fi. fa.* to the sheriff; and this lien is as absolute before levy as it is afterwards.

Therefore, a creditor is not deprived of this l by an act of bankruptcy on the part of the deb committed before the levy is made, but after execution is in the hands of the sheriff.

THIS case came up from the Circuit Court the United States for the District of K tucky, on a certificate of division in opinion tween the judges thereof.

The following is the entire record in case:

"The following statement of questions points of law which arose in this case, and adjournment thereof into the Supreme Co of the United States for decision, was orde to be entered, to wit:

"Savage had the title to the land; the pla iff claimed under the decree of his bankrupt the defendant, under a sheriff's sale under execution.

"The act of bankruptcy of savage committed on the 27th April, 1842; the petit of his creditors was filed against him in District Court on the 25th day of June, 18 and he was declared a bankrupt on the 26th October, 1842; the plaintiff was appointed assignee, and this is his title.

"An execution of *fieri facias* on a judgm against the estate of Savage was delivered to sheriff on the 9th of April, 1842, before the of bankruptcy, and was levied on the land the ——— day of ——— before the petiti but after the act of bankruptcy the defend purchased at the sheriff's sale, had his d and this was his title.

"The question was, has the plaintiff, by decree of bankruptcy and its relations bac the act of bankruptcy, the elder and better t Or has the defendant, by the prior delivery the execution into the hands of the sheriff, his levy of it before the petition was filed, prior and superior title?

"On this question the judges were divi and opposed in opinion; whereupon, on mo of the counsel of the plaintiff, the questio stated and ordered to be certified to the Supr Court for decision."

Messrs. Morehead and *B. Monroe* for plaintiff.

Mr. Richard French for the defendants:

The argument on behalf of the plaintiff this:

Two questions arise: 1st. Did Best, the te in possession and the plaintiff in the execu under which the sale of land was made, acq any lien, such as is recognized by the latter viso *of the 2d section of the bankrupt [*1 law, before the execution was in fact levied

2d. If any such was acquired, is it effec against the rights of the assignee of the b

NOTE.—*When and to what extent a judgment is a lien upon lands.*

At common law, a judgment was no lien on the real estate of the defendant. But as his land was made liable to satisfy the judgment under the *elegit*, this created a lien. Shrew v. Jones, 2 McLean, 78; Scriba v. Deanes, 1 Brock. Marsh., 166.

A judgment has relation to the first day of the term at which it was rendered; and from that time it constitutes a lien on the lands of the defendant lying within the jurisdiction of the court. Sturges v. B'k of Cleveland, 3 McLean, 140; S. C., 1 West. Law J., 207; B'k of Cleveland v. Sturges, 2 McLean, 341; Rockwell v. Hanna, 4 McLean, 554.

All judgments rendered at the same term l equal liens on the real estate of the defend however the executions have been issued levied, provided the levy has been made within year. 2 Ohio, 395; 3 *Id.*, 366; 5 *Id.*, 52; McLea Rockey, 3 McLean, 235.

The lien of a judgment on the lands of the det created by statute, and limited to a certain pe of time, is unaffected by the circumstance of plaintiff not proceeding upon it until a subsequ lien has been obtained and carried into execut Rankin v. Scott, 12 Wheat., 177; Green v. Alle Wash. C. C., 280; Griswold v. Hill, 2 Paine, 492.

If a judgment become dormant, its lien is lo

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rupt, when the act of bankruptcy was committed before the levy of the execution? Or could the execution, in virtue of the lien given by the State law, which was in the hands of a sheriff, but not levied before an act of bankruptcy, be afterwards levied, and the property sold?

These questions render it necessary to look to the character of the lien given by the statutes of Kentucky in favor of execution creditors, and when that lien commences. The statute of Kentucky (1 Stat. Law, 636) provides "that no writ of *fieri facias*, or other writ of execution, shall bind the estate of the defendant or defendants but from the time such writ shall be delivered to the sheriff or other proper officer to be executed." What is the import of the term "bind," as used in the statute? That it has some binding effect is evident, but to what extent? Is it a lien within the meaning of the proviso of the bankrupt law? It is insisted that it is not, but is only so far binding as to prevent such disposition of the property by the defendant as will defeat the execution so in the hands of the officer; and does not so far bind the property as to prevent other execution creditors from levying their executions upon the debtor's property. (See *Tubb* v. *Harris*, 4 Bibb, 229; and *Kelly* v. *Haggin*, 2 J. J. Marshall, 212.) In the latter case the court use this language: "The only object of attaching a lien to an execution is to prevent the debtor from defeating the creditor by alienating or embarrassing his estate. The reason of the lien, in such a case, does not apply to competition between creditors, and *cessante ratione cessat lex*, moreover, it is but sheer justice to give the preference to the creditor who by his superior industry and vigilance shall have procured the first levy on the debtor's estate." This interpretation of the statute shows what is the character of that binding spoken of in the statute, and that it does not amount to the lien referred to in the bankrupt law until the execution be in fact levied, when it may be admitted that it amounts to such lien.

2d. The proceedings against Savage was at the instance of a creditor. The act of bankruptcy complained of was committed before any levy of the execution, though the filing of the petition and the decree were subsequent to the levy of the execution of Best. At common law a *fieri facias* had relation to its *teste*, but by our statute only from the day of its delivery to the officer. According to the adjudications of the English courts on the bankrupt laws of that country anterior to the 36 George III. and the 6 George IV., the uniform and well settled doctrine was that the assignee had a right to overhaul all the transactions of the bankrupt subsequent to the first act of bankruptcy, and recover all moneys or property which passed through his hands; but by the 18th section of the 6 George IV. "all *bona fide* trans- [*113 actions entered into more than two calendar months before the date and issuing the commission against the bankrupt, and all executions and attachments against his lands or chattels *bona fide* executed or levied more than two calendar months before the issuing of the commissions," are made valid, "notwithstanding any prior act of bankruptcy, provided the parties had no notice of it."

Our bankrupt law has this proviso in the 2d section (1st proviso): "That all dealings and transactions by and with the bankrupt, *bona fide* made and entered into more than two months before the petition filed against him or by him, shall not be invalidated by this act, provided that the other party to any such dealings or transactions had no notice of a prior act of bankruptcy, or of the intention of the bankrupt to take the benefit of this act."

These provisos have no bearing upon the questions involved. No reference is here made to any executions or attachments, as in the English statute, but they are left to be governed by the last proviso of the 2d section.

The binding effect of writs of *fieri facias* in England, by the common law, was from the *teste;* by the statutes of Kentucky it is from the delivery to the sheriff; but in the character of this binding effect there is believed to be no other distinction but in respect of the time of its commencement. It may be proper, then, to learn what was the course of adjudication by the English courts upon this question. In *Cooper* v. *Chitty* (2 W. Black., 65; 1 Burr., 20), it is said if a sheriff take goods of a bankrupt in execution after the act of bankruptcy and before commission issued, and sell them after the commission, trover will lie against him.

Again, the sheriff seized the goods of a defendant under a *fieri facias*, and sold and delivered them to the judgment creditor, in satisfac-

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against a mortgage executed by the judgment creditor during the continuance of the judgment lien. 5 Ohio, 178; 10 *Id.*, 403; 15 *Id.*, 435; Tracy v. Tracy, 5 McLean, 456.

A judgment creditor who proves his debt against a bankrupt, thereby surrenders his judgment as a lien on the lands of the bankrupt. Briggs v. Stephens, 7 Law Rep., 281.

Judgment liens protected under the Bankrupt Act of 1841. McLean v. Lafayette B'k, 3 McLean, 587; S. C., 1 West. Law J., 300; Aff'd, 13 How., 151; Kemper v. Bavey, 5 McLean, 507.

Judgments and decrees rendered in the courts of the United States are liens upon the defendant's real estate in all cases where similar judgments or decrees of the State courts are made liens by the law of the State. Ward v. Chamberlain, 2 Black, 430; S. C., 5 Am. Law Reg., 330; 9 *Id.*, 171; Lombard v. Bayard, 1 Wall., Jun., C. C., 196; 6 How. (Miss.), 252; 7 *Id.*, 324; Williams v. Benedict, 8 How., 107.

In those States where a judgment in the State courts creates a lien, a judgment in a court of the United States has that operation throughout the district to which its jurisdiction extends, and State legislation, modifying the lien of judgments, or restricting their operation, cannot affect the lien of judgment in the courts of the United States. Massingill v. Downs, 7 How., 760; Konig v. Bayard, 2 Paine, 251.

Judgments and decrees rendered in the United States courts, and duly recorded, become liens upon land of the judgment debtor lying within the district where they are rendered. It is not necessary they should be registered in any State office. Cropsey v. Crandall, 2 Blatchf., 341; Crandall v. Cropsey, 10 N. Y. Leg. Obs., 1; Lombard v. Bayard, 1 Wall., Jun., C. C., 196.

Section 967 of U. S. Rev. Stat. does not vest in the court the discretionary power to make an order exempting lands from lien of judgment according to provisions of New York Code of Procedure during pendency of an appeal. Myers v. Tyson, 13 Blatchf., 242.

Judgment is not a lien on lands in Dist. of Columbia which before judgment was rendered was conveyed to trustees with power of sale to secure the payment of certain debts of the grantor specified in the trust deed. Morsell v. First Nat'l B'k, 1 Otto, 357.

Judgment is a lien upon an equity of redemption

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tion of the debt, after a secret act of bankruptcy committed by the defendant, but before the issuing of a commission against him: held, that the seizure and sale of the goods was a wrongful conversion, for which the sheriff was liable in an action of trover at the suit of the assignee subsequently chosen. (*Balme* v. *Hutton*, 3 M. & Scott, 1, 9 Bingh., 471, 1 C. & M., 262; reversing S. C., Tyr., 17; 2 C. & J., 19; 2 Y. & J., 101, held by seven judges K. B. and C. P. (Gaselie, *J., dissentient); Price* v. *Helyar*, 1 Bingh., 597, 1 M. & P., 541; S. P., *Porter* v. *Starkie*, 1 M. & S., 260; *Blogg* v. *Phillips*, 2 Camp., 129.)

Farther, in *Lazarus* v. *Waithman* (5 Moore, 313), where a trader committed an act of bankruptcy on the 9th November, and the sheriff took his goods in execution on the 15th November, and sold them on the 21st December, and a commission issued on the 23d, and an assignment made on the 6th January following, it was held "that the assignee might maintain trover against the sheriff," although he had sold before the assignment was made, as the **114***] bankrupt's property *vested in him by such assignment from the act of bankruptcy by relation.

These authorities are deemed sufficient to show that the binding effect of an execution from its date, in England, was not such as to give the execution creditor any lien or preference over other creditors, unless the execution was in fact levied before the act of bankruptcy; and if not levied, the decree in bankruptcy, by relation, reached back, and effectually passed all the rights of the bankrupt to the assignee, as they existed at the time of the commission of the act of bankruptcy. And there is believed to be nothing in our bankrupt law which requires that it should receive a different interpretation from the English statutes in this particular. The action of some creditor was necessary to bring about the decree in bankruptcy; it is, therefore, the effort of the creditor, not of the defendant in the execution, which brings about the decree. The investiture of the rights of the debtor in the assignee is the act of the law, and the effect of the action of one or more creditors, for his own benefit and that of other creditors; and the result of this conclusion is, that there is a *pro rata* distribution of the bankrupt's property, rather than the appropriation of the whole to a single creditor.

Is the placing the execution in the hands of the sheriff a dealing by and with the bankrupt, to which the first proviso in the 2d section has reference? It is insisted that it is not. The bankrupt has, in that matter, been passive entirely. There has been no act upon his part, which is to acquire sanctity by the lapse of sixty days, spoken of in this proviso. But in this case sixty days had not elapsed; therefore, this proviso is altogether inoperative.

Although when an execution is levied, and a sale made, the title of the purchaser reaches back, and is protected from any effort of the debtor to pass the title of the property; yet it is not so when two executions are out against the same defendant, in the hands of different officers; that which is first levied will hold, though it be youngest in date; and a levy and sale under that which was first in the hands of the officer, but last levied, will be ineffectual to pass any title to the purchaser. This is the law, as understood by the counsel, in contests between execution creditors in Kentucky; and it is insisted that the case of a petitioning creditor in bankruptcy is analogous to that of an execution creditor, and that the filing of the petition by a creditor is tantamount to the levy of an execution: it is a proceeding by which a lien is acquired by the assignee, for the benefit of the general creditors, and will oust any such inchoate lien as that relied on as arising from an execution not in fact levied.

The assignee had his election to sue the sheriff or to sue the purchaser of the land; and having elected to sue the purchaser of the land, who was the plaintiff in the execution levied thereon, and having shown title and right of possession, the judgment should be for the assignee, for the possession of the land.

*Mr. *French*, for defendants: [*115

The question on which the court below divided was, whether the title acquired by purchase under an execution which came to the hands of the sheriff before the act of bankruptcy and was levied after the act of bankruptcy, but before filing of petition in bankruptcy, related back to the time the execution came to the hands of the sheriff, and over

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of real estate from time of its record. First Nat'l B'k v. Morsell, 1 McArthur, 155.

A judgment of U. S. Circuit Court for District of Indiana is a lien from its date on all lands of the defendant within the district, and its lien instantly attaches to subsequently acquired lands, and a sale of them by defendant before execution issues does not devest the lien. As between purchasers from the judgment debtor the purchaser of the subsequently acquired land cannot, as against a prior purchaser of lands on which the judgment became a lien at the moment of its rendition, insist that the officer shall first levy on and sell the lands held by such prior purchaser, before the subsequently acquired lands shall be levied on and sold. Barth v. Makeever, 4 Biss., 206.

Judgment rendered by U. S. Court in one district of Penn. is a lien of real estate of defendant anywhere in the State, notwithstanding judgment is rendered in one district of the State, and real estate is in another. Right of lien is co-extensive with right of execution, which by Rev. Stat., sec. 985, may run and be executed in all parts of the State. Prevost v. Gonell, 5 Reporter, 616; 12 West., Jun., 369.

In Virginia, judgments of U. S. courts in the State need not be recorded to become a lien on real estate, and as against a subsequent purchaser without notice the lien of a judgment of a federal court does not cease, though it is not docketed in accordance with the State law. U. S. v. Humphreys, 1 Hugh., 201; 7 Reporter, 330; 13 West., Jun., 258; 2 Int. Rev. Rec., 201.

In Oregon the lien of a judgment given by sec. 266 of Civil Code of that State, depends upon docketing the judgment. It is a strict legal right, and must stand or fall by the statute which gives it. The entry of the judgment cannot be referred to supply deficiencies or explain ambiguities in the docket. The latter must be complete in itself. Docket giving amount of judgment in figures only without word or sign to show that dollars are meant, creates no lien, and the docket of a judgment payable in coin must state that fact. *In re* Boyd, 16 Bank. Reg., 137, 204; 4 Sawyer, 282.

Where the amount, date, parties to judgment and court in which it was rendered can be made out from the whole entry, it is a sufficient docket. *Ibid.*

As to priority of judgments, see *In re* Rowland, 1 Hugh., 210; Lash v. Hardwick, 5 Reporter, 532; Howard v. Milwaukee, &c., R. R. Co., 7 Biss., 53.

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reached the title of the assignee in bankruptcy; or, was the title of assignee the better title?

The defendants rely on the last proviso in the 2d section of the bankrupt law, which protects "any liens, mortgages, or other securities on property, real or personal, which may be valid by the laws of the States respectively."

That an execution, delivered to the proper officer, constitutes a lien on defendants' property, and that title acquired by purchase under such execution relates back to the time of delivery, is a proposition most clearly settled by judicial decision in Kentucky. In *Million* v. *Riley* (1 Dana, 359) execution was delivered to sheriff June 16th, and was levied August 5th. On the intermediate July 22d defendant sold and conveyed. Held, that execution acquired a lien from June 16th, and that purchaser's title related back to that time. He recovered, therefore, in ejectment against the vendee of execution debtor.

In *Clagett* v. *Force* (1 Dana, 428), after execution delivered, defendant removed a horse to Indiana, and sold him there. The purchaser brought the horse to Kentucky, where he was levied on by the same execution, delivered as aforesaid. Held, that the lien was not lost by the removal to Indiana and the sale there; and, therefore, that the horse was subject to the execution.

Orchard v. *Williamson* (6 J. J. Marshall, 561); after execution delivered, defendant swapped a horse for another. Both were levied on: and held, that both were subject, one by virtue of the lien, and the other as the property of defendant.

Addison, &c., v. *Crow* (5 Dana, 274): levying an execution has the effect of rendering the lien more specific, and of continuing the lien and authority of the sheriff; further than this, it had no greater efficacy than placing the execution in the hands of the sheriff. Neither the delivery nor the levy devests the defendant of title: he may sell and pass the title, still the execution is a lien or charge on the land, and when completed by sale, the title relates back to the delivery, and overreaches all intermediate conveyances.

Hood, &c., v. *Winsatt* (1 B. Monroe): after execution delivered, property was removed to another county. The execution was returned on the return day, and another one issued to the county to which the property had been removed, and was placed in the hands of the sheriff of that county the same day. Held, that the lien was continued from the delivery of the original execution.

Having referred to a few of the Kentucky 116*] cases, which hold, without *the shadow of doubt, that an execution delivered acquires a lien, I shall notice some of the decisions in which the above recited proviso of the 2d section of the bankrupt law is brought under review.

The leading case is that of *Ex-parte Foster* (5 Law Reports, 55).

The question judicially decided in this case was, that by the laws of Massachusetts a party proceeding by attachment did not acquire a lien on the attached property until judgment, and that a petitioner in bankruptcy could enjoin proceedings on the attachment, until it was ascertained whether the bankrupt obtained his certificate. If he did, he could plead the certificate in bar of the attachments, and thus defeat the inchoate lien.

The profession generally, however, understood the case differently, and supposed the effect of it would be to cut off all judgment liens, execution liens, even though levied, vendors' liens, &c., from all benefit under the proviso above referred to. This case, thus understood, was relied on as authority before other judges, and first before *Judge* Conkling, of New York, in the case *In the matter of Allen et al.* (5 Law Reports, 363).

In this case judgment creditors had attached choses in action. The court sustained the lien acquired by the attachment, evidently inclining to a broader definition of the liens embraced by the proviso in question than was given in *Ex-parte Foster*.

The next case is *Dorsner et al.* v. *Bracket* (5 Law Reports, 392), before *Judge* Prentiss, of Vermont. He discusses the subject ably and at large, declaring his opinion that every kind of lien, unless fraudulent, to wit, the vendor's lien, attachment liens, judgment liens, &c., are protected. (P. 394, 396.) Attachment binds as effectually as judgment or execution issued. Judgment or execution issued binds all the property of debtor, &c. *Grosvenor* v. *Gold* (9 Mass. Rep., 209) is referred to, to show that the lien of judgment, execution issued, and attachment, all stand on the same ground.

In *Haughton* v. *Eustice* (5 Law Reports, 505) *Judge* Thompson, of Vermont, decided that an attachment lien was protected by the proviso, in question. He expressed the opinion that judgment liens, and such similar liens, were protected.

That the case of *Foster* was greatly misapprehended is evident from the subsequent decisions of *Judge* Story.

Thus, in the case of *Parker & Blanchard, plaintiffs, in the matter of Muggridge, &c.* (5 Law Reports, 351), after judgment, *Judge* Story maintained the lien by attachment; because, after judgment, there could be no day in court to plead the discharge. He also expressed the opinion that judgment liens were protected by the proviso in question.

In the case, *The matter of Cook* (5 Law Reports, 443), *Judge* Story expressed surprise that the case of *Foster* had been so much misunderstood, and in this latter case sustains the lien of the attaching creditors, who had obtained judgment, declaring that this lien was equivalent to *the common law judgment lien, add- [*117 ing that he never doubted that that lien was protected.

All the judges, then, to whose opinions I have referred, concede that judgment liens are protected; and *Judge* Prentiss places judgment liens and executions issued on the same footing.

I will endeavor, further, to show that the lien of execution issued is fully equivalent to the judgment lien.

Land by the common law, as it originally stood, was not, except under some peculiar circumstances, subject to the debts of the owner. (2 Bac. Abr., tit. Execution, *A*, 685; 3 Black, 418.)

The judgment lien on land arises from the construction of the statute of Edward I., chap.

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18, commonly called the statute of Westminster. (See *Ex-parte Foster*, 5 Law Reports, 63, 67.)

It was by this statute the elegit was given, by virtue of which the judgment creditor has his election to take a *fieri facias* for the sale of goods and chattels, or the elegit to extend the goods and chattels and one half the land. (See 2 Bac. Abr., tit. Execution, *A*. 686; 3 Black, 418.)

This statute does not expressly give any lien, but only authorizes the creditor, at his election, to sue out the elegit directed to the sheriff, and the command of the writ as prescribed is, that the sheriff shall levy the debt of the goods and chattels, and one half the land. (See form of writ, 2 Bac. Abr., tit. Execution, *C*. 710.

It is by construction of this statute, the writ relates back to the judgment, and overreaches all intermediate incumbrances.

In like manner, at common law, the *fieri facias*, which commanded the sheriff to levy the debt of the goods and chattels, related back to its *teste*, and bound from that time. (2 Bac. Abr., tit. Execution, *I*, 733; as judgments did from time of judgment, same title, 731.)

By 29th Charles II., the statute of frauds (the same from which the Kentucky statute is copied), executions only bind from the time they are delivered. (2 Bac. Abr., tit. Execution, *I*, 733.)

Judgments docketed, and executions delivered, are evidently, in Bacon, at the pages cited (731, 733), placed on the same footing.

They seem to be placed on the same footing in the case of *Foster* (5 Law Reports, 63, 67).

There are some other striking analogies between judgments and executions issued, which I will notice.

An execution, as conceded, does not vest a title until executed, neither does a judgment. (*Ex-parte Foster*, 5 Law Reports, 64.) Covenant of seisin is not broken by outstanding judgment. (*Sedgwick* v. *Hollenback*, 7 Johns., 380.)

As between execution plaintiffs, he that by superior diligence acquires the first levy is preferred; so between judgments of the same date, he that first sues execution and sells, acquires a preference. (*Adams* v. *Dyer*, 8 Johns., 350; *Watterman, &c.*, v. *Haskins*, 11 Johns., 230.)

118*] *Sale under junior execution, if first levied, would be valid; so is sale under junior judgment. (*Sanford* v. *Roosa*, 12 Johns., 162.)

To conclude, then, the title of the assignee can only relate back to the act of bankruptcy. The title of the defendants, as we have seen by the cases of *Million* v. *Riley* (1 Dana, 359), and *Addison, &c.*, v. *Crow* (5 Dana, 274), relates back to the time the execution was delivered to the sheriff. This period being anterior to the act of bankruptcy, the title of the defendants is older than that of the plaintiff.

2d. All the authorities concurring in the opinion that judgment liens are protected by the proviso in the 2d section, and the analogies between the judgment lien and execution issued being so striking, I would respectfully maintain that the title of the defendants is also protected by the proviso referred to.

Mr. Chief Justice TANEY delivered the opinion of the court:

This case comes before the court upon a certificate of division between the judges of the Circuit Court of the United States for the District of Kentucky, upon the following statement:

"Savage had the title to the land; the plaintiff claimed under the decree of his bankruptcy; the defendant under a sheriff's sale under an execution.

"The act of bankruptcy of Savage was committed on the 27th April, 1842; the petition of his creditors was filed against him in the District Court on the 25th day of June, 1842, and he was declared a bankrupt on the 26th October, 1842; the plaintiff was appointed the assignee, and this is his title.

"An execution of *fieri facias* on a judgment against the estate of Savage was delivered to the sheriff on the 9th April, 1842, before the act of bankruptcy, and was levied on the land on the ——— day of ———, before the petition; but after the act of bankruptcy the defendant purchased at the sheriff's sale, had his deed, and this was his title.

"The question was, has the plaintiff, by the decree of bankruptcy and its relation back to the act of bankruptcy, the elder and better title? Or has the defendant, by the prior delivery of the execution into the hands of the sheriff, and his levy of it, before the petition was filed, the prior and superior title?"

The statute of Kentucky, upon this subject, provides, "that no writ of *fieri facias*, or other writ of execution, shall bind the estate of the defendant or defendants but from the time such writ shall be delivered to the sheriff, or other proper officer, to be executed." According to the laws of that State a judgment is not a lien upon land, and the real as well as personal estate is not bound until the process of execution against the property of the defendant is delivered to the officer. The question to be determined is, whether the delivery of the *fieri facias* to the sheriff to be executed created a lien on the property of the defendant, for the amount for which the execution was *issued. [*119 If it did, the title of the defendant is the superior and better title, and protected by the last proviso in the second section of the Act to establish a uniform system of bankruptcy throughout the United States.

In construing the statute above mentioned, the decisions of the courts of Kentucky have not been entirely uniform. In the case of *Tabb* v. *Harris* (4 Bibb., 29), decided in 1816, it was held, that the delivery to the sheriff created no lien on the property of the defendant. In a subsequent case, however, in the same volume, *Daniel* v. *Cochrane's Administrator* (4 Bibb, 532), decided in 1817, the court, in delivering their opinion, speak of the lien of a *fieri facias*, from the time it was delivered to the sheriff to be executed, as if it were a known and settled principle of law in that State. But this was not the main point in that case, which turned upon the question, whether the execution continued to bind the property of the debtor until the judgment was satisfied. The court held that it did not, and that the lien ceased after the return day of the execution, if it was not levied before. The question, as to

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the lien acquired by the delivery to the officer, again arose in the case of *Kilby* v. *Haggin* (3 J. J. Marshall, 208), and in this case, which was decided in 1830, the doctrine in the case of *Tubb* v. *Harris* was fully sustained; and it was directly and distinctly decided, that the delivery to the sheriff created no lien against any other creditor, and that an execution afterwards placed in the hands of the sheriff, if first levied upon the property, was entitled to a preference.

But in the case of *Million* v. *Ryley* (1 Dana, 360), decided in 1833, the court held that the plaintiff obtained a lien by the delivery to the sheriff, and that the title acquired by the purchaser, when the execution was regularly levied and the property sold, related back to the delivery to the officer; and they speak of this lien as secured to the creditor by the Kentucky statute. In 1837 this subject again came before the court, in the case of *Addison et al.* v. *Crow et al.* (5 Dana, 274), and in this case the question appears to have been very fully considered, and the case of *Million* v. *Ryley* was referred to and commented on, and the principle decided in it in relation to the lien of an execution re-affirmed. In this case the court say "the levy of a *fieri facias* upon the land of the debtor undoubtedly renders the lien more specific, and being a necessary step in the execution of a writ, completes the authority of the officer to sell, and has the further effect of giving continuance both to the authority and the lien, which would otherwise expire with the return of the writ. And we do not perceive any necessity or reasonable ground for ascribing to it any other efficacy than this;" and in page 277 of the same case, the court again say, "no reason appears for attributing to a levy any efficacy except as one step towards the consummation of the lien arising from the delivery of the execution to the officer."

120*] *This is the latest decision in the courts of the State to which we have been referred, or of which we are aware, and, as we have already said, it appears to have been well considered. And whatever doubts might before have been entertained, we must, under the authority of this case, regard it as the settled law of the State, that the creditor obtains a lien upon the property of his debtor by the delivery of the *fieri facias* to the sheriff; that it acquires no additional validity or force by being actually levied, but that the lien is as absolute before the levy as it is afterwards, and continues while the process remains in the hands of the sheriff to be executed.

In this view of the subject it is unnecessary to examine or to remark upon the cases which have been decided in other States or in England, because the question depends altogether upon the law of Kentucky. And as by the laws of that State a *fieri facias*, when delivered to the sheriff, is a lien upon the property of the debtor while it continues in the hands of the officer to be executed, the creditor is not deprived of this lien by an act of bankruptcy on the part of the debtor committed before the levy is made, but after the execution is in the hands of the sheriff. In the case before us, therefore, the court are of opinion that the defendant, by the prior delivery of the execution and the subsequent levy and sale, has the prior and superior title, and we shall certify accordingly to the Circuit Court.

Cited—3 How., 440; 7 How., 620; 11 Bank. Reg., 412; 18 Blatchf., 537.

THE UNITED STATES, *Plaintiff*,

v.

HEZEKIAH H. GEAR, *Defendant*.

THE UNITED STATES, *Complainant*,

v.

HEZEKIAH H. GEAR, *Defendant*.

Act creating additional land districts in Illinois and Missouri construed—Injunction granted to restrain digging lead ore from public lands.

The Act of Congress entitled "An Act to create additional land districts in the States of Illinois and Missouri, and in the territory north of the State of Illinois," approved June 26th, 1834, does not require the President of the United States to cause to be offered for sale the public lands containing lead mines situated in the land districts created by said act.

The said act does not require the President to cause said lands, containing lead mines, to be sold, because the 5th section of the Act of the 3d March, 1807, entitled "An Act making provision for the disposal of the public lands situated between the United States military tract and the Connecticut reserve, and for other purposes," is still in full force.

The lands containing lead mines in the Indiana territory, or in that part of it made into new land districts by the Act of the 26th June, 1834, are not subject, under any of the pre-emption laws which have been passed by Congress, to a pre-emption by settlers upon the public lands.

The 4th section of the Act of 1834 does in no way repeal any part of the 5th section of the Act of the 3d March, 1807, by which the lands containing lead mines were reserved for the future disposal of the United States, by which grants for lead mine tracts, discovered to be such before they may be bought from the United States, are declared to be fraudulent and null, and which authorized *the [*121 President to lease any lead mine which had been, or might be, discovered in the Indiana territory, for a term not exceeding five years.

The land containing lead mines, in the districts made by the Act of 1834, are not subject to pre-emption and sale under any of the existing laws of Congress.

Digging lead ore from the lead mines upon the public lands of the United States is such a waste as entitles the United States to a writ of injunction to restrain it.

THESE two cases came up from the Circuit Court of the United States for the District of Illinois, and involved the right of Gear, the defendant, to a tract of land upon which there was a lead mine. The first was an action of trespass *quare clausum fregit* on the common law side of the court; and the second a bill in chancery, with a prayer for an injunction to stay waste, on the equity side. The declaration charged Gear with having broke and entered the north half section 23, township 29 north, range 1 east, and the south half of fractional section 8, township 28 north, range 1 east, both being east of the fourth principal meridian, and then and there dug up the mineral lead ore, &c., &c.

The defendant filed six pleas, all resting on the ground that he had settled, resided on, and occupied the land in question in the year 1827, and cultivated a part thereof, and had ever

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since remained, continued, and still was in the possession thereof, and was lawfully entitled to the pre-emption right to said quarter section; said premises being subject to pre-emption rights, and not yet offered for sale by the President's proclamation; by reason whereof, he, the defendant, dug lead ore or mineral, as he might lawfully do, &c., &c.

To these pleas the plaintiffs replied, in substance, that the quarter section of land was, and always had been, the property of the plaintiffs; that it contained a valuable lead mine, the existence of which was well known to the defendant before and at the time he settled upon the land, &c.

To these replications the defendant demurred generally, and the plaintiffs joined in the demurrer.

The same principles were involved in the chancery case, alleged, of course, in a different manner.

When the cause came up for argument, in the court below, the judges were divided in opinion, and the questions duly certified to this court. They are somewhat differently stated in the two cases, and it is proper to mention both.

In the chancery case they are thus stated:

1. Whether the Act of Congress, entitled "An Act to create additional land districts in the States of Illinois, Missouri, and the territory north of the State of Illinois," approved June 26th, 1834, so far repeals the 5th section of the Act of the 3d of March, 1807, entitled "An Act making provision for the disposal of the public lands situated between the United States military tract and the Connecticut reserve, and for other purposes," as to subject the lands mentioned in said Act of June 26th, 1834, containing lead mines, to be entered and **122***] *purchased by pre-emption under any of the pre-emption laws of Congress.

2. Whether the said act (1834) requires the President of the United States to cause lands containing lead mines to be sold, or only authorizes him to do so in his discretion.

3. Whether lands containing lead mines are subject to be held or purchased under any of the acts of Congress granting the rights of pre-emption to settlers upon the public lands.

4. Whether the digging lead ore from the lead mines upon the public lands of the United States is such a waste as entitles the United States to the allowance of a writ of injunction to restrain.

In the common law case they are thus stated:

1. Does the Act of Congress, entitled "An Act to create additional land districts in the States of Illinois and Missouri, and in the territory north of the State of Illinois," approved June 26th, 1834, require the President of the United States to cause to be offered for sale the public lands situate in the land district created by said act, containing lead mines?

2. Does the said act require the President to cause said lands, containing lead mines, to be sold, notwithstanding the 5th section of the Act of the 3d of March, 1807, entitled "An Act making provisions for the disposal of the public lands situated between the United States military tract and the Connecticut reserve, and for other purposes?"

3. Are the said lands, containing lead mines, subject to pre-emption under any of the pre-emption laws which have been passed by Congress?

4. Does the 4th section of the said Act of 1834 so far repeal the 5th section of the Act of 1807 as to subject the public lands containing lead mines to be sold by the United States in the same manner as other public lands not containing lead mines?

5. Are the said lands, containing lead mines, subject to pre-emption or sale under any of the existing laws of Congress?

The acts of Congress referred to are the following:

On the 3d of March, 1807, an act was passed (1 Land Laws, 162), by the 5th section of which it was enacted, "That the several lead mines in the Indiana territory, together with as many sections contiguous to each as shall be deemed necessary by the President of the United States, shall be reserved for the future disposal of the United States; and any grant which may hereafter be made for a tract of land containing a lead mine, which had been discovered previous to the purchase of such tract from the United States, shall be considered fraudulent and null. And the President of the United States shall be, and he is hereby authorized to lease any lead mine which has been, or may hereafter be, discovered in the Indiana territory, for a term not exceeding five years."

*At that time the land now included [*123 within the State of Illinois was part of the Indiana territory.

In 1827, Gear, the defendant, entered upon the north half of section 23, township 29 north, of range 1 east, erected a house upon it, cultivated and occupied it.

On the 29th of May, 1830, Congress passed "An Act to grant pre-emption rights to settlers on the public lands," the first section of which was as follows:

"That every settler or occupant of the public land prior to the passage of this act, who is now in possession, and cultivated any part thereof in the year 1829, shall be, and he is hereby authorized to enter with the register of the land office for the district in which such lands may be, by legal subdivisions, any number of acres, not more than one hundred and sixty, or a quarter section, to include his improvement, upon paying to the United States the then minimum price of said land: Provided, however, that no entry or sale of any land shall be made, under the provisions of this act, which shall have been reserved for the use of the United States, or either of the several States in which any of the public lands may be situated."

The 4th section declared that the sale of the public lands should not be delayed, nor should the act be available for those who failed to make proof and payment, and concluded as follows:

"Nor shall the rights of pre-emption contemplated by this act extend to any land which is reserved from sale by act of Congress, or by order of the President, or which may have been appropriated for any purpose whatsoever."

The act was to remain in force for one year after its passage.

On the 5th of April, 1832, Congress passed

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an "Act supplementary to the several laws for the sale of the public lands," which permitted the public lands to be purchased either in entire sections, half sections, quarter sections, half quarter sections, or quarter quarter sections, and contained three provisions, the third of which was as follows:

"Provided further, that all actual settlers, being housekeepers, upon the public land, shall have the right of pre-emption to enter, within six months after the passage of this act, not exceeding the quantity of one half quarter section, under the provisions of this act, to include his or their improvements, under such regulations as have been, or may be, prescribed by the Secretary of the Treasury," &c.

On the 14th of July, 1832, Congress passed "An Act supplemental to an act granting the right of pre-emption to settlers on the public lands, approved on the 29th of May, 1830," which is too long to be quoted. The purport of it was to extend to occupants and settlers the privilege granted by the prior act until one year after the surveys had been made, or the land had been attached to a particular land district.

On the 2d of March, 1833, an act was passed [*124] reviving that of April 5th, 1832, extending the privileges granted by that act to the same period as those just mentioned, and placing the beneficiaries of the two acts of the 5th of April and 14th of July upon the same footing.

In 1834, two acts were passed, one on the 19th and one on the 26th of June. That of the 19th was to revive the Act to grant pre-emption rights to settlers on the public lands, approved May 29th, 1830.

The first section declared that every settler or occupant of the public lands prior to the passage of the act, who was then in possession, and cultivated any part thereof in the year 1833, should be entitled to all the benefits and privileges provided by the Act of 29th May, 1830; which act was revived and continued in force for two years.

The Act of the 26th June was entitled "An Act to create additional land districts in the States of Illinois and Missouri, and in the territory north of the State of Illinois."

The 4th section enacted, "that the President shall be authorized, as soon as the survey shall have been completed, to cause to be offered for sale, in the manner prescribed by law, all the lands lying in said land districts, at the land offices in the respective districts in which the land so offered is embraced, reserving only section 16, in each township, the tract reserved for the village Galena, such other tracts as have been granted to individuals and the State of Illinois, and such reservations as the President shall deem necessary to retain for military posts, any law of Congress heretofore existing to the contrary notwithstanding."

On the 22 of June, 1838, an act was passed, the title of which was "An Act to grant pre-emption rights to settlers on the public lands." It enacted that every actual settler of the public lands, being the head of a family, or over twenty-one years of age, who was in possession and a housekeeper, by personal residence thereon at the time of the passage of the act and for four months next preceding, should be entitled to all the benefits and privileges of the Act of May 29th, 1830; which act was thereby revived and continued in force for two years. It contained a number of provisions, one of which was, that it should not be so construed as to give a right of pre-emption to any land specially occupied or reserved for town lots or other purposes by authority of the United States.

By the Act of the 1st June, 1840, the above act was continued in force until the 22d of June, 1842, subject to the exceptions therein contained.

On the 4th of September, 1841, an act was passed entitled "An Act to appropriate the proceeds of the sales of the public lands, and to grant pre-emption rights."

The 10th section granted pre-emption rights to actual settlers, with several limitations and exceptions, two of which were as follows, viz.:

"No lands included in any reser- [*125 vation by any treaty, law, or proclamation of the President of the United States, or reserved for salines or for other purposes," and "No lands on which are situated any known salines or mines, shall be liable to entry under and by virtue of the provisions of this act."

Mr. Nelson, Attorney-General, for the United States.

Mr. Hardin for the defendant.

Mr. Nelson. The early acts of Congress upon the subject are all stated in Mr. Gilpin's argument (14 Peters, 529). The Act of 1807 reserves all lead mines. If that act is still in force the case is clearly within it, because the replication avers the existence of a lead mine on this tract of land, and it is not controverted. If the case is withdrawn from the operation of that act, it must be through the effect of some one of the pre-emption laws. Let us inquire.

By the Act of 1830 (1 Land Laws, 473, 474, chap. 401), there is no right of pre-emption in lands reserved from sale.

That of 1832 cannot apply, because there is nothing in the record to show that the defendant made an application for this land, and thus brought himself within the provisions of the act.

That of 1834 merely revived the Act of 1830. Of course the same restriction was continued; and by that of 1838 it was continued for two years longer.

By the Act of 1841 (Session Acts, p. 26, chap. 16, sec. 10), no land is to be entered on which lead mines are.

In no act is there a pre-emption right varying from that given by that of 1830, except in the law of 1832, which says it shall be subject to such conditions as the Secretary of the Treasury should impose. But, in making these conditions, it was his duty to conform to the settled policy of the country.

These acts may then be laid aside, as having no bearing on the case. The one under which the controversy arises is that passed in 1834. At this session, two acts were passed, viz.: 1834, chap. 467, passed on 19th June; 1834, chap. 527, passed on 26th June.

The 4th section of the latter act is the clause to which the attention of the court should be directed. It authorizes the President to offer for sale the lands therein mentioned, with certain exceptions; and it is contended, on the part

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of the defendant, that lead mines are not named in the exceptions, and that, consequently, the right of pre-emption accrued.

The question is, does this act repeal that of 1807, and authorize the President to sell without regard to the restrictions imposed upon him by the Act of 1807? I think not; because,

1. The Act of 1834 was not designed to bear upon that of 1807. It had a different object in view, professing to establish land offices. There were two laws passed at that session, one seven days after the other. The one first passed provided for pre-emptions, and reserved lead mines, **126***] *Is it probable that these provisions would be repealed by a law passed a few days afterwards, and purporting to regulate an entirely different matter.

2. In every subsequent act, of 1838, 1840, 1841, there is the same reservation as in 1830, which is a strong legislative exposition of the meaning of Congress. In the distribution law, it is repeated; and the practice of the Executive Department has always been to refuse to grant such lands.

3. There is another legislative interpretation. In 1842 (chap. 190) an act was passed, including Wisconsin in the Act of 1834. Those who had entered lead mines were indemnified, and allowed to enter other lands, provided they did not violate the Act of 1830.

4. By the section of 1834 under consideration, the President might offer the lands for sale, but it was not incumbent on him to do so. He had a discretionary power, which carried with it the right to refuse to sell them at the minimum price of one dollar and twenty-five cents per acre. (See opinion of Attorney-General Butler, 2 Land Laws, 127, 128.)

In 14 Peters, 526, the court has decided this question. In that case the contract for leasing was made after 1834. It is true, that the act was not noticed in the argument, but this shows the opinion to have been then, that the act had nothing to do with the subject. It was argued by *Mr. Benton* upon a different ground.

But suppose that the President was authorized to sell these lands. How does the right of pre-emption follow? This is a matter regulated by Congress only. Does the Act of 1834 give a right of entry before the lands are offered at public sale? The Act of 1830 might have thrown open all lands, then in the market, to pre-emption rights; but it does not follow that that of 1834 did so too.

As to the propriety of granting an injunction in the equity case, on the ground that the bill alleges that the injury will be irreparable. (See 2 Land Laws, 17; 3 Wheat., 131; 2 Story's Eq., 207, 208; Dewey on injunctions, 137, 183, 184, 112.)

Mr. Hardin, for defendant:

The Act of 1807 reserved lead mines from sale, but left them subject to the future action of Congress. They were not appropriated to any particular purpose; no plan was adopted for their subsequent government. All that was done by that act was to say, that at some time thereafter Congress would consider what course should be taken with regard to them. They were, therefore, just as much open to the legislation of Congress as any other portion of the public lands. If an appropriation of them had been made, to take immediate effect, the case would have been different; for there is a distinction between reservation and appropriation. Grants made by executive officers were declared void; but this was not intended to guide future congressional action. By the Act of 1830, pre-emption rights are given *in [***127** the broadest sense, except where lands are reserved for the United States. But they were often reserved for canals, light-houses, &c. As long as the Act of 1807 was in force, we admit that the Act of 1830 did not give a right of pre-emption to the land in question, because it was reserved from sale. But the Act of April 5th, 1832, permits quarter quarter sections to be entered, and extends the privilege to all housekeepers, who had settled on the public lands, in the broadest possible terms. The defendant's plea shows him to have been entitled to claim it. There was no reservation in the act. It has been said, by the Attorney-General, that no settlement could be made on lands which had not been offered for sale, and that the Secretary of the Treasury must prescribe regulations. But the very term implies a recognition of a settlement thus made. What is it? Pre-emption: a right to purchase before the day of public sale. Before the passage of such a law, a settler was an intruder; but afterwards he had an estate upon condition. And if he complied with the act, he fulfilled the condition, and the estate became absolute. It has been called a gift. But if so, it was a gift under a legislative grant, which, in effect, vests the title, of which a subsequent patent is only the evidence. (2 Kent, 255; 4 Peters, 408, 422; 2 Howard, 816, 844.)

Being so, it was not in the power of the President or any executive officer to take it away.

If we look to results, they are all in our favor. The object of Congress, in making the original reservation, was to prevent monopoly, but not the general settlement of the country. The leasing system has not paid expenses, and it injures the land. The Secretary of War has, for many years, recommended that the lead mines should be sold; and we say that Congress has ordered it, but that the President has improperly withheld them from sale.

By the Act of 26th June, 1834, the President was authorized to sell the public lands with certain reservations, and these are not within the reservations. But the Attorney-General says that the President was only authorized to sell; that it was a matter within his discretion. Be it so. This removes them from the list of reservations; and being no longer reserved, the pre-emption law of the 19th June comes in and operates upon them. What construction must be given to the word "authorized"? We say it makes it the duty of the President to sell.

It is not only used so in the Act of 26th June, 1834, but in all acts in which Congress directs or authorizes land to be sold by order of the President. As in these acts: February 17th, 1818, sec. 3, Land Laws, 294; March 3d, 1823, sec. 10, Land Laws, 364; July 14th, 1832, sec. 2, Land Laws, 511; July 7th, 1838, sec. 1, Land Laws, 578; March 3d, 1815, sec. 5, Land Laws, 260; May 6th, 1812, sec. 1, Land Laws, 214.

Congress never does order the President in imperative terms. The *language is [***128** courteous; but it is a ministerial act to pro

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claim the lands for sale. (*Grignon* v. *Astor*, 2 Howard, 344.)

This power can be exercised by other officers than the President; and in the following cases other subordinate officers are authorized, *alias* directed, to make sales, &c.: Secretary of War, March 3d, 1803, sec. 2, Land Laws, 99; Secretary of Treasury, March 3d, 1825, sec. 1, Land Laws, 408; registers and receivers, April 27th, 1816, sec. 1, Land Laws, 274; April 30th, 1810, sec. 1, Land Laws, 176; "proper officer," May 13th, 1800, sec. 1, Land Laws, 78; "commissioners," July 14th, 1832, sec. 2, Land Laws, 510. See, also, Acts 23d August, 1842, sec. 2, Acts 124; 4th August, 1842, sec. 1, Acts 83; 10th May, 1842, sec. 1, Acts 14.

These lead mine lands being authorized to be sold, without any reservation, and no power existing in the President to reserve them from sale, more than any other public lands, so much of the law of 1807, as "reserved them for the future disposal of the United States," was necessarily repealed by the Act of 1834. The reservation being taken off, they become subject to rights of occupancy, as other lands, and settlers acquiring rights to pre-emption, by virtue of pre-emption laws, cannot be devested of these rights by the refusal of the President to proclaim them for sale.

If the pre-emption laws, passed prior to the Act of 1834, did not give the defendant a right of pre-emption, the pre-emption law of 1838 did. This act makes no mention of reserving lead mines. It is provided in this act that it shall not extend "to any land specially occupied or reserved for town lots, or other purposes, by authority of the United States."

These lead mine lands were not occupied or reserved for any purpose by the United States. They were, in 1807, reserved from sale for future disposal; but nowhere are they appropriated or reserved for the use of the government, to dig mineral, or other special use. The object of the original reservation was to delay the sale until Congress should determine what disposition should be made of them. By the law of 1834, and the various pre-emption laws, Congress has authorized their sale and disposal, and they are not, consequently, within the meaning of any reservation or appropriation mentioned in the subsequent pre-emption laws.

On all public lands, authorized to be sold, citizens are permitted and encouraged, by the pre-emption laws, to go on them and improve them. To do so, they must erect houses, break up the natural meadow, and fell trees. These are all acts of waste, according to the common law.

The old acts of Congress against waste, and to punish for trespasses in cutting timber, &c., are inconsistent with these pre-emption laws, and the rights and privileges granted to occupants under them; consequently, they are repealed by the pre-emption laws subsequently passed. Neither action can therefore be sustained.

129*] *Mr. *Nelson*, in reply and conclusion: The question of a general reservation does not arise in the case. The replication sets out, that defendant knew that mines were on the land; and by his demurrer he admits that he knew it. The Act of 1807 reserves mines, and declares that all grants of them shall be considered fraudulent and null. Under this act alone, the defendant would have been a trespasser, even if he had obtained a grant of the land.

It has been said that the district attorney had no right to bring suit without the authority of an act of Congress. But the Constitution makes it the duty of the President to see that all laws are executed, and the power to sue results from the nature of things.

The Act of 1830 is the first and general pre-emption law; and no law, now in force, is inconsistent with this. It says that its provisions do not apply to lands which were reserved from sale; but the Act of 1807 had already reserved these lands.

The Act of April, 1832, has no application. It was not designed as a pre-emption law, but to allow smaller subdivisions than had been before tolerated. The claim here is not for one of these subdivisions, but an entire quarter-section. But the privilege granted by the Act of 1832 is confined to half quarter-sections, and extends to no larger amount.

The Act of July, 1832, merely gave an extension of time.

The Act of 1834 appears to be the chief reliance of the defendant. We admit, that if the court think that this act grants the lands, the plaintiff is not entitled to maintain this suit. But it does not profess to be a pre-emption act. It is to create additional land districts. It authorizes the President to do certain things in the manner prescribed by law. But a pre-emptioner can only claim under an act of Congress, and this act does not give him power to enter, which is expressly prohibited by the Act of 1830. It does not follow that any pre-emptioner may take up lands as soon as theirsale is authorized. No statute gives him such a right. The question is, what was the intention of Congress in passing this law? The answer must be sought in the act itself, and in the circumstance that, seven days before, a regular pre-emption law had been passed.

The Act of 1838 contains many reservations, and it is argued that mines are not included within them. But the general phrase, "for other purposes," will include mines; and besides, it professed to revive the Act of 1830, with all its reservations.

Mr. Justice WAYNE delivered the opinion of the court:

From the foregoing statement of all the acts of Congress having any bearing on the subject before us, we think it obvious it was not intended to subject lead mine lands in the districts made by the Act of the 26th June, 1834, to sale as other public lands are sold, or to make them liable to a pre-emption by settlers.

*The argument in support of a con- [*130
trary conclusion is, that the reservations in the fourth section of that act, with the authority given to the President to sell all the lands in the districts, any law of Congress heretofore existing to the contrary notwithstanding, exclude lead mine tracts in those districts from the operation of the Act of the 3d of March, 1807. At most, the language of the fourth section of the Act of 1834 imparts only an authority to the President to sell, given in the same way as it has been conferred upon him in other acts

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providing for the sale of the public lands. Then the question occurs, whether the section of an act, in general terms to sell (certain reservations excepted), without any reference to a previous act, which declares that lead mines in the Indiana Territory shall be reserved for the future disposal of the United States, is so far a repeal of the latter, that lead mine lands in a part of that territory are subjected to sale as other public lands are. Why should Congress, without certain words showing an intention to depart from the policy which had governed its legislation in respect to lead mine lands in the whole of the Indiana territory, from 1807 to 1834, be supposed to have meant to exempt a portion of the lead mine lands in that territory from that policy, in an act, the whole purview of which was to create additional land sale districts? Besides, the reservations in the fourth section of the Act of 1834, except the tract for the village of Galena, are no more than the re-affirmance of some of the provisions of other statutes respecting reservations made or to be made out of the public lands in other districts; and cannot, therefore, be considered as an enumeration in connection with the general power to sell all lands, any law of Congress heretofore existing to the contrary notwithstanding, repealing another act, providing for a reservation of a particular class of lands within the same land district to which the Act of 1834 applies. The reservations in the fourth section of the Act of 1834 are limitations upon the authority to sell, and not an enlargement of the general power of the President to sell lands, which, by law, he never had a power to sell; which have always been prohibited by law from being sold, and which never have been sold, except under the authority of a special statute, such as that of the 3d March, 1829 (1 Land Laws, 457), which authorized the President to cause the reserved lead mines in the State of Missouri to be sold. In looking at that act, no one can fail to observe the care taken by the government to preserve its property in the lead mine lands, or to come to the conclusion that the reservations of them can only be released by special legislation upon the subject matter of such reservations. Authority, then, to sell all lands in the districts made by the Act of 1834, though coupled with the concluding words of the fourth section, can only mean all lands not prohibited by law from being sold, or which have been reserved from sale, by force of law. The propriety of this interpretation of that section is more manifest, when it is considered, if a contrary interpreta-
131*] tion *is given, that the lead mine lands in one district of the same territory would be liable to sale and pre-emption, and those in another part of it would not be.

Can ony one possible reason be suggested to sustain even the slightest intention upon the part of Congress, when it was passing the Act of 1834, to make such differences in respect to lands within the same locality, as have just been mentioned? Could Congress have meant to say, under a power to sell, that it would be lawful to sell in the new land district what it was unlawful to sell in other land districts of the same territory of which the new land district was also a part? And that settlers upon the public lands within the new district should have a right of pre-emption in lead mine tracts, which settlers upon other lands within the same territory, but not within the new land district, could not have? The mere fact of a new land district having been made out of a part of the territory in which the lead mine ands had been reserved, with the authority to the President to sell all lands in the new district, can have no effect to lessen the force of the original reservation. In truth, the Acts of 1834 and 1807 do not present a case of conflict in the sense in which statutes do, when, from some expression in a later act, it may seem that something was intended to be excepted from the force of the former, or to operate as a partial repeal of it. The rule is, that a perpetual statute (which all statutes are unless limited to a particular time), until repealed by an act professing to repeal it, or by a clause or section of another act directly bearing in terms upon the particular matter of the first act, notwithstanding an implication to the contrary may be raised by a general law which embraces the subject matter, is considered still to be the law in force as to the particulars of the subject matter legislated upon. Thus in this case, all lands within the district mean lands in which there are, and in which there are not, minerals or lead mines; but a power to sell all lands, given in a law subsequent to another law expressly reserving lead mine lands from sale, cannot be said to be a power to sell the reserved lands when they are not named, or to repeal the reservation. In this case there are two acts before us, in no way connected, except in both being parts of the public land system. Both can be acted upon without any interference of the provisions of the last with those of the first—each performing its distinct functions within the sphere as Congress designed they should do. But further, that the Act of 1834 was not intended as a repeal of the Act of 1807, in regard to lead mines, so as to grant a right of pre-emption in them to settlers, is manifest from the fact that an act was passed only seven days before it, reviving an act to grant pre-emption rights to settlers on the public lands, which excludes settlers from the right of pre-emption in any land reserved from sale by act of Congress. Thus re-asserting, then, what had been uniformly a part of every pre-emption law before, and what has been a limitation upon the right of pre-emption in every act for *that purpose since. We do not think [*132 it necessary to pursue the subject further, except to say that the view we have here taken of the Act of 1834, in respect to lands containing lead mines, and the right of pre-emption in them, is coincident with the opinion given by this court in the case of *Wilcox* v. *Jackson* (13 Peters, 513). That case was well and most carefully considered, and expressed in the deliberate language of this court. We determined then, the point being directly in the cause, that the Act of 1834 had relation to a sale of lands in the manner prescribed by law, at public auction, and that a right of pre-emption was governed by other laws. This court said, "the very Act of 19th June, 1834, under which this claim is made, was passed but one week before the one of which we are now speaking (meaning the Act of 26th June, 1834),

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thus showing that the provisions of the one were not intended to have any effect upon the subject matter on which the other operated." We see no reason to change what was then the view of the court. On the contrary, there is much in this case to confirm it. Let it be certified, therefore, to the judges of the Circuit Court of the United States for the District of Illinois, that this court is of the opinion that the Act of Congress, entitled "An Act to create additional land districts in the States of Illinois and Missouri, and in the territory north of the State of Illinois," approved June 26, 1834, does not require the President of the United States to cause to be offered for sale the public lands containing lead mines situated in the land districts created by said act. 2d. That the said act does not require the President to cause said lands, containing lead mines, to be sold, because the 5th section of the Act of the 3d of March, 1807, entitled "An Act making provision for the disposal of the public lands situated between the United States military tract and the Connecticut reserve, and for other purposes," is still in full force.

To the third question we reply, that the lands containing lead mines in the Indiana Territory, or in that part of it made into new land districts by the Act of the 26th June, 1834, are not subject, under any of the pre-emption laws which have been passed by Congress, to a pre-emption by settlers upon the public lands.

To the 4th question, we reply that the 4th section of the Act of 1834 does in no way repeal any part of the 5th section of the Act of the 3d of March, 1807, by which the lands containing lead mines were reserved for the future disposal of the United States, by which grants for lead mine tracts, discovered to be such before they may be bought from the United States, are declared to be fraudulent and null, and which authorized the President to lease any lead mine which had been, or might be, discovered in the Indiana Territory, for a term not exceeding five years.

To the 5th question we reply, that the land containing lead mines in the districts made by the Act of 1834, are not subject to pre-emption and sale under any of the existing laws of Congress.

133*] *The foregoing answers apply also to the points upon which the judges were divided in opinion upon the bill in chancery, between the United States and the defendant Gear, except the fourth question certified in that case; and to that we reply, that digging lead ore from the lead mines upon the public lands in the United States, is such a waste as entitles the United States to a writ of injunction to restrain it.

[For the dissenting opinion of *Mr. Justice* McLEAN, see App., p. 789.]

Cited—2 How., 289; 7 Wood. & M., 83; McAll., 296, 297.

SAMUEL GORDON, *Plaintiff in Error*,
v.
THE APPEAL TAX COURT.

JAMES CHESTON, *Plaintiff in Error*,
v.
THE APPEAL TAX COURT.

Corporate property of bank taxable, charter not —statute of Maryland, construction of.

The charter of a bank is a franchise, which is not taxable, as such, if a price has been paid for it, which the Legislature accepted.

But the corporate property of the bank is separable from the franchise, and may be taxed, unless there is a special agreement to the contrary.

The Legislature of Maryland, in 1821, continued the charters of several banks to 1845, upon condition, that they would make a road and pay a school tax. This would have exempted their franchise, but not their property, from taxation.

But another clause in the law provided, that upon any of the aforesaid banks accepting of and complying with the terms and conditions of the act, the faith of the State was pledged not to impose any further tax or burden upon them during the continuance of their charters under the act.

This was a contract relating to something beyond the franchise, and exempted the stockholders from a tax levied upon them as individuals, according to the amount of their stock.

THESE were kindred cases, brought up by writ of error from the Court of Appeals of the State of Maryland, under the 25th section of the Judiciary Act of 1789.

The first case depended upon the constitutionality of a tax imposed by the Legislature of Maryland in 1841, it being alleged to be in violation of a contract made by the Legislature in 1821; and the second depended upon the same circumstance, with the addition that the plaintiff in error was entitled to the benefit of the same contract, by virtue of an act of the General Assembly, passed in 1834.

The facts in the case were these:

At November session, 1804, the Legislature of Maryland incorporated the Union Bank of Maryland. Samuel Gordon, the plaintiff in error in the first case, was, at the institution of the suit below, a stockholder in this bank. No *bonus* was required to be paid to the State, but five thousand shares were reserved for the use and benefit of the State of Maryland, to be subscribed for by the State, when desired by the Legislature thereof. The charter was to last until 1816.

At the session of 1812, the Legislature passed an act, entitled "An Act to incorporate a company to make a turnpike road leading to Cumberland, and for the extension of the charters of the several *banks in this State, and [*134 for other purposes." It proposed to extend the charters of the banks to 1835, upon condition that they would subscribe for as much stock as would raise a fund necessary and sufficient to finish and complete the road, and upon the further condition, should bind themselves to pay into the treasury the sum of $20,000, for each and every year that the charters should continue; the fund being pledged for the support of common schools.

NOTE.—*As to vested rights and how affected by subsequent statute, or repeal of statute*, see note to Fletcher v. Peck, 6 Cranch, 88.

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The 12th section was as follows:

"That upon any of the banks in this State complying with the conditions of this act, the faith of the State is hereby pledged not to impose any further tax or bonus on the said banks during the continuation of their charters under this act."

This act was not accepted by any of the banks.

At the session of 1813, the Legislature passed another act, which was entitled a supplement to the foregoing. The 1st section incorporated a company to make the road. The second was as follows: "And for the purpose of raising a fund to make and complete said road: Be it enacted, That the charters of the several banks, &c., shall be, and they are hereby continued and extended to the 1st day of January, 1835, and to the end of the session of the General Assembly next thereafter, upon condition of the said several banks subscribing, in proportion to their respective capitals actually paid in at the time of such subscriptions, for as much stock as is necessary and sufficient to finish and complete said road," &c., &c.

The 7th section enacted that every bank should pay annually into the treasury the sum of twenty cents on every hundred dollars of the capital stock actually paid in; and if this were neglected for six months after it was due, the bank so neglecting should forfeit its charter.

The 8th section continued the charters of such banks as complied with the act until 1835.

The 11th section ran thus: "That upon any of the aforesaid banks accepting of and complying with the terms and conditions of this act, the faith of the State is hereby pledged not to impose any further tax or burden upon them during the continuance of their charters under this act; and in case of the acceptance of and compliance with the provisions of this act by the several banks hereby required to make the aforementioned road, the faith of the State is further solemnly pledged to the several existing banks in the city of Baltimore, not to grant a charter of incorporation to any other banking institution to be established in the city or precincts of Baltimore before the 1st day of January, 1835."

At the session of 1815, an act was passed, "declaring the continuation and extension of the charters of the several banks therein mentioned." It recited, that several banks, and amongst them the Union Bank, had accepted the Act of 1813, and then declared, that their charters were extended to 1835.

135*] *At the session of 1821, another act was passed, entitled, "An Act to incorporate a company to make a turnpike road from Boonsborough to Hagerstown, and for the extension of the charters of the several banks in the city of Baltimore, and for other purposes." The preamble was as follows: "Whereas it is to the interest of the State that a turnpike road should be made, leading from Boonsborough to Hagerstown, in Washington County, and it is represented to the Legislature, that the banks hereinafter mentioned are willing to make the same, if an extension of their several charters be granted to them, as they were heretofore extended by an act entitled a supplement to the act entitled, an act to incorporate a company to make a turnpike road, leading to Cumberland, and for the extension of the charters of the several banks in the city of Baltimore, and for other purposes, passed at December session, 1813: Therefore, Be it enacted." &c.

The 1st section, incorporated a company to make the road.

The 2d section was as follows: "And for the purpose of raising a fund to make and complete said road, Be it enacted, That the charters of the several banks aforesaid shall be, and they are hereby continued and extended to the 1st day of January, 1845, upon condition of the said several banks subscribing, in proportion to their respective capitals actually paid in at the time of such subscriptions, for as much stock as is necessary and sufficient to finish and complete said road," &c.

The 6th section was as follows: "That if the said company shall not commence the making of the said turnpike road within two years from the passage of this act, and shall not complete the same in four years thereafter, the right of the said company to the said road shall revert to the State of Maryland, and the charters of the said banks are hereby declared not to be continued or extended by virtue of this act."

The 7th section enacted, that the banks should annually pay to the treasurer the sum of twenty cents on every hundred dollars of the capital stock of each bank actually paid in; and in case of neglect, the bank was to forfeit its charter.

The 8th section renewed and continued the charters of the complying banks until 1845 and the session of the General Assembly next thereafter.

The 11th section was as follows: "That upon any of the aforesaid banks accepting of and complying with the terms and conditions of this act, the faith of the State is hereby pledged not to impose any further tax or burden upon them during the continuance of their charters under this act; and in case of the acceptance of and compliance with the provisions of this act by the several banks hereby required to make the aforementioned road, the faith of the State is further pledged, to the aforesaid banks in the city of Baltimore, not to grant a charter of incorporation to any other banking institution to be established in the city or precincts of Baltimore before the 1st day of January, 1845."

*The 12th section was as follows: [*136 "That the said banks, specified in the 7th section of this act, should they elect so to do, shall be, and they are hereby exempt from the payment of the annual tax hereby imposed upon condition of their paying to the treasurer of the Western Shore of Maryland, on or before the 1st day of January, 1823, the sum of $100,000, to be appropriated in the manner hereinbefore provided for."

The Union Bank, as was admitted in the court below, duly accepted and complied with the terms and conditions of this Act of 1821.

At the session of the Legislature of December, 1834, an act was passed (chap. 274) to "extend the charters of several banks in the city of Baltimore," by which, amongst other enactments, the charter of the Union Bank was extended to the end of the year 1859. It introduced some new provisions into the charter,

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required the payment of the school tax and a proportionate share of $75,000; but contained no stipulation like that of the 11th section of the Act of 1821.

At the session of December, 1835, the Farmers' and Planters' Bank was incorporated. It was required to pay a bonus and school tax, but the charter contained no exemption from taxation.

At the same session, viz., December, 1835, an act (chap. 142) was passed, reciting that whereas, by the 11th section of the Act of 1821, the faith of the State was pledged not to impose any further tax or burden upon certain banks, and it was equitable that other banks should stand on equal footing, and enacting that the faith of the State was pledged not to impose any further or other tax on banks incorporated since the year 1822 than might be imposed on banks which had complied with the terms of that act.

The 8d section was as follows: "And be it enacted, That in the said Act of 1821, it was not, nor is it now, the intention of the General Assembly of Maryland, to exempt from taxation and equitable contribution to the common burdens for State purposes, the property, stock, or dividends severally held in or derived from any bank in this State, by any person or persons whatever: but that the true intent and meaning of the pledge given by the said act of Assembly was, to limit the taxation upon the franchises only of the banks therein mentioned."

In April, 1841, an act was passed "for the general valuation and assessment of property in this State, and to provide a tax to pay the debts of the State." It directed, amongst other things, that "all stocks or shares owned by residents of this State in any bank, institution, or company incorporated in any other State or territory: all stocks or shares in any bank, institution, or company incorporated by this State," &c., should be assessed, and a tax imposed upon this and all other species of property, of twenty cents, or one fifth of one per cent. on every hundred dollars of assessable property. It also provided for an Appeal Tax Court, whose decisions should be carried to the Court of Appeals.

137*] *In the trial of the cause in the Court of Appeals, the following agreement was filed:

"It is agreed, that the appellant banks, to wit, the Union Bank of Maryland, the Bank of Baltimore, the Mechanics' Bank of Baltimore, the Commercial and Farmers' Bank of Baltimore, the Marine Bank of Baltimore, and the Farmers' and Merchants' Bank of Baltimore, commonly called the old banks, were chartered previous to the year of 1821; and that the new banks, to wit, the Merchants' Bank of Baltimore, the Farmers' and Planters' Bank of Baltimore, the Citizens' Bank of Baltimore, and the Western Bank of Baltimore, were chartered since the year 1830; the respective periods of the incorporation of all the aforegoing banks appearing by reference to their charters.

"It is admitted that the old banks have duly accepted and complied with the terms and conditions of the Act of 1821, chap. 131, the manner of which acceptance appears by the paper marked A, herewith filed; and have also accepted and complied with the provisions of the Act of 1834, chap. 274: and it is also admitted, that taxes have always, since the incorporation of said banks, been levied and assessed upon their real and personal property in all the cities and counties of this State, in the same manner as upon property of the same kind belonging to individuals, and that said taxes have always been paid by said banks up to this time. And it is further admitted, that said banks did not, at the time of the enactment of the Act of 1841, chap. 23, nor have they at any time since, paid or redeemed their notes or other obligations in specie."

The Court of Appeals decided that the tax imposed by the Act of 1841 was not a violation of the contract between the State and the banks, which was affected under the Act of 1821, and to review this opinion the writ of error was brought.

Messrs. Meredith and *Dulany* for the plaintiffs in error.

Mr. Nelson, Attorney-General, and *Mr. Steele* for the defendants.

In the case of Samuel Gordon, the counsel for the plaintiff in error contended:

1. That the Union Bank of Maryland having accepted of and complied with the terms and conditions of the Act of 1821, chap. 131, a contract was created by the 11th section thereof, on the part of the State, "not to impose any further tax or burden upon said bank during the continuance of its charter under the 8th section of said act; and that this exemption from taxation extended to all the property of said bank, real and personal.

2. That the 1st and 45th sections of the Act of 1841, chap. 23, imposed upon the said bank "a further tax and burden," in violation of the said contract, and was therefore void as against the provisions of the Constitution of the United States.

And in the case of *James Cheston, Plaintiff in Error*, v. *The Appeal* *Tax Court*, who [*138 was a stockholder in the Farmers' and Planters' Bank of Baltimore, one of the new banks chartered since 1830, the counsel for said Cheston contended:

That if the aforesaid assessment law of 1841, so far as it imposes a further tax upon the stockholders of the old banks, should be declared void for its repugnance to the Constitution of the United States, then, that it is equally void, so far as it imposes an additional tax upon James Cheston, the stockholder of one of the new banks, as it thereby deprives the new banks of the immunity from further taxation granted to them by the 1st section of the Act of 1835, chap. 142, which immunity is itself a franchise, granted for a valuable consideration, and cannot, therefore, be taken away.

Mr. Dulany, for the plaintiffs in error, said that he would not stop to cite authorities to show that the law was void, if it impaired the obligation of a contract, but would refer to two cases which were analogous to the present. (7 Cranch, 154; 4 Peters, 561.)

He then entered into a detailed examination of the charter of the Union Bank with its several supplements, and asked the court to compare the 11th section of the Act of 1821 with the Act of 1841, and he thought it would be found, that the latter took away what the former gave. It was admitted that there was

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an exemption of some kind in the Act of 1821, and the only question in the case was, what kind of exemption was it?

In Dwarris on Statutes, 51 (9 Law Library), it was said that every word of a statute must have its effect; that it was better to observe what the Legislature said than what they are supposed to have meant. Apply this to the paragraph, coupled with the doctrine that in Maryland property is not taxed, but persons are. (1 Maxcy's Laws, 12, Declaration of Rights, article 13, shows this.) The exemption was then a pledge given to a person, viz., the bank. Why should it be limited, as contended for by the opposite side, to an exoneration of the franchise merely from taxation? The construction ought to be in favor of the banks, because it was the intention of the Legislature to invite them to accept the law. If you narrow it down now, it is not the spirit in which the offer was made. It is easy to see what that spirit was. The two objects of promoting internal improvement and fostering public schools were great public objects, and it was very desirable to encourage them without resorting to direct taxation. The banks were the invited party, and the act was to be laid before the stockholders for approval or rejection. Of course, the terms would be closely looked at. The proposition was, that no "further" tax should be imposed. The word "further" refers to the preceding section, in which the tax for the road and schools is provided. It is true that the Act of 1841 imposed a tax upon the property; but the tax for road and schools fell upon the very same property, and, as it happened, was of just the same amount. A further tax of the

139*] *same character was meant. The object to which the money is to be applied makes no difference in the character of the tax. The clause is clear in itself, and we are not to look to the preamble, as a guide to intention, unless there is some ambiguity. (Dwarris on Stat., 19.) And if we look to the preamble, it will not enlighten us, because it only refers to the road, without saying anything about schools. If the exemption related only to the franchise, it was worth nothing, because whether the tax should be laid on the franchise or the property of the bank, the same people would pay it in either case. The Legislature could have derived the same amount by taxing property as if they taxed the franchise; and to hold that they were at liberty to do so, of course renders the exemption of the franchise worthless. There are two decisions upon similar words: (2 Harrison, 78, 79, 80; 7 Dana. 342).

True, the banks have heretofore paid taxes upon their real property, but the amount was trifling, and the stock was not taxed as now. Besides, their consent does not furnish a rule by which we are to construe the law.

It is said, on the other side, that the contract of exemption was made with the bank and not the stockholders; and by the Act of 1841 only the latter are taxed. But what is a corporation? Only the union of certain persons, with power to sue, &c. (4 Peters, 552; Angell & Ames on Corp., 1, 3, 5.)

The name is only the legislative baptism of the stockholders. Natural persons are substratum of the corporation; they receive all its benefits. They pay the taxes, and yet we are told, that a contract for the benefit of the corporation does not reach them. They were the persons who accepted the law in a general meeting, and not the bank, acting as a corporation. What is the difference between taxing them in the gross and taxing them individually?

As to the case of Cheston. He is a stockholder of the Farmers' and Planters' Bank, one of what are called the new banks, chartered in 1836. The Act of March, 1836, chap. 142, puts these on the same footing with the old banks. The 3d section, it is true, says that the exemption relates only to franchises; but the Legislature had no right to deprive, by law, the banks of a benefit which they had already acquired under a contract. And the words "without violation," &c., show that the Legislature did not intend to take away any such benefit.

The tax of 1841 clashes with the exemption. It is laid on everything which constitutes the property of the bank, because in a schedule everything, even the franchise, goes to make up the aggregate value of the stock, and the tax is laid on the cash value of the stock. By the 17th section, the assessors are directed to value it at the market price. But the market price is governed by the value of all the different species of property held by the bank, including even the franchise, because a purchaser looks at all these, when about to *invest. [*140 It is impossible to separate that portion of the tax which falls upon the franchise, and as the Legislature has covered the whole the entire tax must fall.

Mr. Steele, for the defendants in error, contended:

1. That the contract between the State of Maryland and the Union Bank of Maryland, created by the Act of 1821, chap. 131, and continued by the Act of 1834, chap. 274, exempted from taxation, not the property of said bank, nor the shares of its stock in the hands of individual stockholders, but its corporate franchises, and their exercise during the continuance of its charter.

2. That the tax imposed by the Act of 1841, chap. 23, being a tax upon the shares of stock owned by individual stockholders, was not a violation of the contract between the State and the bank, and was, therefore, not unconstitutional.

In the case of *James Cheston*, a tax was imposed and assessed under the same Act of 1841, chap. 23, on the shares of stock owned by the plaintiff in error in the Farmers' and Planters' Bank of Baltimore—a bank chartered since 1830, and not included in the provisions of the Act of 1821, chap. 131, and the Act of 1834, chap. 274.

In this case, the counsel for the defendant in error contended—

That the plaintiff in error was entitled to no immunity from taxation upon his shares of stock in said Farmers' and Planters' Bank of Baltimore, either under the acts of Assembly, hereinbefore mentioned, or under the Act of 1835, chap. 142.

Mr. Steele said the Appeal Tax Court is the nominal defendant only; the real one is the State of Maryland. The Act of 1841, chap. 33, is a general tax upon all property; not on banks alone, but every species of property. The

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Court of Appeals decided that it did not conflict with the Act of 1821. Is it not a rule that this court will adopt a State's construction of its own laws?

In this case it is not correct to construe the contract favorably to the banks. On the contrary, the rule is to construe strictly any provision which imposes a limit upon the taxing power. (4 Peters, 508, *Prov. Bank* v. *Billings.*) 11 Peters, 546–548, carries the rule still further.

Such a rule is necessary to protect the community from improvident legislation. Another rule is, that where there are two constructions, that one is adopted which will produce the least injury. It has been said that our construction, exempting franchises only, renders the whole nugatory, because the franchises would have been safe from taxation without such exemption. But not so. Being the creatures of law, they are peculiarly appropriate for the taxing power. (4 Wheat., 699; 12 Mass., 252; 4 Peters, 526.)

A charter makes a bank a person to carry on a business; but it must be carried on in the same way that other persons do. Suppose a pre-existing law had taxed banks, would a subse-
141*] quent charter have *been exempt? No; because the laws would not conflict with each other. Nor do they conflict when the charter is passed first.

It has been said that the exemption is clear. But the section itself refers to the preceding part of the law, and the Legislature, twice, in 1835 and 1841, put the same construction on it that we do. The 7th section and all preceding ones provides for an extention of charters. It was right to exempt the franchises, because the Legislature was dealing with that subject; but why should they go beyond that and exempt private property to an extent that they were not aware of. The State was not in want of money, nor was there a motive in the banks to purchase such an exemption as that contended for. No one then anticipated what has since come to pass. Taxes were light, and always paid. The Act of 1818 contains the same clause, when there did not exist any system of taxation. Up to 1841 the State had never taxed bank stock or choses in action, and the taxes upon real or other property did not amount to the fourth part of twenty cents. A proposition, therefore, to exempt stock which had never been taxed at all, upon the payment of four times the amount which other property paid, would have been considered a strange one. The tax of twenty cents must have been imposed upon the franchise. The compensation for extending the charters was that the banks would make the road, and for future exemption of the franchise was that they should pay twenty cents towards the school fund. The word "further" means another tax like that one; and if the tax imposed upon was the franchise, a further one upon the same thing was all that was intended to be prohibited.

Look at the contemporaneous exposition of the law by both parties. County and city taxes were paid by the banks; and not only so, but a small State tax, levied in 1822 upon real property, was paid by them also. Other banks were incorporated in 1833, 1834, and 1835, which pay the twenty cents, without anything being granted except the charter. The Act of 1835 gives the new banks an exemption upon the franchise, and nothing more. In the case in 2 Harrison, the words were "further or other tax." Exemptions have been strictly construed. (11 Johns., 77; 8 Term R., 416.) The penalty for not paying the twenty cents, shows upon what the tax was imposed, for it provides that the charter shall cease if the tax is not paid. It was therefore a bonus for the charter.

But suppose that the contract was made as contended for by the other side. By their own showing, it was made with the bank as a person, and the individual stockholders cannot avail themselves of it. If the corporation were to purchase a house, one of the members could not claim an interest in the purchase. They have an interest which is distinct from that of the corporation, because they may sue it, or sue each other. If the contract here be not to tax the bank, it is not equivalent to an agreement not to tax the stockholders. The difference is shown by supposing the tax to be laid before the bank *commenced operations, [*142
and laid afterwards. In the first case, it would diminish the capital of the bank, but in the latter it would not. If the individual stockholders can claim the benefit of the exemption, they must also be liable to the State for the payment of the tax which is the price of the exemption. But if Samuel Gordon were sued for the twenty cents stipulated in the act, no one can suppose that he would be bound to pay it. The difference between taxing banks and stockholders is shown in 1 Nott & McCord, 527; 4 Wheat., 436; 2 Peters, 459; 2 Bayley, 654, 672, 683.

Who pays the tax of 1841? If the bank does not, there is no violation of the contract with the bank, and the bank does not, in fact, pay it.

As to *Cheston's* case and the new banks, it has been said that they are on the same footing as the old. The best reply to this is to read the law. The Legislature expressly say, that they intend to exempt only the franchises.

Mr. Nelson, Attorney-General, on same side: There are two propositions to be examined:

1. The nature of the contract of 1821.

2. Whether the Act of 1821 was in force at all in 1841.

1. We admit there was a contract in 1821, and that it is protected by this court. But what is its nature and extent? The original charter of the Union Bank contained no exemption, and, therefore, according to the doctrine in the *Providence Bank* v. *Billings*, the State could tax it. The charter was passed in 1804, and contained no clause imposing a school tax. But this might have been imposed at any time after the charter, without asking the consent of the bank. The only point upon which the assent of the bank was required, in any subsequent legislation, was that its charter should be continued. It was to expire in 1816. In 1812 an act was passed proposing to extend the charter on certain conditions, but these were not accepted. In 1813 another act was passed extending the charter to 1st January, 1835, which was accepted.

[*Mr. Nelson* here went into a detailed examination of the several acts.] All the acts show

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that the Legislature had in view the making of the road, and the banks the extension of their charters. The pledge not to incorporate any other banks shows that it was only the franchise which was intended to be protected. The contract was made with the banks as such. They were the contracting party in their corporate capacity. What does the Act of 1841 do? It imposes no tax on the capital stock of any bank, but on individual interests. No bank is plaintiff in error here, complaining of a violated contract. The 9th section of the act directs the mode of making the assessment, which was upon the stock in the hands of individuals at its cash value. But this is not the same with its nomi-
143*] nal *value, which would have been the guide if the bank had been taxed. As laid, it is nothing more than an income tax, and cannot a Legislature lay that without regard to the source from which revenue comes? The distinction between a tax upon a bank, as such, and a tax upon its property, is clearly recognized in the case of *McCulloch* v. *State of Maryland*, where the court say that one may be taxed but not the other. The identity between a bank and its stockholders is shown not to exist, when we consider that the bank, as a corporation, could not become one of its own stockholders. Application had to be made to the Legislature for permission for the bank to purchase its own stock. It is true, as said on the other side, that the Act of 1821 was accepted by the stockholders in general meeting, but this was a corporate act, and not one proceeding from individual interests. If it had been the latter, whence would the majority have derived the right to bind the minority?

2. The Act of 1884, chap. 274, was accepted by the Union Bank, and by virtue of it the charter was extended to 1859. The acceptance of this new law is a merger of the old, and in the new there is no limitation of the power to tax.

Mr. Meredith, for plaintiffs in error, in reply and conclusion:

Let us inquire,

1. What was the nature and character of the contract?

2. Has it been impaired?

Mr. Meredith reviewed the charter of the Union Bank and its supplements, and said that in 1821, some years before the charter was to expire, the Legislature was desirous of making a road. It was a fact of universal notoriety that turnpike roads were not profitable. Individuals could not be pursuaded to subscribe and make this one. The cost to the Union Bank was $161,000, nearly ten per cent. upon a capital of $1,800,000. It is conceded that for this the State has relinquished a portion of the power of taxation; but then it is said to be only a partial exemption. We agree that to make out a total exemption, the language must be so strong as to leave no reasonable doubt; and we say it is so. What are the words? "Not to impose any further tax or burden on the banks." There are two important words: "any" and "further." What is the meaning of "any"? In its popular acceptation it would include all kinds of taxes in whatever form they might be laid. According to lexicographers, the word is of unusual and indefinite signification. "Any" tax must mean "every tax," of every nature or description whatsoever. Then there is the word "further," which refers to something which has been done before and additional. The other side wish to limit the meaning to an addition of the same nature; but no dictionary or example can be found to justify this restriction.

*[*Mr. Meredith* here read from Rich- [*144
ardson's Dictionary, title Further.] The two words together are as comprehensive as language could be used. They are quite as strong as those used in 2 Harrison. In the Act of 1835, when the Legislature intended to put the new banks upon a footing with the old, they say "further or other" in the 3d section. In a preceding section, the words are the same as those in 1821, which shows that they were supposed to be equivalent. The case cited from 11 Johnson was not that of a tax; it was an assessment for opening a street; and the case in 8 T. R. was decided on two grounds: 1. That the property did not belong to the occupier, and 2. That the statute had been repealed. Neither case is in point. In South Carolina seven out of eight banks are exempted under a clause exempting banks from taxation. The case in Nott & McCord decided that words of exemption did not extend to the franchise only, but all taxation.

If the words of a statute are plain and definite it is dangerous to depart, &c. (Dwarris on Stat., 3 Law Lib., 48.)

If the construction of the other side be given to the Act of 1821, the 11th section is of no use because without it the franchise would have been safe from taxation. In the cases of 1 Mass. and 4 Peters, the right was maintained it is true, to impose a tax on existing banks but in neither case was there a relinquishment of the taxing power, express or implied, except from the mere granting of the charter. We may concede the authority of both. But here the banks paid a high price for their renewed charters, and the Legislature could not have taxed the franchise any further. If so, the operation of the 11th section must be extended beyond the franchise.

[*Mr. Meredith* then entered into a critical examination of the Acts of 1812 and 1813, and argued that the first act was not accepted, because it did not go as far in protecting the bank as that of 1813: and that the latter would have been rejected if it had not been supposed to exempt them entirely from taxation.]

Mr. Justice WAYNE delivered the opinion of the court:

The question raised in this case by the agreed statement of facts upon the record, is, does the Act of Maryland of 1841, chap. 23, so far as it imposes a tax upon the shares of stock held by stockholders in the Union Bank of Maryland and the other banks mentioned in the statement, impair the obligation of a contract?

The banks are classified in that statement as the old and the new banks. The old are those which were chartered previous to the year 1812, the new those which were chartered after the year 1830.

Their exemption from the tax imposed by the Act of 1841 is claimed under the Acts of Maryland of 1821, chap. 131, and that of the 19th March, 1835, chap. 274, called the Act of the Session of 1834.

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145*] *It is admitted that the old banks accepted and have complied with the terms and conditions of the Act of 1821; that they also accepted and have complied with the provisions of the Act of 1834; and that taxes have always, since the incorporation of the banks, been assessed and levied upon their real and personal property in all the cities and counties of the State, in the same manner as upon property of the same kind belonging to individuals, and that they have always been paid by the banks up to this time.

The question, however, which this court is called upon to decide, and to which our decision will be confined, is, are the shareholders in the old and the new banks liable to be taxed, under the Act of 1841, on account of the stock which they own in the banks?

The statement given by the reporter of the acts of the Legislature of Maryland, by which the charters of the banks have been extended at different times, makes it unnecessary to refer to them in detail here.

Are the old banks in Baltimore and their stockholders exempted from further taxation during the continuance of their charters under the Act of 1821, chap. 121, by force of the 11th section of that act? Can the old banks, after the year 1845, the time to which their charters were extended by the Act of 1821, and the new banks, claim any exemption from taxation under the Act of 1834, chap. 274, unless it be a tax upon their franchise of banking?

It appears, from the Acts of 1812, 1813, and 1821, that the Legislatures which passed them had in view the construction of the Cumberland and Boonsborough turnpike roads, and the establishment of a school fund. That they designed to accomplish those objects by making some of the banks construct the roads, and all of them contributors to the school fund, as the price for their charters. A round sum, or an annual charge, with or without reference to capital stock, may be asked by a Legislature for such a franchise. It may be more convenient to the banks to have such a consideration or bonus distributed through the years of their corporate existence, than to pay its equivalent in advance. This option was given to the old banks. Being so given, it is conclusive that the Legislature intended the annual tax or charge upon the capital stocks of the banks to be the bonus or price, or part of the price as to some of them, that they were to pay for the prolongation of their franchise of banking. When the banks accepted the acts, by choosing to pay the annual charge instead of the stipulated alternative, it is plain that they thought so too, and that they understood in that way the contract between themselves and the State. Either was a condition, to be accepted and complied with before the charters were to be extended. Such a contract is a limitation upon the taxing power of the Legislature making it, and upon succeeding Legislatures, to impose any further tax upon the franchise. But why, when bought, as it becomes property, may it not be taxed, as land is taxed which has been 146*] *bought from the State, was repeatedly asked in the course of the argument. The reason is, that everyone buys land, subject in his own apprehension to the great law of necessity, that we must contribute from it and all of our property something to maintain the State. But a franchise for banking, when bought, the price is paid for the use of the privilege whilst it lasts, and any tax upon it would substantially be an addition to the price. But whether the bonus for the franchise is paid by an annual tax upon the capital stock, or in any other way, it is in the discretion of the Legislature to tax the capital stock as an aggregate, according to its actual value, or the stockholders on account of their separate ownership of it, or the dividends in the aggregate, or the stockholders on account of their portions of them. The limitation and the power to tax, as both have been just expressed, was substantially conceded by counsel on both sides of this cause. We did not understand the counsel for the appellants as contending, that the shareholders in the old banks were exempted from the tax imposed upon them on account of their stock, except by the force of the 11th section of the Act of 1821. Their argument was, though the franchise might be taxed separate from the stock of a bank, whether the annual tax paid by the banks upon their capital stock was a tax upon their franchises or not, that the banks were exempted from further taxation; the old banks by force of the 11th section of the statute of 1821, and all of the banks in Baltimore by force of the Act of 1834. The argument of the counsel for the defendant in error was, that the annual tax paid by the banks was a tax upon their franchises, and that the 11th section did not give to the stockholders any exemption from being taxed as persons on account of their stock. Whether or not the exemption given by that section is extended to the old and the new banks in virtue of the Act of 1834, is another question, to which a separate answer must be given in the course of this opinion.

Has such an exemption been given to the old banks? The language of the 11th section of the Act of 1821 is: "And be it enacted, That, upon any of the aforesaid banks accepting and complying with the terms and conditions of this act, the faith of the State is hereby pledged not to impose any further tax or burden upon them during the continuance of their charters under this act." This is the language of grave deliberation, pledging the faith of the State for some purpose—some effectual purpose. Was that purpose the protection of the banks from what that Legislature and succeeding Legislatures could not do, if the banks accepted the act, or from what they might do, in the exercise of the taxing power? The terms and conditions of the act were, that the banks should construct the road and pay annually a designated charge upon their capital stocks, as the price for the prolongation of their franchise of banking. The power of the State to lay any further tax upon the franchise was exhausted. That is the contract between the State and the banks. It follows, then, *as a matter of course, [*147 when the Legislature go out of the contract, proposing to pledge its faith, if the banks shall accept the act, not to impose any further tax or burden upon them, that it must have meant by those words an exemption from some other tax than a further tax upon the franchise of the banks. The latter was already provided against. To confine the pledge to any further tax upon the franchise, surrenders the whole

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clause as a substantive enactment, to a supposed needless declaration of the Legislature, that it would not do what it had stipulated by its contract not to do. The faith of States is never pledged but for some substantial end, within the competency of their legislative power; and it is not for us to suppose that of Maryland was given in the Act of 1821 with a less grave intent. "Not to impose any further tax or burden," when used in reference to some tax already imposed, means no other tax besides that to which reference is made. Those words, so used, cannot be limited by a refinement upon the etymology of the word "any," out of or beyond its meaning in common discourse, to any like; and the words "any further tax," used with relation to some other tax, will, by common consent, as it always has been, be intended to mean any additional tax besides that referred to, and not any further like tax.

Having determined that the clause in question was not meant as a pledge against further taxation upon the franchises of the banks, but that it was a pledge against additional taxation, what is the extent of exemption given by it, or to what does it apply? Does it exempt the respective capital stocks of the banks, as an aggregate, and the stockholders from being taxed as persons on account of their stock? We think it does both. The aggregate could not be taxed, without its having the same effect upon the parts that a tax upon the parts would have upon the whole. Besides, the Legislature, in proposing the terms and conditions of the act, use the word "banks" with reference to the consent or acceptance of the act being given by the stockholders, according to a fundamental article of their charters. The acceptance of the act could only be made by the stockholders. They did accept, and the State recognized it as the act of the stockholders. It could not have been given or been recognized in any other way. True it is, when accepted and recognized, it became a contract with the banks. But its becoming a contract with the banks determines of itself nothing. We must look in what character, or by whose assent it was to become a contract with the State, to ascertain the intention of the Legislature in making the pledge, "that upon any of the aforesaid banks accepting of and complying with the terms and conditions of this act, the faith of the State is hereby pledged not to impose any further tax or burden upon them during the continuance of their charters under this act."

The senses in which the words "bank or banks" are used, occur every day in conversation, and are understood by everyone. But the **148*]** *sense in which they are intended to be used, is determined by their connection with what is said besides. When we speak of an act to be done by a bank or banks, we mean an act to be done by those who have the authority to do it. If it be an act within the franchise for banking, or the ordinary power of the bank to contract, and it is done by the president and directors, or by their agent, we say the bank did it, and everyone understands what is meant. If, however, an act is to be done relative to the institution, by which its charter is to be in any way changed, the stockholders must do it, unless another mode to effect it has been provided by the charter. In one sense, but after it has been done, we may say the bank did it, but only so because what the stockholders have done, became a part of the institution, which it was not before. The act to be done in this instance was relative to the institution. The Legislature knew it could only be done by the stockholders, and it uses the word "banks" in reference to the act being accepted by the stockholders. The act was accepted by them. When, then, the Legislature says "that upon any of the aforesaid banks accepting of and complying with the terms and conditions of this act, the faith of the State is hereby pledged not to impose any further tax or burden upon them during the continuance of their charters under this act," the relative is as broad as the antecedent, comprehending all that the latter referred to. It cannot be said, then, that the stockholders in the old banks are not exempted by the 11th section of the Act of 1821 from being taxed as persons, on account of their stock in those banks, during the continuance of their charters under that act.

Such was manifestly the intention of the Legislatures which passed the Acts of 1813 and 1821, from their language. It is confirmed by the attendant circumstances. Each of those Legislatures were anxious to have a certain road constructed, which they thought the convenience and intercourse of the citizens of Maryland required; and they were also anxious to raise an adequate school fund for every county in the State. They determined that both should be accomplished by incorporating certain banks, with the obligation upon them to make the roads, and to make all the banks in the State pay an annual tax upon their respective capitals, for a school fund, as the conditions upon which their charters were to be extended. By the Act of 1813, chap. 122, every incorporated bank in the State was required to pay the annual tax of twenty cents upon every hundred dollars of its capital stock, as the condition upon which its charter was to be extended.

When the Legislature, in 1821, incorporated the Boonsborough Turnpike Company, and proposed to extend the charters of those banks which, by the terms of the act, were to subscribe for stock enough to complete the road, it renewed upon those banks the school tax which had been imposed upon them in common with the *other banks, by the Act of 1813. [***149** The 11th sections in both acts are identical. In what spirit were those acts offered to the acceptance of the banks? In what spirit was it that the banks viewed and accepted these acts? It was an unusual way of providing means for the construction of turnpike roads. The tolls might turn out to be enough to compensate them for the expenditures. They might not. Though the Legislature thought the construction of the roads and paying the school fund tax were no more than an adequate price for an extended franchise, it is very certain that the stockholders may have thought that the incorporation of the banks into turnpike companies, with an obligation upon them to withdraw so much money from their business operations as was sufficient to finish the roads, presented only a contingent possibility that they could be remunerated by tolls from the roads. When the Act of 1821 was proposed, they had some ex-

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perience of what had been the result of the construction of the Cumberland road. Is it not possible, then, that when the Acts of 1813 and 1821 were in preparation, or as they were being enacted, that the 11th section was introduced as an inducement from the stockholders to accept those acts? Whether the tolls from the road have ever compensated the banks for the expenditure upon them, does not appear in the case. But it was natural that the stockholders, knowing as they did that a tax upon the franchises of the banks would not exempt them from other taxation, stipulated in both instances that a provision should be introduced into the acts surrendering the State's right to tax them further than they were about to be by those acts. In whatever way we examine the acts of 1813 and 1821, we are of opinion that it appears from the 11th sections of those acts, to have been the intention of the Legislatures which passed them, to exempt the stockholders from taxation as persons on account of the stock which they owned in the banks. This exemption, however, is limited to the old banks in Baltimore which were chartered before 1821, during the continuance of their charter under the Act of 1821. It is founded upon the 11th section of that act, and it is our opinion that the Act of 1841, chap. 23, in so far as it imposes a tax upon the stockholders in those banks, on account of their stock, does impair the obligations of a contract, and is void by the 10th section of the 1st article of the Constitution of the United States.

The Act of 1834 does not extend to the old or the new banks an exemption from the tax imposed by the Act of 1841, chap. 23. It is an act to extend the charters of the several banks in Baltimore. The second section prescribes the terms upon which the franchise for banking is extended. Those terms are the payment annually of twenty per cent. upon every hundred dollars of the respective capitals of the banks, and their proportional parts of $75,000, in two yearly installments, computed from the passage of the act, according to the combined rates of 150*] their respective capitals paid in, *and of the time for which their charters are respectively continued beyond the first day of January, 1845.

Upon a failure of any bank to pay either the annual charge or its proportional installment, its charter is declared null and void. The annual charge and the installment make the bonus to be paid by each bank for its continued franchise. It was urged for the old and the new banks, that the annual tax which they were required to pay by the second section of the Act of 1834 being upon their respective capitals, a tax upon the stockholders on account of their stock would be equivalent to an increase of the price which had been given for the franchise. The effect upon the stockholders would be the same, as they pay both, but that is because they agreed to pay an annual tax upon the capital stock, for their franchise, without any stipulation by the State that they were not to be taxed as stockholders, on account of their stock, as was the case in the eleventh section of the Act of 1821. The franchise is their corporate property, which, like any other property, would be taxable, if a price had not been paid for it, which the Legislature accepted, as the consideration for allowing them to use the franchise during the continuance of their charters. The capital stock is another property—corporately associated, for the purpose of banking—but in its part is the individual property of the stockholders in the proportions they may own them. Being their individual property, they may be taxed for it, as they may for any other property they may own. This is not only the case of Maryland. A franchise for banking is in every State of the Union recognized as property. The banking capital attached to the franchise is another property, owned in its parts by persons, corporate or natural, for which they are liable to be taxed, as they are for all other property, for the support of government.

We are of opinion that the stockholders in the old banks are exempt from the tax imposed by the Act of 1841, chapter 23, during the continuance of their charters under the Act of 1821, but that the stockholders in the old and new banks are liable to be taxed by the Act of 1841, or that they can claim no exemption under the Act of 1834, by which their charters were further extended.

The judgment of the Court of Appeals is therefore reversed, and the cause will be remanded, with directions to enter up a judgment for the plaintiff in error.

Criticised—16 How., 401, 403.
Cited—6 How., 332, 542; 16 How., 386, 420, 429, 430; 1 Black, 446; 4 Wall., 259; 8 Wall., 438; 13 Wall., 376; 21 Wall., 498; 5 Otto, 687, 690, 694; 2 Abb. U. S., 337; 12 Blatchf., 462.

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*WILLIAM SEARIGHT, Commission-[*151
er and Superintendent of the Cumberland Road, within the State of Pennsylvania,
Plaintiff in Error,

v.

WILLIAM B. STOKES AND LUCIUS W. STOCKTON, who have survived RICHARD C. STOCKTON, *Defendants in Error.*

Construction of act ceding road with proviso of free passage to vehicle carrying U. S. mail or property.

Under the acts of Congress ceding to Pennsylvania that part of the Cumberland Road which is within that State, and the acts of Pennsylvania accepting the surrender, a carriage, whenever it is carrying the mail, must be held to be laden with the property of the United States, within the true meaning of the compact, and consequently exempted from the payment of tolls.

But this exemption does not apply to any other property conveyed in the same vehicle, nor to any person traveling in it, unless he is in the service of the United States and passing along in pursuance of orders from the proper authority.

Nor can the United States claim an exemption for more carriages than are necessary for the safe, speedy, and convenient conveyance of the mail.

THIS case was brought up by writ of error from the Circuit Court of the United States for the Western District of Pennsylvania, and involved the right of the plaintiff in error, acting under the authority of the State of Pennsylvania, to collect tolls from the stage-coaches which carried the mail of the United States.

The circumstances under which the question arose were these:

On the 30th of April, 1802, and 3d of March,

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1803, acts of Congress were passed, the effect of both of which taken together was, that three per cent. of the amount received for the sales of public land in Ohio, should be expended in making roads within the said State, and two per cent. of said fund be also expended in making public roads leading from the navigable waters emptying into the Atlantic to the Ohio River, upon certain conditions, which were accepted by Ohio.

On the 29th of March, 1806, Congress passed an act to provide for laying out the road by commissioners, and directed the President to pursue such measures as in his opinion should be proper to obtain the consent for making the road, of the State or States through which the same may have been laid out; the expense of the road to be charged to the two per cent. fund.

Pennsylvania, Virginia, and Maryland all gave their assent. Pennsylvania passed her law on the 9th of April, 1807, and gave power to those who were to make the road to enter upon land, dig, cut, and carry away materials, &c. The road was laid out from Cumberland, in Maryland, to Wheeling, on the Ohio River, and made; but a great difficulty having arisen, on the part of the United States, in keeping it in repair, the road fell into decay, and a new system of legislation was adopted to attain this object.

On the 4th of February, 1831, the State of Ohio passed a law for the preservation and repair of the United States road. It provided, that whenever the consent of Congress thould be obtained, the governor of the State should take the road under his care, erect gates and **152*]** *toll-houses, appoint a superintendent, collectors of tolls, &c., with this proviso amongst others: "Provided, also, That no toll shall be received or collected for the passage of any stage or coach conveying the United States mail, or horses bearing the same, or any wagon or carriage laden with the property of the United Stated, or any cavalry or other troops, arms, or military stores belonging to the same, or to any of the States comprising this Union, or any person or persons on duty in the military service of the United States, or of the militia of any of the States."

The law contained the necessary provisions for the preservation of good order upon the road, and also a stipulation that the tolls should be neither below nor above a sum necessary to defray the expenses incident to the preservation and repair of the same.

On the 2d of March, 1831, Congress assented to this act.

On the 4th of April, 1831, Pennsylvania passed an act "for the preservation and repair of the Cumberland Road." It provided for the appointment of commissioners, who were directed to build toll-houses and erect toll-gates, to collect tolls, with the following exceptions: "And provided, also, That nothing in this act shall be construed so as to authorize any tolls to be received or collected from any person or persons passing or re-passing from one part of his farm to another, or to or from a mill, or to or from any place of public worship, funeral, militia training, elections, or from any student or child going to or from any school or seminary of learning, or from persons and witnesses going to and returning from courts: and pr vided, further, that no toll shall be received collected for the passage of any wagon or ca riage laden with the property of the Unit States, or any cannon or military stores belon ing to the United States or to any of the Stat composing this Union."

The 4th section directed the amount of tol after deducting expenses, to be applied to t repairs and preservation of the road, and ga the commissioners power to increase or dimi ish the rates of tolls, provided that they shou at no time be increased beyond the rates of t established by an act incorporating a compan to make a road from Harrisburg to Petersbur passed in 1806. The toll fixed by this act upo a coach and four horses was twenty cents f every five miles.

The 10th section was as follows: "And be enacted, &c., That this act shall not have an force or effect until the Congress of the Unite States shall assent to the same, and until s much of the said road as passes through th State of Pennsylvania be first put in a goo state of repair, and an appropriation made b Congress for erecting toll-houses and toll-gate thereon, to be expended under the authority o the commissioners appointed by this act: Pr vided, the Legislature of this State may, at an future session thereof, change, alter, or amen this act, provided, that the same shall not be s altered or amended as to reduce or increase th rates of toll hereby *established below [*15 or above a sum necessary to defray the expense incident to the preservation and repair of sai road, for the payment of the fees or salaries o the commissioners, the collectors of tolls, an other agents. And provided, further, that n change, alteration, or amendment shall ever b adopted, that will in any wise defeat or affec the true intent and meaning of this act."

On the 23d of January, 1832, Maryland pass ed an act, which, in its essential provisions was the same with that of Pennsylvania; and on the 7th of February, 1832, Virginia passed a similar law.

On the 3d of July, 1832, Congress declared its assent to the above mentioned laws of Penn sylvania and Maryland in these words, "to which acts the assent of the United States is hereby given, to remain in force during the pleasure of Congress," and appropriated $150,000 to carry into effect the provisions of said acts; and on the 2d of March, 1833, assented to the act of Virginia, with a similar limitation.

On the 24th of June, 1834, Congress passed an act for the continuation and repair of the Cumberland Road, appropriating $300,000 to that object.

The 4th section was as follows: "And be it further enacted, That as soon as the sum by this act appropriated, or so much thereof as is necessary, shall be expended in the repair of said road, agreeably to the provisions of this act, the same shall be surrendered to the States respectively through which said road passes; and the United States shall not thereafter be subject to any expense for repairing said road."

On the 1st of April, 1835, Pennsylvania passed a supplement to the act above mentioned, accepted the surrender by the United States, &c., &c.

On the 13th of June, 1836, Pennsylvania

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passed another act "relating to the tolls on that part of the Cumberland road which passes through Pennsylvania, and for other purposes," the 1st section of which was as follows: "That all wagons, carriages, or other modes of conveyance, passing upon that part of the Cumberland Road which passes through Pennsylvania, carrying goods, cannon, or military stores belonging to the United States, or to any individual state of the Union, which are excepted from the payment of toll by the 2d section of an act passed the fourth of April, *Anno Domini* eighteen hundred and thirty-one, shall extend only so far as to relieve such wagons, carriages, and other modes of conveyance from the payment of toll to the proportional amount of such goods so carried belonging to the United States or to any of the individual States of the Union; and that in all cases of wagons, carriages, stages, or other modes of conveyance, carrying the United States mail, with passengers or goods, such wagon, stage, or other mode of conveyance, shall pay half toll upon such modes of conveyance."

On the 5th of April, 1843, another act was [154*]passed by Pennsylvania, *the 39th section of which was as follows: "That from and after the passage of this act, the commissioner of the Cumberland Road shall have power to increase the rate of tolls on all stage-coaches drawn by four or more horses, to any sum not exceeding one dollar, at each gate upon said road within the State of Pennsylvania; and the said commissioners shall have the same power to enforce the payment and collection of tolls authorized by the act of thirteenth of June, eighteen hundred and thirty-six, relating to tolls on that part of the Cumberland Road passing through Pennsylvania, by stopping such coach or coaches, as is provided by the act of fourth of April, eighteen hundred and thirty-one, for the preservation and repair of the Cumberland Road; and to exercise all the means and remedies authorized by said acts for the collection of tolls and prevention of fraud on said road; reserving also to the said commissioner the right to sue or maintain any action therefor, as he might or could do at common law, in addition to the remedies herein provided."

A suit was brought on the 29th November, 1842, in the Circuit Court of the United States for the Western District of Pennsylvania, by agreement of parties, and a statement of facts, signed by the respective counsel, in the nature of a special verdict, as follows:

"It is agreed that this case be submitted to the court on the following statements of facts, as if found by a jury.

"The plaintiff is the commissioner and superintendent of so much of the Cumberland or National Road as lies within the State of Pennsylvania, duly appointed under and by virtue of the laws of that State in such case provided, and is a citizen of said State. The defendants and Richard C. Stockton, whom they have survived, are and were citizens of Maryland. The defendants, together with the said Richard, whom they have survived, were joint partners in certain contracts for carrying the mail of the United States hereunto annexed. The route described in said contracts extended over so much of the road called the Cumberland or National Road as lies within the Commonwealth of Pennsylvania. Said contracts were duly executed between the Postmaster-General of the United States thereto lawfully authorized by the laws of the United States, and said contractors in conformity with law. The mail of of the United States was transported by said contractors in accordance with the provisions of said contracts, during the time therein stipulated, in carriages constructed in conformity with the directions and requirements of the Postmaster-General; said carriages were constructed and accommodated as well for the transportation of the mail, as for carrying passengers and their baggage, but the number of said passengers was limited so as not to interfere with or impede the transportation of the mail, and in no case was any passenger carried when the transportation of the mail would be thereby retarded or interfered with. The said National Road within the territorial limits *of Pennsylvania was, so far and to [*155 such extent as the Constitution and laws of the United States, and the State of Pennsylvania, vested the same, the property of the United States, and had been constructed under the authority of said laws by the United States. The Constitution and laws of the United States, and of the Commonwealth of Pennsylvania, bearing upon this subject, and the executive proceedings of the same respectively, are to be deemed and considered part of this agreed case. No tolls were paid by said contractors for or upon any vehicle or carriages employed or used by them for the transportation of said mail during the period of the existence of said contracts, notwithstanding said carriages ordinarily as aforesaid carried passengers, and said contractors received the passage money therefor for their own use.

"Under the laws of the United States and of the State of Pennsylvania, so much of said Cumberland or National Road as lies within the limits of the State of Pennsylvania, was ceded by the United States and accepted by Pennsylvania, upon the terms and conditions expressed and contained in said statutes. Since the year 1835 the State of Pennsylvania has held said road under and by virtue of said laws, and has performed the terms and conditions therein prescribed in every respect, unless the imposition and claim of tolls as herein stated is so far an infraction of the compact created by said laws. Payment of tolls imposed by and under the laws of Pennsylvania, has been demanded of said contractors by the plaintiff and his predecessors in office, for and on account of their carriages so as aforesaid employed in the transportation of the mail with passengers so carried as aforesaid; such payment of tolls has been resisted and refused by said contractors on the ground that the carriages employed in the transportation of the mail of the United States, on said road, were not under the said compact and laws legally liable to the payment of said tolls.

"The said carriages employed in the transportation of the mail were four-wheel carriages drawn by four horses each, and they ran over said route and through the six gates which are upon said road within the said State of Pennsylvania, twice daily, being their eastern and western routes. The full rates of toll established by law upon said road in Pennsylvania,

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for a daily line of four-horse coaches or stages, were, at each of the said six gates, including the eastern and western routes, daily

From 1 January, 1836, to 1 April, 1837, 40 cents.
April, 1837, to 1839, 60 cents.
After 1839, to present time, 100 cents.

"If, upon the foregoing state of facts, the court shall be of opinion that the defendants are liable to pay tolls for their carriages so employed in the transportation of the mail of the United States, judgment to be entered for the plaintiff for the sum of $6,000. If it shall be of opinion that the said carriages so employed **156*]** are not subject *to the payment of said tolls, then judgment to be entered for the defendants.

"R. P. FLENNIKEN for Plaintiffs.
"RICH'D. S. COX for Defendants."

Upon this statement of facts the court below directed judgment to be entered in favor of the defendant, and to review this decision of the court the writ of error was brought.

Messrs. Veech and *Walker* for the plaintiffs in error.

Messrs. Coxe and *Nelson*, Attorney-General, for the defendants in error.

[This case was argued at the preceding term of the court by *Messrs. Flenniken* and *Walker* for the plaintiffs in error, and *Mr. Coxe* for defendants, but the court ordered a re-argument at the present term.]

Mr. Veech, for plaintiffs in error, after reciting the history of the road, said, that if the road was the property of the United States, it might be considered a hardship that the mail could not pass free. But Pennsylvania had only granted the right of way. She was the last of the three States who argued that it should be made, and then stipulated that it should pass certain points.

The United States had no jurisdiction over the soil, and no more power over it than State officers had when they were making State roads. No one thought of making any provision for keeping the road in repair. As soon as ten miles were made, a difficulty arose upon this point. (1 Collection of Surveys, &c., published in 1839, by order of the Senate; Report of Shriver, communicated to Congress by Mr. Gallatin.)

Mr. Gallatin said, that "tolls were suggested, but that could only be done by authority of the State." (Same book, 133, 639.)

Mr. Dallas, when Secretary of the Treasury, made a report on the subject, in which he said that provision ought to be made for keeping the road in repair, but that Congress, of itself, had no power in the premises. (Doc. No. 59, page 658.)

The road continued to decay until 1822, when a bill was passed to erect gates and collect tolls, which was vetoed by the President of the United States. Congress then appropriated a small sum for repairs. Mr. Buchanan moved an amendment, providing for a cession of the roads to the States through which it passed, on condition that they would collect tolls and keep it in repair. There was no reservation in favor of the mail.

In 1823 the same amendment was offered, without any reservation.

Between 828 and 1832, the road became so much out of repair that another movement was made. [The counsel here referred to the several acts which were passed by State Legislatures and by Congress.]

*In the meantime, Pennsylvania had [***157** constructed roads leading from Philadelphia to Pittsburg, and the question was, whether she should turn the travel off her own roads to one which passed through only a small portion of the State. The Pennsylvania Legislature struck out a part of the Ohio bill, which they had before them. When the Ohio bill was before Congress, Mr. Burnet, a senator from that State, said that care was taken that the mail of the United States should pass free. (7 Reg. Deb., 287.)

There are other differences between the laws of Pennsylvania and Ohio. The Virginia law is almost a copy of that of Ohio, although, in the spirit of old fashioned Virginia hospitality, one who is visiting his neighbor is not allowed to be charged any toll. Maryland copies the law of Pennsylvania. Maryland and Pennsylvania said that the United States should first put the road in repair and erect toll-houses, whilst Virginia imposed no such restriction. The cost to Congress was about $750,000 in repairing the road and erecting gates. Before this time the mail was carried in one line of coaches. The contract with the defendants for carrying it in 1835 was to pay them $9,708. In 1837 they were paid $27,600.

Under the present law half toll is charged upon the coaches which carry the mail and passengers; if there is nothing but the mail they go free. Suppose we admit that the mail is the property of the United States, can a coach be said to be "laden with the property of the United States" when it has nine passengers in it and only a small mail bag? Or, could this be affirmed of a wagon laden with flour and one musket? Such a construction forces words from their true import. But the mail cannot be properly called the property of the United States. All carriers have a special property in their load to protect it from depredations. But what the law means is, that the United States must have an unqualified right of property in the subject matter. It will be necessary for the other side to make out two propositions:

1. That the mail is the property of the United States.

2. That a vehicle can be said to be laden with the mail when it has a single bag in it.

Mr. Coxe, for defendants in error:

[*Mr. Coxe* traced the history of the road as it is found in the laws and in 1 State Papers, Mit. Miscellaneous, 432, 474, 714, 718, 940, 947.]

The error of the argument on the other side is in supposing that Ohio was the only party interested in the original construction of the road. The United States was a large landed proprietor, and wished to open an easy access to the lands in the west, in order that sales might be increased. Pennsylvania, it is true, did not cede the land over which the road passed, but she was deeply interested in the general result. The United States did not claim sovereign power *over it. Still [***158** they have some interest in it, and we do not claim more than all incorporated companies have over the roads which they make. The Pennsylvania act is different from that of Ohio.

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But the reason is, that the road was completed in the former State and not in the latter. [*Mr. Cox* here reviewed the particular provisions of the several acts.] Is there any ground to suppose that Congress intended to make a different contract with different States? The conditions are essentially the same: one exempts the property of the United States, and the other, the mail." The act of Pennsylvania speaks of "vehicles carrying the United States mail," thus recognizing the mail as belonging to the government. The mail is one of the most valuable branches of the government, connecting itself closely with the business of the people, and a proportion of the mail matter is absolutely the property of the government, being communications from one public officer to another. The mail is fenced round with protection, by law, from robbery and depredation, and the bags and locks are public property. The act of Congress of 1831, throughout, recognizes the mail as being the property of the government. Unless passengers were to go in the coaches, there would have to be a guard; but they are the best guard. The contracts require that stages shall be suitable for passengers. The right of altering the contract is always reserved to the government, and although there may be three lines now instead of one formerly, yet the letter of the Postmaster-General to the governor of Pennsylvania shows that the mail could not now be carried in one coach. If there can be a toll imposed upon carriages when there are passengers, why not also when there are no passengers? And such an amount may be taxed as will prevent the running of the mail. A question of power cannot be decided by the greater or lesser exercise of it. (4 Wheat., 327, 351, 387, 417, 426, 429.)

Mr. Nelson, Attorney-General, on the same side:

The question lies in a narrow compass. It is, whether there is a contract between the United States on the one hand and Pennsylvania on the other; and if so, what is its nature? The Act of 4th April, 1831, is the foundation of the compact. It proposed to provide for the repair of the road. Commissioners were appointed on condition that the United States would repair the road and erect gates. The act was to have no force until Congress assented to it, and appropriated money for toll-houses and gates. Here is a proposal, an offer for a contract. The 10th section says that it shall not go into operation until an appropriation is made, but there is nothing said about ceding jurisdiction. Congress, in 1832, assented, on condition that Pennsylvania would execute her part of the contract and keep the road in repair. The power of Congress over internal improvements is not drawn into the case at all. The United States have a right to purchase the privilege of 159*] transporting the mail over *any road. If Pennsylvania had said, give us $750,000, and your mail shall pass free, would not such a contract have been within the competency of the parties to make, and have been good? The consideration was a valuable one to Pennsylvania. She cannot now deny the right of the United States to make the road, because she accepted the cession, and actually holds title under the United States. (9 Laws U. S., 232, 233, act of surrender by United States.)

There was a power reserved to Pennsylvania to change the regulations of the road, provided the compact was not infringed. But the Act of 1836 asserts the authority of the Legislature to vary the original terms, and levies half tolls. It cannot be said by the other side that the two acts do not clash with each other, because the Legislature says they do. That the mail is property is too plain to be argued.

What were the circumstances under which the acts were passed? The road had been in use for twelve or fourteen years before 1831. The mail was carried in stages, without paying any toll, in the same description of vehicle as that now taxed. There never was any other species of property of the United States carried on it; at least, the record does not show that there was. Was it a lure, then, to the government to spend $800,000 for the privilege of passing property free which it had never transported on the road, and was not likely to transport?

It has been said, that because Ohio was more specific in her legislation, therefore Pennsylvania did not mean to exempt the mail. But of what authority is the act of another State? The object was the same with them all.

We have the opinion of the executive and judicial departments of Pennsylvania. (2 Watts & Sergeant, 168.)

But suppose there was no compact. The Act of 1836 would still have been invalid. It is not a general law to collect tolls, but directed specifically against the mail. The property of the contractors is, no doubt, subject to taxation by a State; but a law leveled exclusively against the mail is a different thing. A power to destroy the means implies a power to destroy the thing itself. The case of *McCulloch* v. *Maryland* (4 Wheaton) was an attempt to tax the means by which the bank carried on its operations. In *Weston* v. *City of Charleston* (2 Peters, 449) the same principle was established. It was held that loans were means to execute the powers of Congress, and to tax the stock would impair the means. (So, 15 Peters, 435, 448.) It has been said, that if these tolls are not collected the road will go out of repair. But can this be so? The whole amount charged is only $1,200 a year, upon a road on which $800,000 were expended as late as 1835, built at the request of Pennsylvania, and which she pledged her faith to keep in repair. It has been said also that the privilege of passing free may be abused; that one hundred stages may be run upon the road. But the record presents no such case. *The stages are used [*160 *bona fide* by the contractors under their contract with the Postmaster-General.

Mr. Walker, for plaintiffs in error, in reply and conclusion:

If the court shall be against us on the interpretation of the compact, we shall have to invite their attention to the following grave questions:

1. That the federal government has no power, under the Constitution, to construct a road within the limits of a State.

2. That the consent of a single State cannot enlarge the powers of the federal government,

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even within its own limits, and much less within the limits of another State.

3. That the two per cent. fund referred to in the several acts of appropriation was exhausted before the road reached the Pennsylvania line.

4. That the consent of Pennsylvania, under the law of 9th of April, 1807, was based upon the appropriation of the two per cent. fund, and that alone to the construction of said road within her limits.

5. That Congress possessed no power, under the Constitution, to collect toll upon said road in the State of Pennsylvania.

6. That the State of Pennsylvania had jurisdiction of said road, and the right to collect toll, and possessed this power as one of the rights not delegated in forming the Constitution of the Union, and which could only be relinquished by an amendment of the Constitution.

7. That the right to collect toll in this case was never surrendered by the State of Pennsylvania.

The power of the federal government to construct roads has been abandoned for eight years past. The authority to establish post-roads, is merely to designate the road from point to point; and if the United States have no constitutional power, an act of one of the States cannot confer it. If there was no power to make the road, there was none to repair it or collect tolls; and an agreement to repair it was null and void, as being repugnant to the Constitution. The jurisdiction which Pennsylvania had, originally, over the soil of the road, was never surrendered; and if it had been, her Legislature had no power to surrender it.

The speech of Mr. Burnet gives the history of this matter. The road was going to ruin, and Congress refused to appropriate. The friends of the road in Ohio obtained the passage of an act there. It was a favorite in that State, but not in Pennsylvania. The latter State had commenced a large system of improvement from Philadelphia to Pittsburg, and knew that this Cumberland Road would draw off the travel from her own works. The law of Pennsylvania was, therefore, dissimilar from that of Ohio. Ohio did not require the road to be put in repair before accepting the cession, but Pennsylvania did. There are many other important differences between the **161*]** *two laws. Congress hastened to accept the Ohio law before Pennsylvania acted. What reason is there to think that Pennsylvania intended to imitate Ohio? There is none. If so, why was the phraseology changed? Some words must have been intentionally omitted, and yet this court is now asked to insert them, to change places with the Legislature at Harrisburg, and do what it refused to do. Although, in general, the mail may be property, can it be considered so here, where there is a special exclusion? Every word of a statute must receive a meaning, unless the court are compelled to consider some words synonymous. In the Ohio law, the words "mail" and "property" are not synonymous; it exempts a "stage or coach, carrying the mail," and a "wagon or carriage, carrying property of the United States;" referring to different vehicles, carrying different things. The "mail" is never carried in wagons. The government recently brought a large copper rock from Lake Superior. This could not have passed free unless under the head of property. Ohio had, therefore, two distinct provisions in her law; Pennsylvania adopted only one of them. The toll on "stages" included the coach carrying the mail, in words and letters. The Ohio law asked her to exempt the mail, but she refused.

But does "property" include the mail? Does a department, when making a schedule of its property, include the contents of the mail? The United States is only a common carrier, and paid as such. If not, then postage is exacted for carrying the property of the United States. It is the property of the persons interested; they can recover it at law. It has been said that because a common carrier has a special property in what he carries, therefore the United States have a property in the mail. But this technical principle was unknown to the farmers and mechanics who passed the Act of 1831. Again, what is the meaning of "laden"? It is the bulk of the load. If an officer of the United States puts a single box in a wagon, and the rest of the load is private property, could it be said with any propriety that the wagon was "laden" with the property of the government? To justify this, other words must be interpolated into the law, viz., "in whole or in part." But they are not there. If "property" means the "mail," then the section must read, "laden with the mail;" and if this be so, a single mail bag will not exempt the coach from tolls. If the contractors had a steam wagon conveying one hundred passengers and a small mail bag, would they all go free? It is said that we attack the mail, but we do not. The government pays turnpike gates everywhere else. When companies make roads with their own money, they allow the government to use them on the same terms with everyone else. If it can seize upon roads, the Postmaster-General would soon get rid of all difficulties with railroad companies. But we deny the right.

But upon whom does the tax fall in this case? The record says that stages conveying nothing but the mail pass free. It is then *the [*162 passengers who pay the tax. The contractors must increase the fare. The government is not a party upon the record, and the Postmaster-General has no business to come here by counsel. The whole difficulty has arisen from an effort of contractors to draw custom to their own line from roads where tolls are charged. All opposition stages, too, must be broken down on this road, because those stages will be charged with toll.

It is said that passengers are a guard to the mail. They do not consider themselves as paying their passage money for the privilege of guarding the mail. But upon this theory, the contractors ought to be bound to carry some always; whereas the stages frequently run without any passengers.

Pennsylvania has been charged with violating her faith. But how can this be? She derives no revenue from the road; the whole of the tolls are expended upon repairs, and that, too, in a case where her own pecuniary interests suffer,

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because the travel is drawn away from her own roads. The true interest of the United States is to maintain our view of the case; because, if tolls enough are not collected to keep the road in repair, it must go to ruin, and then the contractors will charge a higher price for carrying the mail, even at a slower pace.

The Act of 1836 is only declaratory of that of 1831, and not inconsistent with it. The latter exempts wagons when laden with the property of the United States in the whole; and the former proportions the exemption to the amount of property thus owned. The imposition of half toll is, in fact, a privilege granted. The whole of the Pennsylvania legislation is one continued series, instead of being separate and inconsistent acts. The law of 1831 accepted the road, when it should be put in repair and toll-houses erected. The act of Congress making the appropriation, did not pass till 1834; and in April, 1835, Pennsylvania accepted the surrender, and appointed commissioners. Between that time and the first of January, 1836, gates were erected, and the Act of 1836, now under consideration, was passed without any loss of time. The case in Watts & Sergeant has been referred to, but here is a certified copy of the record, showing that, from 1836 to 1839, bills were made out quarterly. Before the Act of 1836, all the stages, except the fast line, paid tolls. These were therefore collected under the Act of 1831. There were only two lines, and the commissioners agreed to excuse one, on the condition that the other paid. This was half toll, and was the foundation of the law.

Mr. Chief Justice TANEY delivered the opinion of the court:

The question in this case is, whether the State of Pennsylvania can lawfully impose a toll on carriages employed in transporting the mail of the United States over that part of the Cumberland road which passes through the territory of that State?

163*] *The dispute has arisen from an act of the Legislature of Pennsylvania, passed in 1836, whereby wagons, carriages, stages, and other modes of conveyance, carrying the United States mail, with passengers or the goods of other persons, are charged with half the toll levied upon other vehicles of the like description. The plaintiff in error is the commissioner and superintendent of the road, appointed by the State. The defendants and contractors for carrying the mail, and they insist that their carriages when engaged in this service are entitled to pass along the road free from toll, although they are conveying passengers and their baggage at the same time. In order to obtain the opinion of this court upon the subject, an amicable action was instituted by the plaintiff in the Circuit Court of the United States for the Western District of Pennsylvania, for the tolls directed to be collected by the law above mentioned, and the facts in the case stated by consent. The judgment of the Circuit Court was against the plaintiff, and it is now brought here for revision by writ of error.

The Cumberland Road has been so often the subject of public discussion, and the circumstances under which it was constructed and afterwards surrendered to the several States through which it passes, are so generally known, that we shall forbear to state them further than may be necessary for the purpose of showing the character of the present controversy, and explaining the principles upon which the opinion of this court is founded.

The road in question is the principle line of communication between the seat of government and the great valley of the Mississippi. It passes through Maryland, Pennsylvania, Virginia, and Ohio, and was constructed at an immense expense by the United States, under the authority of different and successive acts of Congress: the States contributing nothing either to the making of the road or to the purchase of land over which it passes. They did nothing more that enact laws authorizing the United States to construct the road within their respective limits, and to obtain the land necessary for that purpose from the individual proprietors upon the payment of its value.

After the road had thus been made—although it was constructed with the utmost care, sparing no efforts to make it durable—it was still found to be incapable of withstanding the wear and tear produced by the number of carriages continually passing over it, engaged in transporting passengers, or heavily laden with agricultural produce or merchandise; and that either a very great expense must be annually incurred in repairs, or the road, in a short time, would be entirely broken up and become unfit for use. As no permanent provision had been made for these repairs, applications were made to Congress for the necessary funds; and as these demands upon the public treasury unavoidably increased as the road was extended or longer in use, they naturally produced a strong feeling of dissatisfaction *and opposition in those [*164 portions of the Union which had no immediate interest in the road; and the constitutional power of Congress to make these appropriations was also earnestly, and upon many applications, contested by many of the eminent statesmen of the country. It therefore became evident, that unless some other means than appropriations from the public treasury could be devised, a work which everyone felt to be a great public convenience, in which a large portion of the Union was directly and deeply interested, and which had been constructed at so much cost, must soon become a total ruin.

In this condition of things, the State of Ohio, on the 4th of February, 1831, passed an act, proposing, with the assent of Congress, to take under its care immediately the portion of the road within its limits which was then finished, and the residue from time to time as different parts of it should be completed, and to erect toll-gates thereon, and to apply the tolls to the repair and preservation of the road, specifying in the law the tolls it proposed to demand, and containing a proviso in relation to the property of the United States, and to persons in its service, in the following words: "That no toll shall be received or collected for the passage of any stage or coach conveying the United States mail, or horses bearing the same, or any wagon or carriage laden with the property of the United States, or any cavalry or other troops, arms, or military stores belonging to the same, or to any of the States comprising this Union, or any person or persons on duty in the military

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service of the United States, or of the militia of any of the States." On the 2d of March, in the same year, Congress passed a law assenting to this act of Ohio, which is recited at large in the act of Congress, with all its provisions and stipulations.

The measure proposed by the State of Ohio seems to have been received with general approbation; and on the 4th of April, 1831, Pennsylvania, about two months after the passage of the law of Ohio, passed an act similar in its principles, but varying from it in some respects on account of the different condition of the road in the two States. In Ohio it was new and unworn, and therefore needed no repair; while in Pennsylvania, where it had been in use for several years, it was in a state of great dilapidation. While proposing, therefore, to take it under the care of the State, and to charge the tolls specified in the act, it annexed a condition that the United States should first put so much of it as passed through that State in good repair, and an appropriation be also made by Congress for erecting toll-houses and toll-gates upon it. The clause in relation to the passage of the property of the United States over the road, also varies from the language of the Ohio law, and is in the following words: "That no toll shall be received or collected for the passage of any wagon or carriage **165***]laden with the property of *the United States, or any cannon or military stores belonging to the United States, or to any of the States composing this Union."

The example of Pennsylvania was followed by Maryland and Virginia, at the next succeeding sessions of their respective Legislatures: the law of Maryland being passed on the 23d of January, 1832, and the Virginia law on the 7th of February following. The proviso in relation to the property of the United States, in the Maryland act, is precisely the same with that of Pennsylvania, and would seem to have been copied from it, while the proviso in the Virginia law, upon this subject, follows almost literally the law of Ohio.

With these several acts of Assembly before them, Congress, on the 3d of July, 1832, passed a law declaring the assent of the United States to the laws of Pennsylvania and Maryland, to remain in force during the pleasure of Congress; and the sum of $150,000 was appropriated to repair the road east of the Ohio River, and to make the other needful improvements required by the laws of these two States. No mention is made of Virginia in this act of Congress, because in her law the previous reparation of the road, and the erection of toll-houses and gates, at the expense of the United States, was not in express terms made the condition upon which she accepted the surrender of the road; but the assent of Congress was afterwards given to her law by the Act of March 2d, 1833, which, like the contract with the two other States, was to remain in force during the pleasure of Congress.

The sum appropriated, as above mentioned, was, however, found insufficient for the purposes for which it was intended, and by an act of June 24th, 1834, the further sum of $300,000 was appropriated; and this act states the appropriation to be made for the entire completion of the road east of the Ohio, and other needful improvements, to carry into effect the laws of Pennsylvania, Maryland, and Virginia, each of which is particularly referred to in the act of Congress; and further directs that as far as that sum is expended, or so much of it as shall be necessary, the road should be surrendered to the States respectively through which it passed. But so greatly had the road become dilapidated that even these large sums were found inadequate to place it in a proper condition, and by the Act of March 3d, 1835, the further sum of 346,188.58, was appropriated; but this law directed that no part of it should be paid or expended until the three States should respectively accept the surrender; and that the United States should not thereafter be subject to any expense in relation to the said road." Under this act of Congress the surrender was accordingly accepted, in 1835, and the money applied as directed by the act of Congress, and from that time the road has been in the possession of and under the control of the several States, with toll-gates upon it. This is the history of the road, and of the legislation of Congress and the States *upon that subject (so far as it is [*166 necessary now to state it), up to the time when the road passed into the hands of the States. We shall have occasion hereafter to speak more particularly of the act of Congress last mentioned, because it is the act under which the States finally took possession of the road.

When the new arrangement first went into operation no toll was charged in any of the States upon carriages transporting the mail of the United States; and no toll upon such carriages has ever yet been claimed in Ohio, Maryland, or Virginia. But on the 13th of June, 1836, the State of Pennsylvania passed a law, declaring that carriages, &c., carrying the property of the United States or of a State, which were exempted from the payment of toll by the Act of 1831, should thereafter be exempted only in proportion to the amount of property in such carriage belonging to the United States or a State, and, "that in all cases of wagons, carriages, stages, or other modes of conveyance, carrying the United States mail, with passengers or goods, such wagon, stage, or other mode of conveyance shall pay half toll upon such modes of conveyance." And we are now to inquire whether this half toll can be imposed upon carriages carrying the mail under the compact between the United States and Pennsylvania.

It will be seen from this statement that the constitutional power of the general government to construct this road is not involved in the case before us; nor is this court called upon to express any opinion upon that subject; nor to inquire what were the rights of the United States in the road previous to the compacts hereinbefore mentioned. The road has in fact been made at the expense of the general government. It was the great line of connection between the seat of government and the western States and territories, affording a convenient and safe channel for the conveyance of the mails and enabling the government thereby to communicate more promptly with its numerous officers and agents in that part of the United States west of the Alleghany mountains. The object of the compact was to preserve the road for the purposes for which it had been made.

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The right of the several States to enter into these agreements will hardly be questioned by anyone. A State may undoubtedly grant to an individual or a corporation a right of way through its territory upon such terms and conditions as it thinks proper; and we see no reason why it may not deal in like manner with the United States, when the latter have the power to enter into the contract. Neither do we see any just ground for questioning the power of Congress. The Constitution gives it the power to establish postoffices and post-roads; and charged, as it thus is, with the transportation of the mails, it would hardly have performed its duty to the country, if it had suffered this important line of communication to fall into utter ruin, and sought out, as it must have done, some circuitous or tardy and difficult route, 167*]when by the immediate payment *of an equivalent it obtained in perpetuity the means of performing efficiently a great public duty, which the constitution has imposed upon the general government. Large as the sum was which it paid for repairs, it was evidently a wise economy to make the expenditure. It secured this convenient and important road for its mails, where the cost of transporting them is comparatively moderate, instead of being compelled to incur a far heavier annual expense, as they must have done, if, by the destruction of this road, they had been forced upon routes more circuitous or difficult, when much higher charges must have been demanded by the contractors. Certainly, neither Ohio, nor Pennsylvania, nor Maryland, nor Virginia; appear from their laws to have doubted their own power or the power of Congress. But we do not understand that Pennsylvania now upon any ground disputes the validity of the compact or denies her obligation to perform it; on the contrary, she asserts her readiness to fulfill it in all its parts, according to its true meaning; but denies the construction placed upon it by the United States. It is to that part of the case, therefore, that it becomes the duty of the court to turn its particular attention.

It is true, that in the law of Pennsylvania, and of Maryland also, assented to by Congress, the exemption of carriages engaged in carrying the mail is not so clearly and specifically provided for as in the laws of Ohio and Virginia. But in interpreting these contracts the character of the parties, the relation in which they stand to one another, and the objects they evidently had in view, must all be considered. And we should hardly carry out their true meaning and intention if we treated the contract as one between individuals, bargaining with each other with adverse interest, and should apply to it the same strict and technical rules of construction that are appropriate to cases of that description. This, on the contrary, is a contract between two governments deeply concerned in the welfare of each other; whose dearest interests and happiness are closely and inseparably bound up together, and where an injury to one cannot fail to be felt by the other. Pennsylvania, most undoubtedly, was anxious to give to the general government every aid and facility in its power, consistent with justice to its own citizens, and the government of the United States was actuated by a like spirit.

This was the character of the parties and the relation in which they stood. Besides, a considerable number of the citizens of the State had a direct interest in the preservation of the road; and the State had manifested its sense of the importance of the work by the Act of Assembly of 1807, which authorized the construction of the road within its limits; and again in the resolution passed in 1828, by which it proposed to confer upon Congress the power of erecting gates and charging toll. Yet the only value of this road to the general government worth considering is for the transportation of the mails; and in that point of view it is far more important than *any other post- [*168 road in the Union. Occasionally, indeed, arms or military stores may be transported over it; and sometimes a portion of the military force may pass along it. But these occasions for its use, especially in time of peace, but rarely occur; the daily and necessary use of the road by the United States is as a post-road forming an almost indispensable link in the chain of communication from the seat of government to its western borders.

Now, as this was well known to the parties, can it be supposed that when Pennsylvania, by her Act of 1831, proposed to take the road, and keep it in repair from the tolls collected upon it, and exempted from toll carriages laden with the property of the United States, she yet intended to charge it upon the mails? That in return for the large expenditure she required to be made, before she would receive the road, she confined her exemption to matters of no importance, and reserved the right to tax all that was of real value? And when Congress assented to the proposition, and incurred such heavy expenses for repairs, did they mean to leave their mails through Maryland and Pennsylvania still liable to the toll out of which the road was to be kept in repair? Upon this point the Act of Congress of March 3d, 1835, is entitled to great consideration. For it was under this law that the States finally took possession of the road and proceeded to collect the tolls. By so doing they assented to all the provisions contained in this act of Congress; and one of them is an express condition that the United States should not thereafter be subject to any expense in relation to the road. Yet under the argument, the expenses of the road are to be defrayed out of the tolls collected upon it. And if the mails in Pennsylvania and Maryland may be charged, it will be found that instead of the entire exemption, for which the United States so expressly stipulated, and to which Pennsylvania agreed, a very large proportion of the expenses of repair will be annally thrown upon them. We do not think that either party could have intended, when the contract was made, to burden the United States in this indirect way for the cost of repairs. So far as the general government is concerned, it might as well be paid directly from the treasury. For nobody, we suppose, will doubt that this toll, although in form it is paid by the contractors, is in fact paid by the Postoffice Department. It is not a contingent expense, which may or may not be incurred, and about which a contractor may speculate; but a certain and fixed amount, for which he must provide, and which, therefore, in his bid for the contract, he must add to the sum he would be

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otherwise willing to take. It is of no consequence to the United States whether charges for repairs are cast upon it through its treasury or Postoffice Department. In either case it is not free from expense in relation to the road, according to the compact upon which it was surrendered to and accepted by the States.

Neither do the words of the law of Pennsyl- **169***] vania of 1831 require *a different construction. The United States have unquestionably a property in the mails. They are not mere common carriers, but a government, performing a high official duty in holding and guarding its own property as well as that of its citizens committed to its care; for a very large portion of the letters and packages conveyed on this road, especially during the session of Congress, consists of communications to or from the officers of the executive department, or members of the Legislature, on public service, or in relation to matters of public concern. Nor can the word "laden" be construed to mean "fully laden", for that would in effect destroy the whole value of the exemption, and compel the United States to pay a toll even on its military stores and other property, unless every wagon or carriage employed in transporting it was as heavily laden as it could conveniently bear. We think, that a carriage, whenever it is carrying the mail, is laden with the property of the United States within the true meaning of the compact: and that the act of Congress of which we have spoken, and to which the State assented, must be taken in connection with the State law of 1831 in expounding this agreement. Consequently, the half toll imposed by the Act of 1836 cannot be recovered.

The acts of assembly of Ohio and Virginia have been relied on in the argument by the plaintiff in error: and it has been urged that, inasmuch as the laws of these States, in so many words, exempt carriages carrying the mail of the United States, the omission of these words in the law in question shows that Pennsylvania intended to reserve the right to charge them with toll. And it is morever insisted that, as the law of Ohio which contains this provision passed sometime before the act of Pennsylvania, it ought to be presumed that the law of the latter was drawn and passed with a full knowledge of what had been done by the former, and that the stipulation in favor of the mail was designedly and intentionally omitted, because the State of Pennsylvania meant to reserve the right to charge it.

The court think otherwise. Even if the law of Ohio is supposed to have been before the Legislature of Pennsylvania, it does not by any means follow that the omission of some of its words would justify the inference urged in the argument, where the words retained, by their fair construction, convey the same meaning. Indeed, if it appeared that the Ohio law was in fact before the Legislature of Pennsylvania when it framed its own act upon the subject, it would rather seem to lead to a contrary conclusion. For it cannot be supposed that in the compact which the United States was about to form with four different States, and when the agreement with one would have been of no value without the others, Pennsylvania would have desired or asked for any privileges to herself which were not extended to the other States, nor that she would be less anxious to give every facility in her power to the general *government when carrying out through [*170 her territory the important and necessary operations of the Postoffice Department. Nor could she have supposed that Congress would give privileges to one State which were denied to others; and, after having done equal justice to all in the repair and preparation of the road wherever needed, make different contracts with the different States; and, while it bargained for the exemption of its mails in one or more of them, consent to pay toll in another. The fact that they are clearly and explicitly exempted from toll in Ohio and Virginia is a strong argument to show that it was intended to exempt them in all, and that the compacts with Pennsylvania and Maryland were understood and believed to mean the same thing, and to accomplish the same objects. And this conclusion is greatly strengthened by the fact that Maryland, where the words of the law are precisely the same with those of Pennsylvania, has never claimed the right to exact tolls from carriages carrying the mail; nor did Pennsylvania claim it in the first instance, and they were always allowed to pass free until the Act of 1836. Indeed, that law itself appears to recognize the right of the mail and other property of the United States to go free, and the imposition of only half toll would seem to imply that the State intended to reach other objects, and did not desire to lay the burden upon anything that properly belonged to the United States. And so far as we can judge from its legislation, Pennsylvania has never to this day placed any other construction upon its compact than the one we have given, and has never desired to depart from it.

If we are right in this view of the subject, the error consists in the mode by which the State endeavored to attain its object. Unquestionably the exemption of carriages bearing the mail is no exemption of any other property conveyed in the same vehicle, nor of any person traveling in it, unless he is in the service of the United States, and passing along in pursuance of orders from the proper authority. Upon all other persons, although traveling in the mail stage, and upon their baggage or any other property, although conveyed in the same carriage with the mail, the State of Pennsylvania may lawfully collect the same toll that she charges either upon passengers or similar property in other vehicles. If the State had made this road herself, and had not entered into any compact upon the subject with the United States, she might undoubtedly have erected toll-gates thereon, and if the United States afterwards adopted it as a post-road, the carriage engaged in their service in transporting the mail, or otherwise, would have been liable to pay the same charges that were imposed by the State on other vehicles of the same kind. And as any rights which the United States might be supposed to have acquired in this road have been surrendered to the State, the power of the latter is as extensive in collecting toll as if the road had been made by herself, except in so far *as she is restricted by her compact; and [*171 that compact does nothing more than exempt the carriages laden with the property of the

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United States, and the persons and baggage of those who are engaged in their service. Toll may therefore be imposed upon everything else in any manner passing over the road; restricting, however, the application of the money collected to the repair of the road, and to the salaries and compensation of the persons employed by the State in that duty.

It has been strongly pressed in the argument, that the construction placed upon the compact by the court would enable the contractors to drive every other line of stages from the road, by dividing the mail bags among a multitude of carriages, each of which would be entitled to pass toll free, while the rival carriages would be compelled to pay it. And that by this means the contractors for carrying the mail would in effect obtain a monopoly in the conveyance of passengers throughout the entire length of the road, greatly injurious to the public, by lessening that disposition to accommodate which competition is sure to produce, and enhancing the cost of traveling beyond the limits of a fair compensation.

The answer to this argument is, that under the agreement they have made, according to its just import, the United States cannot claim an exemption for more carriages than are necessary for the safe, speedy, and convenient conveyance of the mail. And if measures such as are suggested were adopted by the contractors, it would be a violation of the compact. The Postmaster-General has unquestionably the right to designate not only the character and description of the vehicle in which the mail is to be carried, but also the number of carriages to be employed on every post-road. And it can scarcely, we think, be supposed, that anyone filling that high office, and acting on behalf of the United States, would suffer the true spirit and meaning of the contract with the State to be violated or evaded by any contractor acting under the authority of his department. But undoubtedly, if such a case should ever occur, the contract, according to its true construction, would be enforced by the State in the courts of justice; and every carriage beyond the number reasonably sufficient for the safe, speedy, and convenient transportation of the mail would be liable to the toll imposed upon similar vehicles owned by other individuals. In a case where an error in the post might be so injurious to the public, it would certainly be necessary that the abuse should be clearly shown before the remedy was applied. But there can be no doubt, that the compact in question, in the case supposed, would not shield the contractor, and upon a case properly made out and established, it would be the duty of a court of justice to enforce the payment of the tolls.

No such fact, however, appears or is suggested in the case before us, and the judgment of the Circuit Court is therefore affirmed.

172*] *Mr. Justice* McLEAN:

I dissent from the opinion of the court. And as the case involves high principles, and, to some extent, the action and powers of a sovereign State, I will express my opinion.

This was an amicable action to try whether the defendants, who are contractors for the transportation of the mail on the Cumberland Road, are liable, under the laws of Pennsylvania, to pay toll for stages in which the mail of the United States is conveyed.

This road was constructed by the federal government through the State of Pennsylvania, with its consent. Whether this power was thus constitutionally exercised, is an inquiry not necessarily involved in the decision of this case. The road was made, and for some years it was occasionally repaired by appropriations from the Treasury of the United States. These appropriations were made with reluctance at all times, and sometimes were defeated. This, as a permanent system of keeping the road in repair, was, of necessity, abandoned; and, with the assent of Pennsylvania, Congress passed a bill to construct toll-gates and impose a tax on those who used the road. This bill was vetoed by the President, on the ground that Congress had no constitutional power to pass it. The plan was then adopted to cede the road, on certain conditions, to the States through which it had been established.

On the 4th of April, 1831, Pennsylvania passed "An Act for the preservation of the Cumberland Road."

By the 1st section it was provided, that as soon as the consent of the government of the United States shall have been obtained, certain commissioners, who were named, were to be appointed, whose duties in regard to the road were specially defined. The 2d section enacted, that to keep so much of the road in repair as lies in the State of Pennsylvania, and pay the expense of collection, &c., the commissioners should cause six toll-gates to be erected, and certain rates of toll were established. To this section there was a proviso, "that no toll shall be received or collected for the passage of any wagon or carriage laden with the property of the United States, or any cannon or military stores belonging to the United States or to any of the States composing the Union."

By the 4th section the tolls were to be applied, after paying expenses of collection, &c., to the repairs of the road, the commissioners having power to increase them, provided they shall not exceed the rates of toll on the Harrisburg and Pittsburg Road. The last section provided that the toll should not be altered below or above a sum necessary to defray the expenses incident to the preservation and repair of said road, &c., and also, "that no change, alteration, or amendment shall ever be adopted, that will in any wise defeat or affect the true intent and meaning of this act."

By the 10th section of the above act it was declared to have no effect until Congress should assent to the same, "and until so much of the *said road as passes through the State of [*173 Pennsylvania be first put in a good state of repair, and an appropriation made by Congress for erecting toll-houses and toll-gates thereon, to be expended under the authority of the commissioners appointed by this act."

By their act of the 24th of June, 1834, Congress appropriated $300,000 to repair the Cumberland Road east of the Ohio River, which referred to the above act of Pennsylvania, and also to similar acts passed by Virginia and Maryland. And in the 4th section of the act it was provided, "that as soon as the sum by this act appropriated, or so much thereof as is necessary, shall be expended in the repair of

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said road agreeably to the provisions of this act, the same shall be surrendered to the States respectively through which said road passes; and the United States shall not thereafter be subject to any expense for repairing said road." This surrender of the road was accepted by Pennsylvania, by an act of the 1st of April, 1835.

The above acts constitute the compact between the State of Pennsylvania and the Union, in regard to the surrender of this road. The nature and extent of this compact are now to be considered.

As before remarked, the constitutional power of Congress to construct this road is not necessarily involved in this decision. By the Act of Congress of the 30th of April, 1802, to authorize the people of Ohio to "form a constitution and State government," among other propositions for the acceptance of the State, it was proposed that "five per cent. of the net proceeds of the lands lying within the said State, sold by Congress, should be applied to the laying out and making public roads leading from the navigable waters falling into the Atlantic, to the Ohio, to the said State, and through the same; such roads to be laid under the authority of Congress, with the consent of the several States through which the roads shall pass; provided the State shall agree not to tax land sold by the governmetn until after the expiration of five years from the time of such sale."

By the 2d section of the Act of the 3d March, 1803, three per cent. of the above fund was placed at the disposition of the State, to be "applied to the laying out, opening, and making roads, within the State."

The above conditions, having been accepted by Ohio, constituted the compact under which the Cumberland Road was laid out and constructed by the authority of Congress. And of this work it may be said, however great has been the expenditure through the inexperience or unfaithfulness of public agents, that no public work has been so diffusive in its benefits to the country. It opened a new avenue of commerce between the eastern and western States. Since its completion, and while it was kept in repair, the annual transportation of goods and travel on it saved an expense equal to no inconsiderable part of the cost of the road. But its ces-
174*] sion to the States *through which it was established was found necessary to raise, by tolls, an annual revenue for its repair.

Whatever expenditure was incurred in the construction of this road beyond the two per cent. reserved by the compact with Ohio, was amply repaid by the beneficial results of the work; and this was the main object of Congress. It was a munificent object, and worthy of the Legislature of a great nation.

The road was surrendered to Pennsylvania and the other States through which it had been constructed. But what was ceded to Pennsylvania? All the right of the United States which was not reserved by the compact of cession. This right may be supposed to arise from the compact with Ohio; the consent of Pennsylvania to the construction of the road, and the expense of its construction, including the sums paid to individuals for the right of way. These, and whatever jurisdiction over the road, if any, might be exercised by the United States, wer surrendered to Pennsylvania. The, road, the must be considered as much within the juri diction and control of Pennsylvania, exceptin the rights reserved in the compact, as if it ha been constructed by the funds of that State.] is therefore important to ascertain the exte of the rights reserved by the United States.

In the closing paragraph of the 2d section o the Act of 1831, above cited, it is provide "that no toll shall be received or collected fo the passage of any wagon or carriage lade with the property of the United States, or an cannon or military stores belonging to the Uni ed States, or to any of the States composin this Union. In addition to this, there were ce tain limitations imposed, as to the amount o tolls, on the State of Pennsylvania, which nee not now be considered.

Some light may be cast on the import of th above reservation by a reference to somewh similar compacts made in regard to the sam subject between the United States and th States of Ohio, Maryland and Virginia. Th Ohio Act of the 2d of March, 1831, provides i the 4th section, "that no toll shall be receive or collected for the passage of any stage o coach conveying the United States mail, o horses bearing the same, or any wagon or ca riage laden with the property of the Unite States, or any cavalry or other troops, arms, o military stores, belonging to the same, or t any of the States comprising this Union, or an person or persons on duty in the military ser ice of the United States, or of the militia o any of the States." The 4th section of the Mar land Act of the 28d of January, 1832, provid ed, "that no tolls shall be received or collecte for the passage of any wagon or carriage lade with the property of the United States, or an cannon or military stores belonging to the Uni ed States or to any of the States composing thi Union." In the Virginia Act of the 7th o February, 1832, it is provided, "that no to shall be received or collected for the passage o any *stage or coach conveying the Unit-[*17 ed States mail, or horses bearing the same, o any wagon or carriage laden with property o the United States, or any cavalry or other troop amry or military stores, belonging to the sam or to any of the States comprising this Union, o any person or persons on duty in the militar service of the United States or of the militia o any of the States.

The reservations in the Pennsylvania an Maryland acts are the same, and differ mater ally from those contained in the acts of Ohi and Virginia. In the latter acts the ma stage is excepted, but not in the former Pennsylvania and Maryland exempt fro toll "any wagon or carriage laden wit the property of the United States;" bu the same exemption is contained in the Ohi and Virginia laws in addition to that of th mail stage. Now, can the reservations in thes respective acts be construed to mean the sam thing? Is there no difference between the ac of Ohio and Pennsylvania? Their language different, and must not their meaning be soug from the words in the respective acts? The are separate and distinct compacts. The Ohi law was first enacted, and was, probably, b fore the Legislature of Pennsylvania whe

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their act was passed. But whether this be the fact or not, they were both sanctioned by Congress; and the question is, whether both compacts are substantially the same. That the Legislatures did not mean the same thing seems to me to be clear of all doubt. Did Congress, in acceding to these acts, consider that they were of the same import? Such a presumption cannot be sustained without doing violence to the language of the respective acts.

In both acts wagons laden with the property of the United States are exempted. In the Ohio act the mail stage is exempted from toll, but not in the act of Pennsylvania. Now, is the mail stage exempted from toll by both acts or by neither? Is not either of these positions equally unsustainable? The exemption of the mail stage must be struck out of the Ohio law to sustain one of these positions, and to sustain the other it must be inserted in the act of Pennsylvania. Does not the only difference consist in striking out in the one case and inserting in the other? This must be admitted unless the words, "wagon or carriage laden with the property of the United States," mean one thing in the Ohio law, and quite a different thing in the law of Pennsylvania. These words have a sensible and obvious application in both acts, without including the mail stage. In the Ohio law the words "no toll shall be received or collected for the passage of any stage or coach conveying the United States mail," cannot by any sound construction be considered as surplusage; and yet they must be so considered if the Pennsylvania act exempt the mail stage.

When one speaks of transporting the property of the United States, the meaning of the terms "property of the United States" is never mistaken. They mean munitions of war, pro-
176*] visions purchased *for the support of the army, and any other property purchased for the public revenue. They do not mean the mail of the United States. A wagon laden with property is understood to be a wagon used for the transportation of property, in the ordinary sense of such terms. A wagon or carriage being laden is understood to have a full or usual load. The mail stage of the United States is never spoken of in this sense. It is used for the transportation of passengers as well as the mail, and in this view it is undoubtedly considered when spoken of in conversation, and especially when referred to in a legislative act. In no sense can the mail stage be considered a "carriage laden with the property of the United States." The same exception applies to a wagon or carriage laden with the property of a State. Now, no one can doubt the meaning of the exception thus applied. And can a different meaning be given to the same words when applied to the United States? Certainly not, unless the mail can be denominated the property of the United States.

The mail of the United States is not the property of the United States. What constitutes the mail? Not the leathern bag, but its contents. A stage load of mail bags could not be called the mail. They might be denominated the property of the United States, but not the mail. The mail consists of packets of letters made up with postbills, and directed to certain postoffices for distribution or delivery; and whether these be conveyed in a bag or out of it, they are equally the mail; but no bag without them is or can be called the mail. Can these packets be said to be the property of the United States? The letters and their contents belong to individuals. No officer in the government can abstract a letter from the mail, not directed to him, without incurring the penalty of the law. And can these letters or mailed pamphlets or newspapers be called the property of the United States? They in no sense belong to the United States, and are never so denominated. If a letter be stolen from the mail which contains a bank note, the property in the note is laid in the person who wrote the letter in which the note is inclosed. From these views I am brought to the conclusion that neither party to the compact under consideration could have understood "a wagon or carriage laden with the property of the United States," as including the mail stage of the United States.

Are there any considerations connected with this subject which lead to a different conclusion from that stated? The fact that four distinct compacts were entered into with four States to keep this road in repair, cannot have this effect. We must judge of the intention of the parties to the compact by their language. I know of no other rule of construction. Two of these compacts exempt the mail stage from toll, and two of them do not exempt it. Now, if the same construction, in this respect, must be given to all of them, *which of the [*177 alternatives shall be adopted? Shall the mail stage be exempted by all of them, or not exempted by any of them?

What effect can the expenditures of the United States, in the construction of this road, have upon this question? In my judgment none whatever. The reservation must be construed by its terms, and not by looking behind it. The federal government has been amply repaid for the expenditures in the construction of this road, great and wasteful as they may have been, by the resulting benefits to the nation. It is now the road of Pennsylvania, subject only to the terms of the compact. In the act surrendering this road to the States respectively, through which it passes, Congress say, "and the United States shall not thereafter be subject to any expense for repairing said road." To get clear of this expense was the object of the cession of it to the States. But does this affect the question under consideration. The repairs of the road are provided for by the tolls which the State of Pennsylvania is authorized to impose. And this is the meaning of the above provision. It is supposed that the exaction of toll on the mail stage would conflict with that provision. But how does it conflict with it? The toll on the mail stage is not paid by the government, but by the contractor. And whether this toll will increase the price paid by the government for the transportation of the mail, is a matter that cannot be determined. Competition is invited and bids are made for this service, and the price to be paid depends upon contingent circumstances. The toll would be paid, in part, if not in whole, by a small increase of price for the transportation of passengers. The profits of the contractor might, perhaps, be somewhat lessened by the

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toll, or it might increase, somewhat, the cost of conveying the mail. But this is indirect and contingent; so that in no sense can it be considered as repugnant to the above provision. "The United States are not to be subject to any expense for repairing this road;" and they are not, in the sense of the law, should the Postoffice Department have to pay, under the contingencies named, a part of the toll stated. Whether it does pay it or not, under future contracts, cannot be known; and whatever expense it may pay, will be for the use, and not the repair, of the road.

The Act of the 13th of June, 1836, which is supposed to be in violation of the compact, I will now consider. That act provides, "that all wagons, carriages, or other modes of conveyance, passing upon that part of the Cumberland Road which passes through Pennsylvania, carrying goods, cannon, or military stores belonging to the United States, or to any individual State of the Union, which are excepted from the payment of toll by the second section of an Act passed the 4th of April, 1831, shall extend only so far as to relieve such wagons, carriages, and other modes of conveyance, from the payment of toll to the proportional **178***] amount of such goods *so carried belonging to the United States, or to any of the individual States of the Union; and that in all cases of wagons, carriages, stages, or other modes of conveyance, carrying the United States mail, with passengers or goods, such wagon, stage, or other mode of conveyance, shall pay half toll upon such modes of conveyance."

By the Act of 1831, "every chariot, coach, coachee, stage, wagon, phaeton, or chaise, with two horses and four wheels, were to be charged at each gate twelve cents; for either of the carriages last mentioned, with four horses, eighteen cents." Is the Act of 1836, which imposes half toll on "the mail stage, with passengers or goods," repugnant to the above provision? I think it is not, in any respect.

If the mail be not the property of the United States, then the stage in which it is conveyed is not within the exception of the Act of 1831, and it is liable to pay toll. That only which is within the exception is exempted. That the mail is in no sense the property of the United States, and was not so understood by the parties to the compact, has already been shown. It follows, therefore, that a law of Pennsylvania imposing on such stage a half or full rate of toll is no violation of the compact.

But, if the mail stage were placed on a footing with a wagon or carriage laden with the property of the United States, is the Act of 1836, requiring it to pay toll, a violation of the compact? I think it is not. A wagon or carriage laden with the property of the United States, means a wagon or carriage having, as before remarked, a full or usual load. Such a vehicle is exempted from toll by the Act of 1831. But suppose such wagon or carriage should have half its load of the property of the United States, and the other half of the property of individuals, for which the ordinary price for transportation was paid; is such a wagon, thus laden, exempted from toll? Surely it is not. An exemption under such circumstances would be a fraud upon the compact. It should be required to pay half toll, and this is what the law of Pennsylvania requires. The mail stage by that law is only half toll, when it conveys passengers with the mail. There is then, no legal objection to the exaction of this toll. It is in every point of view just, and within the spirit of the compact.

In the argument for the United States, the broad ground was assumed that no State has the power to impose a toll on a stage used for the transportation of the mail. That it is a means of the federal government to carry into effect its constitutional powers, and, consequently, is not a subject of State taxation. To sustain this position the cases of *McCulloch* v. *The State of Maryland* (4 Wheaton, 316), and *Dobbins* v. *The Commissioners of Erie County* (16 Peters, 435), were cited.

In the first case, this court held "that a State government had no *right to tax any [*171 of the constitutional means employed by the government of the Union, to execute its constitutional powers." And the Bank of the United States was held to be a means of the government. In the second case, under a general law of Pennsylvania imposing a tax on all officers, a tax was assessed on the office held by the plaintiff, as captain of a revenue cutter of the United States, and this court held that such law, so far as it affected such an officer was unconstitutional and void. The court say, "there is a concurrent right of legislation in the States and the United States, except that both are restrained by the Constitution of the United States. Both are restrained by express prohibitions in the Constitution; and the States by such as are reciprocally implied when the exercise of a right by a State conflicts with the perfect execution of another sovereign power delegated to the United States. That occurs when taxation by a State acts upon the instruments and emoluments and persons which the United States may use and employ as necessary and proper means to execute their sovereign power."

Neither of these cases reach or affect the principle involved in the case under consideration. The officer of the United States was considered as a means or instrument of the government, and, therefore, could not be taxed by the State as an officer. To make that case the same in principle as the one before us, the officer must claim exemption from toll as a means of the government, in passing over a toll-bridge or turnpike road constructed by a State, or by an association of individuals, under a State law. The principle of the other case is equally inapplicable. Maryland taxed the franchise of the Bank of the United States; and if the law establishing that bank were constitutional, the franchise was no more liable to taxation by a State than rights and privileges conferred on one or more individuals under any law of the Union. With the same propriety a judge of the United States might be subjected to a tax by a State for the exercise of his judicial functions. And so of every other officer and public agent. But the court held that the stock in the bank owned by a citizen might be taxed.

A toll exacted for the passage over a bridge or on a turnpike road is not, strictly speaking,

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a tax. It is a compensation for a benefit conferred. Money has been expended in the construction of the road or bridge, which adds greatly to the comforts and facilities of traveling, and on this ground compensation is demanded. Now, can the United States claim the right to use such road or bridge free from toll? Can they place locomotives on the railroads of the States or of companies, and use them by virtue of their sovereignty? Such acts would appropriate private property for public purposes, without compensation; and this the Constitution of the Union prohibits.

It is said, in the argument, that as well might a revenue cutter be taxed by a State as to impose a toll on the stage which conveys the mail. The revenue cutter plies on the 180*] thoroughfare of nations or of *the State, which is open to all vessels. But the stage passes over an artificial structure of great expense, which is only common to all who pay for its use a reasonable compensation. There can be no difficulty on this point. At no time, it is believed, has the Postoffice Department asserted the right to use the turnpike roads of a State, in the transmission of the mail, free from toll.

Pennsylvania stands pledged to keep the road in repair, by the use of the means stipulated in the compact. And she has bound herself, "that no change, alteration, or amendment shall ever be adopted that will in anywise defeat or affect the true intent and meaning of the Act of 1831." In my judgment that State has in no respect violated the compact by the Act of 1836. If the mail stage can be included in the exemption by the terms "wagon or carriage laden with the property of the United States," still the half toll on such stage when it contains passengers, is within the compact. But, as has been shown, the mail stage is not included in the exemption, and, consequently, it was liable to be charged with full toll. The State, therefore, instead of exceeding its powers under the compact, has not yet exercised them to the extent which the Act of 1831 authorizes.

Mr. Justice DANIEL:

With the profoundest respect for the opinions of my brethren, I find myself constrained openly to differ from the decision which, on behalf of the majority of the court, has just been pronounced. This case, although in form a contest between individuals, is in truth a question between the government of the United States and the government of Pennsylvania. It is, to a certain extent, a question of power between those two governments; and, indeed, so far as it is represented to be a question of compact, the very consideration on which the interests of the federal government are urged involves implications affecting mediately or directly what are held to be great and fundamental principles in our State and federal systems. It brings necessarily into view the operation and effect of the compact insisted upon as controlled and limited by the powers of both the contracting parties. In order to show more plainly the bearing of the principles above mentioned upon the case before us, they will here be more explicitly, though cursorily, referred to.

I hold, then, that neither Congress nor the federal government in the exercise of all or any of its powers or attributes possesses the power to construct roads, nor any other description of what have been called internal improvements, within the limits of the States. That the territory and soil of the several States appertain to them by title paramount to the Constitution, and cannot be taken, save with the exceptions of those portions thereof which might be ceded for the seat of the federal government and for sites permitted to be purchased for forts, arsenals, dock yards, &c., &c. That the power of *the federal government to ac- [*181 quire, and that of the States to cede to that government portions of their territory, are by the Constitution limited to the instances above adverted to, and that these powers can neither be enlarged nor modified but in virtue of some new faculty to be imparted by amendments of the Constitution. I believe that the authority vested in Congress by the Constitution to establish post-roads, confers no right to open new roads, but implies nothing beyond a discretion in the government in the regulations it may make for the Postoffice Department for the selection amongst various routes, whilst they continue in existence, of those along which it may deem it most judicious to have the mails transported. I do not believe that this power given to Congress, expresses or implies anything peculiar in relation to the means or modes of transporting the public mail, or refers to any supposed means or modes of transportation beyond the usual manner existing and practiced in the country, and certainly it cannot be understood to destroy or in anywise to affect the proprietary rights belonging to individuals or companies vested in those roads. It guaranties to the government the right to avail itself of the facilities offered by those roads for the purposes of transportation, but imparts to it no exclusive rights—it puts the government upon the footing of others who would avail themselves of the same facilities.

In accordance with the principles above stated, and which with me are fundamental, I am unable to perceive how the federal government could acquire any power over the Cumberland Road by making appropriations, or by expending money to any amount for its construction or repair, though these appropriations and expenditures may have been made with the assent, and even with the solicitation of Pennsylvania. Neither the federal government separately, nor conjointly with the State of Pennsylvania, could have power to repeal the Constitution. Arguments drawn from convenience or inconvenience can have no force with me in questions of constitutional power; indeed, they cannot be admitted at all, for if once admitted, they sweep away every barrier erected by the Constitution against implied authority, and may cover every project which the human mind may conceive. It matters not, then, what or how great the advantage which the government of the United States may have proposed to itself or to others in undertaking this road; such purposes or objects could legitimate no acts either expressly forbidden or not plainly authorized. If the mere appropriation or disbursement of money can create rights in

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the government, they may extend this principle indefinitely, and with the very worst tendencies—those tendencies would be the temptation to prodigality in the government and a dangerous influence with respect to others.

In my view, then, the federal government could erect no toll-gates nor make any exaction of tolls upon this road; nor could that government, in consideration of what it had done or **182***] contributed, *constitutionally and legally demand of the State of Pennsylvania the regulation of tolls either as to the imposition of particular rates or the exemption of any species of transportation upon it. As a matter of constitutional and legal power and authority, this appertained to the State of Pennsylvania exclusively. Independently, then, of any stipulations with respect to them, vehicles of the United States, or vehicles transporting the property of the United States and that property itself, would, in passing over this road, be in the same situation precisely with vehicles and property appertaining to all other persons; they would be subject to the tolls regularly imposed by law. There can be no doubt if the road were vested in a company or in a State, that either the company or the State might stipulate for any rate of toll within the maximum of their power, or might consent to an entire exemption; and such stipulation, if made for a valuable or a legal consideration, would be binding.

The United States may contract with companies or with communities for the transportation of their mails, or any of their property, as well as with carriers of a different description; and consequently could contract with the State of Pennsylvania. But what is meant to be insisted on here is, that the government could legally claim no power to collect tolls, no exemption from tolls, nor any diminution of tolls in their favor, purely in consequence of their having expended money on the road, and without the recognition by Pennsylvania of that expenditure as a condition in any contract they might make with that State. Without such recognition, the federal government must occupy the same position with other travelers or carriers, and remain subject to every regulation of her road laws which the State could legally impose on others.

This brings us to an examination of the statutes of Pennsylvania, and to an inquiry into any stipulations which the State is said to have made with the federal government, as declared in those statutes. That examination will, however, be premised by some observations, which seem to be called for on this occasion. These acts of the Pennsylvania Legislature have been compared with the acts of other legislative bodies relative to this road, and it has been supposed that the Pennsylvania laws should be interpreted in conjunction with those other State laws, and farther, that all these separate State enactments should be taken, together with the acts of Congress passed as to them respectively, as forming one, or as parts of one entire compact with the federal government. I cannot concur in such a view of this case. On the contrary, I must consider each of the States that have legislated in respect to this road, as competent to speak for herself; as speaking in reference to her own interests and policy, and independently of others; and unshackled by the proceedings of any others. By this rule of construction let us examine the statutes of Pennsylvania. The Act of April 4th, 1831, which may be called the compact law, as it contains all that Pennsylvania professed to undertake, *be- [*183 gins by stating the doubts which were entertained upon the authority of the United States to erect toll-gates and to collect tolls on the Cumberland Road; doubts which, with the government as well as with others, seem to have ripened into certainties, inasmuch as, notwithstanding its large expenditures upon this road, the government had never exacted tolls for traveling or for transportation upon it. The statute goes on next to provide, that if the government of the United States will make such farther expenditures as shall put the road lying within the limits of Pennsylvania in complete repair, Pennsylvania will erect toll-gates and collect tolls upon the road, to be applied to the repairs and preservation of it. The same act invests the commissioners it appoints to superintend the road, with power to increase or diminish the tolls to be levied; limiting the increase by the rates which the State had authorized upon an artificial road that she had established from the Susquehanna, opposite the borough of Harrisburg, to Pittsburg. Then in the Act of 1831 are enumerated the subjects of toll, and the rates prescribed as to each of those subjects. Amongst the former are mentioned chariots, coaches, coachees, stages, wagons, phaetons, chaises. In the 3d proviso to the 2d section it is declared, "that no toll shall be received or collected for the passage of any wagon or carriage laden with the property of the United States, or any cannon or military stores belonging to the United States, or to any of the States belonging to this Union." On the 18th of June, 1836, was passed by the Legislature of Pennsylvania, "An Act relating to the tolls on that part of the Cumberland Road which passes through Pennsylvania." The 1st section of this act is in the following words: "All wagons, carriages, or other modes of conveyance, passing upon that part of the Cumberland Road which passes through Pennsylvania, carrying goods, cannon, or military stores, belonging to the United States, or to any individual State of the Union, which are excepted from the payment of toll by the second section of an act passed the fourth of April, *Anno Domini* eighteen hundred and thirty-one, shall extend only so far as to relieve such wagons, carriages, and other modes of conveyance, from the payment of toll to the proportional amount of such goods so carried, belonging to the United States, or to any of the individual States of the Union; and that in all cases of wagons, carriages, stages, or other modes of conveyance, carrying the United States mail, with passengers or goods, such wagon, stage, or other mode of conveyance, shall pay half toll upon such modes of conveyance."

Upon the construction to be given to the 1st and 2d sections of the statute of 1831, and to the 1st section of the statute of 1836, depends the decision of the case before us. By the de-

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fendant in error it is insisted that, by the sections of the Act of 1831 above cited, stages or stage-coaches, transporting the mail of the United States, are wholly exempted by compact from the payment of tolls, although the mails may constitute but a small portion of 184*] their lading; and *those vehicles may be at the same time freighted for the exclusive profit of the mail contractors, with any number of passengers, or with any quantity of baggage or goods, which can be transported in them, consistently with the transportation of the mail; and that the 1st section of the Act of 1836, which declares that "in all cases of wagons, carriages, stages, or other modes of conveyance, carrying the United States mail, with passengers or goods, such wagon, stage, or other mode of conveyance, shall pay half toll upon such mode of conveyance," is a violation of the compact. Let us pause here, and inquire what was the natural and probable purpose of the exemption contained in the Act of 1831? Was that exemption designed as a privilege or facility to the government, or as a donation for private and individual advantage? Common sense would seem to dictate the reply, that the former only was intended by the law; and even if the privilege or facility to the government could be best secured by associating it with individual profit, certainly that privilege or facility could, on no principle of reason or fairness, be so sunk, so lost sight of, so entirely perverted, as to make it a mean chiefly of imposition and gain on the part of individuals, and the cause of positive and serious public detriment; and such must be the result of the practice contended for by the defendants in error, as it would tend to impede the celerity of transportation, and to destroy the road itself, by withholding the natural and proper fund for its maintenance. Passing, then, from what is believed to be the natural design of these enactments, let their terms and language be considered. By those of the 2d section of the law of 1831, every stage or wagon is made expressly liable to toll, without regard to the subjects it might transport, and without regard to the ownership of the vehicle itself. The terms of the law are universal; they comprehend all stages and all wagons; they would necessarily, therefore, embrace all stages and wagons of the United States, or the like vehicles of others carrying the property of the United States or of private persons. If, then, either the vehicles of the United States, or of others carrying the property of the United States, have been withdrawn from the operation of the Act of 1831, this can have been done only by force of the 3d proviso of the 2d section of that act. The proviso referred to declares that no toll shall "be collected for the passage of any wagon or carriage laden with the property of the United States," &c., &c. Can this proviso be understood as exempting stages, whether belonging to the government or to individuals, which were intended purposely to carry the mail? It is not deemed necessary, in interpreting this proviso, to discuss the question, whether the United States have a property in mails which they carry. It may be admitted that the United States and all their contractors have in the mails that property which vests by law in all common carriers; it may be admitted that the United States have an interest in the mails even beyond this. These admissions do not vary the real inquiry here, *which is, [*185 whether by this proviso the mails of the United States, or the carriages transporting them, were intended to be exempted from tolls. This law, like every other instrument, should be interpreted according to the common and received acceptation of its words; and artificial or technical significations of words or phrases should not be resorted to, except when unavoidable, to give a sensible meaning to the instrument interpreted; or when they may be considered as coming obviously within the understanding and contemplation of the parties. According to this rule of interpretation, what would be commonly understood by "the property of the United States," or by the phrase "wagons and carriages laden with the property of the United States"? Would common intendment apply those terms to the mail of the United States, or to vehicles carrying that mail? The term "mail" is perhaps universally comprehended as being that over which the government has the management for the purposes of conveyance and distribution; and it would strike the common understanding as something singular to be told that the money or letters belonging to the citizen, and for the tranportation of which he pays, was not his property, but was the property of the United States. The term "mail," then, having a meaning clearly defined and universally understood, it is conclusive to my mind that in a provision designed to exempt that mail, or the vehicle for its transportation, the general and equivocal term "property" would not have been selected, but the terms, "mail," and "stages carrying the mail" —terms familiar to all—would have been expressly introduced.

Further illustration of the language and objects of the Legislature of Pennsylvania may be derived from the circumstance, that, in the law of 1831, they couple the phrase "property of the United States" with "property of the States." The same language is used in reference to both; they are both comprised in the same sentence; the same exemption is extended to both. Now, the States have no mails to be transported. It then can by no means follow, either by necessary or plausible interpretation, that by "property of the United States" was meant the "mails of the United States," any more than by "property of the States" was meant the "mails" of those States; on the contrary, it seems far more reasonable that the Legislature designed to make no distinction with regard to either, but intended that the term "property" should have the same signification in reference both to State and federal governments.

In the acceptation of the term "property," insisted on for the defendants in error, the mails committed to the contractor are the property of that contractor also. Yet it would hardly have been contended that in a provision for exempting the "property" of a mail contractor from tolls, either a vehicle belonging to the United States, and in the use of such a contractor, or the mail which he carried in it, would be so considered as his property as to

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bring them within that exemption; yet such is the conclusion to which the interpretation con-
186*] tended *for by the defendants would inevitably lead. That construction I deem to be forced and artificial, and not the legitimate interpretation of the statute, especially when I consider that there are various other subjects of property belonging to the United States, and belonging to them absolutely and exclusively, which from their variety could not well be specifically enumerated, and which, at some period or other, it might become convenient to the government and beneficial to the country to transport upon this road. But if, by any interpretation, the words "wagon or carriage laden with the property of the United States" can be made to embrace stages carrying the mail, and employed purposely for that service, they surely cannot, by the most forced construction, be made to embrace stages laden with everything else, by comparison, except the mail of the United States, and in which the mail was a mere pretext for the transportation of passengers and merchandise, or property of every description and to any amount free of toll. They must at all events be laden with the mail. The term "laden" cannot be taken here as a mere expletive, nor should it be wrested from its natural import—be made identical in signification with the terms "carrying" or "transporting." Such a departure would again be a violation of common intendment, and should not be resorted to; and the abuses just shown, which such a departure would let in and protect, furnish another and most cogent reason why the common acceptation of the phrase, "property of the United States," should be adhered to. Fairness and equality with respect to all carriers and travelers upon this road, and justice to the State which has undertaken to keep it in repair from the tolls collectable upon it, require this adherence.

If the interpretation here given of the Act of 1831 be correct, then admitting that act to be a compact between Pennsylvania and the United States, the former has, by the 1st section of the Act of 1836, infracted no stipulation in that compact. Pennsylvania never did, according to my understanding of her law of 1831, agree to the exemption from tools for stages, wagons, or vehicles of any kind, intended for carrying the mails of the United States. These stood upon the like footing with other carriages. If this be true, then by the Act of 1836, in which she has subjected to half tolls only, stages, wagons, &c., carrying the mails, and at the same time transporting passengers or goods, so far from violating her compact, or inflicting a wrong upon the government or upon mail contractors, that State has extended to them a privilege and an advantage which, under the 3d proviso of the Act of 1831, they did not possess.

My opinion is, that the plaintiff in the court below had an undoubted right of recovery.

Cited -3 How., 742-745; 12 How., 296.

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*LESSEE OF ANGELICA CROG- [*187
HAN ET AL., *Plaintiff*,

v.

JOHN NELSON, *Defendant*.

Mistakes in entry of land corrected so as to carry out intentions of locator.

In making an entry of land, where mistakes occur which are occasioned by the impracticability of ascertaining the relative positions of the objects called for, the court will correct those mistakes so as to carry out the intentions of the locator.

THIS case came up on a certificate of division in opinion between the judges of the court below. It was an ejectment brought in the Circuit Court of the United States for the District of Kentucky.

The case was this:

On the 16th of August, 1784, William Croghan, under whom the plaintiff claimed title, made the following entry: "William Croghan, assignee, enters 1,000 acres of land, part of a military warrant, No. 2023, beginning at a fork of Mayfield Creek, about two miles by water above Fort Jefferson, where a branch, occasioned by the high waters from the Mississippi, runs out of said creek, and at high water empties into the river at the upper end of the iron banks; from said beginning 500 poles, when reduced to a straight line; and then off from the branch towards [the] Mississippi on a line parallel to Mayfield Creek, until a line from the extremity of said line, parallel with the first line, will strike Mayfield Creek, to include the quantity."

On the 29th of November, 1826, a patent was issued to Croghan by the Governor of Kentucky, which described the land as follows: "Beginning at a fork of Mayfield Creek, occasioned by high water from the Mississippi River, and which creek or bayou empties into the Mississippi at the upper end of the iron banks, on a walnut, sweet gum, and ash, standing on the west bank of the creek; running thence down the bayou or branch aforesaid with the meanders thereof, S. 18° W. 134 poles, S. 36° W. 200 poles, S. 48° W. 72 poles, S. 18° W. 14 poles, S. 18° W. 54 poles, S. 30° W. 120 poles; thence S. 110 poles, to two ash trees, a hackberry and red bud on the west bank of the bayou; thence N. 75° W. 206 poles, to an elm, a sycamore, and box elder on the bank of the Mississippi River; thence up the same, with its meanders, and binding on it at low water-mark, N., &c., &c., to a walnut and two cottonwood trees at the mouth of Mayfield Creek; thence up the creek, with the several meanders thereof, and binding on the same at low water-mark, &c., &c., to the beginning."

In 1830, Nelson took out a patent for the fractional northwest quarter of section 32, &c., containing 103 acres.

The whole dispute being one of location, it is impossible to understand the opinion of the court without a map or diagram.

NOTE.—*Reference in deed to recorded plot. Parol evidence to explain and limit, or to show mistake.* See note to McIver v. Walker, 9 Cranch, 173.

As to patents for lands, and errors in surveys and descriptions of, see note to Watts v. Lindsey, 7 Wheat., 158.

HOWARD S.

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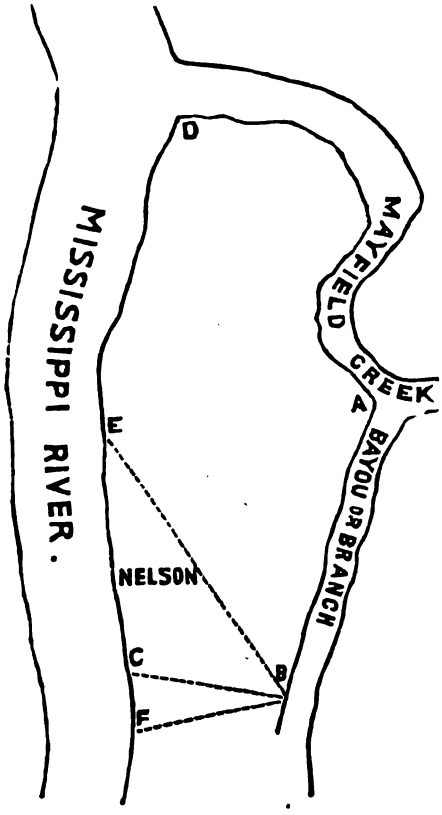
188*] *A, B, C, D, is the survey made for Croghan. A being the beginning station, and D the mouth of Mayfield Creek. The defend-



ant contended that the plaintiff's line should run from B to E, and from E to D, in which case it is manifest that it would not include the 189*] *land granted to Nelson, the line B E being parallel to a line drawn from A to D.

Upon the trial, the counsel for the defendants asked the court to instruct the jury, that "if they believe from the evidence that the course of Mayfield Creek, from A to D, is correctly laid down, then the line from B towards the Mississippi River should be run parallel to that to conform to the entry; and if, in running that parallel line, they shall believe from the evidence that the improvement of the defendants is left out, they ought to find for the defendants. But the court were divided in opinion on the point, whether the second line called for in the entry should run from B to E, or whether the line from B to C should be taken, and recognized as the true and proper line, it being the line on which the patent was founded. One judge being of opinion that for all the land south and west of a line from B to E the patent was void, and the other judge being of a contrary opinion.

Upon this point, the case came up.

It was argued by *Mr. Underwood*, for Croghan's heirs, who contended that the entry was "precise enough for others to locate other warrants with certainty on the adjacent *residuum*," as required by the Act of 1779. The fork of the creek being found, it would be easy for a subsequent locator to run the line to B. Arrived there, and desiring to locate the "adjacent *residuum*" below, I think he has the means of knowing and ascertaining "precisely" the course which Croghan's line from B towards the Mississippi must pursue, and the distance in that direction.

Entries for land are addressed to the common good sense of those engaged in appropriating the vacant domain, and are to be "special and precise," so that subsequent locators shall not be deceived or deluded to their injury.

An entry is to be understood and taken as it would have been understood on the day it was made. (See 1 Bibb, 35, 84; 2 Bibb, 105; Hardin, 287.)

Rectangular figure is not to be departed from without a strong indication of a contrary intent. (2 Bibb, 120; see, also, cases referred to under the 29th rule, in the index to 8 Bibb, under the head Entries.)

A locator is not bound to give the best possible description, but it should be certain to a common intent, and not misleading. (2 Bibb, 144; 1 Bibb, 78, 64.)

With these rules in the mind of a subsequent locator, wishing to ascertain the exact position of Croghan's 1,000 acres, and with the entry before him, let us examine how he would proceed and reason upon the subject. He could not know the exact position of the lines without making a survey of the entry; but that is equally true in respect to every entry, no matter how special. He would know *that the [*190 natural objects called for were to constitute boundaries of the survey, when made. Thus, a subsequent locator would know, by inspecting the entry, that the branch down towards the iron banks from the fork of the creek at A, upon the plat, to a point 500 poles, when reduced to a straight line, from the beginning, constituted part of the boundary. He would also know that Mayfield Creek, from the fork at A down towards its mouth, constituted another portion of the boundary. With this knowledge, he would find no difficulty in locating the adjacent *residuum*, lying eastwardly of the branch and the creek, without interfering with Croghan's entry. Conceding that a subsequent locator would be ignorant of the true course of the line from B upon the plat towards the Mississippi River, until a survey was actually made, still, if he desired to enter the land west of the branch below Croghan's entry, and adjoining Croghan's tract, he could have done so with perfect safety by calling to adjoin Croghan, without giving the course. If a subsequent locator wished to enter land below the mouth of Mayfield Creek, lying between the river and Croghan's entry, supposing there might be land thus situated not covered by Croghan's entry, he would find no difficulty in making such an entry without interfering with Croghan, by calling to bind on Croghan and the river. Thus it is manifest that the "adjacent *residuum*," in the language of the Act of 1779, all around Croghan's entry, might have been appropriated by a subsequent locator, without interfering with Croghan's entry. I, therefore, insist it is "certain to a common intent, and not misleading," in the judicial language of the appellate court of Kentucky. A better descrip-

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tion than that given will therefore not be required.

Mr. Underwood then proceeded to argue, that the line from B should run, not parallel with that part of the creek between A and the mouth of it, but parallel with the general course of the stream, including the part above A, because this would include only 835 acres, and the locator's intention was to enter 1,000.

He then referred to a number of Kentucky cases to show that the intention of the locator must be carried out, &c., &c.

Mr. Justice McKINLEY delivered the opinon of the court:

This is a case certified to this court from the Circuit Court for the District of Kentucky.

The plaintiffs brought an action of ejectment, in that court, against the defendants; and to support their action, they read to the jury a patent for one thousand acres of land, granted by the State of Kentucky to Charles Croghan, bearing date the 29th of November, 1826, and proved title in themselves by the will of the said Charles Croghan. The plat marked A was shown to the jury; and the surveyor proved that the fork of Mayfield Creek, at the letter A, was correctly laid down; that five hundred poles, on a straight line, on the branch leading from Mayfield Creek, would extent the line to **191*** letter B, on *the plat, where one of the patent corners was found; and that the plat truly represented the land granted by the patent.

The defendant then read the following entry of William Croghan, assignee, for 1,000 acres, dated 16th of August, 1784, on which the patent is founded, to wit: "William Croghan, assignee, enters 1,000 acres of land, part of a military warrant, No. 2023, beginning at a fork of Mayfield Creek, about two miles by water above Fort Jefferson, where a branch, occasioned by the high waters from the Mississippi, runs out of said creek, and at high water empties into the river at the upper end of the iron banks; from said beginning 500 poles, when reduced to a straight line; and then off from the branch towards the Mississippi, on a line parallel to Mayfield Creek, until a line from the extremity of said line, parallel with the first line, will strike Mayfield Creek, to include the quantity."

The defendants then offered in evidence a patent from the State of Kentucky to Hugh Nelson, for 108 acres of land, bearing date the 17th of December, 1830; and proved by the surveyor that the beginning of the entry was at A, on the plat, and that the end of the first line was at B, and if a line was run from B towards the Mississippi River, in a direction parallel with the general course of Mayfield Creek, for twelve miles above the fork at A, it would be the red line extending from the letter B to the Mississippi River at F. It was also proved, if a line were run from the corner at B parallel with Mayfield Creek, below the fork, to the letter D, at the mouth of the Creek, it would run from B to E, and leave out the land claimed by the defendants. The surveyor also proved that the various lines on the plat were correctly laid down from actual survey.

"The counsel for the defendants then prayed the court to instruct the jury, if they believe, from the evidence, that the course of Mayfield Creek from A to D is correctly laid down, then a line from B towards the Mississippi River should be run parallel to that line, to conform to the entry; and if, in running that parallel line, they shall believe, from the evidence, that the improvement of the defendants is left out, they ought to find for the defendants. But the court were divided in opinion on the point, whether the second line called for in the entry should run from B to E, or, whether the line from B to C should be taken and recognized as the true and proper line, it being the line on which the patent was founded. One of the judges being of the opinion that for all the land south and west of a line from B to E the patent was void; and the other judge being of a contrary opinion. They were also divided in opinion, for the foregoing reasons, whether the foregoing instructions ought to be given or refused."

By a statute of Kentucky, passed the 26th of December, 1820, it is required that all surveys thereafter to be made on entries west of Tennessee River should be run according to the calls of the entry. And "to enable the register to ascertain whether the survey is made according to entry, a copy of the entry shall be returned to the register's *office, [***192** with the plat and certificate of survey: and any patent issuing on a survey made contrary to the location shall be void to all intents and purposes, so far as the same may be different and variant from the location." The survey in this case was made on the 5th day of November, 1825; and the patent under which the defendants claim, dated the 17th day of December, 1830, was granted for land sold by the State subsequent to the date of the patent under which the plaintiffs claim title, and which covers part of the land claimed by the defendants. This brings in question the legality of the survey, and the construction of the entry on which it was made, and leads to an examination of the points certified for our determination.

But, before we enter on that duty, it will be proper to consider the circumstances in which the locator was placed when he made the entry. It was proved in the Circuit Court that along this branch there was a very dense cane brake, and the greater part of the land covered by the patent is still a dense cane brake. It was also proved, that a line run parallel with the general course of Mayfield Creek, for twelve miles above the fork, and crossing the branch, at the termination of the 500 poles, from A to B, on the plat, would strike the Mississippi River at F, on the plat, a considerable distance below the corner called for in the patent at the letter C. And it appears by the plat that the creek continues to run nearly the same course for 300 or 400 yards below the fork, and then runs north of northwest for about 800 poles. Now, we have a right to infer, from the facts proved, that all the land included in Croghan's patent, and all the river bottom above Mayfield Creek, at the date of the entry, was a dense cane brake; because, if an object, permanent in its nature, is proved to exist at the time of the trial, it is fair to infer that it existed at the time the entry was made. (*Orochet* v. *Greenup*, 4 Bibb, R., 158.) The history and topography

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of the great valley of the Mississippi proves satisfactorily that where there is a cane brake now there was one sixty years ago; and this fairly induces the belief that the cane upon the rich and alluvion lands is coeval with the oldest trees of the forest. As the locator had the means of ascertaining the course of Mayfield Creek above the fork, where it ran across the high lands, and where there was no cane, it is reasonable to suppose, from the calls of the entry, that he believed that Mayfield Creek, below the fork, ran nearly at right angles to the branch in its general course to the river. And he had a right, from the circumstances, also to believe that the distance from the fork of the creek to the river was about two miles, when in fact it was less than one mile.

It is obvious from these circumstances, and the calls of the entry, that the locator believed the survey to be made upon it would approach as near to a parallelogram as the irregularity of the two natural boundaries would permit. 193*]We are led to the conclusion, *therefore, that these mistakes were all occasioned by the impracticability of ascertaining the relative positions of the objects called for, and the course and distances of the lines necessary to include the quantity of land specified in the entry. But mistakes of this character have been corrected, as far as practicable, by the courts of Kentucky, in giving construction to entries, and particularly in two recent cases like this between military claims and purchases from the State. (*Rays* v. *Woods*, and *Daniel, &c.*, v. *Allison*, 2 B. Monroe's Rep., 224.) Keeping these mistakes in view, we will proceed to give construction to the entry. The call to run from the termination of the base line at B, 500 poles from the fork of the creek at A, and off from the branch towards the Mississippi on a line parallel to Mayfield Creek, until a line from the extremity of said line, parallel with the first line, will strike Mayfield Creek, to include the quantity, presupposes that a line from the termination of the base line on the branch, parallel with Mayfield Creek, to include the quantity, would terminate before it reached the river, otherwise the locator would have called to run to the river. But it was found, when they made the survey, that the whole area, bounded by the branch, from the termination of the 500 poles, Mayfield Creek to its mouth, and the Mississippi River, down to the letter E, the point where a line running from the termination of the base line, parallel to Mayfield Creek, strikes the river, would include but 887 acres, and when reduced to straight lines, would present a rhomboidal figure, with two extremely acute, and two extremely obtuse angles, instead of the figure which must have been in the mind of the locator when he made the entry. We might, therefore, upon the authority of the cases referred to in 2 B. Monroe's Rep., sustain the survey on the ground of the mistakes of the locator, evidently made under the influence of causes well calculated to mislead him. But there are other reasons and other authorities upon which this entry and survey may be sustained. It is a well setted rule of construction, that where there are calls in an entry repugnant to each other, those which are inconsistent with the main intention of the locator, manifested by the words of the entry, shall be rejected to give effect to the entry. For example, distance shall prevail over course, where it appears by other calls in the entry the course has been mistaken. (*Smith* v. *Harrow, et al.*, 1 Bibb, 104.) A call to include a natural object will prevail over a mistaken distance called for to reach the object. (*Preeble* v. *Vanhoozer*, 2 Bibb, 118; *McIver* v. *Walker et al.*, 9 Cranch, 173.) Testing the entry by these rules, has it been properly surveyed?

Three of the lines are natural and permanent boundaries, except the line on the river, which may be extended in length; the fourth is artificial and movable. It has been already shown that a line from the termination of the line on the branch, at B, to the river at E, and thence up the river to the mouth of Mayfield Creek, will not *include the quantity of land [*194 called for in the entry. If it is practicable, by a reasonable construction of the entry, to give the whole quantity of land called for, it is the duty of the court to give such construction. The mistakes referred to have defeated the intentions of the locator, no doubt, as to the figure of the survey; but, like all prudent locators, he provided, as far as he could, against the influence of such mistakes, by requiring that the two last lines of the survey should be so run as to include the quantity of land called for in the entry. To these two lines he gave course, but gave no specific distance to either, that they might be run long enough to include the quantity. The first of these lines was to run from the termination of the base line at B, "off from the branch towards the Mississippi, on a line parallel to Mayfield Creek," but no specific distance is given, nor is any natural object called for as the termination of this line. Its termination was to be governed, therefore, by the relative positions of the objects previously called for, and the actual distance of the line, on the branch, from the river, and by the necessary course and distance that the first and second of these two lines should run to include the quantity; and therefore he continues the call by saying, "until a line parallel to the first (the base line) will strike Mayfield Creek, to include the quantity." The word "until," in grammatical construction, modifies and qualifies the words used to give course and distance, and, in legal construction, the call for course must yield to the call for quantity, the latter being the most important call in the entry.

The great and leading object of every entry is to obtain the quantity of land specified in it; every other call, therefore, must be regarded as intended to effect this principal object, and as subordinate thereto. The call, to run a line parallel with the first, or base line, is therefore repugnant to the call to include the quantity, and must be rejected. Because, if this line had been run parallel with the base line, the quantity of land would not have been included. And for the same reason, the words "on a line parallel to Mayfield Creek" must be rejected, they being, also, repugnant to the call to include the quantity. The survey has, therefore, in our opinion, been made in conformity with the entry, by running from the mouth of Mayfield Creek, down the river, to the corner at C, that being the distance required to include the quantity; and the line from B, another corner,

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has been properly run to C, that being the course and distance necessary to close the survey and to include the quantity of land called for in the entry. It is the opinion of this court, therefore, that the Circuit Court ought to have refused the instruction prayed for by the defendant's counsel.

It is ordered, that it be certified to the Circuit Court that the line from B to C "should be taken and recognized as the true and proper line," and that the instructions prayed by the defendant's counsel ought to be refused.

195*] **Mr. Justice* McLEAN:

"Croghan, assignee, enters 1,000 acres of land, part of a military warrant, No. 2023, beginning at a fork of Mayfield Creek, about two miles by water above Fort Jefferson, where a branch occasioned by the high waters from the Mississippi runs out of said creek, and at high water empties into the river, at the upper end of the iron banks; from said beginning, 500 poles when reduced to a straight line, and then off from the branch towards the Mississippi, on a line parallel to Mayfield Creek, until a line from the extremity of said line, parallel with the first line, will strike Mayfield Creek to include the quantity."

By a statute of Kentucky passed in 1820, all entries on military warrants west of the Tennessee River are required to be surveyed agreeable to their calls; and any survey and patent which shall cover more land than the entry calls for, is declared to be void as to such surplus. There can be no objection to the validity of this law, as it impairs no right.

Under this statute, the court were requested to give a construction to the entry in question. The prayer was, that the court should instruct the jury, "if they believe from the evidence that the course of Mayfield Creek, from A to D (the letter A being at the fork of the creek, the beginning of the entry, and the letter D at the mouth of the creek) is correctly laid down, then the line from B (the termination of the first line of 500 poles) towards the Mississippi, should run parallel to that, (or in other words) to Mayfield Creek, to conform to the entry."

The only dispute is as to the second line, which is "to run from the branch towards the Mississippi, on a line parallel to Mayfield Creek." And this was the instruction prayed for, and which was rejected by the court. Had the instruction been in the very words of the entry, there would not have been a closer conformity with it.

The disputed line was called for by the entry "to run parallel to Mayfield Creek." Now, one line to be parallel to another must be equidistant from it. And that was what the instruction asked. From the words of the call in the entry, as to this line, the creek from the forks to the mouth must have been intended, as the line designated could only be parallel to that part of the creek.

The third line called for in the entry was to run from the termination of the line parallel to Mayfield Creek, and "parallel with the first line, so as to strike Mayfield Creek to include the quantity." As this line strikes the creek at the mouth, and runs on the bank of the Mississippi, it cannot be varied to include in the survey the thousand acres called for in the entry. There is a deficiency of one hundred and acres, which covers the land in controversy. And the question is, whether the second line called for in the entry, to run parallel with Mayfield Creek, can be disregarded, and extended *so as to include the lands [*196 of the defendants and the quantity called for in the entry.

In my opinion, this can no more be done than the beginning called for in the entry can be changed, or the first line of the survey. The third line up the Mississippi was, by the entry, "to strike Mayfield Creek so as to include the quantity."

It is admitted that Mayfield Creek, with its meanders, forms the closing line of the survey. I know of no principle in the land law of Kentucky which authorizes a court to disregard the specific calls of an entry, so as to include the quantity designated. The locator was, no doubt, deceived as to the ground covered by his entry. The line called to be run, so as to include the thousand acres being bounded by the Mississippi, could not be varied so as to answer the calls of the entry for quantity. This was the misfortune of the locator which is chargeable only on himself. It is clear that he cannot disregard the calls of the entry, on any other line, so as to include the quantity.

The injustice of such a construction to the defendants, seems to me to be clear. Finding the claim of Croghan's entry designating in plain terms its boundaries, and knowing that by the law he was limited to the calls of his entry, his survey not having been made, they purchased the adjacent *residuum*. And I have no doubt that, by the well established principles of the land law in Kentucky, their title is good; and, therefore, the instruction prayed for should be given.

In *Rays* v. *Daniels et al.* (2 B. Monr., 222), the court say in reference to this district of country where a patent has issued, the proof of a variance in the survey from the entry, so as to make the patent void, for the land not included in the entry, devolves on the adversary claimant. But they do not say, in that or in any other case, that where the locator is limited strictly to the calls of his entry, by a subsequent entry, or, as in the present case, by an express statute, that the call for quantity controls the specific calls of the entry. There is no principle better settled in the land law than that the calls in a survey and patent are not affected by quantity. If no private and paramount right be interfered with, whether the survey and patent contain more or less than the quantity called for, it is equally valid. An entry cannot call for a greater number of acres than is authorized by the warrant on which it is made; but, where the boundaries called for are specific, and the locator is limited strictly to the boundaries of his entry, in making his survey, he can no more disregard them than he can disregard the boundaries called for in his patent.

Palpable mistakes in the entry, such as a call for east instead of west, which is apparent by other calls in the entry, may be corrected. But where there is no mistake or uncertainty in the calls, to vary them is to make a new entry. This, I conceive, no court has *power [*197 to do. An entry, like every other instrument

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of writing, must be construed by the words used. And these words can never be extended, by construction, so as to infringe upon subsequent and *bona fide* entries.

JOHN TAYLOR, JUNIOR, AND WILLIAM BLACKBURNE & CO., Claimants of Cloths and Kerseymeres, *Plaintiffs in Error*,

v.

THE UNITED STATES, *Defendants in Error.*

Customs officer may seize suspected goods in other district than his own—adjudication for sufficient cause cures irregularity in seizure—officers making seizures competent witnesses on trial—evidence, competency, materiality—revenue laws not penal acts—construction—concealment and under-valuation—Act of 1799 sec. 68.

It is the right of an officer of the customs to seize goods which are suspected to have been introduced into the country in violation of the revenue laws, not only in his own district, but also in any other district than his own.

And it is wholly immaterial who makes the seizure, or whether it was irregularly made or not, or whether the cause assigned originally for the seizure be that for which the condemnation takes place, provided the adjudication is for a sufficient cause.

In the trial of such a case the officers of the customs who made the seizure are competent witnesses.

A bill of lading, entry, and owner's oath concerning other goods than those seized, may be admitted as a link in the chain of evidence to show a privity between the parties to commit a fraud upon the revenue.

When a witness on the part of the United States stated that his firm were importers of cloths, and was asked, upon a cross-examination, to state the extent of their importations, to which he answered, "formerly we imported large quantities of woolens; for three or four years past we have imported but a few packages annually," it was a proper question on the part of the United States "whether there was anything in the state of the market which caused the alteration."

It was also a proper question, whether other goods than those seized were lying in the custom-house at New York, under circumstances from which the jury might infer a connivance between parties inconsistent with fair dealing.

An invoice of other goods entered at another port, but marked like those seized was also properly admitted as strengthening the evidence of the true ownership of packages with this mark.

To rebut the proof of a general usage of an allowance of five per cent. for measurement, other invoices were properly introduced in which there was no such allowance.

Where a witness was introduced to prove such usage, and had verified his own invoices, it was admissible to read a letter which had been addressed to the witness and was annexed to one of the invoices.

Revenue laws, for the prevention of fraud, for the suppression of a public wrong, or to effect a public good, are not, in a strict sense, penal acts, although they impose a penalty. But they ought to be so construed as most effectually to accomplish the intention of the Legislature in passing them, instead of being construed with great strictness in favor of the defendant.

Concealment and under-valuation of goods are good grounds, amongst others, for a decision of the court, that probable cause of prosecution existed.

The 68th section of the Act of 1799 reaches cases where, by a false and fraudulent under-valuation, less than the amount of duties required by law has been paid as well as those where no duties at all have been paid.

THIS case came up by writ of error from the Circuit Court of the United States for the Eastern District of Pennsylvania.

*It was an information filed in the [*198 District Court of the United States for the Eastern District of Pennsylvania against sundry cases and pieces of cloths and kerseymeres, seized on land, as forfeited. The information contained thirteen counts.

The first and second were founded on the 50th section of the Act of 1799, chap. 128.

The third on the 68th section of same act.

The fourth and fifth on the 66th section of same act.

The sixth, seventh, and eighth on the 4th section of the Act of 28th May, 1830, chap. 147.

The ninth on the 14th section of the Act of 14th July, 1832, chap. 224.

The tenth on the same section as fourth and fifth.

The eleventh and twelfth on the same section as sixth, seventh and eighth.

The thirteenth on the same section as ninth.

Upon the first and second counts the jury found a verdict for the claimants, and upon the remaining counts for the United States.

The claimants were John Taylor, Jun., and William Blackburne & Co.

The claims filed were as follows:

"John Taylor, Jun., late of the city of New York, but now absent from the United States, by Edward Henry Bradbury, his attorney in fact, comes and claims the said goods, wares, and merchandise, in the said information and libel mentioned, as his property (subject to the repayment of a certain advance or loan of sixty thousand dollars and upwards, thereon made to him by William Blackburne & Co.); and the said John Taylor, Jun., by his said attorney, alleges, that at the time of the seizure aforesaid he was, and yet is the true and lawful owner of the said goods [wares] and merchandise, subject as aforesaid.

"JOHN TAYLOR, Jun.,
"Pr. pro E. H. BRADBURY.

"October, 10th, 1839.

"Edward Henry Bradbury, being duly sworn, says, the facts above set forth are just and true, to the best of my knowledge and belief. I am the duly authorized attorney in fact the above named John Taylor, Jun. He was absent from the United States at the time of the seizure of the above mentioned goods, wares, and merchandise was made, and has ever since continued, and still is absent from the United States.

"E. H. BRADBURY.

"Sworn, October 11th, 1839, before me,
"PTR. CHRISTIAN, Alderman.

"William Blackburne & Co. claim the said goods, wares, and merchandise, in the said libel and information mentioned, as the sole property of them, the said William Blackburne & Co., for the purpose of securing and paying an advance or loan thereon made by them to John Taylor, Jun., of sixty thousand dollars and upwards; *for securing which said loan or ad- [*199 vance the said goods [wares] and merchandise were delivered to them, long before the said seizure, by the said John Taylor, Jun., in whose possession they were as his property, and remained in their possession as aforesaid

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at the time of said seizure, without any notice or knowledge on their part that there was any allegation whatever, that the same had not been duly imported, and the duties paid or secured; or, that the same were on any account liable to seizure, and under the full and entire belief, on their part, that the said goods [wares] and merchandise had been duly imported and entered, and the duties thereon paid or secured according to law.

"WM. BLACKBURNE & CO.

"October 10th, 1839.

"Francis Blackburne, being duly sworn, says, I am a member of the firm of William Blackburne & Co., mentioned in the foregoing claim. The facts stated in the foregoing claim are just and true, to the best of my knowledge and belief. The said firm of William Blackburne & Co., at and before the time of the seizure of the goods and merchandise mentioned in the said information and libel, was composed of William Blackburne, Francis Blackburne, Christopher John Blackburne, and Charles F. Shaw; since that time the said Charles Shaw has retired from said firm and is no longer a member thereof.

"FRS. BLACKBURNE.

"Sworn, October 11th, 1839, before me.

"PTR. CHRISTIAN, Alderman.

"And now, , comes John Taylor, Jun., and, by leave of the court first had, withdraws so much only of his claim heretofore filed in this case as relates to forty-three pieces of cloths, part of the goods above mentioned, and on behalf of James Buckley, claims twenty-nine pieces of cloth, part of said forty-three pieces, as the property of the said James Buckley, and on behalf of John W. Bradbury, claims fourteen pieces of cloths, the residue of the said forty-three pieces, as the property of the said John W. Bradbury; and the said John Taylor, Jun., says, that the said Buckley and Bradbury are respectively the true, sole, and lawful owners of the respective parcels of cloth hereinabove claimed for them respectively, and, so being the owners, respectively consigned the said several parcels to the said John Taylor, Jun., who, as their consignee and factor, at the time of the seizure aforesaid, held, and is still entitled to hold the same, subject to the repayment of the advances made thereon by William Blackburne & Co., in whose actual possession they then were. And the said John Taylor, Jun., further says, that the said Buckley and Bradbury are both resident in England, and were, at and before the time of said seizure, and now are, absent from the United States.

"JOHN TAYLOR, Jun.

200*] *"John Taylor, Jun., being duly sworn, says, that the facts above set forth are true to the best of his belief.

"JOHN TAYLOR, Jun.

"Sworn and subscribed before me, February 12th, 1840.

"WILLIAM MILNOR, Alderman."

In March, 1840, the case came on for trial. Some of the points of law which were raised are thus stated in the record: And the counsel of the said plaintiffs, to support and prove the issue on their part, called as witnesses John J. Logue, George Gideon, and William Cairns, who, being respectively sworn on their *voir dire*, testified that they went to Blackburne's store, and there assisted in making the seizure of the goods mentioned in the said information; the said Logue and Gideon stating that they were, at the time of making said seizure, inspectors of the customs in the District of Philadelphia, and the said Cairns stating that he was at the time of making said seizure, an inspector of the customs in the port of New York. Whereupon, the said defendants objected to the admission of said Logue, Gibeon, and Cairns, severally, as witnesses for the plaintiffs, they being interested in the event of the case. But the judge overruled the said objections and admitted the said witnesses, to which admission the defendants then and there excepted; and the said Logue, Gideon, and Cairns were thereupon severally sworn and examined on behalf of the plaintiffs, and proved the facts attending the seizure of the goods, and that certain original marks on packages containing the said goods had been erased, and among them the mark [B]F, which was originally upon one of said packages.

In the course of the examination of the said witnesses, the following papers were produced and given in evidence, being the affidavit, warrant, and authority under which the seizure of the said goods was made, viz.: A list of the goods seized, affidavit of William Cairns, warrant of Alderman Milnor, authority from George Wolf, Esq., collector of the port of Philadelphia. It was also proved that the greater part of said goods were seized in an apartment in the second story of the house No. 26 Church Alley, adjoining the house No. 24 Church Alley, which apartment was occupied by the house No. 24 Church Alley, into which a doorway had been cut, the communication between said apartment and the remainder of the house No. 26 Church Alley being closed.

The counsel of the United States, further to prove the issue on their part, offered in evidence the bill of lading, entry, and owner's oath, taken on the 16th of July, 1839, in the month preceding the seizure of the goods in question, of nineteen cases of goods (not part of the goods seized), market [B]F 1 *a* 19. To all which the said defendants objected; but the judge overruled the objection, and admitted the same in evidence. Whereupon, the said papers were read in evidence.

[The counsel of the United States, further to prove the issue on *their parts, offered [*201 evidence to prove that William Blackburne & Co. had, in January, 1839, imported certain invoices (no part of the goods seized) into Philadelphia, and had entered them at the custom-house there; that the goods so imported had been appraised above the invoice prices; that the importers had acquiesced in such appraisement; and that Francis Blackburne thereupon stated that he had passed 140 cases at New York at similar prices, and would cease importing goods here; the counsel stating that this was to be followed by evidence to show that he never did import into New York in his own name. All which evidence was objected to by the defendants, but was admitted by the court, to which the defendants then and there excepted; and the said evidence was thereupon given. And the plaintiffs further proved the

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admission of the defendant Taylor, that the said mark [B]F was the mark of said defendant Francis Blackburne, and that said Taylor, as the agent of said Blackburne, had paid freight at New York for packages of goods imported there with that mark; and further proved that no importations had been made at that port in the name of said Francis Blackburne, or of said William Blackburne & Co., previously to the summer of 1839, but that large importations had been made there in the name of the claimant, John Taylor, Jun. It was proved that the goods seized had been imported into New York, and entered and passed there, and the duties thereupon paid, but it was no part of the evidence or case of the United States, that there had been any fraud or connivance on the part of the officers of the custom-house of New York with the importers of said goods.]

Abraham I. Lewis was examined as a witness on behalf of the United States; and having stated that his firm were importers of cloths and kerseymeres, and that he had thereby a knowledge of their quality and value, he was asked, on cross-examination, to state the extent of the importation of his firm; and in reply, said: "Formerly, we imported large quantities of woolens; for three, four, or five years past, we have imported but a few packages annually." Whereupon, the counsel of the United States, on re-examination, proposed the following question, viz.: "Was there anything in the state of the market which caused the alteration which you have mentioned, in the amount imported by you within four or five years last past?" To which question the defendants objected. But the judge allowed the question to be put, saying, the question may have a bearing on the case, &c.; that it was but following out the question on the cross-examination. To which decision the defendants then and there excepted. Whereupon, the said question was put to the witness, and answered by him.

The counsel of the United States further offered to prove, by the oath of David Gardiner, that certain goods marked [B]F, which had been imported into New York in the ship Eutaw, being the same on which defendant Francis 202*] Blackburne was alleged to have *paid the freight as aforesaid, were still in the custom-house at New York. To which the defendants objected. But the judge overruled the objection, and admitted the evidence; to which decision the defendants then and there excepted. Whereupon, the said evidence was given.

The counsel of the United States further offered in evidence an invoice of merinoes (not part of the goods mentioned in the information) bought of Abel Shaw, entered in Philadelphia, by Wm. Blackburne & Co., by ship Franklin, on the 19th August, 1839, marked [B]F, 35 *a* 53, offered as strengthening the evidence of the ownership of packages with this mark. To which the defendants objected. But the judge admitted the evidence; to which decision the defendants then and there excepted. Whereupon, the said invoice was read in evidence.

And the counsel of the United States, in rebutter, offered in evidence invoices of Blackburne, Taylor, and Okie & Robinson, to show the absence of any such custom as to the allowance of five per cent. for measurement, as had been testified to by the witnesses on the part of the defendants. Which evidence was objected to by the defendants. But the objection was overruled by the court, and the said evidence was admitted; to which decision the defendants then and there excepted. Whereupon, said invoices were read.

The defendants produced and examined John Robinson, of the firm of Okie & Robinson, and Robert Walker, to prove an alleged usage of trade, in England, to make a discount or allowance of five per cent. for measure on cloths and cassimeres; said Robert Walker being cross-examined, several invoices of his own importations into the port of New York were shown to and verified by him; and the said invoices were placed by plaintiffs' counsel in the hands of the counsel of the defendants, and one of said invoices was read by the counsel of the United States to the jury. The counsel of the United States, pending this cross-examination, offered to read to the jury a letter from one Waite to the witness, which accompanied and was annexed to one of the said invoices, and left therewith in the New York custom-house, on which the goods had been entered, and referring to the said invoice. The reading of which letter in evidence was objected to by defendants. But the court admitted the same to be read to the jury; to which decision the defendants' counsel excepted. Whereupon, the said letter was read in evidence.

And the counsel of the United States further offered in evidence the several invoices which had been shown to defendants' witness, Robert Walker, during his cross-examination, and had been verified by him, of goods consigned to and imported by said Robert Walker into New York; the said invoices having been shown to the counsel for the claimants, and one of them read to the court and jury, without objection on the part of the claimant to any of them, which *being objected to by defendants, the [*203 judge said that he considered them to be already in evidence, inasmuch as one had been read to the jury, and the others shown to the witness Walker, verified by him, and shown to the counsel of the defendants, and all were offered for the same purpose, and that the papers should be considered in evidence. To which decision the defendants then and there excepted. Whereupon, the said invoices were read to the jury.

And the judge charged the jury.

And, thereupon, the defendant's counsel excepted to the said charge generally, and to every part thereof; and in addition to said general exception, and without prejudice thereto, specified the following exceptions, to wit:

That the judge, in his said charge, instructed the jury:

1. That the whole proceeding in the seizure of the goods in question was, and substantially, in conformity with the act of Congress.

2. That the objections made to the proceedings are immaterial to the issue now trying.

3. That the entry of the goods at New York, their appraisement at the custom-house there, the payment of the duties according to that appraisement, and the delivery of the goods thereupon to the importers, were not conclusive against the United States in this case.

4. That the revenue acts mentioned in this information are not strictly penal laws.

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5. That the duties on the goods were not paid within the meaning of the 68th section of the Act of 1799 (although they had been passed at the custom-house of New York, and the duties there assessed upon them had been paid, according to the value and prices in the invoice), if the jury should be of opinion that they were not invoiced at their fair and true cost and value.

6. That the provision of the 66th section of the Act of 1799, mentioned in the charge, was not repealed.

7. That under the Act of 1830, when a package or invoice has been made up with intention to defraud, the package or invoice (that is, the goods contained in the invoice) are forfeited.

8. That the probable cause mentioned in the 7th section of the Act of 1799, is not a cause existing and known to the persons by whom the seizure was made, antecedent to the seizure, and which was the warrant and ground of the proceedings. The probable cause intended by the act has no reference to the seizure, but to the trial. There must be probable cause for the prosecution, not for the seizure, and the court is to judge of it by what appears to the court—by what comes to the knowledge of the court on the trial of the prosecution.

9. That the United States have shown prob-**204*]** able cause for the *prosecution, and that the *onus probandi* was thrown upon the claimants.

10. That it was not necessary to affirm or deny the doctrine that there can be but one official appraisement of the goods, and that that must be made in the custom-house at which the goods were entered.

11. That the first step in the inquiry whether the goods are invoiced at their actual cost, is to ascertain what was their actual cost; and how has this been done on the part of the United States? By certain appraisements made, in the first place, by official appraisers of the custom-house of this city; and further, by private appraisers, selected for that purpose. If the opinions of Messrs. Stewart and Simpson (the official appraisers at the port of Philadelphia) have not the authority of an official appraisement or act, they have, nevertheless, the weight of the judgment of men accustomed to other goods of this description, and who, from the appointment, as well as their experience, may be presumed to have competent knowledge and skill in ascertaining their value. In this light the jury may consider their evidence, and give credit to it accordingly.

And, thereupon, the counsel for the said claimants did then and there except to the aforesaid charge and opinions of the said court; and inasmuch as the said charge and opinions, so excepted to, do not appear upon the record, the said counsel for the said claimants did then and there tender this bill of exceptions to the opinion of the said court, and requested the seal of the said judge aforesaid should be put to the same, according to the form of the statute in such case made and provided.

And, thereupon, the aforesaid judge, at the request of the said counsel for the claimants, did put his seal to this bill of exceptions, pursuant to the aforesaid statute in such case made and provided.

JOS. HOPKINSON. [L. S.]

Messrs. Meredith and *Crittenden* for the plaintiffs in error.

Messrs. Cadwallader and *Nelson*, Attorney-General, for the United States.

[The reporter was unavoidably absent, and therefore cannot report the arguments of the respective counsel.]

Mr. Justice STORY delivered the opinion of the court:

This is a writ of error to the judgment of the Circuit Court of the Eastern District of Pennsylvania, affirming the judgment of the District Court founded upon an information *in rem* against certain cases of cloth and cassimeres seized on land in the said district. The cause was tried by a jury, who returned a verdict for the United States, upon which the judgment was rendered.

The information contained thirteen counts. The first and second counts were founded on the 50th section of the Duty Collection Act of 1799, chap. 128; the third count was founded on the 68th section *of the same act; [***205** the fourth, fifth, and tenth counts were founded on the 66th section of the same act; the sixth, seventh, eighth, eleventh, and twelfth counts were founded on the 4th section of the Act of 28th of May, 1830, chap. 147; and the ninth and thirteenth counts were founded on the 14th section of the Act of the 14th of July, 1832, chap. 224. The claimants put in a plea or answer denying the allegations in the information, upon which an issue was tendered and joined, and tried by the jury.

At the trial, certain exceptions were taken to the matters ruled, and to the charge given by the learned judge who presided at the trial, the form and frame of which exceptions, as propounded by the counsel, we do not propose to examine; and the questions submitted to us arise from the matters of law thus ruled and contained in his charge. With the comments of the learned judge upon the evidence, except so far as they involved matters of law, we have nothing to do, as they were submitted solely for the consideration of the jury in weighing the evidence, of which they were the proper and final judges.

In the course of the argument in this court, an objection was insisted on, that the seizure itself upon which the information is founded, was irregularly and improperly made, it having been made by the collector of the customs of the port of Philadelphia, when it should have been made by the collector of the customs of the port of New York. And some reliance in support of this objection seems to have been placed upon the supposed intention of the 68th section of the Duty Collection Act of 1799, chap. 128. But if any reliance could be placed thereon (as we think it could not), it would be completely removed by the 70th section of the same act, which makes it the duty of the several officers of the customs to make seizure of all vessels and goods liable to seizure by virtue of that act or any other act respecting the revenue, as well without as within their respective districts. So that it is plain from this provision that a seizure made by any officer of the customs of any district would be good, although made within any other district. And the whole structure of the act shows that any officer of the

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customs had a perfect right to seize goods found in his own district, and indeed that it was his appropriate duty.

But the objection itself has no just foundation in law. At the common law any person may, at his peril, seize for a forfeiture to the government, and, if the government adopts his seizure, and institutes proceedings to enforce the forfeiture, and the property is condemned, he will be completely justified. So that it is wholly immaterial in such a case who makes the seizure, or whether it is irregularly made or not, or whether the cause assigned originally for the seizure be that for which the condemnation takes place, provided the adjudication is for a sufficient cause. This doctrine was fully recognized by this court in *Hoyt* v. *Gelston* (3 Wheat., 247, *310), and in *Wood* v. *The United States* (16 Peters, 342, 358, 359). And from these decisions we feel not the slightest inclination to depart.

[*206] Indeed, if the objection could under any circumstances be maintainable, it was matter that should have been propounded as preliminary matter in the nature of a plea in abatement of the information, and could constitute no point before the jury upon pleadings addressed to the merits of the case, and involving the direct question of forfeiture or not.

In the course of the trial several objections to the competency of certain witnesses, and to the admissibility of certain evidence, offered on behalf of the United States, were taken by the claimants. In the first place an objection was taken to the competency of John J. Logue, George Gideon, and William Cairns, called to support the issue on behalf of the United States, they being officers of the customs and the persons who made the seizure of the goods in controversy. By the 71st section of the Duty Collection Act of 1799, chap. 128, the *onus probandi* to establish the innocence of the property is thrown upon the claimant in all cases where probable cause is shown for the seizure and prosecution. And by the 89th section of the same act it is provided, that when in any prosecution on account of a seizure, judgment shall be given for the claimant, if it shall appear to the court before whom such prosecution shall be tried, that there was a reasonable cause of seizure, the court shall cause a certificate and entry to be made thereof; and in such case the person making the seizure, or the prosecutor, shall not be liable to any action, suit, or judgment, on account of such seizure and prosecution. The argument, therefore, on behalf of the claimant is, that these witnesses are incompetent, they being interested in the event of the suit, and being liable to an action at the suit of the claimants, if reasonable cause for the seizure was not established, and that their testimony in effect would conduce to establish such reasonable cause.

Several answers may be given to this objection. In the first place, it is not true that the mere liability of a party to an action in one event of a suit will constitute of itself an absolute or universal objection to his competency. There are many exceptions to the rule on this subject, founded upon necessity, or public policy, or the remoteness, the uncertainty, or the contingent nature of the liability. The present case falls directly within these exceptions. The witnesses were acting as the agents of the government in making the search and seizure; they alone could give testimony as to the facts attending such search and seizure, and were, therefore, witnesses from necessity: and their acts being adopted or authorized by the government, public policy requires that the government should have the means of enforcing its own rights through the instrumentality of their testimony. Their competency for such purposes falls directly within the reasoning of the Court of King's Bench in the case of *The King* v. *Williams* (9 Barn. & Cress., 549), and the case of *The United States* v. *Murphy* [*207 (16 Peters, 203), where the subject was considered very much at large.

In the next place, the witnesses were not objectionable in point of competency on account of any interest in the event of the cause. Their interest, if any they had, as informers or otherwise, in the forfeiture, was completely removed by the provision of the 91st section of the Duty Collection Act of 1799, chap. 128, which, when they are used as witnesses, takes away from them the share of the forfeiture to which they would otherwise be entitled. In the event of the suit, therefore, they had no interest, for the suit was solely to enforce the forfeiture. The question, whether there was probable or reasonable cause for the seizure, constituted no part of the issue to be tried by the jury. So far as it respected throwing the *onus probandi* upon the claimants, it was a matter solely for the consideration of the court in the progress of the trial, and collateral to the main inquiry, although of great importance in regulating the nature and extent and sufficiency of the evidence. And so far as respected the certificate and entry of reasonable cause to protect the seizors from future liability for the seizure, it was no part of the issue, and, indeed, was an act to be done by the court before whom the prosecution was tried, only in case judgment upon the verdict should pass for the claimants; and it therefore was plainly an act to be done and inquiry to be had posterior to the trial.

In the next place, the objection taken was to the competency of the witnesses, as such, for any purposes in the cause. They were not called by the government as witnesses to give evidence of matters showing reasonable or probable cause for the seizure, but as witnesses generally "to support the issue on the part" of the government. If competent for any purpose upon the trial, they could not be rejected generally; and that they were competent to prove "the facts attending the seizure of the goods, and that certain original marks on packages containing the said goods had been erased, and among them the mark [B]F, which was originally upon one of the said packages," cannot, in our judgment, admit of any just doubt. It could make no difference as to their admissibility for these purposes, that collaterally these facts might bear upon the question of probable or reasonable cause or not.

In the next place, there was another and independent ground upon which their competency is clear. It is, that they were acting under a search-warrant in making the search and seizure, which would undoubtedly, under the 68th section of the same act, be a complete protection to them against all liability to any

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suit therefor, unless, indeed, in a case where the witnesses acted from malice, and also without probable cause; and the absence of either would exonerate them from all liability. So that in this view their liability was remote, contingent, and uncertain.

208*] *Upon all these grounds, we are of opinion that the witnesses were clearly admissible.

Another objection was to the admissibility of a bill of lading, entry, and owner's oath, taken on the 16th of July, 1839, in the month preceding the seizure of the goods in question, of nineteen cases of goods (not part of the goods seized) marked [B]F, 1 *a* 19. Although this evidence was objected to, and it was admitted, yet it does not appear upon the record that any exception was taken to the ruling. But, without dwelling upon this, which was perhaps an accidental omission, it is proper to say that this evidence was not offered as a single, isolated document (for in that view it might be deemed at most as irrelevant and inconsequential for any purpose), but it was offered in connection with other documents and evidence to establish a privity between Taylor and Blackburne & Co., in other importations of a kindred character, and under a scheme of meditated fraud upon the revenue of the United States, of which these documents were a link in the chain. For this purpose they might be important and necessary; and although the whole evidence is not set forth in the record, yet it is apparent, from what is there found in reference to the next objection, that the evidence had an intimate connection and bearing upon that which is there stated.

The objection here alluded to is in the record stated in the following words: "The counsel of the United States." [See the paragraph in the statement of the reporter which is included within brackets.] Now, we think the exception to this evidence was properly overruled, and the evidence admissible to establish the connection between Taylor and Blackburne in other importations as well as in the importation of the goods now in controversy, and also to displace any presumption that the acts of the one were not properly to be deemed attributable to any connivance with the other, or that they were not jointly interested in the same scheme of importations, and mutually cognizant of the designs of each other. What effect this evidence ought to have after its admission in the cause, taken in connection with the other evidence, was a matter for the consideration of the jury alone; but of its admissibility for the purposes above stated we entertain no doubt. It is, indeed, a strange omission in the record, that the other evidence in the case is not therein fully stated, nor the points, to which it was adduced, suggested, so that we are left to conjecture from very imperfect materials what was the true extent and bearing of the various matters excepted to as improper evidence.

Another objection is to a question put to Abraham J. Lewis, a witness on behalf of the United States, who, having stated that his firm were importers of cloths and kerseymeres, and that he had thereby a knowledge of their quality, was asked, on cross-examination, to state the extent of the importations of his firm; and in reply he said: "Formerly we imported large quantities of woolens; for *three or [*209 four years past we have imported but a few packages annually." Whereupon, the counsel for the United States, on re-examination, proposed the following question, viz.: "Was there anything in the state of the market which caused the alteration which you have mentioned in the amount imported by you within four or five years last past?" To which question the claimants objected; but the judge allowed the question to be put, saying it might have some bearing on the case, and that it was but following out the question put on the cross-examination. We think the decision of the court was perfectly correct, for the reason stated by the judge. The answer might show that the witness had ceased to import so largely, not from want of skill or capital, but for reasons which might connect themselves with the importations of the claimants. What the answer was we do not know; and certainly it could be no just ground of exception, that the answer was such as had no bearing either way upon the merits of the case, and *a fortiori* not, if favorable to the claimants.

Another objection was to the admissibility of the evidence of David Gardner, who was offered to prove that certain goods, marked [B]F, which had been imported into New York, in the ship Eutaw, being the same on which Francis Blackburne was alleged to have paid the freight, were still in the custom-house at New York. We think that this evidence was properly admissible, for the same reasons as those which have been already stated. It was a part of the *res gestæ*. If the other parts of the evidence were favorable to the innocence of the claimants in their various importations, then no conclusion against them could fairly be drawn from this fact. But if, on the other hand, strong circumstances of suspicion of fraud attached to other importations, then the circumstance, so contrary to the usual course of mercantile transactions in cases of perishable articles, or articles liable to depreciation or decay, of their remaining long in the custom-house, might fairly be deemed to inflame those suspicions, especially if in the interval the government was on the alert to detect supposed frauds in other importations.

Another objection was to the admission of the evidence of an invoice of merinoes (not part of the goods mentioned in the information), entered in Philadelphia, by Blackburne & Co., and marked [B]F, 35 to 53, offered as strengthening the evidence of the ownership of packages with this mark. In this view we can perceive no possible question as to the competency or propriety of the evidence.

Another objection was to the admissibility in evidence of certain invoices of Blackburne, Taylor, Okie & Robinson, to show the absence of any such usage as to the allowance of five per cent. for measurement, as had been testified to by the witnesses on the part of the claimants. We see no just ground of exception to the admissibility of such evidence. The usage set up was of a general nature, and *all evidence which went to establish [*210 the want of such generality, by proof of the non-existence of such a deduction in invoices of a similar nature—where, if it was general

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and well known, it ought to be found—was certainly admissible to rebut the presumptions derived from the adverse proof. The same answer may be given, and indeed applies more forcibly, to the evidence given by Robert Walker, a witness for the claimants, who, upon his cross-examination, verified several invoices of his own importations into the port of New York; and also a letter of one Waite, annexed to one of the invoices. The introduction of this letter was objected to; but it was an accompaniment of the invoice introduced without objection, and it was offered not in chief, but as qualifying and repelling the evidence offered by the claimants as to the five per cent. usage—founded, among that of others, upon the very testimony of Walker. The other invoices verified by Walker were, for the same reason, in our judgment, equally admissible.

We have thus gone over the various objections taken to the competency and admissibility of the testimony in this case; some of which, considering all the circumstances of the case, can scarcely be treated otherwise than as being *inter apices juris;* and shall now proceed to examine the exceptions taken to the charge of the court. Of many of these it is unnecessary to take any special notice, since they have been already disposed of in the case of *Wood* v. *The United States* (16 Peters, 342), or have incidentally fallen under notice in the preceding parts of this opinion. Upon the point that the revenue laws, on which the information was founded, were not, as the judge in the court below suggested, to be deemed penal laws in the sense in which that phrase is sometimes used, it may be proper to say a very few words. He treated the point as not of great importance in the case, as we think it was not, since it had no tendency to change the interpretation of the provisions of the revenue laws then under his consideration. In one sense, every law imposing a penalty or forfeiture may be deemed a penal law; in another sense, such laws are often deemed and truly deserve to be called remedial. The judge was therefore strictly accurate when he stated that "It must not be understood that every law which imposes a penalty is therefore, legally speaking, a penal law, that is a law which is to be construed with great strictness in favor of the defendant. Laws enacted for the prevention of fraud, for the suppression of a public wrong, or to effect a public good, are not, in the strict sense, penal acts, although they may inflict a penalty for violating them." And he added: "It is in this light I view the revenue laws, and I would construe them so as most effectually to accomplish the intention of the Legislature in passing them." The same distinction will be found recognized in the elementary writers, as, for example, in Blackstone's Commentaries (1 Black. Com., 88), and Bacon's Abridgement (statute 1., 7, 8), and Comyn's 211[*] Digest (Parliament R., *13, R. 19, R. 20); and it is also abundantly supported by the authorities.

The main exception, however, to the charge is as to the ruling of the judge that there was probable cause of seizure, and that therefore the *onus probandi* to establish the innocence of the importation, and to repel the supposed forfeiture, was upon the claimants. We entirely concur in the opinion of the judge in his views of the evidence as applicable to this point. He, and not the jury, was to judge whether there was probable cause or not to throw the *onus probandi* on the claimants; for the 71st section of the Act of 1799, chap. 128, expressly declares that "the *onus probandi* shall lie on the claimant only where probable cause is shown for such prosecution, to be judged of by the court before whom such prosecution is to be had." In our judgment, the circumstances were abundantly sufficient to justify him, nay, to require him to throw the *onus probandi* on the claimants. The extraordinary circumstances connected with the concealment of the goods, the prevarications and false statements of Blackburne, and the undervaluation of the goods, all required the most plenary proofs on the part of the claimants, to deliver the property from the perils by which it was surrounded. The original cost of the purchases could have been fully proved by the claimants, if the transactions were *bona fide* purchases; and they had the most ample means within their power to establish it. Taylor and Blackburne were so completely mixed up in these transactions, as principals and agents, or as joint principals, that the acts of the one might most justly be attributed to the other; and in fact they admit of no reasonable separation as to design or privity of co-operation.

There is but one other exception remaining, which requires any special notice. It is whether the 68th section of the Act of 1799, chap. 128, was intended to reach, or does reach cases where, by a false and fraudulent undervaluation, less than the amount of duties required by law has been paid, or whether it applies only to cases where no duties at all have been paid upon the goods. In our opinion, the section was designed to apply equally to both cases. In the sense of that section all goods are forfeited on which, by fraud, all the duties shall not have been paid, or secured to be paid which are by law required to be paid or secured thereon.

Upon the whole, the judgment of the Circuit Court is affirmed.

Cited—4 How., 250, 260, 332; 17 How., 93, 94; 3 Wall., 143, 148; 1 Abb., U. S., 421, 423; 2 Abb., U. S., 137, 314; 3 Ben., 511; 5 Ben., 227; 1 Dill., 58; 7 Blatchf., 463, 474, 489; 15 Blatch., 547; 3 Ware, 208, 210; Deady, 64, 70; Chase, Dec., 511; 2 Curt., 587.

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*JOHN POLLARD ET AL., Lessee, [*212
Plaintiff in Error,
v.
JOHN HAGAN ET AL., *Defendants in Error.*

When Alabama was admitted into the Union it became entitled to soil under navigable waters therein, same as original States—nothing therein remained to the U. S. but the public lands—these do not include lands below high water-mark in navigable streams.

The stipulation contained in the 6th section of the Act of Congress, passed on the 2d of March, 1819, for the admission of the State of Alabama into the Union, viz.: "that all navigable waters within the said State shall forever remain public

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highways, free to the citizens of said State, and of the United States, without any tax, duty, impost, or toll therefor, imposed by said State," conveys no more power over the navigable waters of Alabama to the government of the United States, than it possesses over the navigable waters of other States under the provisions of the Constitution.

And it leaves as much right in the State of Alabama over them as the original States possess over navigable waters within their respective limits.

The shores of navigable waters, and the soils under them, were not granted by the Constitution to the United States, but were reserved to the States respectively; and the new States have the same rights, sovereignty, and jurisdiction over this subject as the original States.

The United States never held any municipal sovereignty, jurisdiction, or right of soil in and to the territory of which Alabama, or any of the new States, were formed, except for temporary purposes, and to execute the trusts created by the acts of the Virginia and Georgia Legislatures, and the deeds of cession executed by them to the United States, and the trust created by the Treaty of the 30th April, 1803, with the French Republic, ceding Louisiana.

Upon the admission of Alabama into the Union, the right of eminent domain, which had been temporarily held by the United States, passed to the State. Nothing remained in the United States but the public lands.

The United States now hold the public lands in the new States by force of the deeds of cession and the statutes connected with them, and not by any municipal sovereignty which it may be supposed they possess or have received by compact with the new States for that particular purpose.

That part of the compact respecting the public lands, is nothing more than the exercise of a constitutional power vested in Congress, and would have been binding on the people of the new States whether they consented to be bound or not.

Under the Florida treaty the United States did not succeed to those rights which the King of Spain had held by virtue of his royal prerogative, but possessed the territory subject to the institutions and laws of its own government.

By the acts of Congress under which Alabama was erected a territory and a State, the common law was extended over it to the exclusion of all other law, Spanish or French.

The Treaty of 1795 was not a cession of territory by Spain to the United States, but the recognition of a boundary line, and an admission, by Spain, that all the territory on the American side of the line was originally within the United States.

The United States have never admitted that they derived title from the Spanish government to any portion of territory included within the limits of Alabama; for, by the Treaty of 1795, Spain admitted that she had no claim to any territory above the thirty-first degree of north latitude, and the United States derived its title to all below that degree from France, under the Louisiana treaty.

It results from these principles that the right of the United States to the public lands, and the power of Congress to make all needful rules and regulations for the sale and disposition thereof, conferred no power to grant land in Alabama which was below usual high water-mark at the time Alabama was admitted into the Union.

213*] *THIS case was brought up by writ of error from the Supreme Court of Alabama.

It was an ejectment brought by the plaintiff in error in the Circuit Court (State court) of Alabama, to recover a lot in the city of Mobile, described as follows, viz.: Bounded on the north by the south boundary of what was originally designated as John Forbes & Co.'s Canal, on the west by a lot now or lately in the occupancy of, or claimed by, —— Ezel, on the east by the channel of the river, and on the south by Government Street.

The case was similar in its character to the two cases of *The City of Mobile* v. *Emanuel et al.*, reported in 1 Howard, 95, and Pollard's *Lessee* v. *Files* (2 Howard, 592). In the report of the first of these cases the locality of the ground and the nature of case are explained.

In 1 Howard, 97, it is stated that the court charged the jury, that "if the place in controversy was, subsequent to the admission of this State into the Union, below both high and low water-mark, then Congress had no right to grant it; and if defendants were in possession, the plaintiffs could not oust them by virtue of the act of Congress." And at page 98 it is remarked, that "the Supreme Court of Alabama did not decide the first point raised in the bill of exceptions, viz.: that Congress had no right to grant the land to the city of Mobile."

In the case of *Pollard's Lessee* v. *Files*, it is remarked (2 Howard, 601) that "the arguments of both counsel as to the right of the State of Alabama over navigable water in virtue of her sovereignty, are omitted, because the opinion of the court does not touch upon that point.

In the present case, there were objections made upon the trial below to the admission of certain evidence which was offered by the defendant; but these objections were not pressed, and the whole argument turned upon the correctness of the charge of the court, which was as follows: "That if they believed that the premises sued for were below usual high water-mark, at the time the State of Alabama was admitted into the Union, then the act Congress, and the patent in pursuance thereof, could give the plaintiff no title, whether the waters had receded by the labor of man only, or by alluvion; to which plaintiff excepted, and the court signs and seals this bill of exceptions."

Under these instructions the jury found for the defendant, and the Supreme Court of Alabama affirmed the judgment. From this last court the case was brought up, under the 25th section of the Judiciary Act, and the only question was upon the correctness of the above instructions.

Mr. Coxe for the plaintiff in error.

Mr. Sergeant for the defendant in error.

Mr. Coxe, for plaintiff in error, said, [***214** that the only point presented upon the record grew out of the charge of the court. The plaintiff gave in evidence a patent from the United States for the premises in question; an Act of Congress, July 2d, 1836, and an Act of 26th May, 1824. Proof was given that the waters of Mobile Bay, at high tide, overflowed the premises during all the time up to 1822.

This same title has been before the court already and confirmed. (1 Howard, 95; 2 Howard, 591.)

The act of Congress admitting Alabama into the Union is in 6 Laws U. S., chap. 458, p. 380. The 6th section contains a proviso, that all navigable waters shall remain public highways, &c. Unless this section prevents the land described in the patent from belonging to the United States, the plaintiff must recover under it.

In 14 Peters, 361, the land in question was situated just like this, and the title was confirmed. (So in 16 Peters, 234, 245.) In these two cases there is an implied opinion of the court upon the point now under consideration, and the expressed opinion of one judge. (16 Peters, 262, 266.)

In 2 Howard, 599, the point was expressly raised by the counsel on the other side.

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If the land did not belong to the United States, it belonged to nobody. Neither the State of Alabama nor the city of Mobile had any title to it. Many lands are in the same situation, subject to be overflowed, and if they belong to nobody, there is an end to all improvement of them, and they must remain public nuisances.

Mr. Sergeant, for defendant in error, stated the following points:

1. The plaintiff rested his case entirely upon the Act of Congress of the 2d July, 1836, and the patent issued under it, showing no previous or other right. The act and the patent gave him no title to the premises, because,

1st. The United States had nothing to grant or to release; the right, if any, between high and low water-mark being in the State of Alabama, and not in the United States; and if ever in the United States, after Alabama became a State was passed away and parted with by the Act of 1824.

2d. The right and title in and to the premises in question were vested in those under whom defendant claims, by a valid grant from Spain before the Treaty of 1803, namely, by the grant of June 9th, 1802.

3d. The grant from Spain, calling for the river as a boundary, maintained the same boundary and followed the river.

4th. The length of the line referred to in the grant does not limit defendant's right, because it is not stated for the purpose of limiting the right, but only as the then distance to the river; because it actually went into the river, and also because the call for the river controls both course and distance.

215*] *2. The act of Congress could not operate as a release or confirmation, because there was no right or color of right for a release or confirmation to operate upon.

3. The right of the defendant was saved and confirmed by the Act of 1824, so as to place it thenceforward beyond doubt or question.

[All of *Mr. Sergeant's* remarks which bear upon other points than the one upon which the opinion of the court rested are omitted.]

Had the United States any title to land covered by navigable water, after the admission of Alabama into the Union? *Judge* Catron has decided in favor of the United States, but the court has expressed no opinion in preceding cases. The land in question was a part of the shore of the river when Alabama was admitted, and was so when the Act of 1824 passed. It was a part of the river. What is a river? Are not its banks included? In the language of courts, there are two distinct parts of a river, its shore and its channel. The shores sometimes extend a mile out. They may be left bare at low tide, but are still a part of the river, either for the purposes of navigation or fishing. Beyond that is the channel. The record describes this land as being bounded by the channel of the river. The question, whether the United States had a title after 1817, was not decided in 14 Peters, nor in 16 Peters, nor in *Pollard* v. *Files*. It is of little importance to the United States, because free navigation is secured, but of great magnitude to the State. It has been said, that if the decision be against the United States, the shores must remain unimproved. But not so. Their improvement requires local regulation. They are avenues to navigation, and want a nearer guardian than the United States. Other States have the control of similar property. The United States describe the limits of a port in their revenue laws, and if they want a local property they buy it. A State can manage this sort of property better than the United States, who have never done anything with it. The question is important to the new States, as involving an attribute of sovereignty, the want of which makes an invidious distinction between the old and new States. In 9 Porter, 577, there is an outline of the argument upon this subject, and the authorities are cited. (See, also, 589, 591.) It is not material for me to examine the power of the King of Spain, because after the transfer in 1803, the country became subject to the common law and statute laws of the United States, except as to previous grants.

At page 596, this particular question is examined, and the case in 10 Peters referred to.

It appears, therefore, that the Supreme Court of Alabama studied the subject, and there is no adverse decision in this or any State court. On the contrary, the decision of Alabama has been sustained by this court in principle.

A right to the shore between high and low water-mark is a sovereign *right, not a [*216 proprietary one. By the treatics of 1803 and 1819 there is no cession of river shores, although land, forts, &c., are mentioned. Why? Because rivers do not pass by grant, but as an attribute of sovereignty. The right passes in a peculiar manner; it is held in trust for every individual proprietor in the State or the United States, and requires a trustee of great dignity. Rivers must be kept open; they are not land, which may be sold, and the right to them passes with a transfer of sovereignty. (16 Peters, 367, 413, 410, 416.)

It follows from this decision, that the rights over rivers became severed from the rights over property. In Pennsylvania, after the Revolution, an act was passed confiscating the property of the Penn family; and no act was passed transferring the sovereignty of the State. The reason is that no act was necessary. Sovereignty transferred itself, and when this passes, the right over rivers passes too. Not so with public lands. The right which New Jersey acquired in 16 Peters was precisely the right which Alabama claims now. There can be no distinction between those States which acquired their independence by force of arms and those which acquired it by the peaceful consent of older States. The Constitution says the latter must be admitted into the Union on an equal footing with the rest. The dissenting opinion of *Judge* Thompson (page 419) is not inconsistent with this.

If these positions are right, the United States had nothing below high water-mark. They might have reserved it in the compact with the State. The third article of the Treaty with Spain (1 Land Laws, 57) contains such a reservation. But as it is, the United States have nothing in Alabama but proprietary rights. They cannot put their foot in a State to claim jurisdiction without its consent. No principle is more familiar than this, that whilst a State has granted a portion of its sovereign power to the United States, it remains in the

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enjoyment of all the sovereignty which it has not voluntarily parted with. This court, though inexpressibly valuable to the country, is yet a court of limited jurisdiction. In the Constitution, what power is given to the United States over the subject we are now discussing? In a territory they are sovereign, but when a State is erected a change occurs. A new sovereign comes in. Where the power of taxation occurs, it is because it has been yielded by compact. (1 McLean's Rep., 337, 339, 343, 344, 354, 371, 374, 378.)

The case in 10 Peters, 731 (*New Orleans* v. *The United States*), sanctions the idea that the power of which we have been speaking must be held in trust; that the kings of France had jurisdiction over the shore, but it was a police power, and used for the common benefit, not as a proprietary right. If the trust be in the State of Alabama, the United States cannot defeat that trust. The right of accretion could not belong to the United States, because it belongs to the adjacent proprietor.

217*] *Mr. *Coxe*, in reply, insisted, that former decisions of this court cover this case. The nature of the ground in question is fully shown in 9 Porter, 580, 581; that the tide rises one and a half or two feet. In 10 Peters, 667, property similarly situated is described, where the water would overflow unless confined by banks. It has been said that the United States cannot exercise acts of ownership over it, but it is conceded that Spain had and exercised jurisdiction to the extent of granting it to individuals. (10 Peters, 679, 680, 681; Attorney-General's opinion, 16 Peters, 252; 9 Porter, 591.)

In 10 Peters, 662, no question like the present was raised, as to the power to grant, but whether the property ever had been granted.

The case of *New Orleans* v. *United States* involved merely the question, whether the land had been dedicated to the public. It was like the Pittsburg and Cincinnati cases, differing only as to the facts proved to substantiate such dedication and the code of law which was to govern it. The citations from Domat, 723, are designed merely to point out the places which belong to the public. No question was presented or decided, nor was any opinion indicated as to the points involved in this controversy.

Prior to the treaty by which the United States acquired this territory, the former sovereign claimed and exercised the rights which the United States have undertaken to exercise. But it is said that we must show that our government could be the recipient of this power. Suppose we cannot. Then the right must remain in Spain, which would be a strange result. But we say,

1. That portion of sovereign power which is vested in the United States by our Constitution and laws is unlimited.

2. The exercise of power by any department or functionary of the government, as among and operating on ourselves, is limited.

3. The sovereign power as a nation in its foreign intercourse is subject to no constitutional restraint.

But it is contended that the right to the shore is a sovereign and political, not a proprietary right. In what the distinction exists, so far as it is applicable to this controversy, has not been explained, and is not easy to be understood. That there is an immense body of lands in all our alluvial territory, from the North River to the Sabine, including the meadows between Newark and New York, those on the Delaware, the rice plantations of Carolina and Georgia, the marshes of Florida, the swamps of Louisiana, is a matter of fact. They are subject to periodical inundations, some daily, some by occasional freshets, some with the semi-annual rise of waters. According to the argument on the other side, all these are to be considered part of the shore. How can a political power be said to exist without a proprietary right over marshes where no one can live?

It is said the treaties of 1803 and 1819 nowhere specify rivers, and from this the conclusion is drawn that they passed as part of the sovereignty. It seems more probable that they passed as part of the *territory. Islands [*218 are mentioned, out in the ocean, under which we hold Key West, Tortugas, &c. Why should they be considered merely as incidents to sovereignty and not part of the territory? The language of the grant is, in "full property and sovereignty."

The Treaty of 1795 with Spain (1 Laws U. S., 264), in designating the boundaries, speaks of them which separate the territories of the contracting parties, and establish part of this line of territory in the middle of a river. Article 4th designates the middle of the channel, or bed of the Mississippi, as the western boundary. In this treaty, as in that of 1819, a river is the boundary, and its free navigation is secured. Did any one ever suppose that either party precluded itself from using the highway, or from holding or disposing of the lands on the banks subject to inundation?

It is said that the land which was in question in *Martin* v. *Waddell* (16 Peters, 369), was similarly situated to the present; that it was below high water, and thence it is inferred that it was above low water-mark. But the special verdict indicates no such thing. It says, "covered with water," "where the tide ebbs and flows." Nor is there anything in the passages cited (410, 413, 416) conflicting with this idea. New Jersey, who asserted the right sustained in that case, would be astonished to learn the construction now placed upon it, denying the right of private property in the flats left bare at low water, or in the valuable meadows protected by banks from daily inundation, and converted into productive property, conducive equally to health and wealth.

In the lands thus situated, which had not been severed from the public domain, the United States had the capacity to acquire, and did acquire, a proprietary interest. Nor is this repugnant to our Constitution or laws, or the principles of our government. Throughout the Union such property is held by individuals under titles sanctioned by legislative acts and judicial decisions.

The sea-shore and arms of the sea, "like other public property, may be granted by the king or government to individual proprietors." (2 Dane's Abr., 690, 691.)

The Massachusetts Colony Act of 1691 grants numerous pieces of flats to the proprietors of

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the adjoining uplands. This was in strict conformity with the English law. The soil on which the sea flows and ebbs, that is, between high and low water-marks, may be parcel of a manor. Where the tide flows, it is within the jurisdiction of the admiralty; where the tide ebbs, the land may belong to a subject. Everything done on the land when the sea is out, shall be tried at common law. (5 Co., 107, *Constable's* case.) In New York and New Jersey, the inlets of the sea on Long Island and between the Passaic and Hackensack, have all been reclaimed and converted into meadows. When New York claimed the entire jurisdiction of the North River, she never thought of claiming the mead-219*] ows *and marshes on the Jersey side, although they were covered at every high tide by the waters of that river.

On the Delaware, in the States of Delaware, New Jersey, and Pennsylvania, the same law prevails.

In Maryland, South Carolina, and Georgia, valuable private property has been thus reclaimed from the water.

Throughout our western country, Ohio, Indiana, Illinois, Missouri, Louisiana, Alabama, Mississippi, no question has ever been raised on this point until these cases first presented it. Millions of acres are thus held. The right has been uniformly asserted by the United States. It was so in the Act of 20th April, 1818, for the sale of Fort Charlotte lands, which gave rise to the suits in Peters and Porter. (9 Porter; 16 Peters, 250; 6 Laws U. S., 846.)

The Act of May 26th, 1824, expressly grants land of this description, and the Act of July, 1836, does the same.

All the titles under these acts are now in controversy. It is said that the United States have little or no interest in this question; but their interest is of incalculable value. See Darley's Louisiana, as to the amount of overflowed lands.

The right has been judiciously recognized. In 16 Peters, 408 (*The United States* v. *Fitzgerald*), where there was a claim under the preemption laws. In the five different cases in which this very grant has been disputed. *Pollard* v. *Kibbe* (14 Peters, 355), where the title of both parties was presented. So far as the plaintiff's title appears, it was identical with that now exhibited, with the only addition of the Spanish origin, which had been rejected by the board of commissioners. The defendant's title the same as now. All the objections now urged to the plaintiff's title were then apparent on the record. (*Mobile* v. *Eslava*, 16 Peters, 234; 9 Porter; *Mobile* v. *Hallett*, 16 Peters, 261; *Mobile* v. *Emanuel*, 1 Howard, 95; *Pollard* v. *Files*, 2 Howard, 592.)

Mr. Justice MCKINLEY delivered the opinion of the court:

This case comes before this court upon a writ of error to the Supreme Court of Alabama.

An action of ejectment was brought by the plaintiffs against the defendants, in the Circuit Court of Mobile County, in said State; and upon the trial, to support their action, "the plaintiffs read in evidence a patent from the United States for the premises in question, and an Act of Congress passed the 6th day of July, 1836, confirming to them the premises in the patent mentioned, together with an Act of Congress passed the 20th of May, 1824. The premises in question were admitted by the defendants to be comprehended within the patent; and there was likewise an admission by both parties that the land lay between Church Street and North Boundary Street, in the city of Mobile; and there the plaintiffs rested their case."

*"The defendants, to maintain the [*220 issue on their part, introduced a witness to prove that the premises in question, between the years 1819 and 1823, were covered by water of the Mobile River at common high tide;" to which evidence the plaintiffs, by their counsel, objected; but the court overruled the objection, and permitted the evidence to go to the jury. It was also in proof; on the part of the defendant, that at the date of the Spanish grant to Panton, Leslie & Co., under which they claim, the waters of the Mobile Bay, at high tide, flowed over what is now Water Street, and over about one third of the lot west of Water Street, conveyed by the Spanish grant to Panton, Leslie & Co.; and that the waters continued to overflow Water Street, and the premises sued for, during all the time up to 1822 or 1823; to all which admissions of evidence, on part of the defendants, the plaintiffs excepted." "The court charged the jury, that if they believed the premises sued for were below usual high water-mark, at the time Alabama was admitted into the Union, then the act of Congress, and the patent in pursuance thereof, could give the plaintiffs no title, whether the waters had receded by the labor of man only, or by alluvion; to which the plaintiffs excepted. Whereupon, a verdict and judgment were rendered in favor of the defendants, and which judgment was afterwards affirmed by the Supreme Court of the State."

This question has been heretofore raised, before this court, in cases from the same State, but they went off upon other points. As now presented, it is the only question necessary to the decision of the case before us, and must therefore be decided. And we now enter into its examination with a just sense of its great importance to all the States of the Union, and particularly to the new ones. Although this is the first time we have been called upon to draw the line that separates the sovereignty and jurisdiction of the government of the Union, and the State governments, over the subject in controversy, many of the principles which enter into and form the elements of the question have been settled by previous, well considered, decisions of this court, to which we shall have occasion to refer in the course of this investigation.

The counsel for the plaintiffs insisted, in argument, that the United States derived title to that part of Alabama in which the land in controversy lies from the King of Spain; and that they succeeded to all his rights, powers, and jurisdiction, over the territory ceded, and therefore hold the land and soil, under navigable waters, according to the laws and usages of Spain; and by those laws and usages the rights of a subject to land derived from the crown could not extend beyond high water-mark, on navigable waters, without an express grant; and that all alluvion belonged to the

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crown, and might be granted by this king, to gether with all land between high water and the channel of such navigable waters; and by the compact between the United States and 221*] Alabama, on *her admission into the Union, it was agreed, that the people of Alabama forever disclaimed all right or title to the waste or unappropriated lands lying within the State, and that the same should remain at the sole disposal of the United States; and that all the navigable waters within the State should forever remain public highways, and free to the citizens of that State and the United States, without any tax, duty, or impost, or toll therefor, imposed by that State. That by these articles of the compact, the land under the navigable waters, and the public domain above high water, were alike reserved to the United States, and alike subject to be sold by them; and to give any other construction to these compacts, would be to yield up to Alabama, and the other new States, all the public lands within their limits

We think a proper examination of this subject will show that the United States never held any municipal sovereignty, jurisdiction, or right of soil in and to the territory, of which Alabama or any of the new States were formed; except for temporary purposes, and to execute the trusts created by the acts of Virginia and Georgia Legislatures, and the deeds of cession executed by them to the United States, and the trust created by the Treaty with the French Republic, of the 30th of April, 1803, ceding Louisiana.

All that part of Alabama which lies between the thirty-first and thirty-fifth degree of north latitude, was ceded by the State of Georgia to the United States, by deed bearing date the 24th day of April, 1802, which is substantially, in all its principles and stipulations, like the deed of cession executed by Virginia to the United States, on the 1st day of March, 1784, by which she ceded to the United States the territory northwest of the river Ohio. Both of these deeds of cession stipulated, that all the lands within the territory ceded, and not reserved or appropriated to other purposes, should be considered as a common fund for the use and benefit of all the United States, to be faithfully and *bona fide* disposed of for that purpose, and for no other use or purpose whatever. And the statute passed by Virginia authorizing her delegates to execute this deed, and which is recited in it, authorizes them, in behalf of the State, by a proper deed to convey to the United States, for the benefit of said States, all the right, title, and claim, as well of soil as jurisdiction, "upon condition that the territory so ceded shall be laid out and formed into States, containing a suitable extent of territory, not less than 100, nor more than 150 miles square, or as near thereto as circumstances will admit: and that the States so formed shall be republican States and admitted members of the federal Union, having the same rights of sovereignty, freedom, and independence, as the other States." And the delegates conclude the deed thus: "Now know ye, that we, the said Thomas Jefferson, Samuel Hardy, Arthur Lee, and 222*] James Monroe, by virtue of the *power and authority committed to us by the act of the said General Assembly of Virginia before recited, and in the name and for and on behalf of the said Commonwealth, do by these presents convey, transfer, assign, and make over unto the United States in Congress assembled for the benefit of said States, Virginia inclusive, all right, title, and claim, as well of soil as of jurisdiction, which the said Commonwealth hath to the territory or tract of country within the limits of the Virginia charter, situate, lying, and being to the northwest of the river Ohio, to and for the uses and purposes, and on the conditions of the said recited act."

And in the deed of cession by Georgia it is expressly stipulated, "That the territory thus ceded shall form a State and be admitted as such into the Union as soon as it shall contain sixty thousand free inhabitants, or at an earlier period if Congress shall think it expedient, on the same conditions and restrictions, with the same privileges, and in the same manner, as is provided in the ordinance of Congress of the 13th day of July, 1787, for the government of the northwestern territory of the United States, which ordinance shall in all its parts extend to the territory contained in the present act of cession, that article only excepted which forbids slavery." The manner in which the new States were to be admitted into the Union, according to the ordinance of 1787, as expressed therein, is as follows: "And whenever any of the said States shall have sixty thousand free inhabitants therein, such State shall be admitted by its delegates into the Congress of the United States, on an equal footing with the original States in all respects whatever." Thus it appears that the stipulations, trusts, and conditions are substantially the same in both of these deeds of cession; and the acts of Congress, and of the State Legislatures in relation thereto, are founded in the same reasons of policy and interest, with this exception, however—the cession made by Virginia was before the adoption of the Constitution of the United States, and that of Georgia afterwards. Taking the legislative acts of the United States, and the States of Virginia and Georgia, and their deeds of cession to the United States, and giving to each, separately, and to all jointly, a fair interpretation, we must come to the conclusion that it was the intention of the parties to invest the United States with the eminent domain of the country ceded, both national and municipal, for the purposes of temporary government, and to hold it in trust for the performance of the stipulations and conditions expressed in the deeds of cession and the legislative acts connected with them. To a correct understanding of the rights, powers, and duties of the parties to these contracts, it is necessary to enter into a more minute examination of the rights of eminent domain, and the right to the public lands. When the United States accepted the cession of the territory, they took upon themselves the trust to hold the municipal eminent domain for the new States, and to invest them with it, to *the same extent, in all re- [*223 spects, that it was held by the States ceding the territories.

The right which belongs to the society, or to the sovereign, of disposing, in case of necessity, and for the public safety, of all the wealth contained in the State, is called the eminent domain. It is evident that this right is, in certain

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cases, necessary to him who governs, and is, consequently, a part of the empire, or sovereign power. (Vat. Law of Nations, section 244.) This definition shows that the eminent domain, although a sovereign power, does not include all sovereign power, and this explains the sense in which it is used in this opinion. The compact made between the United States and the State of Georgia, was sanctioned by the Constitution of the United States; by the 3d section of the 4th article of which it is declared that "New States may be admitted by the Congress into this Union; but no new State shall be formed or erected within the jurisdiction of any other State, nor any State be formed by the junction of two or more States or parts of States, without the consent of the Legislatures of the States concerned, as well as of Congress."

When Alabama was admitted into the Union, on an equal footing with the original States, she succeeded to all the rights of sovereignty, jurisdiction, and eminent domain which Georgia possessed at the date of the cession, except so far as this right was diminished by the public lands remaining in the possession and under the control of the United States, for the temporary purposes provided for in the deed of cession, and the legislative acts connected with it. Nothing remained to the United States, according to the terms in the agreement, but the public lands. And, if an express stipulation had been inserted in the agreement, granting the muncipal right of sovereignty, and eminent domain to the United States, such stipulation would have been void and inoperative; because, the United States have no constitutional capacity to exercise municipal jurisdiction, sovereignty, or eminent domain, within the limits of a State or elsewhere, except in the cases in which it is expressly granted.

By the 16th clause of the 8th section of the 1st article of the Constitution, power is given to Congress "to exercise exclusive legislation in all cases whatsoever, over such district (not exceeding ten miles square) as may by cession of particular States, and the acceptance of Congress, become the seat of government of the United States and to exercise like authority over all places purchased, by the consent of the Legislature of the State in which the same may be, for the erection of forts, magazines, arsenals, dock yards, and other needful buildings." Within the District of Columbia, and the other places purchased and used for the purposes above mentioned, the national and municipal powers of government of every description, are united in the government of the Union. And these are the only cases, within the United States, in which all the powers of government are united in a single government, except in the 224*] cases already *mentioned of the temporary territorial governments, and there a local government exists. The right of Alabama and every other new State to exercise all the powers of government, which belong to and may be exercised by the original States of the Union, must be admitted, and remain unquestioned, except so far as they are, temporarily, deprived of control over the public lands.

We will now inquire into the nature and extent of the right of the United States to these lands, and whether that right can in any manner affect or control the decision of the case before us. This right originated in voluntary surrenders, made by several of the old States, of their waste and unappropriated lands to the United States, under a resolution of the old Congress, of the 6th of September, 1780, recommending such surrender and cession, to aid in paying the public debt, incurred by the war of the Revolution. The object of all the parties to these contracts of cession was to convert the land into money for the payment of the debt, and to erect new States over the territory thus ceded; and as soon as these purposes could be accomplished, the power of the United States over these lands, as property, was to cease.

Whenever the United States shall have fully executed these trusts, the municipal sovereignty of the new States will be complete, throughout their respective borders, and they, and the original States, will be upon an equal footing, in all respects whatever. We, therefore, think the United States hold the public lands within the new States by force of the deeds of cession, and the statutes connected with them, and not by any municipal sovereignty which it may be supposed they possess, or have reserved by compact with the new States, for that particular purpose. The provision of the Constitution above referred to shows that no such power can be exercised by the United States within a State. Such a power is not only repugnant to the Constitution, but it is inconsistent with the spirit and intention of the deeds of cession. The argument so much relied on by the counsel for the plaintiffs, that the agreement of the people inhabiting the new States, "that they forever disclaim all right and title to the waste or unappropriated lands lying within the said territory; and that the same shall be and remain at the sole and entire disposition of the United States," cannot operate as a contract between the parties, but is binding as a law. Full power is given to Congress "to make all needful rules and regulations respecting the territory or other property of the United States." This authorized the passage of all laws necessary to secure the rights of the United States to the public lands, and to provide for their sale, and to protect them from taxation.

And all constitutional laws are binding on the people, in the new States and the old ones, whether they consent to be bound by them or not. Every constitutional act of Congress is passed by the will of the people of the United States, expressed through their representatives, *on the subject matter of the enact- [*225 ment; and when so passed it becomes the supreme law of the land, and operates by its own force on the subject matter, in whatever State or territory it may happen to be The proposition, therefore, that such a law cannot operate upon the subject matter of its enactment, without the express consent of the people of the new State where it may happen to be, contains its own refutation, and requires no farther examination. The propositions submitted to the people of the Alabama territory, for their acceptance or rejection, by the act of Congress authorizing them to form a constitution and State government for themselves, so far as they related to the public land within that territory, amounted to nothing more nor less than rules

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and regulations respecting the sales and disposition of the public lands. The supposed compact relied on by the counsel for the plaintiffs, conferred no authority, therefore, on Congress to pass the act granting to the plaintiffs the land in controversy.

And this brings us to the examination of the question, whether Alabama is entitled to the shores of the navigable waters, and the soils under them, within her limits. The principal argument relied on against this right, is that the United States acquired the land in controversy from the King of Spain. Although there was no direct reference to any particular treaty, we presume the Treaty of the 22d of February, 1819, signed at Washington, was the one relied on, and shall so consider the argument. It was insisted that the United States had, under the treaty, succeeded to all the rights and powers of the King of Spain; and as by the laws and usages of Spain, the king had the right to grant to a subject the soil under navigable waters, that, therefore, the United States had the right to grant the land in controversy, and thereby the plaintiffs acquired a complete title.

If it were true that the United States acquired the whole of Alabama from Spain, no such consequences would result as those contended for. It cannot be admitted that the King of Spain could, by treaty or otherwise, impart to the United States any of his royal prerogatives; and much less can it be admitted that they have capacity to receive or power to exercise them. Every nation acquiring territory, by treaty or otherwise, must hold it subject to the constitution and laws of its own government, and not according to those of the government ceding it. (Vat. Law of Nations, bk. 1, ch. 19, sec. 210, 244, 245, and bk. 2, ch. 7, sec. 80.)

The United States have never claimed any part of the territory included in the States of Mississippi or Alabama, under any treaty with Spain, although she claimed at different periods a considerable portion of the territory in both of those States. By the treaty between the United States and Spain, signed at San Lorenzo el Real on the 27th of October, 1795, "The high contracting parties declare and agree that the line between the United States and East and West Florida shall be designated by a line, be-
226*] ginning on the river *Mississippi, at the northernmost part of the thirty-first degree of north latitude, which from thence shall be drawn due east to the middle of the Chatahouchee River," &c. This treaty declares and agrees that the line which was described in the Treaty of Peace between Great Britain and the United States, as their southern boundary, shall be the line which divides their territory from East and West Florida. The article does not import to be a cession of territory, but the adjustment of a controversy between the two nations. It is understood as an admission that the right was originally in the United States.

Had Spain considered herself as ceding territory, she could not have neglected to stipulate for the property of the inhabitants, a stipulation which every sentiment of justice and of national honor would have demanded, and which the United States would not have refused. But, instead of requiring an article to this effect, she expressly stipulated to withdraw the settlements then within what the treaty admits to be the territory of the United States, and for permission to the settlers to take their property with them. "We think this an unequivocal acknowledgment that the occupation of the territory by Spain was wrongful, and we think the opinion thus clearly indicated was supported by the state of facts. It follows, that Spanish grants made after the Treaty of Peace can have no intrinsic validity." (*Henderson* v. *Poindexter*, 12 Wheat., 535.)

Previous to the cession made by Georgia, the United States, by the Act of Congress of the 7th of April, 1798, had established the Mississippi territory including the territory west of the Chatahouchee River, to the Mississippi River, above the 31st degree of north latitude, and below the Yazous River, subject to the claim of Georgia to any portion of the territory. And the territory thus erected was subjected to the ordinance of the 13th of July, 1787, for its government, that part of it excepted which prohibited slavery. (1 Story's Laws, 494.) And by the Act of the 1st of March, 1817, having first obtained consent of Georgia to make two States instead of one within the ceded territory, Congress authorized the inhabitants of the western part of the Mississippi territory to form for themselves a constitution and State government, "to consist of all the territory included within the following boundaries, to wit: Beginning on the river Mississippi at the point where the southern boundary line of the State of Tennessee strikes the same; thence east along the said boundary line to the Tennessee River; thence up the same to the mouth of Bear Creek; thence by a direct line, to the northwest corner of Washington County; thence due south to the Gulf of Mexico; thence westwardly, including all the islands within six leagues of the shore, to the junction of Pearl River with Lake Borgne; thence up said river to the thirty-first degree of north latitude; thence west along said degree of latitude to the Mississippi River; thence up the same to the beginning." (3 Story's Laws, 1620.) *And on the 3d of March, 1817, Con- [*227
gress passed an act declaring "That all that part of the Mississippi territory which lies within the following boundaries, to wit: Beginning at the point where the line of the thirty-first degree of north latitude intersects the Perdido River; thence east to the western boundary line of the State of Georgia; thence along said line to the southern boundary line of the State of Tennessee; thence west, along said boundary line, to the Tennessee River; thence up the same to the mouth of Bear Creek; thence by a direct line to the northwest corner of Washington County; thence due south to the Gulf of Mexico; thence eastwardly, including all the islands within six leagues of the shore to the Perdido River; thence up the same to the beginning; shall, for the purposes of temporary government, constitute a separate territory, and be called Alabama."

And by the 2d section of the same act it is enacted, "That all offices which exist, and all laws which may be in force when this act shall go into effect, shall continue to exist and be in force until otherwise provided by law." (3 Story's Laws, 1634, 1635.) And by the 2d article of the compact contained in the ordi-

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nance of 1787, which was then in force in the Mississippi territory, among other things, it was provided, that "The inhabitants of the said territory shall always be entitled to the benefits of the writ of *habeas corpus*, and of the trial by jury, and of judicial proceedings according to the course of the common law. And by the proviso to the 5th section of the Act of the 2d of March, 1819, authorizing the people of the Alabama territory to form a constitution and State government, it is enacted, "That the constitution, when formed, shall be republican, and not repugnant to the ordinance of the 13th of July, 1787, between the States and the people of the territory northwest of the Ohio River, so far as the same has been extended to the said territory [of Alabama] by the articles of agreement between the United States and the State of Georgia." By these successive acts on part of the United States, the common law has been extended to all the territory within the limits of the State of Alabama, and therefore excluded all other law, Spanish or French.

It was after the date of the Treaty of the 22d of February, 1819, between the United States and Spain, but before its ratification, the people of the Alabama territory were authorized to form a constitution; and the State was admitted into the Union, according to the boundaries established when the country was erected into a territorial government. But the United States have never admitted that they derived title from the Spanish government to any portion of the territory included within the limits of Alabama. Whatever claim Spain may have asserted to the territory above the thirty-first degree of north latitude, prior to the Treaty of the 27th of October, 1795, was abandoned by that treaty, as has been already shown. We will now inquire whether she had any right to 228*] territory below *the thirty-first degree of north latitude, after the treaty between France and the United States, signed at Paris on the 30th of April, 1803, by which Louisiana was ceded to the United States. The legislative and executive departments of the government have constantly asserted the right of the United States to this portion of the territory under the 1st article of this treaty; and a series of measures intended to maintain the right have been adopted. Mobile was taken possession of, and erected into a collection district, by Act of the 24th of February, 1804, chap. 13 (2 Story's Laws, 914). In the year 1810, the President issued his proclamation, directing the Governor of the Orleans territory to take possession of the country, as far as the Perdido, and hold it for the United States. In April, 1812, Congress passed an act to enlarge the limits of Louisiana. This act includes part of the country claimed by Spain, as West Florida. And in February, 1813, the President was authorized to occupy and hold all that tract of country called West Florida, which lies west of the river Perdido, not then in the possession of the United States. And these measures having been followed by the erection of Mississippi territory into a State, and the erection of Alabama into a territory, and afterwards into a State, in the year 1819, and extending them both over this territory: could it be doubted that these measures were intended as an assertion of the title of the United States to this country?

In the case of *Foster & Elam* v. *Neilson* (2 Peters, 253), the right of the United States to this country underwent a very able and thorough investigation. And *Chief Justice* Marshall, in delivering the opinion of the court, said: "After these acts of sovereign power over the territory in dispute, asserting the American construction of the treaty, by which the government claims it, to maintain the opposite construction in its own courts would certainly be an anomaly in the history and practice of nations. If those departments, which are intrusted with the foreign intercourse of the nation, which assert and maintain its interests against foreign powers, have unequivocally asserted its rights of dominion over a country of which it is in possession, and which it claims under a treaty; if the Legislature has acted on the construction thus asserted, it is not in its own courts that this construction is to be denied." The Chief Justice then discusses the validity of the grant made by the Spanish government, after the ratification of the treaty between the United States and France, and it is finally rejected on the ground that the country belonged to the United States, and not to Spain, when the grant was made. The same doctrine was maintained by this court in the case of *Garcia* v. *Lee* (12 Peters, 511). These cases establish, beyond controversy, the right of the United States to the whole of this territory, under the treaty with France.

Alabama is therefore entitled to the sovereignty and jurisdiction over all the territory within her limits, subject to the common law, *to the same extent that Georgia pos- [*229 sessed it before she ceded it to the United States. To maintain any other doctrine, is to deny that Alabama has been admitted into the Union on an equal footing with the original States, the constitution, laws, and compact, to the contrary notwithstanding. But her rights of sovereignty and jurisdiction are not governed by the common law of England as it prevailed in the colonies before the Revolution, but as modified by our own institutions. In the case of *Martin et al.* v. *Waddell* (16 Peters, 410), the present Chief Justice, in delivering the opinion of the court, said: "When the Revolution took place, the people of each State became themselves sovereign; and in that character hold the absolute right to all their navigable waters, and the soils under them for their own common use, subject only to the rights since surrendered by the Constitution." Then to Alabama belong the navigable waters, and soils under them, in controversy in this case, subject to the rights surrendered by the Constitution to the United States; and no compact that might be made between her and the United States could diminish or enlarge these rights.

The declaration, therefore, contained in the compact entered into between them when Alabama was admitted into the Union, "that all navigable waters within the said State shall forever remain public highways, free to the citizens of said State, and of the United States, without any tax, duty, impost, or toll therefor, imposed by the said State," would be void if inconsistent with the Constitution of the United States. But is this provision repugnant to the Constitution? By the 8th section of the 1st article of the Constitution, power is granted to

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Congress "to regulate commerce with foreign nations, and among the several States." If, in the exercise of this power, Congress can impose the same restrictions upon the original States, in relation to their navigable waters, as are imposed, by this article of the compact, on the State of Alabama, then this article is a mere regulation of commerce among the several States, according to the Constitution, and, therefore, as binding on the other States as Alabama.

In the case of *Gibbons* v. *Ogden* (9 Wheat.. 196), after examining the preliminary questions respecting the regulation of commerce with foreign nations, and among the States, as connected with the subject matter there in controversy, *Chief Justice* Marshall said: "We are now arrived at the inquiry: What is this power?

"It is the power to regulate, that is, to prescribe the rule by which commerce is to be governed. This power, like all others vested in Congress, is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations other than are prescribed in the Constitution. These are expressed in plain terms, and do not affect the questions which arise in this case. If, as has been always understood, the sovereignty of Congress, though limited to specified objects, is plenary as to those objects, **230*]** the power over *commerce with foreign nations, and among the several States, is vested in Congress as absolutely as it would be in a single government having in its constitution the same restrictions on the exercise of the power as are found in the Constitution of the United States." As the provision of what is called the compact between the United States and the State of Alabama does not, by the above reasoning, exceed the power thereby conceded to Congress over the original States on the same subject, no power or right was, by the compact, intended to be reserved by the United States, nor to be granted to them by Alabama.

This supposed compact is therefore nothing more than a regulation of commerce, to that extent, among the several States, and can have no controlling influence in the decision of the case before us. This right of eminent domain over the shores and the soils under the navigable waters, for all municipial purposes, belongs exclusively to the States within their respective territorial jurisdictions, and they, and they only, have the constitutional power to exercise it. To give to the United States the right to transfer to a citizen the title to the shores and the soils under the navigable waters, would be placing in their hands a weapon which might be wielded greatly to the injury of State sovereignty, and deprived the States of the power to exercise a numerous and important class of police powers. But in the hands of the States this power can never be used so as to affect the exercise of any national right of eminent domain or jurisdiction with which the United States have been invested by the Constitution. For, although the territorial limits of Alabama have extended all her sovereign power into the sea, it is there, as on the shore, but municipal power, subject to the Constitution of the United States, "and the laws which shall be made in pursuance thereof."

By the preceding course of reasoning we have arrived at these general conclusions: First. The shores of navigable waters, and the soils under them, were not granted by the Constitution to the United States, but were reserved to the States respectively. Second. The new States have the same rights, sovereignty, and jurisdiction over this subject as the original States. Third. The right of the United States to the public lands, and the power of Congress to make all needful rules and regulations for the sale and disposition thereof, conferred no power to grant to the plaintiffs the land in controversy in this case.

The judgment of the Supreme Court of the State of Alabama is therefore affirmed.

Mr. Justice CATRON dissented:

The statute of 1836, and the patent of the United States founded on it, by which the land in controversy was granted to Wm. Pollard's heirs, have on several occasions heretofore received the sanction of this court as a valid title.

1. In the cause of *Pollard's Heirs* v. *Kibbe* (14 Peters, 353), the *Supreme Court of [***231** Alabama having pronounced an opposing claim under the Act of 1824 superior to Pollard's, this court reversed the judgment and established the latter, after the most mature consideration.

2. In the case of *Pollard* v. *Files* (2 How., 591), the precise title was again brought before this court, and very maturely considered; it was then said (page 602): "This court held, when Pollard's title was before it formerly, that Congress had the power to grant the land to him by the Act of 1836: on this point there was no difference of opinion at that time among the judges. The difference to which the Supreme Court of Alabama refers (in its opinion in the record), grew out of the construction given by a majority of the court to the Act of 1824, by which the vacant lands east of Water Street were granted to the city of Mobile."

On this occasion the decision of the Supreme Court of Alabama was again reversed, and Pollard's heirs ordered to be put into possession, and they now maintain it under our two judgments. It is here for the third time.

In the meantime, between 1840 and 1844, a doctrine had sprung up in the courts of Alabama (previously unheard of in any court of justice in this country, so far as I know), assuming that all lands temporarily flowed with tide water were part of the eminent domain and a sovereign right in the old States; and that the new ones when admitted into the Union, coming in with equal sovereign rights, took the lands thus flowed by implication as an incident of State sovereignty, and thereby defeated the title of the United States, acquired either by the Treaty of 1803, or by the compacts with Virginia or Georgia. Although the assumption was new in the courts, it was not entirely so in the political discussions of the country; there it had been asserted that the new States coming in, with equal rights appertaining to the old ones, took the high lands as well as the low, by the same implication now successfully asserted here in regard to the low lands; and indeed it is difficult to see where the distinction lies. That the United States acquired in a corporate capacity the right of soil under water, as well as of the high lands, by the treaty with France, cannot be doubted; nor

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that the right of soil was retained and subject to grant up to the time Alabama was admitted as a State. Louisiana was admitted in 1812; to her the same rules must apply that do to Alabama. All acquainted with the surface of the latter know that many of the most productive lands there, and now in successful cultivation, were in 1812 subject to overflow, and have since been reclaimed by levees.

It is impossible to deal with the question before us understandingly, without reference to the physical geography of the delta of the Mississippi and the country around the Gulf of Mexico, where the most valuable lands have been made and are now forming by alluvion deposits of the floating soils brought down by 232*] the great rivers; the *earlier of which had become dry lands; but the more recent were flowed, when we acquired the country; and are in great part yet so: thus situated they have been purchased from the United States and reclaimed; a process that is now in daily exercise. An assumption that mud-flats and swamps once flowed, but long since reclaimed, had passed to the new States, on the theory of sovereign rights, did, at the first, strike my mind as a startling novelty; nor have I been enabled to relieve myself from the impression, owing to the fact in some degree, it is admitted, that for thirty years neither Congress, or any State Legislature, has called in question the power of the United States to grant the flowed lands, more than others: the origin of title, and its continuance, as to either class, being deemed the same. A right so obscure, and which has lain dormant, and even unsuspected, for so many years, and the assertion of which will strip so much city property, and so many estates of all title, should as I think be concluded by long acquiescence, and especially in courts of justice.

Again, the question before us is made to turn by a majority of my brethren exclusively on political jurisdiction; the right of property is a mere incident. In such a case, where there is doubt, and a conflict suggested, the political departments, State and federal, should settle the matter by legislation; by this means private owners could be provided for and confusion avoided; but no State complains, nor has any one ever complained, of the infraction of her political and sovereign rights by the United States; or by their agents, in the execution of the great trust imposed on the latter to dispose of the public domain for the common benefit; on the contrary, we are called on by a mere trespasser in the midst of a city, to assert and maintain this sovereign right for his individual protection, in sanction of the trespass.

But as already stated, the United States may be an owner of property in a State, as well as another State, or a private corporation, or an individual may. That the proprietor interest is large, cannot alter the principle. I admit if the agents of the United States obstruct navigation, the State authorities may remove the obstructions and punish the offenders; so the States have done for many years without inconvenience or complaint.

Nor can material inconvenience result. If a front to a city, or land for another purpose is needed, Congress can be applied to for a grant, as was done by the corporation of Mobile in 1824. If the State where the land lies was the owner, the same course would have to be pursued. The States and the United States are not in hostility; the people of the one are also people of the other; justice and donation is alike due from each.

Connecticut was once a large proprietor in the Northwest Territory (now Ohio). She owned the shores of a great lake and the banks of navigable rivers. Can it be assumed that the admission of *Ohio defeated the title of [*233 Connecticut, and that she could not grant? The question will not bear discussion, and how can the case put, be distinguished from the one before us; nay, how can either be distinguished from the rights of private owners of lands above water, or under the water? Yet, in either instance, is the owner in fee deprived of his property on this assumption of sovereign rights.

The front of the city of Mobile is claimed by the Act of 1824, sanctioned by this court as a valid grant in the five cases of *Pollard* v. *Kibbe* (14 Peters); of *The city of Mobile* v. *Eslava* (16 Peters, 234); of *The same plaintiff* v. *Hallet* (16 Peters, 261); of *The same plaintiff* v. *Emanuel* (1 How., 95), and of *Pollard* v. *Files* (2 How., 591). Except the grant to Pollard, the Act of 1824 confers the entire title (so far as is known to this court) of a most valuable portion, and a very large portion, of the second city on the Gulf of Mexico, in wealth and population. This act is declared void in the present cause; and the previous decisions of this court are either directly, or in effect, overthrown, and the private owners stripped of all title. On this latter point my brethren and I fully agree. Can Alabama remedy the evil, and confirm the titles by legislation or by patent? I say by patent, because this State, Louisiana, Mississippi, and surely Florida, will of necessity have to adopt some system of giving title, if it is possible to do so, aside from private legislation; as the flowed lands are too extensive and valuable for the latter mode of grant in all instances.

The charge of the State court to the jury was, that the Act of Congress of 1836, and the patent founded on it, and also, of course, the Act of 1824, were void, if the lands granted by them were flowed at high tide when Alabama was admitted; and it was immaterial whether the mud-flat had been filled up and the water excluded by the labor of man or by natural alluvion. And this charge is declared to have been proper by a majority of this court.

The decision founds itself on the right of navigation and of police connected with navigation. As a practical truth, the mud-flats and other alluvion lands in the delta of the river Mississippi, and around the Gulf of Mexico, formed of rich deposits, have no connection with navigation, but obstruct it, and must be reclaimed for its furtherance. This is well illustrated by the recent history of Mobile. When the Act of 1824 was passed, granting to the corporation the front of the city, it was excluded from the navigable channel of the river by a mud-flat, slightly covered with water at high tide of perhaps a thousand feet wide. This had to be filled up before the city could prosper, and of course by individual enterprise, as the vacant space, as was apparent, must become city property; and it is now formed into squares

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and streets, having wharves and warehouses. The squares are built up; and the fact that that part of the city stands on land once subject to the flow of tide will soon be matter of history. At New Orleans, and at most other places front-
234*] ing *rivers where the tide ebbs and flows, as well as on the ocean and great lakes, navigation is facilitated by similar means; without their employment few city fronts could be formed, at all accommodated to navigation and trade. To this end private ownership is indispensable and universal; and some one must make title. If the United States have no power to do so, who has? I repeat, can Alabama grant the soil? She disavowed all claim and title to and in it, as a condition on which Congress admitted her into the Union. By the Act of March 2, 1819 (3 Story's Laws, 1726), the Alabama territory was authorized to call a convention and form a State constitution; but Congress imposed various restrictions, and among others the following one: "And provided always, that the said convention shall provide by an ordinance, irrevocable without the consent of the United States, that the people inhabiting said territory do agree and declare that they forever disclaim all right and title to the waste or unappropriated lands lying within the said territory, and that the same shall be and remain at the sole and entire disposition of the United States."

On the 2d of August, 1819, the convention of Alabama formed a constitution, and adopted an ordinance declaring "that this convention, for and on behalf of the people inhabiting this State, do ordain, agree, and declare, that they forever disclaim all right and title to the waste or unappropriated lands lying within this State; and that the same shall be and remain at the sole and entire disposition of the United States." In addition, all the propositions offered by the Act of March 2, 1819, were generally accepted without reservation.

On the 14th of December, 1819, Congress, by resolution, admitted Alabama as a State, on the conditions above set forth. (3 Story's Laws U. S., 1804.)

That the lands in contest, and granted by the Acts of 1824 and 1836, were of the description of "waste or unappropriated," and subject to the disposition of the United States, when the Act of Congress of the second of March, 1819, was passed, is not open to controversy, as already stated; nor has it ever been controverted, that whilst the territorial government existed, any restrictions to give private titles were imposed on the federal government; and this in regard to any lands that could be granted. And I had supposed that this right was clearly reserved by the recited compacts, as well as on the general principle that the United States did not part with the right of soil by enabling a State to assume political jurisdiction. That the disclaimer of Alabama, to all right and title in the waste lands, or in the unappropriated lands, lying within the State, excludes her from any interest in the soil, is too manifest for debate, aside from all inference founded on general principles. It follows, if the United States cannot grant these lands, neither can Alabama; and no individual title to them can ever exist. And to this conclusion, as I understand the reasoning of the principal opinion, the doctrine *of a majority of my brethren mainly [*235 tends. The assumption is, that flowed lands, including mud-flats, extending to navigable waters, are part of such waters, and clothed with a sovereign political right in the State; not as property, but as a sovereign incident to navigation, which belongs to the political jurisdiction; and being part of State sovereignty, the United States could not withhold it from Alabama. On this theory, the grants of the United States are declared void: conceding to the theory all the plenitude it can claim, still Alabama has only political jurisdiction over the thing: and it must be admitted that jurisdiction cannot be the subject of a private grant.

The present question was first brought directly before this court (as I then supposed, and now do), in the cause of *The City of Mobile* v. *Eslava*, in 1840, when my opinion was expressed on it at some length. It will be found in 16 Peters, 247, and was in answer to the opinion of the Supreme Court of Alabama, sent up as part of the record; having been filed pursuant to the statute of that State, found in Clay's Digest, 286, sec. 6. My opinion, then given, has been carefully examined, and so far as it goes, is deemed correct (except some errors of the press), nor will the reasons given be repeated.

In *Hallet's* case (16 Peters, 263), reasons were added to the former opinion. And again, in the case of *Emanuel*, the question is referred to, in an opinion found in 1 How., 101.

In *Pollard's Lessee* v. *Files* (2 How., 602), the question whether Congress had power to grant the land now in controversy was treated as settled. As the judgment was exclusively founded on the Act of 1836 (the plaintiff having adduced no other title), it was impossible to reverse the judgment of the Supreme Court of Alabama on any other assumption than that the act of Congress conferred a valid title. I delivered that opinion, and it is due to myself to say that it was the unanimous judgment of the members of the court then present.

I have expressed these views in addition to those formerly given, because this is deemed the most important controversy ever brought before this court, either as it respects the amount of property involved, or the principles on which the present judgment proceeds—principles, in my judgment, as applicable to the high lands of the United States as to the low lands and shores.

Cited—9 How., 478; 10 How., 95; 13 How., 26, 584; 18 How., 74; 19 How., 490, 501, 508, 509; 20 How., 92; 3 Wall., 728; 6 Wall., 436; 18 Wall., 66; 4 Otto, 337, 338, 394; 1 Sawy., 579; 1 Wood. & M., 407-411, 417, 419; 1 Abb. U. S., 162, 164; 1 Biss., 550, 552; McAll., 4, 224; 6 McLean, 212, 217.

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*WILLIAM F. CARY AND SAMUEL [*236 T. CARY, *Plaintiffs*,

v.

EDWARD CURTIS.

Money exacted by, and paid to collector of customs for duties, cannot be recovered back by action against him—effect of Act March 3d, 1839, sec. 2.

Since the passage of the Act of Congress of March 3d, 1839, chap. 82, sec. 2, which requires collectors of

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the customs to place to the credit of the Treasurer of the United States all money which they receive for unascertained duties or for duties paid under protest, an action of *assumpsit* for money had and received will not lie against the collector for the return of such duties so received by him.

In what other modes the claimant can have access to the courts of justice, this court is not called upon in this case to decide.

THIS case came up from the Circuit Court of the United States for the Southern District of New York, on a certificate of division in opinion between the judges thereof.

The action was brought in the Circuit Court to recover money paid to Curtis, as collector of the port of New York, for duties. The declaration contained the common money counts, and the defendant pleaded the general issue. The cause was tried at November Term, 1843.

The jury found for the plaintiffs, subject to the opinion of the court, among other things,

1. That the plaintiffs paid the sum of $181.75 to the defendants, on the 3d July, 1841, for duties on the goods imported as being raw silk.

2. That the goods on which the duties were demanded and paid were not raw silk, but a manufactured article.

3. That the money so paid was under a written protest made at the time of payment.

4. That the money had been paid into the treasury by the defendant in the month of July, 1841, and before the commencement of this suit.

Upon the argument of this cause, after verdict, several questions arose; among others, the following, viz.:

Whether or not the 2d section of the Act of Congress, approved on the 3d day of March, 1839, entitled "An Act making appropriations for the civil and diplomatic expenses of government for the year 1839," was a bar to the action.

On this question the opinions of the judges were opposed. Whereupon, on motion of the plaintiffs, by their counsel, it was ordered that the foregoing state of the pleadings and facts, which is made under the direction of the judges, be certified under the seal of this court, according to the statute in such case made and provided, to the Supreme Court of the United States, to the end that the question on which the said disagreement has happened may be finally decided.

The cause was argued (in writing) by *Mr. Sullivan* for the plaintiffs in error, and *Mr. Nelson*, Attorney-General, for the defendant.

237*] *Mr. Sullivan*, for plaintiffs:

This cause comes before the court on a certificate of a division from the Circuit Court of the United States for the Southern District of New York.

The plaintiffs, as importers, had a perfect right to have and maintain this action against the defendant upon the facts as found in this cause. (*Elliott* v. *Swartwout*, 10 Peters, 137.)

The 2d section referred to in the certificate of division (9 Laws U. S., 1012) does not take away this right of action.

Because this right existed at common law, and the statute does not express a clear intent to do so. (Bac. Abr., tit. Statute; 19 Vin. Abr., 524, sec. 125.)

Because this right is not taken from the importer by necessary implication; but, on the contrary, the prospective language of this section shows that Congress contemplated that actions against collectors would and should be brought in future, and sustained, as they had been in all cases of illegal exaction of duties, if paid under sufficient protest. This section provides that money paid to a collector under protest shall not be held by him to await the result of any litigation in relation to the rate or amount of duty legally chargeable. This is all prospective, and relates to suits which may be brought in future; for there is not a word that limits the effect of the provision in this section to the past or present, but words in the future tense only are used. The section commences with the words, "From and after the passage of this act," and refers only to money thereafter to be received by collectors. The whole tenor of the section imports an intent not to take away the right of litigation for money paid under protest. But if it be urged, that the delegation of a new power to the Secretary of the Treasury to take cognizance of such claims for repayment of duties illegally exacted, imports, by necessary implication, that Congress intended to vest in him exclusively the right of ascertaining the facts in such cases, and of deciding the law thereon, the plaintiffs respectfully ask the court to consider in what widely different language such an intent must needs have been expressed. There must have been an express prospective provision of some mode of proving the facts of each case, consistent with the constitutional guaranty of the right of trial by jury; for up to the passing of the act in question the law had, by necessary implication, and by the known course of judicial proceedings in such cases, recognized this right as the right of all importers paying such duties under protest, and the means of an ulterior decision of all questions of law other than the opinion of the Secretary would have been provided: whereas this law, by authorizing the Secretary to repay such illegally exacted duties when he should be satisfied they ought to be repaid, has left open to importers their known and constitutional right of recourse to the tribunals of law when he should not be satisfied; so that the true construction of the provision giving him *such a power may be carried into full [*238 effect, to the utmost inferable intention from the terms of this section, quite consistently with leaving to all importers their remedy at law, as well as the privilege of applying to the Secretary at their option.

Because the purpose of this section appears to be twofold, to wit: the security of public moneys received for duties under protest, and the repayment of them by the Secretary in all cases where he may be satisfied they ought to be repaid, without touching, varying, or altering, in any manner, the right of action by importers against the collector.

Because the collectors have always been required by law to pay over all moneys, without reference to protests. See "An Act to regulate the collection of duties on imports and tonnage"

NOTE.—*As to voluntary payments, and payments under protest, and when money illegally exacted may be recovered back*, see note to Bank of United States v. Bank of Washington, 6 Pet., 8.

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(Acts of 5th Congress, chap. 128, sec. 21, 3 Laws U. S.), which provides, *inter alia*, that the "collector shall at all times pay to the order of the officer who shall be authorized to direct the payment thereof, the whole of the moneys which they may respectively receive by virtue of this act (such moneys as they are otherwise by this act directed to pay, only excepted);" and it is by virtue, in part, of this very act that the collector demanded and received the money paid in this case.

The money being withdrawn from the collector's hands by law, it would seem unjust that he should be exposed to a judgment and execution thereon; but this section provides that it shall be the duty of the Secretary to refund, and thus the collector is indemnified, which is equivalent to a right of retaining money paid under protest, as laid down in the case of *Elliott* v. *Swartwout* (10 Peters, 154), where the court speak of the collector's protecting himself by retaining the money or claiming an indemnity; but if not strictly an indemnity, and it should be found in practice that the collector was not re-imbursed, he would refrain from exacting duties in doubtful cases until he had the sanction of the Secretary, and his assurance that the money should be repaid upon the recovery of a judgment at law. And this court held, in the case of *Tracy & Balestier* v. *Swartwout* (10 Peters, 98, 99), that the personal inconvenience to the collector is not to be considered.

The collector is liable for money illegally exacted and paid under protest, although the same may have been turned over to the government under the requirements of the acts of Congress.

In the case of *Townson* v. *Wilson et al.* (1 Campb., 396), Lord Ellenborough says "if any person gets money into his hands illegally, he cannot discharge himself by paying it over to another;" and this opinion is entitled to more consideration than *Nisi Prius* decisions usually are, because Lord Ellenborough states that he had consulted the other judges, and that they agreed with him.

In the case of *Sadler* v. *Evans*, or *Lady Windsor's* case (4 Burr., 1986), it is held, that where notice is given the agent may and ought to be 239*]*sued, and cannot exonerate himself by payment. This case is cited and approved in *Elliott* v. *Swartwout*.

In the Commentaries of His Honor *Judge* Story, on Agency, p. 311, sec. 307, it is laid down, that "where money is obtained from third persons, by public officers, illegally, but under color of office, it may be recovered back again from them if notice had been given by the party, at the time, to the officer, although the money has been paid over to the government." In the case of *Elliott* v. *Swartwout* (10 Peters, 158) it is held, that "where money is illegally demanded and received by an agent, he cannot exonerate himself from personal responsibility by paying it over to his principal;" and in the case of *Bend* v. *Hoyt* (13 Peters, 267) it is held, that "there is no doubt the collector is generally liable in an action to recover back an excess of duties paid to him, as collector, where the duties have been illegally demanded, and a protest of the illegality has been made at the time of payment, or notice then given that the party means to contest the claim, whether he has paid over the money to the government or not."

If it be objected that the payments here referred to are voluntary, the answer is, that it is evident that the contrary is the fact. If the cases and the remarks in the Commentaries above referred to had been made concerning an ordinary agent, there might be ground for such an objection; but a collector is the defendant in each case, and government officers are specially referred to in the Commentaries, and if there had been any distinction between the kinds of payments, that distinction would have been referred to, for it was well known to the court, that collectors and other government officers were then compelled by law to pay over all money received by them; and, as has been previously shown, the section in question is no more compulsory than the laws in force at the time of those decisions, and, it follows that they are controlling and decisive in the case.

The case of *Greenway* v. *Hurd* (4 Term Rep., 553, 554) does not apply, because it appears to have been a voluntary payment, and is so decided to be in *Elliott* v. *Swartwout*.

[Of *Mr. Nelson's* argument in reply the reporter has no notes.]

Mr. Justice DANIEL delivered the opinion of the court:

In order to arrive at the answer which should be given to the question certified upon this record, the objects first to be sought for are the intention and meaning of Congress in the enactment of the 2d section of the Act of March 3d, 1839, under which the question sent here has been raised. The positive language of the statute, it is true, must control every other rule of interpretation, yet even this may be better understood by recurrence to the known public practice as to matters *in pari materia*, and by the rules of law as previously expounded by the courts, and as applied to and as having influenced that practice. The law as laid down by this court with *respect to collectors [*240 of the revenue, in the case of *Elliott* v. *Swartwout* (10 Peters, 137), and again incidentally in the case of *Bend* v. *Hoyt* (13 Peters, 263), is precisely that which is applicable to agents in private transactions between man and man, viz.: that a voluntary payment to an agent without notice of objection will not subject the agent who shall have paid over to his principal; but that payment with notice, or with a protest against the legality of the demand, may create a liability on the part of the agent who shall pay over to his principal in despite of such notice or protest. Such was the law as announced from this court, and Congress must be presumed to have been cognizant of its existence; and as the peculiar power ordained by the Constitution to prescribe rules of right and of action for all officers as well as others falling within the legitimate scope of federal legislation, they must be supposed to have been equally cognizant of the effects and tendencies of this court's decisions upon the collection of the public revenue. With this knowledge necessarily presumed for them, Congress enact the 2d section of the Act of 1839. It should not be overlooked, for it is very material in seeking for the views of Congress in this enactment, that the court, in the case of *Elliott* v. *Swart-*

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wont, in its reasoning upon the second point submitted to them, say that the claimant by giving notice to the collector would "put him on his guard," by requiring him not to pay over the money. They further say that the collector would, by the same means, be placed in a situation to claim an indemnity. The precise mode in which this protection of the collector was to be accomplished, or his indemnity secured, it is true, the court have not explicitly declared; but it is thought to be no forced construction of their language to explain it as sanctioning a right of retainer in the collector of the funds received by him for the government; for what shield so effectual could he interpose between himself and the cost and hazards of frequent litigation? Indeed, this would appear, according to the opinion of the court, that very protection which justice and necessity would equally warrant. In practice, this retainer has, with or without warrant, been resorted to.

And now let us look to the language of the Act of 1839, chap. 82, sec. 2. "That from and after the passage of this act, all money paid to any collector of the customs, or to any person acting as such, for unascertained duties, or for duties paid under protest against the rate or amount of duties charged, shall be placed to the credit of the Treasurer of the United States, kept and disposed of as all other money paid for duties is required by law, or by regulation of the Treasury Department, to be placed to the credit of the treasurer, kept and disposed of; and it shall not be held by said collector, or person acting as such, to await any ascertainment of duties, or the result of any litigation in relation to the rate or amount of duty legally chargeable and collectable in any case where money is so paid; but whenever it shall be shown to the satisfaction of the Secretary of the 241*] *Treasury, that in any case of unascertained duties, or duties paid under protest, more money has been paid to the collector, or to the person acting as such, than the law requires should have been paid, it shall be his duty to draw his warrant upon the treasurer in favor of the person or persons entitled to the overpayment, directing the said treasurer to refund the same out of any money in the treasury not otherwise appropriated." What is the plain and obvious import of this provision, taking it independently and as a whole? It is that all moneys thereafter paid to any collector for unascertained duties, or duties paid under protest (*i. e.*, with notice of objection by the payer), shall, notwithstanding such notice, be placed to the credit of the treasurer, kept and disposed of as all other money paid for duties is required by law to be kept and disposed of; that is, they shall be paid over by the collector, received by the treasurer, and disbursed by him in conformity with appropriations by law, precisely as if no notice or protest had been given or made; and shall not be retained by the collector (and consequently not withdrawn from the uses of the government) to await any ascertainment of duties, or the result of any litigation relative to the rate or amount of duties, in any case in which money is so paid.

This section of the act of Congress, considered independently and as apart from the facts and circumstances which are known to have preceded it, and may fairly be supposed to have induced its enactment, must be understood as leaving with the collector no lien upon, or discretion over, the sums received by him on account of the duties described therein; but as converting him into the mere bearer of those sums to the Treasury of the United States, through the presiding officer of which department they were to be disposed of in conformity with the law. Looking, then, to the immediate operation of this section upon the conclusions either directly announced or as implied in the decision of *Elliott* v. *Swartwout*, how are those conclusions affected by it? They must be influenced by consequences like the following: That whereas, by the decision above mentioned it is assumed that by notice to the collector, or by protest against payment, a personal liability for the duties actually paid attaches upon, and that for his protection a correspondent right of retainer is created on his part; it is thereby made known (*i. e.*, by the statute) that under no circumstances in future should the revenue be retained in the hands of the collector; that he should in no instance be regarded by those making payments to him as having a lien upon it, because he is announced to be the mere instrument or vehicle to convey the duties paid into his hands into the treasury; that it is the Secretary of the Treasury alone in whom the rights of the government and of the claimant are to be tested; and that whosoever shall pay to a collector any money for duties, must do so subject to the consequences herein declared. Such, from the 3d day of March, 1839, was the public law of the United States; it *op- [*242 erated as notice to everyone; it applied, of course, to every citizen as well as to officers concerned in the regulations of the revenue; and as it removed the implications on which the decision of *Elliott* v. *Swartwout* materially rested, that case cannot correctly control a question arising under a different state of the law, and under a condition of the parties also essentially different.

It will not be irrelevant here to advert to other obvious and cogent reasons by which Congress may have been impelled to the enactment in question; reasons which, it is thought, will aid in furnishing a solution of their object. Uniformity of imports and excises is required by the Constitution. Regularity and certainty in the payment of the revenue must be admitted by everyone as of primary importance; they may be said almost to constitute the basis of good faith in the transactions of the government; to be essential to its practical existence. Within the extended limits of this country are numerous collection districts; many officers must be intrusted with the collection of the revenue, and persons much more numerous, with every variety of interest and purpose, are daily required to make payments at the ports of entry. To permit the receipts at the customs to depend on constructions as numerous as are the agents employed, as various as might be the designs of those who are interested; or to require that those receipts shall await a settlement of every dispute or objection that might spring from so many conflicting views, would be greatly to disturb, if not to prevent, the uniformity prescribed by the Constitution, and by the same means to withhold from the government the means of

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fulfilling its important engagements. In the view of mischiefs so serious, and with the intention of preventing or remedying them, nothing would seem more probable or more reasonable, we might add more necessary, than that the government should endeavor to devise a plan by which, as far as practicable, to retain its fiscal operations within its own control, thereby insuring that uniformity in practice, enjoined by the theory of the Constitution, and that punctuality which is indispensable to the benefit of all. Such a plan has Congress devised in the act in question. We have no doubts of the objects or the import of that act; we cannot doubt that it constitutes the Secretary of the Treasury the source whence instructions are to flow; that it controls both the position and the conduct of collectors of the revenue; that it has denied to them every right or authority to retain any portion of the revenue for purposes of contestation or indemnity; has ordered and declared those collections to be the mere organs of receipt and transfer, and has made the head of the Treasury Department the tribunal for the examination of claims for duties said to have been improperly paid.

It has been urged that the clause of the Act of 1839 declaring that the money received shall not be held by any collector to await any ascertainment of duties, or the result of any litiga-
243*] tion in relation *to the rate or amount of duties legally chargeable and collectable in any case where money is so paid; shows that Congress did not mean to deprive the party of his action of *assumpsit* against the collector; that litigation of that description was still contemplated, and that the only object of the law was to place the money in dispute in the possession of the treasurer, to await a decision, instead of leaving it in the hands of the collector. The court cannot assent to this construction. It will be remembered that the two principal cases in which collectors have claimed the right to retain, have been those of unascertained duties, and of suits brought, or threatened to be brought, for the recovery of duties paid under protest. It is matter of history that the alleged right to retain on these two accounts, had led to great abuses, and to much loss to the public; and it is to these two subjects, therefore, that the act of Congress particularly addresses itself. It begins by declaring that all money received on these accounts shall be paid into the treasury; and then, in order to show that the collector is not the person with whom any claims for this money are to be adjusted, or who is to be held responsible for it, the act proceeds to declare that the money shall not remain in his hands even if the protest is followed by a suit: that, notwithstanding suit may be brought against him, he shall still pay the money into the treasury, and that the controversy shall be adjusted with the secretary. Congress supposed, probably, that a party might choose to sue the collector, as has been done in this instance; but it does not by any means follow that it was intended to make him liable in the suit, or to give the party the right of recovery against him. The words used go to show, that neither a protest which is mentioned in the first part of the section, nor a suit which is mentioned in the clause of which we are speaking, shall be a pretext or excuse for retaining the money. Suppose the words in relation to a litigation had been omitted, and the law had said, that the collector should not retain the money for any ascertainment of duties, but that the Secretary of the Treasury in that case, as well as in the case of duties paid under protest, should adjust the claim and pay what was really due. The omission supposed would have strongly implied that, if there was litigation, he might retain, and it might be said with much show of reason, that by forbidding him to retain for unascertained duties, but not forbidding him to retain in case of litigation for duties paid under protest, implied that he could not retain for the former, but might for the latter. We hold it not a logical mode of reasoning where the omission of words would evidently lead to a particular conclusion, to argue that their insertion can do the same thing. Besides, the litigation spoken of, and which is said to lead to this result, is a litigation for duties paid under protest, and not for overpayments of unascertained duties. If these words were intended to sanction suits against collectors for the former, why are litigations *for the latter not also countenanced? [*244 Independently of this statute, the collector might have been sued for overpayments on unascertained duties as well as for duties paid under protest. And it can hardly be reconciled with reason or consistency that Congress designed to preserve the right of suit in the one case, and to deny it in the other. Yet if these words have the force contended for by the defendant in error, they give the right of action against the collector for duties paid under protest only, leaving the party who has overpaid unascertained and estimated duties, no remedy but that of resorting to the Secretary of the Treasury. It would be difficult to assign any good reason for such a diversity; we think none such was intended, that none such in reality exists; that the law intends merely to declare that if a protest is followed by a suit, the duties in that case as well as in the other shall be paid into the treasury, and shall not remain in the hands of the collector to abide the result of the suit. The conclusion to which we have come upon this statute is greatly strengthened by the Act of Congress of May 31st, 1844, chap. 81, which, in suits brought by the United States for the enforcement of the revenue laws, or for the collection of duties due, or alleged to be due on merchandise imported, authorizes a writ of error from this court to the circuit courts without regard to the sum in controversy. The object of this law undoubtedly was, to obtain uniformity of decision in regard to the duties imposed. Prior to the Act of 1839 there were often differences of opinion in the circuits in the construction of the laws, and in instances too, in which the amount in controversy was too small to enable either party to bring them here for revisal by writ of error. It can hardly then, be imagined that when Congress was taking measures expressly to secure uniformity of decision and practice in relation to the amount of duties imposed by law, they would have confined the writ of error to cases brought by the United States, when they were of small amount and refused it in suits against collectors in similar controversies, if they supposed that such suits could still be maintained. Indeed,

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has heretofore been in this latter form that the amount of duties claimed has been far more frequently contested, than by suits brought by the United States. And if this form of trying the question had not been intended to be taken away by the Act of 1839, there could have been no reason for excluding it from the Act of 1844. For the purposes obviously designed by this law, it would have been much more important to the public to have allowed the writ of error in suits against collectors, than in suits instituted by the United States, supposing suits of the former description to be still maintainable; and the omission of such a remedy strongly implies that the Legislature supposed such suits could be no longer maintained.

It is contended, however, that the language and the purposes of Congress, if really what we hold them to be declared in the statute 245*] *of 1839, cannot be sustained, because they would be repugnant to the Constitution, inasmuch as they would debar the citizen of his right to resort to the courts of justice. The supremacy of the Constitution over all officers and authorities, both of the federal and State governments, and the sanctity of the rights guarantied by it, none will question. These are *concessa* on all sides. The objection above referred to admits of the most satisfactory refutation. This may be found in the following positions, familiar in this and in most other governments, viz.: that the government, as a general rule, claims an exemption from being sued in its own courts. That although, as being charged with the administration of the laws, it will resort to those courts, as means of securing this great end, it will not permit itself to be impleaded therein, save in instances forming conceded and express exceptions. Second, in the doctrine so often ruled in this court, that the judicial power of the United States, although it has its origin in the Constitution, is (except in enumerated instances, applicable exclusively to this court), dependent for its distribution and organization, and for the modes of its exercise, entirely upon the action of Congress, who possess the sole power of creating the tribunals (inferior to the Supreme Court), for the exercise of the judicial power, and of investing them with jurisdiction either limited, concurrent, or exclusive, and of withholding jurisdiction from them in the exact degrees and character which to Congress may seem proper for the public good. To deny this position would be to elevate the judicial over the legislative branch of the government, and to give to the former powers limited by its own discretion merely. It follows, then, that the courts created by statute, must look to the statute as the warrant for their authority; certainly they cannot go beyond the statute, and assert an authority with which they may not be invested by it, or which may be clearly denied to them. This argument is in nowise impaired by admitting that the judicial power shall extend to all cases arising under the Constitution and laws of the United States. Perfectly consistent with such an admission is the truth, that the organization of the judicial power, the definition and distribution of the subjects of jurisdiction in the federal tribunals, and the modes of their action and authority, have been, and of right must be, the work of the Legislature. The existence of the Judicial Act itself, with its several supplements, furnishes proof unanswerable on this point. The courts of the United States are all limited in their nature and constitution, and have not the powers inherent in courts existing by prescription or by the common law.

In devising a system for imposing and collecting the public revenue, it was competent for Congress to designate the officer of the government in whom the rights of that government should be represented, in any conflict which might arise, and to prescribe the manner of trial. It is not imagined, that by so doing Congress is justly chargeable with usurpation, or that the citizen is thereby deprived *of [*246 his rights. There is nothing arbitrary in such arrangements; they are general in their character; are the result of principles inherent in the government; are defined and promulgated as the public law. A more striking example of the powers exerted by the government, in relation to its fiscal concerns, than is seen in the Act of 1839, is the power of distress and sale, authorized by the Act of Congress of May 15th, 1820 (3 Story, 1791), upon adjustments of accounts by the First Comptroller of the Treasury. This very strong and summary proceeding has now been in practice for nearly quarter of a century, without its regularity having been questioned, so far as is known to the court. The courts of the United States can take cognizance only of subjects assigned to them expressly or by necessary implication; *a fortiori*, they can take no cognizance of matters that by law are either denied to them or expressly referred *ad aliud examen*.

But whilst it has been deemed proper, in examining the question, referred by the Circuit Court, to clear it of embarrassments with which, from its supposed connection with the Constitution, it is thought to be environed, this court feel satisfied that such embarrassments exist in imagination only and not in reality: that the case and the question now before them present no interference with the Constitution in any one of its provisions, and may be, and should be disposed of upon the plainest principles of common right. In testing these propositions it is proper to recur to the case of *Elliott* v. *Swartwout*, and again to bring to view the grounds on which that case was ruled. It was, unquestionably, decided upon principles which may be admitted in ordinary cases of agency, which expressly recognize the right, nay, the duty of the agent to retain, and make his omission so to retain an ingredient in the gravamen or breach of duty, whence his liability and his promise are implied by the law. The language of the court (10 Peters, 154) is this: "There can be no hardship in requiring the party to give notice to the collector that he considers the duty claimed illegal, and put him on his guard by requiring him not to pay over the money. The collector would then be placed in a situation to claim an indemnity from the government. But if the party is entirely silent, and no intimation is given of an intention to seek repayment of the money, there can be no ground upon which the collector can retain the money, or call upon the government to indemnify him against a suit." Here, then, the right and the duty of retainer are sanctioned in the officer; without them the notice spoken of

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would be nugatory—a vain act, which the law never requires. And this right and this duty in the officer, and this injunction of notice to him, must all be understood and are propounded in this decision as principles or precepts of the law, with the knowledge of which each of the parties must stand affected.

The action of *assumpsit* for money had and received, it is said by Lord Mansfield (Burr., 1012, *Moses* v. *Macfarlen*), will lie in general whenever the defendant has received money **247*]** which is the property *of the plaintiff, and which the defendant is obliged by the ties of natural justice and equity to refund. And by Buller, *Justice*, in *Stratton* v. *Rastall* (2 T. R., 370), "that this action has been of late years extended on the principle of its being considered like a bill in equity. And, therefore, in order to recover money in this form of action the party must show that he has equity and conscience on his side, and could recover in a court of equity." These are the general grounds of the action as given from high authority. There must be room for implication as between the parties to the action, and the recovery must be *ex equo et bono*, or it can never be. If the action is to depend on the principles laid down by these judges, and especially by Buller, a case of hardship merely could scarcely be founded upon them; much less could one of injustice or oppression, nor even one which arose from irregularity or indiscretion in the plaintiff's own conduct. So far as the liability of agents in this form of action appears to have been considered, the general rule certainly is, that the action should be brought against the principal and not against a known agent, who is discharged from liability by a *bona fide* payment over to his principal, unless anterior to making payment over he shall have had notice from the plaintiff of his right and of his intention to claim the money. The absence of notice will be an exculpation of the agent in every instance. And with regard to the effect of the notice in fixing liability upon the agent, that effect is dependent on the known powers of the agent and the character of his agency. If, for instance, the agent was known to be a mere carrier or vehicle to transfer to his employer the amount received, payment to the agent with such knowledge, although accompanied with a denial of the justice of the demand, would seem to exclude every idea of an agreement, express or implied, on the part of the agent to refund; and could furnish no ground for this action against the agent who should pay over the fund received to his principal. This doctrine is believed to be sanctioned by the cases of *Greenaway* v. *Hurd* (4 T. R., 553), of *Coles* v. *Wright* (4 Taunt., 198), and of *Tope* v. *Hockin* (7 Barn. & Cress., 101). 'Tis true that the case in Taunt. and that from Barn. & Cress. were not instances of payment under protest; but the case from 4 T. R. has this common feature with that before us, that it was an action against an excise officer for duties said to have been illegally collected, in which the plaintiff denied the legality of the demand, though he subsequently paid it. But all three of these cases concur in condemning the harshness of a rule which would subject an agent, who is a mere channel of conveyance or delivery of the amount which might pass through his hands. Neither of these cases was affected by a positive statutory mandate requiring the agent to make payment over to his principal.

Another principle held to be fundamental to this action is this: that there must exist a privity between the plaintiff and defendant; something on which an obligation, an engagement, a promise from *the latter to the former [*248 can be implied; for if such implication be excluded from the relation between the parties by positive law, or by inevitable legal intendment, every foundation for the promise and of the action upon it is destroyed: for none can be presumed or permitted to promise what either law or reason does not warrant or may actually forbid. Thus, where bankers received bills from their foreign correspondents, with directions to pay the amount to the plaintiff, but on being applied to by him refused to do so, although they afterwards received the amount of these bills; it was held, that an action for money had and received would not lie to recover it from them, there being no privity between them and the plaintiff. Lord Ellenborough observed, the defendants might hold for the benefit of the remitter, until by some engagement entered into by themselves with the persons who were the objects of the remittance, they had precluded themselves from so doing; but here, so far from there being such an engagement, they repudiated it altogether. (*Williams* v. *Everett*, 14 East, 582.) Again, where J., an attorney, who was accustomed to receive dues for the plaintiff, went from home, leaving B., his clerk, at the office; B., in the absence of his master, received money on account of the above dues for the client, which he was authorized to do, and gave a receipt "B., for Mr. J." J. was in bad circumstances when he left home, and never returned. B. afterwards refused to pay the money to the client, and on an action for money had and received against him, it was held not to lie; for the defendant received the money as the agent of his master, and was accountable to him for it; the master, on the other hand, being answerable to the client for the money received by the clerk, there was no privity of contract between the present plaintiff and the defendant. (*Stevens* v. *Babcock*, 3 Barn. & Adolph., 354.) So in the case of *Sims et al.* v. *Brittain et al.* (4 Barn. & Adolph., 375). A., B., and others, were part owners of a ship in the service of the East India Company; B. was managing owner, and employed C. as his agent, and C. kept a separate account on his books with B. as such managing owner. In order to obtain payment of a sum of money from the East India Company on account of the ship, it was necessary that the receipt should be signed by one or more of the owners besides the managing owner; and upon a receipt being signed by B. and by another of the owners, C. received £2,000 on account of the ship, and placed it to the credit of B. in his books as managing owner; the part owners having brought money had and received to recover the balance of that account, held, that C. had received the money as the agent of B., and was accountable to him for it; and that there was no privity between the other part owners and C., and consequently that the action was not maintainable. To the same effect

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are the cases of *Rogers* v. *Kelly* (2 Camp., 123), and *Edden* v. *Read* (3 Camp., 339), and *Wedlake* v. *Husley* (1 Crompton & Jarvis, 83). If, indeed, the defendant has consented (where he 249*] can properly *consent) to hold the money for the use of the plaintiff, he may be liable. And it is conceded that his consent need not be express, but it must, if not so, rest upon fair and natural implication or legal intendment. Where such implication or intendment is excluded, forbidden by the position of the parties, by positive law, or by the character of the transaction, consent or any obligation upon which to imply it is entirely removed.

We have thus stated, and will here recapitulate, the principles on which the action for money had and received may be maintained. They are these: 1st. Whenever the defendant has received money which is the property of the plaintiff, and which the defendant is obliged, by the ties of natural justice and equity, to refund. 2d. In the case of an agent, where such agent is not notoriously the mere carrier or instrument for transferring the fund, but has the power of retaining, and before he has paid over has received notice of the plaintiff's claim, and a warning not to part with the fund. 3d. Where there exists a privity between the plaintiff and the defendant. Let the case before us be brought to the test of these rules. The 2d section of the act of Congress declares, first, that from its passage, all money paid to any collector of the customs for unascertained duties, or duties paid under protest against the rate or amount of duties charged, shall be placed to the credit of the treasurer, to be kept and applied as all other money paid for duties required by law; second, that they shall not be held by the collector to await any ascertainment of duties, or the result of any litigation concerning the rate or amount of duty legally chargeable or collectable; and, third, that in all cases of dispute as to the rate of duties, application shall be made to the Secretary of the Treasury, who shall direct the repayment of any money improperly charged. This section, as a part of the public law, must be taken as notice to all revenue officers, and to all importers and others dealing with those officers in the line of their duty. There is nothing obscure or equivocal in this law; it declares to every one subject to the payment of duties, the disposition which shall be made of all payments in future to collectors; tells them those officers shall have no discretion over money received by them, and especially that they shall never retain it to await the result of any contest concerning the right to it; and that *quoad* this money the statute has converted those officers into mere instruments for its tranefer to the treasury. With full knowledge thus imparted by the law, can it be correctly understood that the party making payment can, *ex equo et bono*, recover against the officer for acting in literal conformity with the law, converting thereby the performance of his duty into an offense; or that upon principles of equity and good conscience, an obligation and a promise to refund shall be implied against the express mandate of the law? Such a presumption appears to us to be subversive of every rule of right. The more correct inference seems to be, that pay- 250*] ment under such circumstances *must, *ex equo et bono*, nay, *ex necessitate*, and in despite of objection made at the time, be taken as being made in conformity with the mandate of the law and the duty of the officer, which exclude not only any implied promise of repayment by the officer, but would render void an express promise by him, founded upon a violation both of the law and of his duty. The claimant had his option to refuse payment; the detention of the goods for the adjustment of duties, being an incident of probable occurrence, to avoid this it could not be permitted to effect the abrogation of a public law, or a system of public policy essentially connected with the general action of the government. The claimant, moreover, was not without other modes of redress, had he chosen to adopt them. He might have asserted his right to the possession of the goods, or his exemption from the duties demanded, either by replevin, or in an action of detinue, or perhaps by an action of trover, upon his tendering the amount of duties admitted by him to be legally due. The legitimate inquiry before this court is not whether all right of action has been taken away from the party, and the court responds to no such inquiry. The question presented for decision, and the only question decided, is whether, under the notice given by the statute of 1839, payments made in despite of that notice, though with a protest against their supposed illegality, can constitute a ground for that implied obligation to refund, and for that promise inferred by the law from such obligation, which are inseparable from, and indeed are the only foundation of a right of recovery in this particular form of action. And here is presented the answer to the assertion that by the Act of 1839, or by the construction given to it by this court, the party is debarred all access to the courts of justice, and left entirely at the mercy of an executive officer. Neither have Congress nor this court furnished the slightest ground for the above assertion.

But the objection to a recovery in this action may be farther extended, upon grounds which to the court appear to be insuperable. We all know that this action for money had and received is founded upon what the law terms an implied promise to pay what in good conscience the defendant is bound to pay to the plaintiff. It being in such case the duty of the defendant to pay, the law imputes to him a promise to pay. This promise is always charged in the declaration, and must be so charged in order to maintain the action. It was upon this principle that the action for money had and received was sustained in the case of *Elliott* v. *Swartwout*. There money had been taken by the collector for duties which were not imposed. This money lawfully belonged to the plaintiff; it was the duty, therefore, of the collector to pay it back to him. The collector was not bound to pay it to the treasurer, for the law did not command this dispositition of it. It did not belong to the United States, who had no right, therefore, to demand it of him, and could not have recovered it against him in a suit, if he had paid it back to the true *owner. It being the duty of the col- [*251 lector to return what he had unlawfully taken, the law implied on his part a promise to do so; and on this implied promise, arising or inferred

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from a duty imposed upon him, the action was maintained. The protest and notice were to him of no further importance than to warn him to hold over, and to take away an excuse he might otherwise have had from payment to his principal. It was his duty, as the law then stood, not to pay over, but to pay back to the party from whom he had collected without legal authority, when warned that this party should look to him for re-imbursement, and not to his principal. But the law never implies a promise to pay, unless duty creates the obligation to pay; and more especially it never implies a promise to do an act contrary to duty or contrary to law. Now, under the statute of 1839, if the collector receives money, though for duties not due, it is nevertheless made his duty to pay it into the treasury, to be repaid there, if the party claiming is found to be entitled to it. And the question here is, will the law imply a promise from the collector to do that which is contrary to his official duty, contrary to the command of a positive statute? If it will not, then the action of *assumpsit* for money had and received will not lie in this case.

Moreover, the law will never imply a promise where it would be unjust to the party to whom it would be imputed, and contrary to equity so to imply it. Suppose the collector should not, as directed by law, pay the money into the treasury, the United States might undoubtedly maintain an action against him for money had and received to their use. Because it being his duty to do so, the law would imply a promise to pay it. Can the law at the same time imply a promise to pay it elsewhere or to another, and thus burden the collector with the double obligation of paying to the government, and also to one claiming in adversary interest? If suits were instituted against him by both parties, and were standing for trial at the same time, would both be entitled to a recovery, and would the law imply promises to both, promises to pay double the amount received? We think not; and as the law in positive terms directs payment to be made into the treasury, there can be no judicial implication contrary to law, nor that the collector will pay to another what the law directs him to pay to the United States; and no judicial implication which would require him to be guilty of an act of official misconduct, or a breach of his duty to the public. If the law implies a promise to pay back to the party, then it must be the duty of the collector to do so as soon as it is demanded If the money may be recovered of him by suit, then he would be justified in paying without suit, yet if he does so pay, he not only violates a duty imposed by law, but may be compelled to pay over again to the government, as for so much money had and received to its use. We think the law can never imply a promise which must be unjust and oppressive in its results to the party, or **252***] contrary to his duty as *a public officer; and there being no implied promise, therefore in this case the action for money had and received cannot be maintained. It is perfectly clear to the court that, under the Act of 1839, the United States have, by express law, a right to demand the money from the collector, and to recover it in an action for money had and received, even if that officer had paid it over to the person from whom he had received it; and we say with confidence that in the multitude of cases that have been decided in relation to that action, there is not one in which it has been held that money could be recovered from a defendant when his voluntary payment of it would leave him still liable to an action for the same money by another.

We deem it unnecessary to examine further the grounds stated in the second and third heads of inquiry, as forming the foundation of the action for money had and received; or to bring to a particular comparison with those grounds the law and the facts of this case, as presented upon the record. The illustrations given under the first head embrace all that is important under the remaining divisions, with respect to the nature of the demand and the position of the parties. Those illustrations establish, in the view of the court, that, so far is the defendant from being obliged, by the ties of natural equity and justice, to refund to the plaintiff the money received for duties, that, on the contrary, under that notice of the law which all must be presumed to possess, the payment must be understood as having been made with knowledge of the parties that the right of retaining or of refunding the money did not exist in the defendant; that the money by law must pass from him immediately upon its receipt; that payment to him was in legal effect payment into the treasury; that notice to him was, under such circumstances, of no effect to bind him to refund; that as the collector, since the statute, had power neither to retain nor refund, there could, as between him and the plaintiff, arise no privity nor implication, on which to found the promise raised by the law, only where an obligation to undertake or promise exists; and that, therefore, the action for money had and received could not, in this case, be maintained, but was barred by the Act of Congress of 1839.

Mr. Justice STORY:

I regret exceedingly being compelled by a sense of duty to express openly my dissent from the opinion of the majority of the court in this case. On ordinary occasions my habit is to submit in silence to the judgment of the court where I happen to entertain an opinion different from that of my brethren. But the present case involves, in my judgment, doctrines and consequences which, with the utmost deference and respect for those who think otherwise, I cannot but deem most deeply affecting the rights of all our citizens, and calculated to supersede the great guards of those rights intended to be secured by the Constitution through the instrumentality of the *judicial [***253** power, State or national. The question, stripped of all formalities, is neither more nor less than this: Whether Congress have a right to take from the citizens all right of action in any court to recover back money claimed illegally, and extorted by compulsion, by its officers under color of law, but without any legal authority, and thus to deny them all remedy for an admitted wrong, and to clothe the Secretary of the Treasury with the sole and exclusive authority to withhold or restore that money according to his own notions of justice or right.

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If Congress may do so in the present case, in the exercise of its power to levy and collect taxes and duties, and thus take away from all courts, State and national, all right to interpret the laws for levying and collecting taxes and duties, and to confide such interpretation to one of its own executive functionaries, whose judgment is to be at once summary and final, then I must say, that it seems to me to be not what I had hitherto supposed it to be; a government where the three great departments, legislative, executive, and judicial, had independent duties to perform each in its own sphere; but the judicial power, designed by the Constitution to be the final and appellate jurisdiction to interpret our laws, is superseded in its most vital and important functions. I know of no power, indeed, of which a free people ought to be more jealous, than of that of levying taxes and duties; and yet if it is to rest with a mere executive functionary of the government absolutely and finally to decide what taxes and duties are leviable under a particular act, without any power of appeal to any judicial tribunal, it seems to me that we have no security whatsoever for the rights of the citizens. And if Congress possess a constitutional authority to vest such summary and final power of interpretation in an executive functionary, I know no other subject within the reach of legislation which may not be exclusively confided in the same way to an executive functionary; nay, to the executive himself. Can it be true that the American people ever contemplated such a state of things as justifiable or practicable under our Constitution? I cannot bring my mind to believe it; and, therefore, I repeat it, with the most sincere respect for my brethren who entertain a different opinion, I deny the constitutional authority of Congress to delegate such functions to any executive officer, or to take away all right of action for an admitted wrong and illegal exercise of power in the levy of money from the injured citizens. I am further of opinion, as I shall endeavor presently to show, that Congress never had contemplated passing any such act, and that the Act of the 3d of March, 1839, chap. 82, sec. 2, neither requires nor in my humble judgment justifies such an interpretation.

What is the real question presented, upon the division of opinion in the Circuit Court, for the consideration of this court? It is not whether an action to recover back the money illegally claimed and paid to the collector for duties, in order to obtain possession of the 254*] *goods by the owner under a protest that they were not legally due, would lie in the Circuit Court, for no such question arises on the record, and it is incontrovertible and uncontroverted, that if any such action would lie, it would lie in the national courts as well as in the State courts. It is not whether Congress may limit, restrain, modify, or even take away the right to sue in the national courts, in cases like the present, or, indeed, in any other class of cases not constitutionally provided for, but it is simply whether the Act of Congress of the 3d of March, 1839, chap. 82, sec. 2, is a bar to such an action in any court, State or national. If it is a good bar in one court, it is good in all courts under the provisions of that act. If Congress have a right to say, and have said, under the provisions of that act, that no officers of the customs shall be liable to any action for money extorted by him under color of his office without authority and against law, then these provisions are equally applicable to all courts, and furnish the rule of decision for all. And Congress have an equal right to apply a like provision to all other acts of all other officers done under color of office, and the trial by jury may, in suits at common law, be completely taken away in all such cases, and the right of final decision be exclusively vested in the executive, or in any other public functionary, at the pleasure of Congress.

Now, how stands the common law on this very subject? It is that an action for money had and received lies in all cases to recover back money which a person pays to another in order to obtain possession of his goods from the latter, who withholds them from him upon an illegal demand, or claim, *colore officii*, and thus wrongfully receives and withholds the money. Such a payment is in no just sense treated in law as a voluntary payment, but it is treated as a payment made by compulsion, and extorted by the necessities of the party who pays it. Such is the doctrine of the common law as held in England, with a firm and steady hand, against all the claims of prerogative, and it is maintained in our day as the undeniable right of every Englishman, against the unjust and illegal exactions of officers of the crown. *Mr. Justice* Bayley laid down the general principle with great exactness in *Shaw* v. *Woodcock* (7 Barn. & Cress., 73, 84), and said: "If a party has in his possession goods or other property belonging to another, and refuses to deliver such property to that other unless the latter pays him a sum of money which he has no right to receive, and the latter, in order to obtain possession of his property, pays that sum, the money so paid is a payment made by compulsion, and may be recovered back." In *Irving* v. *Wilson* (4 Term R., 485) the doctrine was applied to the very case of the acts of an officer of the excise or customs. Upon that occasion Lord Kenyon emphatically said: "The revenue laws ought not to be made the means of oppressing the subject. If goods liable to a forfeiture be forfeited, the officer is to seize them for the king, but he is not permitted to abuse the duties of his station, *and to make it a mode of [*255 extortion." There are many other authorities leading to the same result, but it is unnecessary to cite them, since the very point that an action for money had and received lies against a collector of the customs to recover back money demanded by and paid to him, *colore officii*, upon goods imported, for duties not legally due thereon, has been, upon the most solemn deliberation, held by this court in the cases of *Elliott* v. *Swartwout* (10 Peters, 137) and *Bend* v. *Hoyt* (13 Peters, 263, 267).

It is an entire mistake of the true meaning of the rule of the common law, which is sometimes suggested in argument, that the action of *assumpsit* for money had and received is founded upon a voluntary, express, or implied promise, of the defendant, or that it requires privity between the parties *ex contractu* to support it. The rule of the common law has a

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much broader and deeper foundation. Wherever the law pronounces that a party is under a legal liability or duty to pay over money belonging to another, which he has no lawful right to exact or retain from him, there it forces the promise upon him *in invitum* to pay over the money to the party entitled to it. It is a result of the potency of the law, and is in no shape dependent upon the will or consent or voluntary promise of the wrongful possessor. The promise is only the form in which the law announces its own judgment upon the matter of right and duty and remedy; and under such circumstances any argument founded upon the form of the action, that it must arise under or in virtue of some contract, is disregarded, upon the maxim *qui hæret in litera, hæret in cortice*. Hence, it is a doctrine of the common law (as far as my researches extend) absolutely universal, that if a man, by fraud, or wrong, or illegality, obtains or exacts, or retains money justly belonging to another, with notice that the latter contests the right of the former to receive, or exact, or retain it, an action for money had and received lies to recover it back; and it is no answer for the wrong-doer to say that he has paid it over to his superior; for although as between the wrong-doer and his superior, the maxim may well apply, *respondant superior*, yet the injured party is not bound to seek redress in that direction; and *a fortiori*, &c., he is not so bound, where, as in the case of the government, the superior is not suable. That would be a mere mockery of justice. And this is the very doctrine affirmed in its full extent by this court in the cases of *Elliott* v. *Swartwout* (10 Peters, 187), and *Bend* v. *Hoyt* (13 Peters, 263, 267).

An action for money had and received being then the known and appropriate remedy of the common law, applied to cases of this sort, to protect the subject from illegal taxation, and duties levied by public officers, what ground is there to suppose that Congress could intend to take away so important and valuable a remedy, and leave our citizens utterly without any adequate protection? It is said that circuitously another remedy may be found. **256*]** The answer is, that if *Congress have taken away the direct remedy, the circuitous remedy must be equally barred. But in point of fact no other judicial remedy does exist or can be applied. If the collector is not responsible to pay back the money, nobody is. The government itself is not suable at all; and certainly there is no pretense to say that the Secretary of the Treasury is suable therefor. Where, then, is the remedy which is supposed to exist? It is an appeal to the Secretary of the Treasury for a return of the money, if in his opinion it ought to be returned, and not otherwise. No court, no jury, nay, not even the ordinary rules of evidence, are to pass between that officer and the injured claimant, to try his rights or to secure him adequate redress. Assuming that the Secretary of the Treasury will always be disposed to do what he deems to be right in the exercise of his discretion, and that he possesses all the qualifications requisite to perform this duty, among the other complicated duties of his office—a presumption which I am in no manner disposed to question—still it removes not a single objection. It is, after all, a substitution of executive authority and discretion for judicial remedies. Nor should it be disguised, that upon so complicated a subject as the nature and character of articles made subject to duties, grave controversies must always exist (as they have always hitherto existed) as to the category within which particular fabrics and articles are to be classed. The line of discrimination between fabrics and articles approaching near to each other in quality, or component materials, or commercial denominations, is often very nice and difficult, and sometimes exceedingly obscure. It is the very case, therefore, which is fit for judicial inquiry and decision, and falls within the reach of that branch of the judicial power given by the Constitution, where it is declared "that the judicial power shall extend to all cases in law and equity arising under this Constitution, the laws of the United States, and treaties, &c." If, then, the judicial power is to extend to all cases arising under the laws of the United States, upon what ground are we to say that cases of this sort, which are eminently "cases arising under the laws," and of a judicial nature, are to be excluded from judicial cognizance, and lodged with an executive functionary?

Besides, we all know that, in all revenue cases, it is the constant practice of the Secretary of the Treasury to give written instructions to the various collectors of the customs as to what duties are to be collected under particular revenue laws, and what, in his judgment, is the proper interpretation of those laws. I will venture to assert that, in nineteen cases out of twenty of doubtful interpretation of any such laws, the collector never acts without the express instructions of the Secretary of the Treasury. So that in most, if not in all cases where a controversy arises, the Secretary of the Treasury has already pronounced his own judgment. Of what use, then, practically speaking, is the appeal to him, since he has already given his decision? Further, it is well known, and the annals of *this court as well as those of the other [*257 courts of the United States establish in the fullest manner, that the interpretations so given by the Secretary of the Treasury have, in many instances, differed widely from those of the courts. The Constitution looks to the courts as the final interpreters of the laws. Yet the opinion maintained by my brethren does, in effect, vest such interpretation exclusively in that officer.

These considerations have led me to the conclusion, that it never could be the intention of Congress to pass any statute by which the courts of the United States, as well as the State courts, should be excluded from all judicial power in the interpretation of the revenue laws, and that it should be exclusively confided to an executive functionary finally to interpret and execute them—a power which must press severely upon the citizens, however discreetly exercised, and which deeply involves their constitutional rights, privileges, and liberties. The same considerations force me, in all cases of doubtful or ambiguous language admitting of different interpretations, to cling to that which should least trench upon those rights, privileges, and liberties, and *a fortiori*

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to adopt that which would be in general harmony with our whole system of government.

And this leads me to say that, after the most careful examination of the 2d section of the Act of 1839, chap. 82, I have not been able to find any ground to presume that Congress ever contemplated anything contained in that section to be a bar to the present action. I look upon that section as framed for a very different object, an object founded in sound policy and to secure the public interest. It was to prevent officers of the customs from retaining (as the habit of some had been) large sums of money in their hands received for duties, upon the pretense that they had been paid under protest, and thus to secure in the hands of the officers a sufficient indemnity for all present as well as future liabilities to the persons who had paid them. By this means large sums of money were withheld from the government, and there was imminent danger that severe losses might thus be sustained from the defalcation of those officers, and the public revenue might be thus appropriated to the personal business or speculating concerns of the officers. If action should be brought and judgment obtained against such officers for the repayment of any of such duties, it was plain that the government would be bound to indemnify them, especially if they had acted under instructions from the Treasury Department. On the other hand, the government, being in possession of the money, would hold it in the meantime as a deposit to await events, and to refund the same if in the due administration of the law it was adjudged that it ought to be refunded. Such, in my judgment, was the object and the sole object of the section, and it seems to me in this view to be founded in a wise protective policy.

258*] *With this exposition in our view, let us examine the language of the section. It is as follows: "That from and after the passage of this act, all money paid to any collector of the customs or to any person acting as such, for unascertained duties or for duties paid under protest against the rate or amount of duties charged, shall be placed to the credit of the Treasury of the United States, kept and disposed of as all other money paid for duties is required by law or by regulation of the Treasury Department to be placed to the credit of said Treasury, kept and disposed of; and shall not be held by the said collector or person acting as such, to await any ascertainment of duty or the result of any litigation in relation to the rate or amount of duty legally chargeable and collectable in any case where money is so paid." Now, pausing here, it seems to me that the clause is plainly and merely directory to the collector or person acting as such, pointing out his duty and requiring him to pass the money so paid to the credit of the government as soon as it is received. Nothing is here said as to the rights of third persons, who pay the money for duties; no declaration is made that the collector shall not be liable to any action for such duties, if not legally demandable or payable, or that the collector or such other person shall not be liable to refund the same. And yet, if such had been the intention of Congress, it seems to me incredible that a provision to this effect should not have been found in the act. But further; not only is there a total absence of any such provision, but there is positive evidence that Congress contemplated that there would be suits brought against the collectors and other persons for the repayment of such duties, and, accordingly, as we see, the money is not to be retained by them "to await any ascertainment of duties or the result of any litigation." The language is not limited to the result of past or pending ligitation, but it equally applies to future litigation; in short, any litigation, without any limitation as to time, and indeed to be co-extensive with the permanent prospective operation of the act. If, then, there is in this clause no positive or implied bar to any action provided for, and if the clause is perfectly satisfied by deeming it to be what it professes on its face to be, a regulation addressed to the collectors and other persons collecting duties, and directory to them, let us see if the subsequent clause, which contains the residue of the section, either enlarges, or qualifies, or repels the inferences drawn from the preceding clause. This clause is: "But whenever it shall be shown to the satisfaction of the Secretary of the Treasury that, in any case of unascertained duty or duties paid under protest, more money has been paid to the collector or other person acting as such, than the law requires should have been paid, it shall be his duty to draw his warrant upon the Treasurer in favor of the person or persons entitled to the overpayment, directing the said treasurer to refund the same out of any money in the treasury not otherwise appropriated."

*This is the whole of the clause, and, unless I am greatly deceived in its purport and effect, not one word is to be found therein which bars the party who has paid the money from his right of action against the collector, or other persons acting as such, to recover back the money illegally claimed, or which compels such party to make his application or appeal solely to the Secretary of the Treasury for redress, or gives to the latter exclusive power, jurisdiction, and final arbitrament in the premises. The true object of this clause seems to be precisely what its language imports, to give the Secretary of the Treasury a power which he did not previously possess, to draw from the treasury money which had been overpaid for duties when he was satisfied of such overpayment, upon the application of the party interested. It was not to be compulsive on the party, that he should so apply, but he had an option to apply to the Secretary, to save the delay and expense of a protracted litigation, if the Secretary should grant him the desired relief. It would also diminish the necessity of applications to Congress for the repayment of money which had been illegally paid for duties, by enabling the Secretary to draw his warrant upon the treasury for the amount; which relief, when the money had been paid into the treasury, could not before be obtained except by means of an act of Congress. It was, therefore, an auxiliary provision to the general rights of action secured to the party by the common law, and not in extinguishment or suspension of it. Whether the clause clothed the Secretary also with authority to draw a warrant in favor of the party, if he recovered back the money in a suit at law against the collector, is a matter which might, upon the strict [*259

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words of the clause, admit of some doubt, since the case provided for is only where the overpayment shall be shown to the satisfaction of the Secretary, and not where it is a result of a judgment at law. But a liberal construction might embrace such a case also, as within the intent, if not strictly within the words. But be this as it may, it is manifest to my mind, with all deference to the judgment of others, that the affirmative power thus given by this clause to the Secretary cannot be construed to exclude the right of the party to his remedy at the common law without a violation of the known rules of interpretation, by adding important and material language which the Legislature has not used, and incorporating provisions which neither the words nor the professed objects of the section require.

Nor am I able to perceive any grounds upon which a different interpretation can be maintained, unless it be, that it would be a hardship upon the collector to require him to pay money over to the government which he might be compelled again to pay to the party from whom he had illegally demanded it. One answer to this suggestion is, that he cannot complain, because it is his own choice to hold an office to which such a duty or responsibility is attached, and if he elects to hold it, he ought to take it *cum* **260*]** *onere*. *Another and conclusive answer is, that he has a perfect right of indemnity from the government; nor can it be doubted that the government will always indemnify all its officers for acts done by its orders and demands made under its authority. On the other hand, an extreme hardship would be thrown upon the injured party, whose money is taken from him against his will by color of office, and against his right, if his common law remedy is swept away; for then he can have no means of redress, and no indemnity, since he has resisted the demands of the government and asserts an adversary interest.

Nor is it any ground of excuse (as has been already suggested), in case of money paid by compulsion, that the officer has paid over the money to his principal; and in this respect it differs from the case of a voluntary payment. This distinction was taken and acted upon in the case of *Snowden* v. *Davis* (1 Taunt. R., 358), where money had been paid to a bailiff under a threat of a distress by an excess of authority, and the money had been paid over by him to the sheriff, and by the latter into the exchequer. And the same doctrine was fully recognized and confirmed by this court upon the most solemn consideration in *Elliott* v. *Swartwout* (10 Peters, 137), after a full review of all the leading authorities.

Upon the whole, my opinion is that the question propounded by the Circuit Court upon the division of opinion of the judges in that court, ought to be answered in the negative; that the 2d section of the Act of 3d March, 1839, chap. 82, was no bar to the action.

Mr. Justice McLEAN:

This suit was brought to recover from the defendant, collector of the customs, an access of duties exacted by him of the plaintiffs against law. And on the trial in the Circuit Court the judges were divided on the question "whether the Act of the 3d of March, 1839, was a bar to the action." This point has been certified to this court.

The 2d section of the above act provides "that from and after the passage of this act, all money paid to any collector of the customs, or to any person acting as such, for unascertained duties, or for duties paid under protest against the rate or amount of duties charged, shall be placed to the credit of the treasurer of the United States, kept and disposed of as all other money paid for duties is required by law or by regulation of the Treasury Department to be placed to the credit of the said treasury, kept and disposed of; and shall not be held by the said collector, or person acting as such, to await any ascertainment of duties or the result of any litigation in relation to the rate or amount of duty legally chargeable and collectable in any case where money is so paid; but whenever it shall be shown to the satisfaction of the Secretary of the Treasury, that, in any case of unascertained duties, or duties paid under protest, more*money has been paid to the collect-[*261 or, or person acting as such, than the law requires should have been paid, it shall be his duty to draw his warrant upon the treasurer in favor of the person or persons entitled to the overpayment, directing the said treasurer to refund the same out of any money in the treasury not otherwise appropriated."

In the case of *Elliott* v. *Swartwout* (10 Peters, 137), and in *Bend* v. *Hoyt* (13 Peters, 263), this court held, that illegal duties exacted by the collector were recoverable from him, where paid under protest, by the importer, in an action of *assumpsit*. This doctrine is not questioned in this country or in England. Has the 2d section of the act above cited changed the law in this respect? A majority of the judges have decided in the affirmative, and that that act constitutes a bar to an action in such a case. I dissent from the opinion of the court.

The above section, in my judgment, so far from taking away the legal remedy, expressly recognizes it. The collector is required, "from and after the passage of the act," to pay over to the treasurer the moneys in his hands, and not "to await any ascertainment of duties, or the result of any litigation in relation to the rate or amount of duty legally chargeable," &c. Now, if Congress intended by this section to withdraw this subject from the courts, and vest the exclusive right to decide the matter in the Secretary of the Treasury, could they have used this language? The law was not to operate upon the past, but upon the future acts of the collector. And I ask in sober earnestness, whether the collector could be required to pay over money, "and not await the result of a litigation," as "to the amount of duties legally chargeable," if the intention was to prohibit such litigation. I use the words of the section; and the words of the section alone, as I think, are conclusive as to the intention of Congress. The collector must pay over the money, and not retain it until the termination of a suit. Does this take away the right to bring a suit? Such an inference, it seems to me, would be as exceptionable in logic as in law.

From the proceedings of this court we know that collectors of the customs, after their removal from office or the expiration of their term, and sometimes while in office, under the

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pretext of indemnifying themselves against suits for the exaction of illegal duties, were in the practice of withholding from the treasury large sums of money. And it was to remedy this evil that the above law was passed. As to the remission of duties illegally charged, it vested in the Secretary no new powers; but it authorizes him, where the excess of duty has been paid into the treasury, to draw it out by a warrant, and pay it over to the person entitled to receive it. By the 21st section of the Duty Act of 1799 (1 Story, 592), the collectors "were required, at all times, to pay to the order of the proper officer the whole of the moneys which they may respectively receive, &c., and shall once in three months, or oftener if required, transmit 262*] their accounts," *&c. Now, it is known from public documents and from cases before this court, that the Secretary of the Treasury has, for a long time before the Act of 1839, required the collector of New York to pay over moneys received by him, weekly or at short intervals. And can it be pretended that the Act of 1799, under the instructions of the Secretary of the Treasury, was not as binding upon collectors as the Act of 1839? In a legal point of view the liability of a collector was the same for illegal duties received by him, whether paid into the treasury under the one law or the other.

It is said that the law cannot raise a promise to pay by an officer, where it requires him to pay the same money into the treasury. The action is founded on the illegality of the transaction. None other than legal duties are payable to the government; and where an officer by his own volition, or acting under the instructions of his superior, demands a higher duty than the law authorizes, he is guilty of a wrong which his instructions cannot justify. And having done this, can it be contended that by paying over moneys so obtained he can escape the legal consequences of his unlawful act? Where one person obtains money illegally from another, is he not bound in conscience to return it? And may not an action of *assumpsit* be sustained for the recovery of the money. In such an action the question is, whether the defendant has received money which he is bound in good conscience to pay to the plaintiff. Now, if the defendant, as collector, exacted a higher duty of the plaintiffs than the law authorized, is he not bound in conscience to return the excess? But it is said that he has paid it over to the Treasury of the United States, in pursuance of the Act of 1839, and that this is a bar to the action. Why has not this bar been set up under the Act of 1799? By that act the collector, when ordered by the Secretary of the Treasury, was as much bound to pay over the money in his hands into the treasury as under the Act of 1839. And yet for forty-four years such a defense has not been thought of. It has never been supposed that the payment of the money into the treasury exonerated the collector. He has violated the law, and he is answerable for that violation. This must be the case, unless, in the language of this court in the case of *Elliott* v. *Swartwout*, above cited, "the broad proposition can be maintained that no action will lie against a collector to recover back an excess of duties paid him, but that recourse must be had to the government for redress. Such a principle," the court say, "would be carrying an exemption to a public officer beyond any protection sanctioned by any principles of law or sound public policy."

In *Townsend* v. *Wilson et al.* (1 Camp., 396) Lord Ellenborough says: "If any person gets money into his hand illegally, he cannot discharge himself by paying it over to another." The same doctrine is held in *Sadler* v. *Evans* (4 Burr., 1986). And this court in the above case of *Elliott* v. *Swartwout* say: "It may be assumed as the *settled doctrine of the [*263 law, that where money is illegally demanded and received by an agent, he cannot exonerate himself from responsibility by paying it over to his principal, if he has had notice not to pay it over. A notice not to pay over the money to the principal, it is contended, presupposes a right in the agent to retain it. No such inference could arise under the Act of 1799, nor can it be made under the present law. The notice should induce the collector to reconsider his act, and if found to have been against law to correct it. But, it is said, he may have acted under the orders of the Secretary of the Treasury. Suppose he did, would that justify or excuse an illegal act? I will answer this in the language of this court in the case last cited: "Any instructions from the Treasury Department could not change the law or affect the rights of the plaintiff. He, the collector, was not bound to take and adopt that instruction. He was at liberty to judge for himself, and act accordingly." And in *Tracy* v. *Swartwout* (10 Peters, 99) this court say "that the personal inconvenience of the collector is not to be considered." When acting under instructions the government is bound to indemnify him. In my judgment the Act of 1839 interposes no bar to this action.

But there is another aspect in which this case must be considered. Feeling, as I do, an unfeigned respect for the opinion of the judges who differ from me, yet I cannot, without concern, look at the consequences of the principle established in this case. The right of a citizen to resort to the judicial tribunals of the country, federal or State, for redress for an injury done by a public officer, is taken away by the construction of an act of Congress, which, in my judgment, bears no such construction. But I will take higher ground, and say that Congress have no constitutional power to pass such an act as the statute of 1839 is construed to be by this decision.

By the 2d section of the 8d article of the Constitution of the United States, the judicial power extends to all cases in law and equity arising under the Constitution and laws of the Union. And by the 7th section of the amendments to the Constitution it is provided that "in suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved."

The Act of 1839, in my judgment, does not conflict with either of the above constitutional provisions. But if it take away the right of the citizen to sue in a court of law for the injury complained of, as construed by my brethren, then it is in direct conflict with both of the above provisions.

In a matter of private right it takes from the judiciary the power of construing the law, and vests it in the Secretary of the Treasury, the

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executive officer under whose sanction or instruction the wrong complained of was done.
264*] *And, in the second place, it takes from the citizen the right of trial by jury, which is expressly given to him by the Constitution.

I again repeat that Congress have not done this, nor did they intend to do it by the Act of 1839. But the act is so construed by the decision just pronounced. Under this view, I feel myself bound to consider the principle established by the court, and to speak of its consequences.

That the act, as construed, is in direct conflict with the above provisions of the Constitution, is so palpable that it seems to me no illustration could make it clearer.

The right to construe the laws in all matters of controversy, is of the very essence of judicial power. Executive officers who are required to act under the laws, of necessity must give a construction to them. But their construction is not final. When it operates injuriously to the citizen, he may, by any and every possible means through which it may be brought before the courts, have the construction of the law submitted to them, and their decision is final.

But the court say that the plaintiffs in this case cannot seek redress for the injury complained of by an action at law, but, under the Act of 1839, are referred to the Secretary of the Treasury; an executive officer, who has prejudged the case, who can exercise neither the forms nor the functions of a judicial officer; who acts summarily, without a jury, and from whose judgment their is no appeal. The case turns upon facts; facts properly triable by a jury. The question is, whether the articles on which the duties have been assessed are such articles as under the law are liable to be thus taxed. This is a question most fit to be answered by a jury of merchants, under the instructions of a court of law. The plaintiffs allege that the duty was not authorized by law, but to obtain possession of their goods, they were compelled to pay it, protesting against the right of the government. And they brought an action at law to recover from the collector the excess of duty paid. This course had been sanctioned by previous decisions. It was, in fact, the only effectual course they could take to obtain possession of their goods.

A tender of the legal duty, and a replevin, if it would lie, involved the necessity of security for a return of the goods which, if in the power of the importers, might not have been convenient to them. But a replevin is expressly prohibited in such a case by the Act of 2d March, 1833.

The question arises on the facts stated. Illegal duties were demanded by the collector and paid to him by the plaintiffs, before they could obtain their goods; and the question is, has their remedy at law been cut off by the statute of 1839? This is a taxing power: the most delicate power that is exercised by the government. It reaches the concerns of the citizen, and takes from him a part of his property for purposes of revenue. The tax should be judicious, and the mode of collecting it should be specially guarded. Care
265*] *should be taken not to infringe private right in making this public exaction. But, especially, where, in this respect, a wrong has been done to the citizen, the courts should be open to him. His remedy should be without obstruction. But my brethren say that the Act of 1839 takes away from the plaintiffs all remedy except an appeal to the Secretary. The State courts as well as the federal are closed against the injured party.

The able men who laid the foundations of this government saw that, to secure the great objects they had in view, the executive, legislative, and judicial powers, must occupy distinct and independent spheres of action. That the union of these in one individual or body of men constitutes a despotism. And every approximation to this union partakes of this character.

What though no positive injustice be done to the plaintiffs in this case; is that any reason why the great principle involved in it should be yielded? What is this principle? It is nothing less than this: that throughout the whole course of executive action, summary, diversified, and multiform as it is, for wrongs done the citizen, all legal redress may be withdrawn from him; and he may be turned over as a petitioner to the power that did the wrong. If this may be done in the case under consideration, it may, on the same principle, be done in every similar case.

A seizure of a vessel and cargo may be made by an officer under a supposed breach of the revenue law, and the question of forfeiture may be referred to the Secretary of the Treasury. Private property may be taken for public purposes, and the owner may be limited to the remedy, if remedy it may be called, of petitioning some executive officer for remuneration. Military violence may be perpetrated on the person of a citizen or on his property, and his relief may be made to depend on the will of the commander-in-chief. In short, in every line of the executive power, wrongs may be done and legal redress may be denied.

The cases put may seem to be extreme ones, and therefore not likely to happen. But do they not test the principle? I think they do. If Congress may deprive these plaintiffs of their remedy by action at law, they may do the same thing in the cases specified. Indeed, it would be difficult to prescribe any limit to legislative action on this subject. It can, at least, be extended through all the ramifications of executive power.

To say that this will never be done, and that the consequences spoken of can never happen, is no answer to the argument. Do the consequences lie within the exercise of the principle? If they do, the consequences must follow a general exercise of the power. The danger is in sanctioning the principle. At this point, I meet the principle and combat it. I object to it because it is dangerous and may be ruinous. It takes from the citizen his rights—rights secured to him by the Constitution; the trial by jury, in a court of *law. This is done [*266 by the Act of 1839, if it be what it is now construed to be. In this aspect, then, I say the act is unconstitutional and void. It not only strikes down the rights of the citizen, but it inflicts a blow on the judicial power of the country. It unites, in the same department, the executive and judicial power. And on a subject the most delicate and interesting; and one

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which, of all others, may most easily be converted into an engine of oppression.

In this government, balances and checks have been carefully adjusted, with a view to secure public and private rights, and any departure from this organization endangers all. We have less to apprehend from a bold and open usurpation by one department of the government of powers which belong to another, than by a more gradual and insidious course. In my judgment, no principle can be more dangerous than the one mentioned in this case. It covers from legal responsibility executive officers. In the performance of their ministerial duties, however they may disregard and trample upon the rights of the citizen, he can claim no indemnity by an action at law. This doctrine has no standing in England. No ministerial officer in that country is sheltered from legal responsibility. Shall we in this country be less jealous of private rights and of the exercise of power? Is it not our boast that the law is paramount, and that all are subject to it, from the highest officer of the country to its humblest citizen? But can this be the case if any or every executive officer is clothed with the immunities of the sovereignty? If he cannot be sued, what may he not do with impunity. I am sure that my brethren are as sincere as I am in their convictions of what the law is in this case, and I have only to regret that their views do not coincide with those I have stated.

Cited—4 How., 332; 8 How., 449; 2 Black., 478; 5 Wall., 732; 7 Wall., 129; 12 Wall., 12, 15; 18 Wall., 577; 22 Wall., 639; 2 Otto, 452; 6 Otto, 150; 1 Blatchf., 381; 2 Blatchf., 551; 3 Blatchf., 389; 4 Blatchf., 486-488; 5 Blatchf., 275-278; 2 Abb. U. S., 106, 107; 5 Bank. Reg., 470; 2 Curt., 241; 2 Cliff., 596; 3 McLean, 558.

ROBERT WHITE, *Plaintiff in Error.*

v.

WILLIAM S. NICHOLLS, WILLIAM ROBINSON, OTHO M. LINTHICUM, EDWARD M. LINTHICUM, RAPHAEL SEMMES, PAUL STEVENS, AND CHARLES C. FULTON, *Defendants in Error.*

ROBERT WHITE, *Plaintiff in Error.*

v.

HENRY ADDISON, *Defendant in Error.*

Libel—action lies on privileged communication, if malicious—actual malice must be averred and proved—facts constituting need not be averred—letters to President of U. S. containing charges against public officer, if false and malicious, actionable—want of probable cause authorizes inference of malice.

In an action for a libel it is not indispensable to use the word "maliciously" in the declaration. It is sufficient if words of equivalent power or import are used.

Every publication, either by writing, printing, or pictures, which charges upon or imputes to any person that which renders him liable to punishment, or which is calculated to make him infamous, or odious, or ridiculous, is *prima facie* a libel, and implies malice in the author and publisher towards the person concerning whom such publication is made.

Proof of malice cannot, in these cases, be required of the party complaining, *beyond [*267 the proof of the publication itself; justification, excuse, or extenuation, if either can be shown, must proceed from the defendant.

Privileged communications are an exception; and the rule of evidence, as to such cases, is so far changed as to require of the plaintiff to bring home to the defendant the existence of malice as the true motive of his conduct.

Privileged communications are of four kinds:

1. Wherever the author and publisher of the alleged slander acted in the *bona fide* discharge of a public or private duty, legal or moral, or in the prosecution of his own rights or interest.

2. Anything said or written by a master in giving the character of a servant who has been in his employment.

3. Words used in the course of a legal or judicial proceeding, however hard they may bear upon the party of whom they are used.

4. Publications duly made in the ordinary mode of parliamentary proceedings, as a petition printed and delivered to the members of a committee appointed by the House of Commons to hear and examine grievances.

But in these cases the only effect of the change of the rule is to remove the usual presumption of malice. It then becomes incumbent on the party complaining to show malice, either by the construction of the spoken or written matter, or by facts and circumstances connected with that matter, or with the situation of the parties, adequate to authorize the conclusion.

Proof of express malice, so given, will render the publication, petition, or proceeding, libelous. Falsehood and the absence of probable cause will amount to proof of malice.

The jury being the tribunal to determine whether this malice did, or did not mark the publication, the alleged libel should be submitted to them, and the court below erred in withholding it.

THESE two cases depended upon the same facts and principles, and were argued together. They were brought up by a writ of error from the Circuit Court of the United States for the District of Columbia, sitting for the County of Washington.

The facts were these:

On the 26th of June, 1841, the following letter was addressed to the President of the United States:

"GEORGETOWN, June 26th, 1841.

"SIR: We feel it to be proper to put you in possession of the grounds upon which the removal of Mr. Robert White, from the office of collector of customs of this port, is requested. You will recollect the humiliating and prostrate condition of the people of this district about a year ago, when the majority then in Congress determined to destroy our banks as a punishment upon us for having avowed and published our preference for the candidates of the great

NOTE.—*Privileged communications in libel and slander.*

It is a good defense in an action for libel that the alleged libel was in the nature of a privileged communication, and although perhaps not true, was believed to be so by the publishers who acted without malicious intent. Holt v. Parsons, 23 Texas, 9.

The meaning in law of a privileged communication is, a communication made on such an occasion as rebuts the *prima facie* inference of malice arising from the publication. Wright v. Woodgate, 2 C. M. & R., 573; 1 Tyr. & G., 12; 1 Gale, 329; Saunders v. Baxter, 6 Heisk. (Tenn.), 369; Holt v. Parsons, 23 Texas, 9.

Privileged communications comprehend all statements made *bona fide* in performance of a duty, or with a fair and reasonable purpose of protecting the interests of the person making them, and the *onus* of proving malice lies on the plaintiff. Somerville v. Hawkins, 10 C. B., 583; 15 Jur., 450.

It is for the judge to rule whether the occasion creates the privilege. The question of express

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whig party. It was in that dark season that Mr. White determined to desert his own fellow-citizens, and to join in the war which was making upon their liberties and interests. Being then seeking office, he thought to recommend himself to the executive by getting up a memorial here, which was to be used as a sanction or approval, on the part of our own citizens, of the mad policy which had been adopted by their oppressors. He then joined with an assemblage of forty-eight persons in getting up a memorial, which none but themselves could be induced to sign. The memorialists, with about five exceptions, could not be identified by name **268*]** or residence, *as citizens of Georgetown. Upon investigation, they proved to be apprentices and journeymen, holding a transient residence in the town. Being few in number, they were no doubt believed by Congress, and persons at a distance, to be a select body of experienced merchants and traders, who had some knowledge of the subject of their memorial. A copy of the memorial has been deposited with the Secretary of the Treasury.

"It is, perhaps, one of the vilest calumnies ever issued by a band of thoughtless and irresponsible individuals, many of whom would have shrunk from such a proceeding had they the necessary intelligence to comprehend of its enormity. But not so with Mr. White. He knew the paper contained an unmitigated slander. He seemed to be willing to blacken the character of those of his fellow-citizens who had been intrusted with the charge of our banks, if that would only secure an appointment when all other methods had failed him for the preceding twelve years.

"We revolt at the idea of Mr. White being permitted to remain in an office whose emoluments flow from the labor and enterprise of the very men whose business and families he sought to involve in ruin.

"It is impossible that he can ever regain the confidence of men whom he abandoned and vilified in the darkest hour of their existence. His expulsion from office is no less demanded by his unpardonable conduct, than by justice to the wounded feelings of an injured community.

"About the same time, June, 1840, with the persons under his influence, and as is believed at the request of an office-holder of great political rancor, Mr. White procured Dr. Duncan, then a member of Congress from Ohio, to deliver a speech here in abuse of General Harrison. The speech was, perhaps, the very vilest that was ever delivered by that gentleman.

"It was so satisfactory to Mr. White, who acted as vice-president on the occasion, that he immediately rose, and moved the doctor a vote of thanks, and a request that the speech be furnished for publication. The resolutions which were adopted unanimonsly on the occasion were nearly as calumnious as the speech itself.

"We refer you to the Globe newspaper of the 3d July last, for an official account of the proceedings of the meeting. We will only trouble you with a few sentences, that you may have some idea of the character of those extraordinary proceedings. They denounced General Harrison as 'the nominee of the bank whig federalist, abolitionist and anti-masons,' 'an abolitionist of fraud and concealment,' as being guilty of pursuing a course 'grossly insulting to common sense, honesty, and decency, by shrouding himself in darkness,' 'of courting dangerous fanatics, and countenancing them (abolitionists) in their mad warfare upon our peace, our property, *and our lives,' [*269 and 'that he should be treated as an abolitionist.'

"Mr. White's was the place where the leading men of his party nightly assembled up to the close of the presidential election, and a respectable citizen declares that since Mr. White's appointment he circulated 'bushels' of the 'Globe'. He declines to give his formal evi-

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malice should be left to the jury. Cooke v. Wildes, 5 El. & Bl., 329; 3 C. L. R., 1090; 1 Jur. (N. S.), 610.

What are privileged. Palmer v. Concord, 48 N. H., 217; Elam v. Badger, 23 Ill., 498; Lester v. Thurmond, 51 Ga., 118; Mackay v. Ford, 5 Hurl. & Nor., 792; Hodgson v. Scarlett, 1 B. & A., 232; Flint v. Pike, 2 D. & R., 523; 4 B. & C., 473; Revis v. Smith, 36 Eng. Law. & Eq., 268; 18 C. B., 126; Kennedy v. Hilliard, 10 Ir. C. L. R., 195; Henderson v. Broomhead, 4 H. & N., 569; 28 L. J. Exch., 360; Osborn v. Forshee, 22 Mich., 209; Smith v. Higgins, 82 Mass. (16 Gray), 251; Larkin v. Noonan, 19 Wis., 82; Dawkins v. Rokeby, L. R., 7 H. L., 744; 14 Eng., 127; Aff'g, L. R., 8 Q. B., 255; 5 Eng. R., 212; Lewis v. Levy, 1 Ellis, B. & E., 537; Davis v. Duncan, L. R., 9 C. P., 396; 23 W. R., 575; 43 L. J. C. P., 185; 30 L. T. (N. S.), 464.

What are not privileged. York v. Johnson, 116 Mass., 482; O'Donaghue v. McGovern, 23 Wend., 26; Story v. Wallace, 60 Ill., 51; Cincinnati, &c., Co. v. Timberlake, 10 Ohio (N. S.), 548; Stanley v. Webb, 4 Sandf. (N. Y.), 21; Hunt v. Bennett, 19 N. Y. (5 Smith), 173; Saunders v. Baxter, 6 Heisk. (Tenn.), 369; Alpin v. Morton, 21 Ohio St., 536; Perkins v. Mitchell, 31 Barb., 461; Williamson v. Freer, L. R., 9 C. P., 393; 10 Eng. R., 225; 43 L. J. C. P., 161; 22 W. R., 878; 30 L. T. (N. S.), 382; Jackson v. Hopperton, 16 C. B. (N. S.), 829.

What are privileged when required by one's own interest. Clapp v. Devlin, 35 N. Y. Supr. (3 J. & Sp.), 170; McDougall v. Claridge, 1 Campb., 266; Howard v. Thompson, 21 Wend., 319; P. W. & B. R. R. v. Quigley, 21 How., 202; Klinck v. Colby, 46 N. Y. (1 Sick.), 427; Harrison v. Bush, 32 Eng. Law & Eq., 173; 5 El. & Bl., 344; Whiteley v. Adams, 15 C. B. (N. S.), 392; Shipley v. Todhunter, 7 C. & P., 680; Lewis v. Chapman, 16 N. Y. (2 Smith), 369; Sunderlin v. Bradstreet, 46 N. Y. (1 Sick.), 188; 7 Am. Rep., 322; Washburn v. Cooke, 3 Denio, 110; Lewis v. Chapman, 16 N. Y. (2 Smith), 369; Ormsby v. Douglass, 37 N. Y. (10 Tiff.), 477; Beardsley v. Tappen, 5 Blatchf., 497.

What are privileged when required by duty to public or individuals. Henwood v. Harrison, L. R., 7 C. P., 606; 3 Eng. R., 398; 41 L. J. C. P., 206; 26 L. T. (N. S.), 938; Wilson v. Fitch, 41 Cal., 363; Campbell v. Spottiswoode, 3 B. & S., 769; 3 F. & F., 421; Ryan v. Wood, 4 *Id.*, 735; Cox v. Feeny, *Id.*, 13; Hedley v. Barlow, *Id.*, 224.

What are privileged when in defense of self or interest. Toogood v. Spyring, 1 C. M. & R., 194; Somerville v. Hawkins, 10 C. B., 583; Moore v. Butler, 48 N. H., 161; Van Wyck v. Aspinwall, 17 N. Y. (3 Smith), 190; Laughton v. Bishop of Lodor and Man, L. R., 4 P. C., 495; Simmonds v. Dunne, 5 Ir. L. C. L., 358; O'Donaghue v. Hussey, 5 Ir., R. C. L., 124; Cooke v. Wildes, 5 El. & Bl., 329; 1 Jur. (N. S.), 610; 24 L. J. Q. B., 367; 3 C. L. R., 1090; Brow v. Hathaway, 13 Allen (Mass.), 239; Ormsby v. Douglass, 37 N. Y. (10 Tiff.), 477; Laughton v. Bishop, &c., 9 Moore's P. C. C. (N. S.), 318; 21 W. R., 204; 28 L. T. (N. S.), 377.

What are privileged as literary criticisms. Macleaod v. Wakeley, 3 C. & P., 311; Carr v. Hood, 1 Camp., 355 *n.*; Morrison v. Belcher, 3 F. & F., 614; Frasher v. Berkeley, 7 C. & P., 621; Tabart v. Tipper, 1 Camp., 350; Strauss v. Francis, 4 F. & F., 939, 1107; 15 L. T. (N. S.), 674; Soane v. Knight, M. & M., 74; Thompson v. Shackell, M. & M., 187; Paris v. Levy, 9 C. B. (N. S.), 342; 3 L. J. C. P., 1; 9 W. R., 71; S. C., 2 F. & F., 71.

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dence in the case, upon the ground that he, being a near neighbor of Mr. W., he is unwilling to disturb the friendly personal relations existing between them.

"Such was Mr. White's general political violence, and the unhesitancy with which he descended to the lowest means to secure the favor of the late administration, that no one doubted here but that he would be dismissed when the present party came into power, and no one can be more astonished than Mr. White is himself at his retention to the present time.

"We will also take this opportunity to state that we desire Mr. H. Addison to be appointed to the office of collector in Mr. White's place, whose abundant testimonials and recommendations of our business citizens are already on file with the Secretary of the Treasury.

"With great respect, your obedient servants.

CHAS. C. FULTON,
E. M. LINTHICUM,
RAP. SEMMES,
O. M. LINTHICUM,
WM. ROBINSON,
WM. S. NICHOLLS,
PAUL STEVENS.

"P. S. It is further proper to state that Mr. Addison's recommendations, filed with Mr. Ewing, are signed by every citizen in town, with a single exception, who have regular business to transact at the custom-house."

On some other day, which was not stated in the record, the following letter was addressed to the Secretary of the Treasury:

"Hon. THOMAS EWING, Secretary of the Treasury.

"SIR: Earnestly requesting, as we now do, the immediate removal of Mr. Robt. White from the office of collector of this port, we feel it proper to state candidly our insuperable objections to his continuance in that office.

"At a time when a remorseless and vindictive majority in Congress were making a ruinous war upon all the business interests of the country, by destroying confidence in its banking institutions, and when that majority were pursuing a most persecuting and ruinous course towards the defenseless and unoffending people of this District, Mr. White, for the mere purpose of evidencing his unscrupulous zeal in be-
270*] half *of the late administration, and to secure its favor, did, under the most offensive circumstances, sign a violently abusive and insulting memorial to Congress, urging in the most decided manner the adoption of fatal measures toward the banks, by compelling them to continue specie payments, when all the institutions of Virginia and Maryland had suspended, and thereby to be compelled to pursue a destructive and burdensome policy towards their customers.

"The object of the memorial was to place something in the hands of our enemies, in the shape of an approval of their course, which was a gross deception.

"This offense becomes greatly aggravated, when it is known that Mr. White knew, so far as his acquaintance went with his co-signers, that they were too grossly ignorant of business and banking to be able to express any opinion upon such a subject. The other signers, with the exception of two or three, were so wholly unknown to our business community that Mr. White would not be able to identify their persons or designate their residences. It is to be taken for granted that they were merely transient laborers, or persons so young as not then to have attracted the notice of our oldest and most observing citizens; some of them, indeed, were known to be small apprentices. So offensive and unpopular was the whole proceeding, that with the exception of, perhaps, two others (from whom our community would look for nothing better), Mr. White was the only respectable man of business who could be induced to put his name upon the paper. His own purpose could never have been detected, but for his appointment as collector, which so soon succeeded. Mr. White's experience in trade had taught him the indispensable necessity there was for banks in this District, and his intelligence and sense of justice were outraged by the declaration that our banks should be made to pay specie, when the banks of our neighboring States of Virginia and Maryland found it wholly impracticable so to do. He knew the gentlemen who had the management of our banks, directors as well as officers, and he knew they stood without reproach, and that it was wholly impossible that they could be influenced by the low and disreputable designs which his memorial so unscrupulously charged to them. It was a vile slander, put forth so as to evade the responsibility of a legal prosecution. We think he is the last man to hold an office the value of which depends upon the enterprise and integrity of the very men whose families and business were alike to be overwhelmed with ruin at his special application.

"His removal from an office thus obtained would be doubly gratifying to us, when we know his family does not need its emoluments for support.

"It can be proved that at his store, in which the office of collector is kept, there were almost nightly assemblages of the principal party men who sustained the late administration, and particularly during the fall of 1840.

*"A highly respectable man has [*271 stated that, during the latter part of the late canvass, he saw Mr. White preparing immense numbers of the newspaper called the 'Washington Globe,' for circulation, but, being a neighbor of Mr. White, he is unwilling to appear as a witness against him. The language the gentleman used was, that 'he had seen bushels of the Globe so prepared since his appointment as collector.'

"Under these circumstances, we would most respectfully ask you to dismiss Mr. White from the office, and that our fellow-townsman, Mr. Henry Addison, who has already been recommended by most of us, may be appointed to fill it.

O. M. LINTHICUM,	WM. HAYMAN,
RAPHAEL SEMMES,	JOS. SMOOT,
WM. ROBINSON,	WM. S. NICHOLLS,
E. M. LINTHICUM,	JAMES THOMAS,
PEREGRINE WARFIELD,	JEREMIAH ORME,
ROBERT OULD,	T. P. WAUGH,
WM. JEWELL,	EDW. S. WRIGHT,
WILLIAM LAIRD,	J. RILEY,
WM. LANG,	W. S. RINGGOLD,
S. E. SCOTT,	J. I. STULL,

On the 19th of June, 1841, the following letter was addressed to the Secretary of the Treasury:

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"GEORGETOWN, June 19, 1841.

"SIR: About a year ago, the Hon. A. Duncan, of Ohio, was invited, by a number of office-holders and others, to hold a political meeting in this town.

"The meeting was held on the 26th June, 1840, and the proceedings were published in the Globe on or about the 3d July.

"Mr. Robert White, our collector of customs, acted as one of the vice-presidents of the meeting, and who was so tickled and delighted with Duncan's vile calumnies upon Gen. Harrison, that he arose and made the motion that he (Duncan) would prepare the speech for publication. The address was said to be one of the vilest, and, if you desire it, a copy shall be presented for your perusal. The persons who moved the resolutions, and one of the secretaries, were clerks in the departments.

"We now hand you a copy of two of the resolutions, and an account of the proceedings, which we present separate, for your immediate and convenient notice, referring you at the same time to the very lengthy account to be found in the Globe of the date mentioned above.

"You will see that the copy now sent applies the following language to General Harrison: 'Nominee of the bank whigs, federalists, abolitionists, and anti-masons.' 'Fraud and concealment'—'grossly insulting common sense, decency and honesty, by shrouding himself in darkness'—'of courting dangerous fanatics, and 272*] *countenancing them in their mad warfare upon our peace, property, and lives.' 'He should be treated as an abolitionist.'

"This conduct of Mr. White, in connection with his signature being placed to the infamous anti-bank memorial, which a delegation from town left in your hands when Mr. White's removal was first requested, renders him extremely offensive to the whigs here. We again would take the opportunity to remind you of our earnest hope that Mr. H. Addison will be appointed to that office, whose full and abundant testimonials are already in your possession.

"The continuance of Mr. White is mortifying to every real friend of the administration here. With respect, your obedient servants.

O. M. LINTHICUM,
WILLIAM LAIRD,
WM. S. NICHOLLS.

"Hon. T. EWING, Secretary of the Treasury."

On the 21st of September, 1841, the following letter was addressed to the President.

"GEORGETOWN, Sept. 21, 1841.

"SIR: Should any paper be sent to you, contradicting in any manner a representation made by ourselves to the conduct of Mr. White, late collector of this port, we will thank you to let us have a copy of that paper, with the names appended thereto, that we may see in what particular, and to what extent, our statement may have been contradicted, and by whom.

"With great regard, we are, sir, your obedient servant,

O. M. LINTHICUM,
W. ROBINSON,
WILLIAM LAIRD,
RAPH. SEMMES,
WM. S. NICHOLLS,
D. ENGLISH, Jun.

"To His Excellency, JOHN TYLER, President U. S."

And upon the 23d of September, 1841, the following:

"GEORGETOWN, Sept. 23, 1841.

"Sir: I feel bound to make to you this statement, in consequence of a report which has reached my ears, that Mr. Robert White, with Captain Carbery, and B. Mackall, are endeavoring, by their joint influence and representations, to injure me in your estimation. It is due no less to you, than to my friends and myself, to write you this letter, in which I shall omit everything that is not really necessary to be stated.

"As to Mr. White, I feel warranted in assuring you that the representations made to you by my friends in regard to him, are true throughout, of which fact they will be able to furnish you the *abundant evidence. No man [*273 of character here would hazard the intimation that these friends of mine would possibly descend to a misrepresentation in regard to Mr. White or anyone else.

"For all they have stated they can produce a mass of evidence too strong to be doubted.

"In relation to Mr. Carbery, I have only to refer you to my letter to you of the 23d August, and its accompanying papers. I would take much pleasure in furnishing you with any further explanations in regard to that case that you might desire.

"It is wholly impossible that Mr. Mackall can have the least ground for complaint, as I can supply you with abundant proof that there was no employment here for him whatever, nor any prospect of need of his services at any time hereafter. All the labor performed by him since I have been appointed to this office, was merely to sign a receipt for his pay. He, or his friends for him, appealed to the Secretary of the Treasury, and seemed to have succeeded in producing an impression on his mind that I was meditating an unjust proceeding towards Mr. Mackall—all this, too, before I had said or written a word to Mr. Ewing upon the subject. He wrote me that Mr. Mackall must not be removed until I assigned him my reasons for so doing. I obeyed his order; but, on the very day I wrote him that there were no service for Mr. Mackall to perform, Mr. Ewing instructed me to discontinue the office. Mr. Mackall still complained to the Secretary, who wrote me to come to the Treasury Department. I went, and after hearing my statement, he said he was then satisfied that he had done what was proper in the case. I did not feel at all hurt at the course taken by Mr. Ewing, because I knew that the whole matter had been grossly misrepresented to him. I had been waited upon by a friend, who earnestly remonstrated with me upon the subject of abolishing Mr. Mackall's office; as he said that, in that case, the influence of a powerful family connection would be immediately wielded against me. I did not exactly see the propriety of being governed by such apprehensions, and took the course prompted by my sense of duty, and relying confidently upon the favorable result of an impartial investigation, should any difficulty occur.

"There is but little revenue collected at this port, and I felt it to be my duty to conduct it business with as little expense as possible. I found the expense of this office, as far as

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Georgetown is concerned, to be - $2,573 34
"I have reduced these expenses
to the sum of - - - - - 1,045 00

"Thus saving to the government $1,428 34 without at all impairing the efficiency of the service. The whole expense of the office for Georgetown is now absolutely $45 a year less than Mr. Mackall was receiving for doing nothing. The expenses in Washington I have re-
[*274] duced twenty-five per cent. I did *this from a sense of duty, but not without anticipating much misrepresentation and abuse.

"I am, sir, with great regard, your obedient servant, "H. ADDISON.

"To the PRESIDENT."

On the 18th of November, 1841, Robert White brought the two suits mentioned in the titling of this statement.

The declaration in the suit against Nicholls and others contained two counts.

The first was as follows: "And whereupon the said plaintiff, by Brent & Brent and Francis S. Key, his attorneys, complains, for that whereas previous to, and at the time of committing of the several grievances by the defendants as hereinafter mentioned, the plaintiff was collector of the customs for the district, and inspector of the revenue for the port of Georgetown in the District of Columbia; yet the defendants well knowing the premises, but greatly envying the happy state and condition of the said plaintiff, and contriving, and wickedly and maliciously intending to injure the plaintiff in his good name, fame, and credit, and to bring him into public scandal, infamy, and disgrace, with and amongst all his neighbors, and other good and worthy citizens of the county aforesaid, and to cause the plaintiff to be removed from his said office, heretofore, to wit; on the 20th June, 1841, at Georgetown, to wit, at the county aforesaid, falsely, wickedly, and maliciously did compose and publish, and caused to be composed and published, of and concerning the plaintiff, and of and concerning his aforesaid office, and of and concerning the plaintiff's conduct in his said office, for the purpose of procuring his removal from said office, a certain false, malicious, and defamatory libel, containing, amongst other things, the false, scandalous, malicious, defamatory, and libelous matter of and concerning the plaintiff, and of and concerning his aforesaid office, and of and concerning his said plaintiff's conduct in his said office, for the purpose of procuring the removal of the plaintiff from his said office, as follows, that is to say: (then followed a copy of the letter to the President of June 26, 1841, down to the words "delivered by that gentleman," with the necessary innuendoes).

The second count was as follows: "And whereas, also, the said defendants, intending and contriving to cause the plaintiff to be removed from the office then held by him, as stated in the first count heretofore, to wit, on the 20th June, 1841, at Georgetown, to wit, at the county aforesaid, falsely, wickedly, and maliciously did compose and publish, and caused to be composed and published, of and concerning the plaintiff, and of and concerning his office, and of and concerning his conduct in his said office, and for the purpose of procuring his removal from his said office, a certain other false, malicious, and defamatory libel, containing, amongst other things, the following false, scandalous, malicious, defamatory, and libelous *matter of and concerning the plaintiff, [*275 and of and concerning his said office, and of and concerning his, said plaintiff's, conduct in his said office, and for the purpose of procuring the plaintiff's removal from his said office, that is to say:

"Mr. White's was the place, &c.," (then followed the remainder of the letter not included in the first count).

The declaration concluded as follows:

"By reason of publishing of which said several libels, the said plaintiff saith, that he hath been and is greatly injured in his good name, fame, and credit, with and amongst all his neighbors, friends, and acquaintance. And by reason of the publishing of which said several libels, the plaintiff saith that he was heretofore, to wit, on the 12th day of July, 1841, at the county aforesaid, removed from his office aforesaid, and was thereby deprived of the emoluments and income of said office, amounting to a large sum of money, to wit, the sum of three thousand dollars annually, and hath been otherwise greatly injured, whereby the said plaintiff saith that he hath damage, and is the worse, to the value of twenty-five thousand dollars; and therefore he brings suit, and so forth. BRENT & BRENT, for plaintiff."

The declaration in the suit against Addison also contained two counts, with no essential variation from the above.

The defendants pleaded not guilty, and in November, 1842, the causes came on for trial. They were tried together, the same evidence and instructions prayed from the court being common to both. The jury, under the direction of the court, found a verdict of "not guilty," and the following bills of exceptions show the points of law which were raised and ruled:

Plaintiff's First Bill of Exceptions.

"In the trial of these causes, the plaintiff, to support the issues on his part, offered evidence to show that he was duly appointed to the office set forth and described in the declaration, on the 21st day of July, 1840; and that he was acting as such officer, from that time till the 9th day of July, 1841, when he was removed from office, and the defendant, Henry Addison, appointed in his place; and then further offered in evidence a written paper (viz., the letter to the President), and proved that the same was in the handwriting of the defendant Addison, and that the signatures thereto were in the handwriting, respectively, of the several defendants; that the said paper so written and subscribed was sent to the President of the United States, and by him sent to the Treasury Department, where it was filed on or before the 30th June, 1841, and kept by a clerk of that department having charge of such papers, and shown on one occasion to one person by him —which person had called to see it at the request of the plaintiff, and also on another occasion to another person.

*"And the plaintiff further offered [*276 evidence that one of the said defendants, whom

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he named, said, about the time of signing the said paper, and before the plaintiff was turned out of office, that the plaintiff had signed a memorial against the banks in the District, and swore that he would have him turned out of office.

"And also offered evidence that another of said defendants, also named, had on one occasion said, after the said paper had been sent to the President, that he made no charges against the plaintiff; and on another occasion he stated he had made charges, and that he could prove against the plaintiff more than he had so charged.

"And the plaintiff further proved that the said paper, so written, and subscribed, was shown to a citizen of Georgetown for the purpose of being subscribed by him, who refused so to do, because he was not acquainted with all the facts stated in said paper.

"And the plaintiff, upon the evidence aforesaid, offered thereupon to read the said paper to the jury; but the court refused to allow the said paper to be read in evidence to the jury.

"To which refusal of the court the plaintiff excepts, and prays the court to sign and seal this bill of exceptions which is done accordingly, this 8d day of January, 1843.

"B. THRUSTON, [SEAL.]
"JAS. S. MORSELL. [SEAL.]"

Plaintiff's Second Bill of Exceptions.

"And the plaintiff further offered, after the evidence aforesaid in former exceptions had been given, to show the malice of defendants in writing, signing, and presented said paper, to read the said paper, and offered evidence in connection therewith of the falsehood of the charge therein stated, which the court also refused, and the plaintiff excepts to said refusal, and prays the court to sign and seal this bill of exceptions, which is done accordingly, this 8d January, 1843.

"B. THRUSTON, [SEAL.]
"JAS. S. MORSELL. [SEAL.]"

Plaintiff's Third Bill of Exceptions.

"And the plaintiff, after the evidence was offered, as stated in the first and second bill of exceptions, and after the opinion had been given by the court, as therein stated, then offered to prove by substantial evidence, for the purpose of showing malice in the defendants in writing, signing, and presenting the said paper, that the charge contained in the said paper, of the plaintiff's having lost the confidence of the men from whose labors and enterprise, the emoluments of his office flowed, was false, malicious, and without probable cause; that all the persons doing business with the said plaintiff, as such officer in his said office, during all the time of his continuing in office, were General Walter Smith, Henry McPherson, John Hopkins, and Jabez Travers—all which per-

277*] sons the plaintiff *now offers as witnesses to prove that the plaintiff had never lost their confidence, but that they always continued their confidence in the plaintiff, and approved of his conduct as such officer. And also, further to falsify the said charge, the plaintiff offers to prove that an election was held in Georgetown, in February, 1841 and 1842, for a common councilman in said town, in which election a majority of the qualified voters of said town voted for the plaintiff; and he was elected to the common council, notwithstanding the active opposition of several of the defendants.

"And the plaintiff, also, further offered to prove that the charges in the said paper of the plaintiff's having descended to the lowest means to secure the favor of the late administration, and that he procured Doctor Duncan to deliver a speech in Georgetown in the abuse of General Harrison; and that the plaintiff's was the place where the leading members of his party nightly assembled up to the close of the presidential election; and that the plaintiff, since his appointment to his said office, had distributed bushels of the Globe, were false, malicious, and without probable cause, by producing witnesses to falsify and disprove the said charges, and show that there was no foundation or probable cause for said charges.

"But the court was of opinion that such evidence was inadmissible, and refused to allow the same to be given in evidence to the jury; to which refusal the plaintiff, by his counsel, excepts, and prays the court to sign and seal this bill of exceptions, which is done accordingly, this 8d of January, 1843.

"W. CRANCH, [SEAL.]
"JAS. S. MORSELL. [SEAL.]"

Plaintiff's Fourth Bill of Exceptions.

"In the further trial of this cause, and after offering the evidence stated in the preceding bills of exceptions, and after the opinions and decisions of the court as therein stated, the plaintiff, by his counsel, in order to show express malice, and the want of all probable cause in the defendants, in writing, and subscribing, and presenting, as before stated, the paper—writing set out in the declaration—and that the same was so written, subscribed, and presented by such defendants, not for the purpose of claiming redress for a grievance in the conduct of a public officer, but maliciously, and from private pique and resentment, and in order that the said paper, with the evidence now to be offered, should go to the jury as evidence of malice on the part of the defendants by competent evidence, and the want of probable cause for the charges contained in said paper, and in connection with such evidence to offer the said paper in evidence to the jury.

"And the defendants, by their counsel, objected to said evidence; and thereupon the court refused to allow the same to be given for the purpose above stated; or for any other purpose; to which the plaintiff, *by his [*278 counsel, excepts, and prays the court to sign and seal this bill of exceptions, which is done accordingly, this 5th day of January, 1843.

"Witness our hands and seals, this 5th day of January, 1843.

"B. THRUSTON, [SEAL.]
"JAS. S. MORSELL. [SEAL.]"

Plaintiff's Fifth Bill of Exceptions.

"In the further trial of this cause, and after the evidence stated in the preceding bills of exceptions had been offered as stated, and after the opinions and rejections of evidence as herein stated, the plaintiff, in support of the issues joined on his part, for the purpose of proving a publication of the libel charged in the decla-

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ration on the part of certain of defendants, whose names are signed to the papers, now offered in evidence the following papers (the several handwritings of the said defendants signing the same being admitted):

"The letter to the Secretary of the Treasury;

"The letter of June 19th, 1841;

"The letter of September 21st, 1841;

by showing, from the said papers, that the said defendants had referred to and re-asserted the truth of the charges contained in the said libel charged in the declaration; and that such reference and re-assertion was not privileged, and was a publication of the libel, for which said defendants were responsible in this action.

"And in the case against Henry Addison, the plaintiff, for a like purpose, and to prove in the same way such a publication of the libel charged in the declaration as he was responsible for in this action, offered in evidence a paper, admitted to be in the handwriting of said defendant, Henry Addison, viz.: the letter of September 23d, 1841.

"And the defendants, by their counsel, objected to the admissibility of said papers so offered in evidence.

"And the court sustained the said objection, and refused to allow the said paper to be given in evidence; to which opinion and refusal the plaintiff, by his counsel, excepts, and prays the court to sign and seal this bill of exceptions; which is done accordingly, this 5th day of January, 1843, as witness our hands and seals.

"W. CRANCH, [SEAL.]

"JAS. S. MORSELL. [SEAL.]"

To review the decision of the court on these several points of law the present writ of error was brought.

Messrs. May and *R. Brent* for the plaintiff in error.

Messrs. Bradley and *Coxe* for the defendants in error.

Mr. May, for plaintiff in error:

What is the law applicable to the facts exhibited in this record?

279*] *It will hardly be denied that, in ordinary cases, the writing here declared on would, in view of its terms and tendency, be considered a libel, and the defendants to have acted maliciously, that is, with the view to effect those consequences, to which the means they have used naturally and obviously lead. (2 Starkie's Ev., 361.)

But it will be contended that this is distinguished from the ordinary cases of libel, by reason of the occasion of writing and publishing it; it purporting to be a complaint about an official grievance, and being addressed to the President of the United States, the proper authority to redress it; that this is what is termed "a privileged communication."

That there is such a description of libels, well classified by stable legal distinctions, is admitted. They are founded upon considerations of public policy and convenience, and do confer upon their authors and publishers certain privileges.

Now, what is the nature of a privileged communication, and what are its legal incidents?

It may be defined to be a writing published *bona fide* about a lawful occasion.

This lawful occasion may be found in the performance of a public or private duty of a legal or moral nature—of the fair and honest fulfillment of such obligations as spring out of the social relations of life; as in the exhibition of articles of the peace before a civil magistrate, or other communication in the way of a judicial proceeding; a petition about a public nuisance, or remonstrance presented by citizens to the proper authorities; an account of the character of a servant, made by a master; a report on the character of an intended husband, given by a brother to a sister, &c.

But these privileged libels are separated into two classes.

The first are all such communications as are presented in the course of justice, and before a tribunal having power to examine into their truth or falsehood.

The second class are all such as do not arise in the course of justice, and before a tribunal, &c.

Now, it is said to be the incident of the first class that the occasion is an absolute bar to an action, even though the libel be false and malicious.

The incidents of the second class are that the law only raises a *prima facie* presumption in favor of the occasion, which operates in the nature of evidence, and supplies a *prima facie* justification; and also that, under the general issue plea, the motives of the defendant and the truth of the libel may be given in evidence to the jury.

But there must be the concurrence of an upright intention along with the lawful occasion. It must not be an officious intermeddling with the rights of others, nor published through hatred and ill-will. It is the first requisite of this class of "privileged communications," that there be no taint of personal malice about it.

*A writing thus justified by the oc- [*280 casion and good motives of its authors, bestows upon them an irresponsibility to legal condemnation, even though it produce injury to the rights of others.

This doctrine is founded not only upon considerations of public convenience, but also on a confidence in human motives, where they are upright and pure.

The law preferring to suffer the contingencies of occasional injury that may happen to individuals, rather than by shutting the door to the freedom of inquiry and complaint upon the administration of public affairs, the proceedings of courts of justice, or the performance of moral duties, where done fairly and truthfully, and the well-being of society should be prejudiced. Besides, the party accused in such cases is not without redress. If he be assailed unjustifiably in a judicial proceeding in a court, its dignity is offended and its censures secured; besides, the benefit of evidence to vindicate himself and disprove such charges is afforded. The true criterion of the privilege in the first class (which creates a bar to an action) is to be found in the power of the tribunal to afford this redress. If the libel be published before those who cannot afford this summary redress, then the occasion does not bar an action, and the libel belongs to the second class of privileged communications; and in all these, if the libel be malicious in fact, the privilege is gone, and the pretext of the occasion only serves to aggravate the wrong.

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But the law in favor of these occasions will not (as in ordinary libels) imply malice, but it must be proved. And this is the great distinction.

There are two kinds of malice, as *Justice* Bayley distinguishes in 4 Barn. & Cress., 255; malice in law and malice in fact. The first is inferred, the last must be proved. The first is a legal inference from all ordinary libels. The last is a legal requisite to maintain an action upon a privileged libel; and when malice in fact can be proved, the privilege that surrounded the libel, and in legal contemplation purified it, is stripped off, and the exposed libeler stands on the same level with the rest of his kind.

Lord Mansfield said, in Buller's *N. P.*, 8, "Malice is the gist of the action, which is not implied from the occasion, but must be directly proved."

And to sustain this summary of the general doctrine, are the following authorities:

English: 4 Reports, 14; 2 Smith, 3; 1 Barn. & Ald., 239; 5 Barn. & Ald., 648; 8 Barn. & Cress., 578; 1 Moody & Rob., 198; 2 Bingham's New Cases, 464; 1 Saund., 131; 2 Burrows, 808.

American cases and authorities: 2 Kent's Com., 22. In Massachusetts, 3 Pick., 383; 4 Mass., 168; 9 Mass., 264. New York, 5 Johns., 84; 5 Johns., 524; 4 Wendell, 135. Pennsylvania, 2 Serg. & Rawle, 22; 4 Serg. & Rawle, 423. Maryland, 5 Harr. & Johns., 459.

281*] *Now, the case at bar must belong to the second class of privileged communications, if indeed it be privileged at all. The President could not afford any redress to the plaintiff. He has no power to compel the attendance of witnesses, or to administer an oath. He could not inquire in a judicial way into the truth or falsehood of the charges. The plaintiff then turned to the Circuit Court for redress, and brought his action on the case. But that court refused, as the exceptions show, to allow him to read the libel to the jury, and to prove it "false and without probable cause," and that the defendants were actuated by malice in fact, or "express malice." But falsehood and want of probable cause are in themselves evidence of malice in fact. (1 Moody & Rob., 470; 4 Bingham, 408; 4 Serg. & Rawle, 423; 5 Harr. & Johns., 458.)

But the privilege of this libel is very questionable. It prefers charges not relating in any wise to the plaintiff's official character. It alleges political offenses committed before his appointment to office. It shows a personal aspiration after the office held by plaintiff. It is couched in terms of great asperity, and breathes throughout a spirit wholly incompatible with the honest purpose of redressing a public grievance. The privilege is doubtful upon the face of the libel, and whether privileged or not was a question for the jury. (9 Barn. & Cress., 406; 2 Bingham, 408.)

The fifth exception shows a reiteration of the libel by the defendant Addison, after the plaintiff was removed from office. Then there was no privilege, and such repetition is a republication. (3 Stephens' *N. P.*, 2564, and cases there cited.)

I have now explored this record. Questions of the gravest consequences are presented by it. They may well claim to be decided by this, the highest court in our land. The doctrine of "privileged communications" is here to be settled. There is seeming contrariety of judicial opinion on the subject in our country. The cases in 1 Saunders, in 5 Johnson, and in 2 Tyler, were approved by the court below as establishing the irresponsibility of these defendants, and will be relied on here to sustain that position.

Under the free dispensations of our Constitution and laws, where the greatest liberty of speech and of publication is allowed, and where this liberty, under the heat of political passions, is ever tending towards licentiousness, in assaults upon political adversaries who may be enjoying in office the fruits of party success, the questions here presented become most interesting, and the decision that your honors may pass upon them will ascertain the value of that great right, to this description of citizens, "of being secure in their good reputation."

Mr. Bradley, for defendants:

If this action should be maintained there will be no end to actions for libels. The defendants were dissatisfied with a public officer, and *complained of what they thought a [**282** grievance to the officer who could redress it. If this course was not absolutely privileged, yet it was so much so as to compel the plaintiff to show that the acts were done without probable cause and with malice, and to charge it so in his declaration. Buller's *N. P.*, as cited, says that malice and falsehood are the gist of the action, but publication is also necessary. The case in 7 Term R., 110, 111, shows that the occasion there justified the publication; and this is always a question for the court. In 1 Barn. & Ald., 339, the jury determined whether or not the words were used, but the question of occasion was reserved for the court. In 12 Wendell, 410, 546, all the American authorities are summed up. The great difficulty is to know how far the question of privilege goes. In this case the court below thought that the letters were addressed to such officers as were competent to remedy the grievance. In 1 Term R., 130, the defendant pleaded precisely what has been shown in this case. In 2 Tyler's (Vermont) Rep., 129, 133, it was held that where the occasion made a petition to the Legislature necessary no action would lie. If in this case the defendants had published the letter to the President, no privilege could have been pleaded. (Kent's Com., 22.)

In 2 Serg. & Rawle, 23, the libel was read to the jury without objection; but here we object that the plaintiff himself shows it to be a case of privilege.

In 4 Serg. & Rawle, 424, it was ruled that where malice and want of probable cause were relied upon to take away the ground of privilege, they must be averred in the declaration. So, also, 1 Wilson, 242; 2 Wilson, 304. All the exceptions in this case depend upon the first, for if the libel cannot be read the other papers cannot.

Mr. Coxe, on same side:

What are the points in the case? [*Mr. Coxe* here examined the several counts in the declaration.] The result of the whole is, that a person belonging to one party charges some of the other party with being guilty of a crime to effect his removal from office. The communi-

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cation charged as libelous, was addressed to the President, and is not averred to have been ever published. That officer was vested with the whole control of the subject. The paper was sent to the Secretary of the Treasury, from whom an agent of the plaintiff obtained it. There was no proof of publication whatever. Some of the exceptions relate to mere matters of aggravation, which were not admissible in evidence unless a ground of action was laid. Publication is essential; and it must be proved before the libel can be given in evidence. (Starkie Ev., 351.) The defendants are charged, it is true, with having shown the paper to citizens of Georgetown; but they had a right to show it for the purpose of obtaining signatures. (1 Wendell, 547.)

283*] *Was it a publication to send it to the President? It was not sent for the purpose of injuring the plaintiff's character, but solely for the purpose of obtaining his removal from office. It was a perfectly constitutional proceeding; if not, Congress should pass an act to burn all the letters in the departments. The President had full and exclusive jurisdiction over the subject, and was the sole judge of the propriety of the removal of the plaintiff. His reasons cannot be inquired into by the judiciary. (13 Peters, 255.)

It is a well established principle that when an action is brought for an act which is in itself lawful, those matters beyond the act, which make it criminal must be averred in the declaration. For example, in an action for keeping a mischievous dog, it must be averred that the dog was addicted to biting, and that the defendant knew it to be so. In this case the defendants had a right to address the President, and it must be averred that there was express malice, and also a want of probable cause. If the paper had been printed and handed about, it would have given a different aspect to the affair. In *Stockdale's* case, he was not responsible as long as the paper was confined to Parliament. Generally, sending it to a third party is a publication, but not in all cases; such as sending information about a servant, &c.

It is said that the President could not have taken testimony about the matter. Suppose it to be so, and that his functions are imperfect, still his jurisdiction over the subject matter and power to act according to his judgment cannot be denied.

Evidence of malice cannot be given under this declaration. There should have been a special action on the case.

Mr. R. J. Brent, for plaintiff, in conclusion:

This declaration is in the usual form, if the paper is an ordinary libel; but not, if the paper is one which the party was privileged to send. On the face of the paper, it is clear that the removal of the plaintiff was not asked for upon public grounds, because the acts complained of took place before his appointment to office. He is not charged with unfitness for office, but held up to odium as a private individual. There was a personal motive in all this. Addison was to be appointed in his place. The motive is an important consideration. (2 Bingh. New Cases, 463.)

The paper is actionable on its face, as it charges the plaintiff with things which are calculated to bring public odium upon him, such as "descending to the lowest means," &c.

The declaration avers special damage. (1 Chitty's Pl., 291, ed. 1829; 3 Johns. Cas., 198.)

It has been said that the declaration is insufficient, because it does not aver express malice. But it charges that the acts were done "falsely and maliciously." Is not this enough? It does not *aver that the libel was published [*284 "in presence of divers citizens," but it says that it was "published," which is the usual form.

In 2 Bingham's New Cases, 273, the declaration was the same as in the present case.

In all the cases cited, the libel was read to the jury, but in the court below it was shut out.

As to the question in pleading, see 4 Wend., 136; 2 Burr., 812; 4 Bos. & Pul., 48. In the last case the action was for defaming a candidate for Parliament. The averment in the declaration was the same as in this case, and the plaintiff recovered.

As to what is a sufficient averment, see Holt on Libels, 256; 2 Smith, 43.

Mr. Justice DANIEL delivered the opinion of the court:

In the investigation of these cases it is deemed unnecessary to examine *seriatim* the five bills of exceptions sealed by the Circuit Court, and made parts of the record in each of them. The papers declared upon as libelous, and the instructions asked of the Circuit Court, are literally the same in both actions; the reasons, too, which influenced the decision of the court pervade the whole of these instructions, and are presented upon their face.

Before proceeding more particularly to consider the rulings of the court upon these instructions, it may be proper to animadvert upon a point of pleading which was incidentally raised in the argument for the defendants in error; which point was this: that, assuming the publication declared on as a libel to be one which would be *prima facie* privileged, the circumstances which would render it illegal, in other words, the malice which prompted it, must be expressly averred. Upon this point the court will observe, in the first place, that in cases like the one supposed in argument, they hold, that in describing the act complained of, the word "maliciously" is not indispensable to characterize it; they think that the law is satisfied with words of equivalent power and import: thus, for instance, the word "falsely" has been held to be sufficiently expressive of a malicious intent, as will be seen in the authorities cited. (2 Saund., 242 *a*, *note* 2.) But the declaration in each of these cases charges the defendants, in terms, with maliciously and wickedly intending to injure the plaintiff in his character, and thereby to affect his removal from office, and the appointment of one of the defendants in his stead; and with that view, with having falsely, wickedly, and maliciously composed and published, and having caused to be composed and published a false, malicious, and defamatory libel concerning the plaintiff, both as a citizen and an officer. The averments in these declarations appear to the court, in point of fact, to be full up to the requirement insisted on, and to leave no room for the criti-

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cism attempted with respect to them. But the defense set up for the defendants in error reaches much farther and to results infinitely higher 285*]*than anything dependent upon a mere criticism upon forms of pleading. It involves this issue, so important to society, viz.: How far, under an alleged right to examine into the fitness and qualifications of men who are either in office or are applicants for office—or, how far, under the obligation of a supposed duty to arraign such men either at the bar of their immediate superior, or that of public opinion, their reputation, their acts, their motives or feelings may be assailed with impunity—how far that law, designed for the protection of all, has placed a certain class of citizens without the pale of its protection? The necessity for an exclusion like this, it will be admitted by all, must indeed be very strong to justify it; it will never be recognized for trivial reasons, much less upon those that may be simulated or unworthy. If we look to the position of men in common life, we see the law drawing providently around them every security for their safety and their peace. It not only forbids the imputation to an individual of acts which are criminal and would subject him to penal infliction; but, regarding man as a sympathetic and social creature, it will sometimes take cognizance of injuries affecting him exclusively in that character. It will accordingly give a claim to redress to him who shall be charged with what is calculated to exclude him from social intercourse; as, for instance, with being the subject of an infectious, loathsome, and incurable disease. The principle of the law always implying injury, wherever the object or effect is the exposure of the accused to criminal punishment or to degradation in society. These guardian provisions of the law, designed, as we have said, for the security and peace of persons in the ordinary walks of private life, appear in some respects to be extended still farther in relation to persons invested with official trusts. Thus it is said that words not otherwise actionable may form the basis of an action when spoken of a party in respect of his office, profession, or business. (*Ayston* v. *Blagrave*, Strange, 617, and 2 Ld. Raym., 1369.) Again, in *Lumby* v. *Allday* (1 Crompt. & Jarv., 301), where words are spoken of a person in an office of profit, which have a natural tendency to occasion the loss of such office, or which impute misconduct in it, they are actionable. And this principle embraces all temporal offices of profit or trust, without limitation. (1 Starkie on Slander, 124.)

With regard to that species of defamation which is effected by writing or printing, or by pictures and signs, and which is technically denominated libel, although in general the rules applicable to it are the same which apply to verbal slander, yet in other respects it is treated with a sterner rigor than the latter; because it must have been effected with coolness and deliberation, and must be more permanent and extensive in its operation than words, which are frequently the offspring of sudden gusts of passion, and soon may be buried in oblivion. (*Rex* v. *Beau*, 1 Ld. Raym., 414.) It follows, therefore, that actions may be maintained for defamatory words published in 286*] *writing or in print, which would not have been actionable if spoken. Thus, to publish of a man in writing that he had the itch and smelt of brimstone, has been held to be a libel. (*Per* Wilmot, *C. J.*, in *Villers* v. *Mousley*, 2 Wils., 403.) In *Cropp* v. *Hilney* (3 Salk.) Holt, *Ch. J.*, thus lays down the law: "That scandalous matter is not necessary to make a libel; it is enough if the defendant induce a bad opinion to be had of the plaintiff, or make him contemptible or ridiculous." And Bayley, *J.*, declares in *McGregor* v. *Thwaites* (3 Barn. & Cress., 33), that "an action is maintainable for slander either written or printed, provided the tendency of it be to bring a man into hatred, contempt, or ridicule." To the same effect are the decisions in 6 Bingh., 409, (*The Archbishop of Tuam* v. *Robeson*); and in 4 Taunt., 355 (*Thorley* v. *The Earl of Kerry*). In every instance of slander, either verbal or written, malice is an essential ingredient; it must in either be expressly or substantially averred in the pleadings; and whenever thus substantially averred, and the language, either written or spoken, is proved as laid, the law will infer malice until the proof, in the event of denial, be overthrown, or the language itself be satisfactorily explained. The defense of the defendants in error, the defendants likewise in the Circuit Court, is rested upon grounds forming, it is said, an established exception to the rule in ordinary actions for libel; grounds on which the decision of the Circuit Court is defended in having excluded from the jury, under the declarations in these cases, the writings charged in them as libelous. These writings were offered as evidence of express malice in the defendants. The exception relied on belongs to a class which, in the elementary treatises, and in the decisions upon libel and slander, have been denominated privileged communications or publications. We will consider, in the first place, the peculiar character of such communications, and the extent of their influence upon words or writings as to which, apart from that character, the law will imply malice. Second, we will examine the burden or obligation imposed by the law upon the party complaining to remove presumptions which might seem to be justified by the occasion of such communications, and to develop their true nature. And last, we will compare the requirements of the law with the character of the publication before us, and with the proceedings of the Circuit Court in reference thereto. The exceptions found in the treatises and decisions before alluded to are such as the following: 1. Whenever the author and publisher of the alleged slander acted in the *bona fide* discharge of a public or private duty, legal or moral; or in the prosecution of his own rights or interests. For example, words spoken in confidence and friendship, as a caution; or a letter written confidentially to persons who employed A as a solicitor, conveying charges injurious to his professional character in the management of certain concerns which they had intrusted to him, and in which the writer of the letter was also interested. *2. Anything said or written by a [*287 master in giving the character of a servant who has been in his employment. 3. Words used in the course of a legal or judicial proceeding, however hard they may bear upon the party of whom they are used. 4. Publications duly

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made in the ordinary mode of parliamentary proceedings, as a petition printed and delivered to the members of a committee appointed by the House of Commons to hear and examine grievances.

But the term "exceptions," as applied to cases like those just enumerated, could never be interpreted to mean that there is a class of actors or transactions placed above the cognizance of the law, absolved from the commands of justice. It is difficult to conceive how, in society where rights and duties are relative and mutual, there can be tolerated those who are privileged to do injury *legibus soluti;* and still more difficult to imagine, how such a privilege could be instituted or tolerated upon the principles of social good. The privilege spoken of in the books should, in our opinion, be taken with strong and well defined qualifications. It properly signifies this, and nothing more. That the excepted instances shall so far change the ordinary rule with respect to slanderous or libelous matter, as to remove the regular and usual presumption of malice, and to make it incumbent on the party complaining to show malice, either by the construction of the spoken or written matter, or by facts and circumstances connected with that matter, or with the situation of the parties, adequate to authorize the conclusion. Thus, in the case of *Cockayne* v. *Hodgkisson* (5 Car. & Pa., 543), we find it declared by Parke, Baron, "That every willful and unauthorized publication injurious to the character of another is a libel; but where the writer is acting on any duty, legal or moral, towards the person to whom he writes, or is bound by his situation to protect the interests of such person, that which he writes under such circumstances is a privileged communication, unless the writer be actuated by malice." So in *Wright* v. *Woodgate* (2 Crompton, Meeson & Roscoe, 573), it is said, "a privileged communication means nothing more than that the occasion of making it rebuts the *prima facie* inference of malice arising from the publication of matter prejudicial to the character of the plaintiff, and throws upon him the *onus* of proving malice in fact; but not of proving it by extrinsic evidence only; he has still a right to require that the alleged libel itself shall be submitted to the jury, that they may judge whether there is evidence of malice on the face of it." In regard to the second example mentioned, viz., that of a master giving the character of a servant, although this is a privileged communication, it is said by Lord Mansfield in *Weatherstone* v. *Hawkins* (1 T. R., 110), and by Parke, J., in *Child* v. *Affleck* (9 Barn. & Cress., 406), that if express malice be shown, the master will not be excused. And the result of these authorities, with many others which bear upon this head, is this, that if the conduct of 288*] the defendant entirely consists *of an answer to an inquiry, the absence of malice will be presumed, unless the plaintiff produces evidence of malice; but if a master unasked, and officiously, gives a bad character to a servant, or if his answer be attended with circumstances from which malice may be inferred, it will be a question for the jury to determine, whether he acted *bona fide* or with malice.

With respect to words used in a course of judicial proceeding, it has been ruled that they are protected by the occasion, and cannot form the foundation of an action of slander without proof of express malice; for it is said that it would be matter of public inconvenience, and would deter persons from preferring their complaints against offenders, if words spoken in the course of their giving or preferring their complaint should be deemed actionable (per Lord Eldon in *Johnson* v. *Evans* (3 Esp., 32); and in the case of *Hodgson* v. *Scarlett* (1 Barn. & Ald., 247), it is said by Holroyd, *J.*, speaking of the words of counsel in the argument of a cause: "If they be fair comments upon the evidence, and relevant to the matter in issue, then unless malice be shown, the occasion justifies them. If, however, it be proved that they were not spoken *bona fide*, or express malice be shown, then they may be actionable." Abbot, *J.*, in the same case remarks: "I am of opinion that no action can be maintained unless it can be shown that the counsel availed himself of his situation maliciously to utter words wholly unjustifiable." In relation to proceedings in courts of justice, it has been strongly questioned whether, under all circumstances, a publication of a full report of such proceedings will constitute a defense in an action for a libel. In the case of *Curry* v. *Walter* (1 Bos. & Pull., 525) it was held that a true report of what passed in a court of justice was not actionable. The same was said by Lord Ellenborough in *Rex* v. *Fisher* (2 Camp., 563): but this same judge in *Rex* v. *Creevy* (1 M. & S., 273), and Bayley, *J.*, in *Rex* v. *Carlisle*, dissented from this doctrine as laid down in *Curry* v. *Walter*, observing that it must be understood with very great limitations; and by Tindal, *Ch. J.*, in the case of *Delegal* v. *Highly* (3 Bing. N. C., 690), it is said "to be an established principle upon which the privilege of publishing the report of any judicial proceeding is admitted to rest, that such report must be strictly confined to the actual proceedings in court, and must contain no defamatory observations or comments from any quarter whatsoever in addition to what forms strictly and properly the legal proceedings." So a publication of the result of the evidence is not privileged; the evidence itself must be published. Neither is a publication of a counsel's speech unaccompanied by the evidence. (*Lewis* v. *Walter* 4 Barn. & Ald., 605; *Flint* v. *Pike*, *Ibid.*, 473.)

Publications duly made in the ordinary course of parliamentary proceedings have been ruled to be privileged, and therefore not actionable. As where a false and scandalous libel was contained in *a petition which the de- [*289 fendant caused to be printed and delivered to the members of the committee appointed by the House of Commons to hear and examine grievances, it was held not to be actionable. Such appears to be the doctrine ruled in *Lake* v. *King* (1 Saund., 163); and the reason there assigned for this doctrine is, that the libel was in the order and course of proceedings in the Parliament, which is a court. The above case does certainly put the example of a privileged communication more broadly than it has been done by other authorities, and it seems difficult, from its very comprehensive language, to avoid the conclusion that there might be instances of privilege which could not be reached even by

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the clearest proof of express malice. The point, however, appearing to be ruled by that case, is so much in conflict with the current of authorities going to maintain the position that express malice cannot be shielded by any judicial forms, that the weight and number of these authorities should not, it is thought, be controlled and even destroyed by the influence of a single and seemingly anomalous decision. The decision of *Lake* v. *King* should rather yield to the concurring opinions of numerous and enlightened minds, resting as they do upon obvious principles of reason and justice. The exposition of the English law of libel given by Chancellor Kent in the second volume of his Commentaries (part 4th, p. 22), we regard as strictly coincident with reason as it is with the modern adjudications of the courts. That law is stated by Chancellor Kent, citing particularly the authority of Best, *J.*, in the case of *Fairman* v. *Ives* (5 Barn. & Ald., 642), to the following effect: "That petitions to the king, or to Parliament, or to the Secretary of War, for redress of any grievance, are privileged communication, and not actionable libels, provided the privilege is not abused. But if it appear that the communication was made maliciously, and without probable cause, the pretext under which it was made aggravates the case, and an action lies." It is the undoubted right, we know, of every citizen to institute criminal prosecutions, or to exhibit criminal charges before the courts of the country; and such prosecutions are as much the regular and appropriate modes of proceeding as the petition is the appropriate proceeding before Parliament—yet it never was denied that a prosecution with malice, and without probable cause, was just foundation of an action, though such prosecution was instituted in the appropriate court, and carried on with every formality known to the law. The Parliament, it is said, is a court, and it is difficult to perceive how malicious and groundless prosecutions before it can be placed on a ground of greater impunity than they can occupy in another appropriate forum. The case of *Lake* v. *King*, therefore, interpreted by the known principles of the law of libel, would extend the privilege of the defendant no farther than to require as to him proof of actual malice. A different interpretation would establish, as to such a case, a rule that is perfectly anomalous, **290***] and *depending upon no reason which is applicable to other cases of privilege.

By able judges of our own country, the law of libel has been expounded in perfect concurrence with the doctrine given by Chancellor Kent. Thus, in the case of *The Commonwealth* v. *Clap* (4 Mass. Rep., 169), it is said by Parsons, *Ch. J.*, "that a man may apply by complaint to the Legislature to remove an unworthy officer; and if the complaint be true, and made with honest intentions of giving information, and not maliciously, or with intent to defame, the complaint will not be a libel. And when any man shall consent to be a candidate for a public office conferred by the election of the people, he must be considered as putting his character in issue, so far as it may respect his fitness and qualifications for the office; and publications of the truth on this subject, with the honest intention of informing the people, are not a libel; for it would be unreasonable to conclude, that the publication of truths, which it is the interest of the people to know, should be an offense against their laws. For the same reason, the publication of falsehood and calumny against public officers, or candidates for public offices, is an offense dangerous to the people, and deserves punishment, because the people may be deceived, and reject their best citizens, to their great injury, and, it may be, to the loss of their liberties. The publication of a libel maliciously, and with intent to defame, whether it be true or not, is clearly an offense against law on sound principles, &c."

In the case of *Bodwell* v. *Osgood* (3 Pick. Rep., 379), it was ruled that a false complaint, made with express malice, or without probable cause, to a body having competent authority to redress the grievance complained of, may be the subject of an action for a libel, and the question of malice is to be determined by the jury. The court in this last case say (p. 384): "It may be admitted, that if the defendant had proceeded with honest intentions, believing the accusation to be true, although in fact it was not, he would be entitled to protection, and that the occasion of the publication would prevent the legal inference of malice." The court proceed further to remark (p. 385): "It has been argued that the jury should have been instructed, that the application to a tribunal competent to redress the supposed grievance was *prima facie* evidence that the defendant acted fairly, and that the burden of proof was on the plaintiff to remove the presumption. The judge was not requested thus to instruct the jury. He did, however, instruct them that the burden of proof was on the plaintiff to satisfy them that the libel was malicious, and that if the plaintiff did not prove the malice beyond any reasonable doubt, that doubt should be in favor of the defendant."

We have thus taken a view of the authorities which treat of the doctrines of slander and libel, and have considered those authorities particularly *with reference to the distinction [*291 they establish between ordinary instances of slander, written and unwritten, and those which have been styled privileged communications; the peculiar character of which is said to exempt them from inferences which the law has created with respect to those cases that do not partake of that character. Our examination, extended as it may seem to have been, has been called for by the importance of a subject most intimately connected with the rights and happiness of individuals, as it is with the quiet and good order of society. The investigation has conducted us to the following conclusions, which we propound as the law applicable thereto: 1. That every publication, either by writing, printing, or pictures, which charges upon or imputes to any person that which renders him liable to punishment, or which is calculated to make him infamous, or odious, or ridiculous, is *prima facie* a libel, and implies malice in the author and publisher towards the person concerning whom such publication is made. Proof of malice, therefore, in the cases just described, can never be required of the party complaining beyond the proof of the publication itself; justification, excuse, or extenuation, if either can be shown, must proceed from the defendant. 2. That the description of cases recognized as privileged communications, must

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be understood as exceptions to this rule, and as being founded upon some apparently recognized obligation or motive, legal, moral, or social, which may fairly be presumed to have led to the publication, and therefore *prima facie* relieves it from that just implication from which the general rule of the law is deduced. The rule of evidence, as to such cases, is accordingly so far changed as to impose it on the plaintiff to remove those presumptions flowing from the seeming obligations and situations of the parties, and to require of him to bring home to the defendant the existence of malice as the true motive of his conduct. Beyond this extent no presumption can be permitted to operate, much less be made to sanctify the indulgence of malice, however wicked, however express, under the protection of legal forms. We conclude, then, that malice may be proved, though alleged to have existed in the proceedings before a court, or legislative body, or any other tribunal or authority, although such court, legislative body, or other tribunal, may have been the appropriate authority for redressing the grievance represented to it; and that proof of express malice in any written publication, petition, or proceeding, addressed to such tribunal, will render that publication, petition, or proceeding, libelous in its character, and actionable, and will subject the author and publisher thereof to all the consequences of libel. And we think that in every case of a proceeding like those just enumerated, falsehood and the absence of probable cause will amount to proof of malice.

The next and the only remaining question necessary to be considered in these cases, is that 292*] which relates to the rulings of the *court below excluding the publication declared upon as a libel from going to the jury in connection with other evidence to establish the existence of malice. We forbear any remark upon the intrinsic character of the injury complained of, or upon the extent to which it may have been made out. These are matters not properly before us. But if the publication declared upon was to be regarded as an instance of privileged publications, malice was an indispensable characteristic which the plaintiff would have been bound to establish in relation to it. The jury, and the jury alone, were to determine whether this malice did or did not mark the publication. It would appear difficult *à priori* to imagine how it would be possible to appreciate a fact whilst that fact was kept entirely concealed and out of view. This question, however, need not at the present time be reasoned by the court; it has, by numerous adjudications, been placed beyond doubt or controversy. Indeed, in the very many cases that are applicable to this question, they almost without an exception concur in the rule, that the question of malice is to be submitted to the jury upon the face of the libel or publication itself. We refer for this position to *Wright* v. *Woodgate* (2 Crompton, Mees. & Ros., 573); to *Fairman* v. *Ives* (5 Barn. & Ald., 642); *Robinson* v. *May* (2 Smith, 3); *Flint* v. *Pike* (4 Barn. & Cress., 484, per Littledale, *J.*); *Ib.*, 247 (*Bromage* v. *Prosser*); *Blake* v. *Pilford* (1 Mood. & Rob., 198); *Parmeter* v. *Coupland* (6 Mees. & Welby, 105); *Thomson* v. *Shackell* (1 Moo. & Mal., 187). Other cases might be adduced to the same point.

Upon the whole, we consider the opinion of the Circuit Court, in the several instructions given by it in these cases, to be erroneous.

We therefore adjudge that its decision be reversed; that these causes be remanded to the said court, and that a venire facias de novo *be awarded to try them in conformity with the principles herein laid down.*

Cited—2 Dill., 246.

Ex-parte THE CITY BANK OF NEW ORLEANS, in the matter of WILLIAM CHRISTY, Assignee of DANIEL T. WALDEN, a Bankrupt.

District Court of U. S. has power under Bankrupt Act of Aug. 19, 1841, to determine validity of mortgage on bankrupt's property—construction of act—this court no power to revise proceedings of bankrupt court.

This court has no revising power over the decrees of the District Court sitting in bankruptcy; nor is it authorized to issue a writ of prohibition to it in any case except where the District Court is proceeding as a court of admiralty and maritime jurisdiction.

The District Court, when sitting in bankruptcy, has jurisdiction over liens and mortgages existing upon the property of a bankrupt, so as to inquire into their validity and extent, and grant the same relief which the State courts might or ought to grant.

The control of the District Court over proceedings in the State Court upon such liens, is exercised, not over the State courts themselves, but upon the parties, through an injunction or other appropriate proceeding in equity.

*The design of the Bankrupt Act was to se- [*293 cure a prompt and effectual administration of the estate of all bankrupts, worked out by the courts of the United States, without the assistance of State tribunals.

The phrase in the 6th section "any creditor or creditors who shall claim any debt or demand under the bankruptcy," does not mean only such creditors who come in and prove their debts, but all creditors who have a present subsisting claim upon the bankrupt's estate, whether they have a security or mortgage therefor or not.

Such creditors have a right to ask that the property mortgaged shall be sold, and the proceeds applied towards the payment of their debts, and the assignee, on the other hand, may contest their claims.

In the case of a contested claim, the District Court has jurisdiction, if resort be had to a formal bill in equity or other plenary proceeding; and also jurisdiction to proceed summarily.

THIS was a motion on behalf of the City Bank of New Orleans, for a prohibition, to be issued to the District Court of the United States for the District of Louisiana.

The suggestion for the prohibition stated the following as facts in the case:

First. That Daniel T. Walden, of the city of New Orleans, on the 27th July, 1839, and on the 17th day of August, 1839, executed two several mortgages to the City Bank of New Orleans, on a certain plantation, and on lots of land in said State, to secure payment of $200,000 borrowed of said bank; which mortgages were duly recorded, and in all respects good and valid, and created a good, legal, and equitable lien on the property mortgaged for payment of said debt. That, on or about 20th October, 1840, Walden instituted suit in the State District Court, to set aside said mortgages, for the same causes, substantially, as

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William Christy (Walden's subsequent assignee in bankruptcy) has presented by his petition and amended petition in the District Court of the United States at New Orleans, exercising summary jurisdiction in bankruptcy, to set aside the same mortgages, as per certified copy of the proceedings in the District Court of the United States herewith annexed; and the State court, on appeal, decided finally against Walden's complaint, and sustained the mortgages.

Second. That, afterward, the bank proceeded to foreclose its mortgages in the State court; and thereupon, on 17th May, 1842, an order of seizure and sale was made, and an actual seizure of the property executed on 19th May, 1842.

Third. That, on 18th June, 1842, the said Walden filed his petition for the benefit of the Bankrupt Act, in the District Court of the United States at New Orleans, and on the 18th July, 1842, said court decreed him to be a bankrupt.

Fourth. That, after Walden filed his petition, and before decreed a bankrupt, viz., on 27th June, 1842, he applied to the said District Court of the United States for its injunction to stay the sale ordered in the State court of the mortgaged premises; setting forth, as grounds therefor, the same facts, substantially, as sub-
294*] sequently again *set forth by Christy, his assignee, in his petitions aforesaid. After full hearing of said bill, the court refused the injunction; and thereafter the premises seized were duly sold, with every legal requisite and formality, in execution of the previous orders of the State court, and the City Bank became the purchasers.

Fifth. That the said bank has in no wise presented or proved its claim against Walden, in the Bankrupt Court, but pursued the said mortgage claim adversely in the State court, relying on its lien by the State law, and the proviso in the Bankrupt Act, saving such lien from its operation.

Sixth. That the matter in dispute exceeds two thousand dollars in value.

Seventh. That the said Christy, assignee, &c., knowing all the premises, but contriving to impair the lien of the bank by the mortgages aforesaid, contrary to the saving clause of the Bankrupt Act, is endeavoring, by his petition and supplemental petition, to subject all the previous proceedings of the State court upon the mortgages to review and revision in the District Court of the United States, by its summary process in bankruptcy. And the said Christy and Walden, and the Hon. Theodore H. McCaleb, judge of the said District Court of the United States, have wrongfully and vexatiously forced the said bank to appear in said court, upon its summary process, to answer said Christy's petition. And though the bank has objected, by plea, to the summary jurisdiction of the court over the matters aforesaid, yet the court adheres—hath overruled the plea—and persists, by its summary process, to proceed with the cause, to the embarassment of the bank, and to the deprivation of all redress by appeal.

In addition to the foregoing statement filed by the counsel in support of the motion for a prohibition, it may be proper to state that,

On the 8th of October, 1842, Christy filed the petition mentioned in the seventh proposition just quoted. It recited that Walden, the bankrupt, was, at the time of filing his schedule and surrender, the owner of a large amount of real estate; that the bank claimed to have a mortgage upon it; that the bank caused it to be sold and possession delivered; that the sale was void, because the application of Walden operates as a stay of proceeding; that the property was offered for sale in block, though composed of twenty different stores or buildings, and for cash; that the mortgage debt was not justly due, but void an account of usury; and prayed that the sale might be declared void, or if adjudged valid, that the amount thereof should be paid over to the petitioner, to be distributed according to law.

On the 31st of October, 1842, the bank filed a plea to the jurisdiction of the court, with other matters in defense.

On the 17th of February, 1843, the questions raised by the answer of the bank were adjourned to the Circuit Court of the United States.

*At April Term, 1843, the Circuit [*295 Court returned the following answers:

"In answer to the questions adjourned into this court by the District Court for the said district, it is ordered that the following answers be certified to the District Court in bankruptcy, as the opinion of the court thereupon:

"First. That the said District Court has, under the statute of bankruptcy, full and ample jurisdiction of all questions arising under the petition of William Christy, asignee of Walden, to try, adjudge, decree, and determine the same between the parties thereto.

"Second. That the sale made of the mortgaged property, under the seizure and sale ordered by the District Court of the State of Louisiana, is void, and that the District Court of the United States should by its decree declare it void in the suit; and that said last mentioned court has full power and authority to try and determine the validity of said mortgages, and if proved upon the trial void according to the laws of Louisiana, to make a decree accordingly, and order a sale of the property therein contained for the benefit of the several creditors of the bankrupt; but if upon proof said mortgages shall be sustained and adjudged valid, a decree should be rendered in favor of the mortgagees, condemning to sale all their interests, rights, and title therein, and all the interest, right, and title of the bankrupt and all the general creditors, in the hands of the assignee, and the rights and title of the assignee also; and by the order of sale the marshal be directed to pay over to the mortgagees, after deducting the per cent. for his commissions and all the legal costs of the suit, the amount of their claim, if the proceeds of the sale amount to so much, and the balance, if any, to pay over to the assignee; and that by such decree the assignee be ordered to make proper title and conveyance to the purchaser or purchasers, upon the full payment of the purchase money and a reasonable compensation to the assignee for making such conveyance, to be determined and settled by the judge of the District Court, should the purchaser or purchasers and the assignee disagree as to the amount.

"Third. The second and alternative prayer in the petition of the assignee, asking the pay-

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ment to him of the whole amount of the proceeds of the former sale of the mortgaged property, being inconsistent with the opinion of the court in the second point, will therefore be disregarded on the trial by the District Court. J. MCKINLEY,

"Associate Justice of the Supreme Court U. S."

Afterwards, in 1843, an amended petition was filed by Christy, alleging, amongst other things, that the bank claimed to be a creditor of Walden, and "in that capacity had become a party to the said proceedings in bankruptcy," &c., &c.

In December, 1843, the bank prayed oyer of 296*] the time, place, *manner, and form, where, how, and when it became a party to the proceedings in bankruptcy.

The court having granted the prayer for over, Christy, on the 23d of January, 1844, filed the following:

"That the said City Bank became parties to the proceedings in bankruptcy of the said Walden, first, by the operation of law, they being at the time of his bankruptcy mortgage creditors of the said Walden, and placed upon his schedule as such; second, by their own act, having filed a petition in this honorable court on the 5th September, 1842, praying that the demand of the assignee for the postponement of the sale of certain properties be disregarded, that their privileges be recognized, and that said properties be sold under an order of this court for cash; third, that an attempt was made by the said bank to withdraw said petition and prayer of 5th September, 1842, but a discontinuance of the same was opposed by M. W. Hoffman and L. C. Duncan, creditors of said bankrupt, and parties interested, by reason of which said opposition the legal effects of said application, made by the City Bank as aforesaid to this honorable court, remain in full force.

"In consideration of all which, and the documents herewith filed, your petitioner prays that said City Bank be compelled to answer to the merits of the original and supplemental petition in this case filed, without further delay."

On the 10th of February, 1844, the bank filed its answer, denying that it had ever proved its debt, or otherwise subjected itself in any manner to the summary jurisdiction of the District Court sitting as a court of bankruptcy; but, on the contrary, that it had prosecuted its remedy in the State courts of Louisiana, and adding the following:

"And so these respondents and defendants say and insist, that this honorable court, sitting as a bankrupt court, and holding summary jurisdiction in matters of bankruptcy under and by virtue of said act, ought not to have and to take cognizance of the several matters and things in the said petition and supplemental petition contained; forasmuch as all jurisdiction over the same is by law vested in and does of right belong to the Circuit Court of the United States for the Eastern District of Louisiana, holding jurisdiction in equity, and proceeding according to the principles and forms of courts of chancery as prescribed by law and by rules and orders of the Supreme Court of the United States, or to the District Court of the United States for the said district, proceeding in the same manner, and vested with concurrent jurisdiction over all suits at law or in equity which may be brought by the assignee of any bankrupt against any person claiming an adverse interest; which said courts are competent to entertain the suit of the petitioner and grant him the relief of prayer for, if by law he is entitled to the same, and not this court; and forasmuch as this honorable court, sitting as a bankrupt court, and deciding in a summary manner in matters of bankruptcy, is wholly *without jurisdiction in the [*297 premises, these respondents and defendants submit to the judgment of this honorable court, whether they shall be held to make any further or other answer to the several matters and things in the said petition and supplemental petition contained, and pray to be hence dismissed, with their reasonable costs, &c."

An agreement of counsel was filed in the court below relative to the petition of the bank and its discontinuance spoken of in the oyer of Christy, as above set forth. The agreement stated that the discontinuance was ordered in open court by the counsel of the bank, and the proceedings of the court showed that a rule to show cause why the discontinuance should not be set aside was dismissed.

This was the position of the case in the court below.

The motion for a prohibition was sustained by *Messrs. Wilde* and *Henderson*, and opposed by *Mr. Crittenden*. The reporter has no notes of the arguments of *Messrs. Henderson* and *Crittenden*, and from that of *Mr. Wilde* only extracts can be given.

Mr. Wilde referred to the seven facts stated in the beginning of this report, and then said, the questions of law insisted on by the suggestion are:

1. That the Bankrupt Act contemplates two kinds of jurisdiction: one over parties claiming under the bankruptcy, the other over parties claiming adversely to it; the one summary, the other formal; the one exclusive in the District Court exercising summary jurisdiction in matters of bankruptcy, without appeal, as defined by section 6th; the other a concurrent jurisdiction in both district and circuit courts for or against parties claiming an adverse interest, according to the provisions of section 8th, which is not summary, but formal, to be exercised according to the rules and forms of chancery or common law, and subject to review in this court by appeal or writ of error under the general provisions of the laws heretofore passed regulating writs of error and appeals.

2. That the rules of said bankrupt court regulating its summary process, in pursuance of which this proceeding by Christy is assumed to be instituted and entertained, are in violation of the Bankrupt Act—which rules are herewith exhibited.

The reasons why this court should interpose to restrain the District Court from further proceedings in the matter are two:

1. Because said court, proceeding summarily on petition, as in a matter of bankruptcy, has no lawful cognizance and jurisdiction of the matter.

2. Because by permitting said court so to proceed and decide (from which decision no

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appeal would lie), would be to permit said district and inferior court to impair the legiti-
298*] mate powers of this *court in its appellate jurisdiction, and to deprive the bank of its right to invoke the supervisory powers of this court by appeal.

After stating the general principles on which prohibitions issue, which were cases where an appeal does not lie, and citing a number of authorities, *Mr. Wilde* continued:

For the present, then, we are to consider whether the District Court, sitting as a bankrupt court of exclusive and summary jurisdiction of all matters arising under the bankruptcy, and deciding without appeal, has rightful and lawful cognizance of the matters it is proceeding to investigate and adjudicate upon in this case.

Here are lawful mortgages, made and recorded according to the laws of Louisiana, bearing date three years before petition of the mortgageor to be declared a voluntary bankrupt.

Here is a mortgagee who has not proved his debt under the bankruptcy, but has rested on this State lien; prosecuting that lien to judgment of foreclosure upon his said mortgages in the State court, before the petition in bankruptcy.

Here is an order of seizure and sale, and an actual levy on the mortgaged premises by the sheriff one month before the petition of the mortgageor for the benefit of the Bankrupt Act.

Under this levy or seizure the mortgagee proceeded to sell the mortgaged premises, after appraisement, advertisement, and all other legal prerequisites, in several distinct lots, according to their separate enumeration in the mortgages and appraisement, and in as minute divisions as the nature of the property would admit or the law allow.

And the substantial question before this court is, whether he who has never proved his debt, never come in under the bankruptcy, can be dragged into the District Court, sitting as a bankrupt court, and exercising summary jurisdiction, without appeal; his writ of seizure and sale annulled, the judgment of the State court vacated, the sale set aside, and his mortgages declared null and void, though the Supreme Court of the State have declared them good and valid.

The mere statement of such a question would seem to be enough to decide it; but its very simplicity leads to the suspicion of error, and therefore we will verify it step by step.

First, then, the proceedings in bankruptcy, of which we produce an authenticated copy, and the clerk's certificate, show exclusively that the City Bank has never proved its debt against Walden. (See transcript of the petition, schedule, &c., in bankruptcy—clerk's certificate, last page.)

We hold it to be clear law that a party holding a mortgage cannot be compelled to prove his debt, or come in under the commission; and we hold that unless he does so the District Court, exercising the powers of a bankrupt court, and proceeding summarily without appeal, has no jurisdiction over him.

If a creditor has a security or lien, he is not compellable to *come in under the com- [*299
mission; he may elect to stand out, and rely on his security or lien."

"But if he does prove, he relinquishes his security for the benefit of all." (Cullen on Bankruptcy, 145, 149.)

"If this be the case in England, *a fortiori*, it is so under our late bankrupt act, which contains a clause saving State liens. Section 2, page 16, Bankrupt Act: "Nothing in this act contained shall be construed to annul, destroy, or impair any liens, mortgages, or other securities or properties, real or personal, which may be valid by the laws of the States respectively."

In the decisions under this law, although there has been a diversity of opinion as to what constituted a lien, there has been none that a mortgage was one.

There has been no diversity of opinion on the point whether a mortgaged creditor could be compelled to prove or not.

There has been some difference of opinion how, and in what court, and by what process or form of proceeding, the State lien is to be saved; but all agree that saved it must be.

On the score of authority, it cannot be expected we should do more than produce the decisions of circuit or district judges. These questions have not yet been adjudicated in this court.

We rely on the following cases, decided by judges of this court on their circuits, or by district judges, respectable for learning and ability:

The decision of *Mr. Justice* Baldwin, in the matter of *Kerlin*, a bankrupt, reported in the United States Gazette, of Philadelphia, of 28th October, 1843.

The decision of *Mr. Justice* Story, in the case of *Mitchell, Assignee of Roper*, v. *Winslow et al.*, in the Circuit Court of Maine, reported in the Law Reporter of Boston, for December, 1843, pp. 347, 360.

Mr. Justice McLean's decision in the case of *N. C. McLean, Assignee in Bankruptcy*, v. *The Lafayette Bank, J. S. Buckingham et al.*, to be found in the Western Law Journal for October, 1843, p. 15.

Mr. Justice McLean's decision in the case of *N. C. McLean, Assignee*, v. *James F. Meline* (Western Law Journal for November, 1843, p. 51).

Mr. Justice Story's decision in the case of *Muggridge* (5 Law Rep., 357), in *Ex-parte Cook* (5 Law. Rep., 444); *Ex parte Newhall* (5 Law Rep., 308); in *Dutton* v. *Freeman* (5 Law Rep., 452).

Mr. Justice Thompson's decision in *Houghton* v. *Eustis* (5 Law Rep., 506).

Judge Prentiss' (of Vermont) opinion in *Ex-parte Spear* (5 Law Rep., 399), and *Ex-parte Comstock* (5 Law Rep., 165).

Judge Conkling's (of New York) [*300
opinion in *Ex parte Allen* (5 Law Rep., 368).

Judge Monroe's (of Kentucky) opinion in Niles's Register, 5th November, 1842; and those of Irwin, Randall, and Gilchrist, *Ib.*

These cases, it is humbly submitted, establish the doctrine for which the defendants contend, namely: that the State lien in this case was properly and rightfully enforced under the State law and process. (Penn. Law Journal for

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November, 1842, p. 302; *Ex-parte Dudley*, Judge Randall and the late Judge Baldwin's decisions; Penn. Law Journal, April, 1844, p. 246, *Large* v. *Boeler*, District Court of Philadephia; Law Reporter for October, 1844, p. 281, *Judge* Conkling's decision on *Briggs* v. *Stephens* (proving surrenders lien); Western Law Journal, April, 1844, *Judge* McLean's decision in *McLean* v. *Rockey*, p. 302; Law Reporter, July, 1844, *Mr. Justice* Story's decision in *Bellows & Peck*, United States Circuit Court of New Hampshire, pp. 125, 127, Law Reporter, June, 1844, Superior Court of New Hampshire, *Kitteridge* v. *Warren*, p. 87; Penn. Law Journal, October 15th, 1842, p. 223, *Judge* Randall's decision (distress); Penn. Law Journal, October 15, 1842, p. 245, *Judge* Randall (proof withdrawn); *Ex-parte Lafeley*, Report of Kitteridge & Emerson, Sup. Court, New Hampshire.)

The decision of *Judge* Gilchrist in the case of *McDowell's Assignee* v. *Planters' and Mechanics' Bank*, of which an authenticated copy is produced.

But this court very properly holds itself entirely uncommitted by circuit court decisions. They are merely cases at *nisi prius*, and the matters there determined are as open to discussion as ever.

Mr. Wilde then went on to argue that a mortgaged creditor could not be compelled to prove his debt, and that if he did so, he would only come in for a share of the assets *pro rata;* and then investigated the jurisdiction of the district and circuit courts in bankruptcy, and the revisory powers of this court by appeal or prohibition as follows:

In considering the authority of the District Court exercising summary jurisdiction in cases of bankruptcy, it will be most convenient and perspicuous to examine:

First. Its exclusive jurisdiction.

Second. Its jurisdiction concurrently with the Circuit Court.

Its exclusive jurisdiction is granted by the 6th section, which is as follows:

[*Mr. Wilde* here quoted it at length.]

To obtain a distinct idea of the extent and boundaries of the jurisdiction thus granted, it is requisite to examine them under three different aspects:

First. As to the persons over whom—that is, for or against whom—jurisdiction is given.

301*] *Second. As to the objects, rights, or claims, subjected to such jurisdiction.

Third. As to the modes and forms of proceeding.

A careful analysis of this section will show:

First, as to persons:

That the jurisdiction granted extends:

To the bankrupt;

To the creditors claiming any debt under the bankruptcy;

To the assignee, whether in office or removed.

These parties and each of them are authorized to sue each other in the District Court, and to litigate their respective claims or pretensions there. But the court will remark, there is no jurisdiction whatever granted by this section, so far as persons are concerned, to a creditor who does not claim under the bankruptcy. No jurisdiction over such a creditor is granted: none is given for him or against him. This distinction has always been recognized by the courts of the United States wherever the point has been brought to their attention. (*Briggs* v. *Stephens* Law Rep., Oct., 1844, p. 282, per Conkling, *J.; Ex-parte Dudley*, Penn. Law Journal, Nov. 19, 1842, pp. 320, 321, per *Justice* Baldwin; *Assignees of McDowall* v. *Planters' and Mechanics' Bank*, per *Judge* Gilchrist.)

Second. As to objects, rights, claims, and controversies, subjected to the summary jurisdiction of the District Court sitting in bankruptcy.

The jurisdiction granted by this section extends

To all controversies between the bankrupt and any creditor claiming any debt or demand under the bankruptcy;

To all controversies between such creditor and the assignee of the estate;

To all controversies between the assignee and the bankrupt; and

To all acts, matters, and things, to be done under and by virtue of the bankruptcy.

But your honors will observe, that under this section, so far as objects, rights, claims, or controversies are concerned, no jurisdiction is granted in controversies between the assignee and a creditor not claiming under the bankruptcy, but claiming adversely to it.

No jurisdiction is granted in controversies between such a creditor and other creditors claiming under the bankruptcy.

None in cases between a creditor claiming adversely to the bankruptcy and the bankrupt himself.

None where the acts, matters, and things are not done, or be done under and in virtue of the bankruptcy, but before it, independent of it, and adversely to it.

So far, then, as the objects of the District Court's summary jurisdiction in bankruptcy are concerned, no such jurisdiction is granted by this section over the rights or demands of a creditor who claims adversely to the bankruptcy, and not under it.

*In relation to such a creditor, so [*302 claiming such rights, he is not authorized to sue in that court either the assignee or the bankrupt, or the creditors claiming under the bankruptcy; neither, in regard to such a creditor and such rights, is the assignee or the bankrupt, or the other creditors claiming under the bankruptcy, empowered to sue him there.

Third. In reference to the modes and forms of proceeding, it is indisputable that in the District Court, sitting as a bankrupt court, and holding jurisdiction in bankruptcy under the 6th and 7th sections, the proceedings are summary, and in general without appeal.

But however clearly it may appear that by the letter of the 6th section no such jurisdiction is granted for, against, or over a creditor claiming adversely to the bankruptcy, it may be said cognizance of such claims somewhere is indispensable to the full execution of a uniform system, and therefore, *ex necessitate*, it must be vested in some court of the United States.

He who objects to the jurisdiction of a court (it will be said) must show that some other court has jurisdiction. We assume that obligation, and this brings us to a like analysis of the 8th section.

That section is as follows:

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"Sec. 8. And be it further enacted, That the Circuit Court within and for the district where the decree of bankruptcy is passed, shall have concurrent jurisdiction with the District Court of the same district of all suits at law and in equity, which may and shall be brought by any assignee of the bankrupt against any person or persons claiming an adverse interest, or by such person against such assignee, touching any property or rights of property of said bankrupt transferable to, or vested in, such assignee; and no suit at law or in equity shall in any case be maintainable by or against such assignee, or by or against any person claiming an adverse interest, touching the property and rights of property aforesaid, in any court whatsoever, unless the same shall be brought within two years after the declaration and decree of bankruptcy, or after the cause of suit shall first have accrued."

With respect to the jurisdiction granted by this section, the court will observe it is concurrent in the district and circuit courts. But as some complexity and confusion are likely to arise in considering the variety of jurisdictions possessed by the same tribunal, though sitting on different sides, and proceeding by different forms, we will analyze this section as to the jurisdiction thereby granted to the circuit courts, with reference to the persons for or against whom it is granted, the subject matters over which it is extended, and the modes and forms of proceeding required to be adopted.

As soon as we shall have ascertained what the jurisdiction of the Circuit Court is, under the 8th section, it will be easy to apply it to the District Court, for as the two courts under the 8th section have concurrent jurisdiction, it follows that whatever jurisdiction is granted **303*]** *by that section to the one is granted to the other. When the Circuit Court's jurisdiction under it is known, the District Court's jurisdiction under it is known to be the same, and we thus arrive at a clear and precise conception of the two district jurisdictions, which we allege exist in the District Court, namely:

1. Its summary jurisdiction as to parties claiming under the bankruptcy.

2. Its jurisdiction as a court of law and equity, for or against parties claiming adversely to the bankruptcy; a jurisdiction not summary, but to be exercised according to the usual modes and forms of courts of chancery or common law, according as the nature of the case made, or the relief sought, belongs to the one or the other forum.

Let us examine, then, the jurisdiction granted by the 8th section to the Circuit Court.

1. It extends to all suits at law or in equity brought by an assignee against any person claiming an adverse interest.

2. To all suits at law or in equity by such person, against such assignee, touching any property or rights of the bankrupt.

Thus we see that the very jurisdiction over persons claiming an adverse interest and rights, not arising under the bankruptcy, but in opposition to it, which the 6th section did not grant to the District Court exercising summary jurisdiction, has been granted to the Circuit Court by the 8th section, as a court of common law and equity, proceeding according to its ordinary jurisdiction in such suits, and according to the usual modes and forms of proceeding in chancery, where a chancery remedy is sought, and of common law, where a common law remedy is adequate.

The District Court, then, as a court of summary jurisdiction, has no cognizance of cases for or against persons claiming an adverse interest, but the Circuit Court has; and the Circuit Court, as to such cases, proceeds not summarily, but according to the usual modes and forms of courts of common law or chancery.

Now, the jurisdiction granted to the District Court by the 8th section is concurrent with that given to the Circuit Court by the 8th section—that is to say, it is neither more nor less, but precisely the same; to be exercised over the same parties, in the same way, and by the same rules and forms of proceeding.

There are then two distinct jurisdictions given to the district courts; as we undertook to prove.

The one a summary jurisdiction, to be exercised over all claiming under the bankruptcy, and this jurisdiction is exclusive. The other a formal jurisdiction, co-extensive with that given to the Circuit Court, for and against persons claiming adversely to the bankruptcy, which jurisdiction is not summary, but to be exercised according to the usual forms of common law or chancery.

The summary jurisdiction of the Bankrupt Court may be admitted *for the pur- [*304 poses of this argument, to be exclusive and without appeal.

But the jurisdiction granted to the Circuit Court over persons claiming an adverse interest, is not summary, but is the ordinary jurisdiction of that court as a court of common law and chancery, extended over a new class of cases, and a new description of suitors, it is true, but to be exercised according to long established forms; and as the only jurisdiction possessed by the District Court over persons, not parties to the bankruptcy, but claiming adversely to it, is precisely the same as that given by the 8th section to the Circuit Court, it follows that, when the District Court takes cognizance of that class of cases, its jurisdiction is to be exercised according to the usual forms of chancery and common law, by bill or suit, precisely as the Circuit Court would exercise it.

The Circuit Court in such cases cannot decide summarily, and as the jurisdiction of the District Court is the same, and no more, as to that description of persons and controversies, the District Court cannot decide summarily.

To maintain the opposite doctrine, is to assert that a concurrent jurisdiction may be different, and greater in the one court than the other, and that the formal and summary jurisdictions of a court may be adopted and intermingled at its pleasure. It is indisputable, and conviction results from a mere inspection of the proceedings, that William Christy, the assignee, is proceeding in the District Court, sitting in bankruptcy and according to the course of its summary jurisdiction as a bankrupt court.

The petition is so addressed. [P. 7 of the printed papers attached to the suggestion.] All the pleadings and orders in the cause are uniformly so entitled. They are "in the United States District Court, sitting in bankruptcy," pp. 7, 12, 14, 28, 24, 25, 26, 27, and 28.

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Now, where the relief sought belongs to the chancery jurisdiction, it must be sought in Louisiana, as well as elsewhere, in the courts of the United States, according to the course and forms of chancery practice. (*McCullum* v. *Eager*, 2 Howard, 63.)

The proceeding of the assignee is by petition, not by bill in chancery.

The motive of his so proceeding is sufficiently obvious. If he can maintain the jurisdiction of the District Court, exercising summary jurisdiction in bankruptcy, he cuts off all appeal. He has succeeded in persuading the District Court that the case comes under, and belongs to its summary cognizance. A plea to the jurisdiction upon the very ground we are arguing, has been submitted to that court and overruled. (*Vide* the plea to the jurisdiction, p. 25, 26, of the printed record annexed to the suggestion, and order overruling it, p. 26.)

In fine, therefore, it is manifest that William 305*] Christy, the assignee, *is proceeding in the Bankrupt Court, according to the course of its summary jurisdiction.

The plea so expressly alleges, pp. 25, 26.

By demurring *ore tenus* to the plea, which he is held to have done, by praying judgment of the court upon it, although no formal demurrer is allowed by the law or practice of Louisiana, he admits the fact.

And the court, by overruling the plea, decide that he is proceeding in the court of bankruptcy, according to the course of its summary jurisdiction, but that he is rightfully and lawfully proceeding there.

This is the precise point we have attempted to disprove, and upon which we seek the judgment of this court, in the form of an order for a prohibition.

Thus, then, we think we have sustained the first branch of our argument, namely, that the District Court of the United States for the Eastern District of Louisiana is proceeding in the case of William Christy, assignee, against the City Bank of New Orleans, without jurisdiction, and contrary to law, and in such manner as to deprive the City Bank of an important legal right.

This view is sustained by the decision of the late *Mr. Justice* Baldwin (*Ex-parte Dudley*, Penn. Law Jour., Nov. 19, 1842, p. 297); by *Briggs* v. *Stevens* (per Conkling, J., Law Reporter, Oct. 1844, p. 282).

The decision of *Mr. Justice* Baldwin, in the matter of *John Kerlin* (reported for the United States Gazette, 26 October, 1843).

The dissenting opinion of *Judge* Bullard, in the case of *The State* v. *Rosanda* (p. 23 of the Printed Documents), in which it is understood *Chief Justice* Martin agrees, although he did not sit in the cause; and the dissenting opinion of the same judge in *Bank's* case (p. 7 of the same documents).

Assuming, therefore, that the true jurisdiction, in a case like the present, is not in the District Court proceeding summarily by petition and order, but in the United States Circuit Court for the Eastern District of Louisiana sitting in chancery, or the District Court of that district having concurrent chancery jurisdiction, in cases for or against a creditor claiming adversely, under and by virtue of the 8th section of the Bankrupt Act, in which suit the proceeding must be by bill and answer, according to the usual chancery rules and forms.

We are next to show that in such a case an appeal would lie.

[*Mr. Wilde* went on to maintain this proposition, citing many authorities.]

We regard it, then, as established, that from the summary jurisdiction of the Bankrupt Court no appeal lies.

That from the chancery jurisdiction, granted by the 8th section concurrently to the circuit and district courts, an appeal does lie.

*That the summary jurisdiction does [306 not extend to a party claiming adversely.

That the chancery does.

And that Christy, in resorting to the summary jurisdiction, does so because he has an evident interest to deprive the bank of the right of the appeal, and to oust this court of its ultimate appellate jurisdiction.

All this may be true, and yet we may have no redress.

Let us now inquire if this court be competent to grant us any remedy, and whether we have sought the proper one.

We have seen, in the early part of this argument, from the English authorities, that in the King's Bench this would be clearly a case for a prohibition.

But this court, it has already been admitted, does not possess, in such cases, an authority co-extensive with that of the King's Bench.

We are to show

1st. That the exercise of such an authority is delegated to it by the Constitution and laws of the United States; and,

2d. That this exercise is necessary to protect its appellate jurisdiction.

First, then:

Has the Supreme Court power to issue writs of prohibition to the lower courts of the United States generally, wherever they exceed their jurisdiction?

The 13th section of the Judiciary Act of 1789 (1 Law U. S., 59), gives this court power to issue writs of prohibition to the district courts, proceeding as courts of admiralty and maritime jurisdiction, and writs of *mandamus* in cases warranted by law, to any courts, or persons holding office under the United States.

The 14th section gives power to issue writs of *scire facias*, *habeas corpus*, and all other writs not specially provided for by statute, and which may be necessary for the exercise of their jurisdiction.

Now, the writ of prohibition, in civil cases of common law and equity jurisdiction, is a writ not specially provided for by statute; and we undertake to show hereafter that it is necessary for the exercise of the Supreme Court's appellate powers.

The first objection we must meet is, that express authority being given to issue prohibitions in admiralty and maritime cases, it must be presumed there is no such authority in any other cases: "*expressio unius est exclusio alterius.*"

But, besides the argument already used in anticipation, that the writ in common law cases is not specially provided for by statute, and therefore within the general powers granted by the 14th section, it may be remarked:

That it would be singular, indeed, if it did

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not lie by our law, in all that large class of cases in which it does lie by the law of England, and *vice versa*, that in the only case where it has been sometimes held not to lie by the law of England, it does lie by our law.

307*] *Such an anomaly would be contrary to the spirit of our whole legislation, whose tendency is to extend justice, not to barricade jurisdictions.

But why, then, was the express grant of power made to issue prohibitions in admiralty cases? Considered historically, the answer is obvious: out of abundant caution.

At that period the jealousy of a part, and a large part, of the people towards the courts of the United States, especially those not proceeding according to the course of the common law, was excessive.

The amendments made to the Constution, and the debates of the time, are conclusive proofs of the fact.

The decisions of Lord Mansfield in *Lecaux* v. *Eden*, and *Lindo* v. *Rodney*, were made in 1781 and 1782, and in 1789 must have been well known in the United States.

They declared that a writ of prohibition did not lie from the courts of common law to a court of exclusive jurisdiction—as the Court of Prize—although it was alleged the goods belonged to a British subject, and were seized on land.

This was certainly quite enough to alarm a sensitive jealousy; and though the enactment may not have covered the whole ground of apprehension, the fair inference under all the circumstances is, that the clause in our act was adopted to extend the remedy, by prohibition, to cases which it was supposed it could not reach by the common law—to enlarge the remedy, not to contract it.

The general power to issue all other writs necessary to the exercise of their jurisdiction, is broad enough to cover prohibitions, when used as an appellate or revisory process.

[*Mr. Wilde* then went on to review and criticise the cases of *Marbury* v. *Madison*, *Weston* v. *City Counsel of Charleston* (2 Peters, 464), *Cohens* v. *Virginia* (6 Wheat., 397), and contended that the authority to issue a writ of prohibition rested upon the same ground as writs of *mandamus* and *procedendo*, viz., the necessity of protecting the appellate jurisdiction of the Supreme Court.]

If our distinction between the summary bankrupt jurisdiction and the formal chancery jurisdiction of the District Court be well taken, it follows, that when the district judge, sitting in the summary court of bankruptcy, usurps the authority of the formal chancery court, and subjects to the power persons and things belonging to the cognizance of the latter, he commits an excess of jurisdiction.

If the Associate Justice presiding in the Circuit Court of that district, sustains the District Court in that excess, and says, as he is supposed to have done, that it is proceeding regularly and lawfully, when in truth its proceedings are irregular and unlawful, then either this court must have power to issue a prohibition, or its authority to revise the proceedings of inferior tribunals, to confine them within the limits of their jurisdiction, and to protect their own, is so far completely nullified.

*If the application for a prohibition, [*308 therefore, must first be made to the Circuit Court, and when refused there, cannot be brought here by appeal, or writ of error, it follows, that although this court would have ultimate appellate jurisdiction of this cause, if regularly brought and prosecuted according to law, on the chancery side of that court, yet, if irregularly and unlawfully prosecuted on the bankrupt side, and the district judge and circuit judge erroneously sustain it there, we have no redress, and this tribunal is impotent to preserve its own ultimate appellate jurisdiction. In the language of *Chief Justice* Marshall: "It can neither revise the judgment of the inferior court nor suspend its proceedings." (6 Wheat., 397.)

For the general practice in prohibition, we refer the court to *Croucher* v. *Collins* (1 Saund., 136, 140, notes 1, 2, 3, 4, and 5); 2 Chitty's General Practice, 355; 3 Black. Com., 355; 2 Sell. Pract., 425. Cases in Prohibition: 14 Petersdorf Abr., *verbo* Prohibition; 2 Salk., 547; 3 Mod., 244; 6 Mod., 79; 11 Mod., 30. Leading Cases: *Leman* v. *Goulty* (3 Term R., 3); *Dutens* v. *Robson* (1 H. Black., 100; 2 H. Black., 100, 107; *Lecaux* v. *Eden* (Douglass, 594); *Lindo* v. *Rodney*, (*Ibid.*, 613). Pleadings and Forms: 6 Wentworth's Pleadings, 242, 304; 1 Saund., 136, 142.

Mr. Justice STORY delivered the opinion of the court:

This is the case of an application on behalf of the City Bank of New Orleans to this court for a prohibition to be issued to the District Court of the United States for the District of Louisiana, to prohibit it from further proceedings in a certain case in bankruptcy pending in the said court upon the petition of William Christy, assigeee of Daniel T. Walden, a bankrupt. The suggestions for the writ state at large the whole proceedings before the District Court, and contain allegations of some other facts which either do no appear at all upon the face of those proceedings, or qualify or contradict some of the statements contained therein. So far as respects these allegations of facts not so found in the proceedings of the District Court, we are not upon the present occasion at liberty to entertain any consideration thereof for the purpose of examination or decision, as it would be an exercise of original jurisdiction on the part of this court not confided to us by law. The application for the prohibition is made upon the ground that the District Court has transcended its jurisdiction in entertaining those proceedings; and whether it has or not must depend, not upon facts stated *dehors* the record, but upon those stated in the record, upon which the District Court was called to act, and by which alone it could regulate its judgment. Other matters, whether going to oust the jurisdiction of the court, or to establish the want of merits in the case of the plaintiff, constitute properly a defense to the suit, to be propounded for the consideration of the District Court by suitable pleadings, supported by suitable *proofs, and cannot [*309 be admitted here to displace the right of the District Court to entertain the suit.

Let us, then, see what is the nature of the case originally presented to the District Court. It

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is founded upon a petition of William Christy, as assignee of Daniel T. Walden, a bankrupt, in which he states that the bankrupt, at the time of his filing his schedule of property and surrendering it to his creditors, was in possession of a large amount of real estate, described in the petition, situate in the city of New Orleans, which was to be administered and disposed of in bankruptcy; the bankrupt having applied to the court for the benefit of the Bankrupt Act. It further states that the City Bank of New Orleans, claiming to be a creditor of the bankrupt, and to have a mortgage on the aforesaid property, the said corporation being a schedule creditor, being a party to the proceedings in bankruptcy, and being fully aware of the pendency of the same proceedings, did proceed to the seizure of the said property, and did prosecute the said seizure to a sale of the same property, the same being put up and offered for sale at public auction by the sheriff of the State District Court, on or about the 27th of June, 1842; and it was by the said sheriff declared to be struck off to the said City Bank, notwithstanding the remonstrances of the said assignee and his demands to have the same delivered up to him for the benefit of all the creditors of the bankrupt. It further avers, that the same property was illegally offered for sale, and that it is itself a nullity, and conferred no title on the said City Bank; that the sale was a fraud upon the Bankrupt Act; that the City Bank attempted thereby to obtain an illegal preference and priority over the other creditors of the bankrupt, and that the property was sold at two thirds only of its estimated value; that the City Bank had never delegated to any person the authority to bid off the same to the said bank at the sale; and that the previous formalties required by law for the sale were not complied with, and that the property had been illegally advertised and appraised. It further avers that the bankrupt, long prior to his bankruptcy, was contesting the debt claimed by the said bank; and contending that the said debt was not owing by him, and the said property was not bound thereby. It further avers that the said debt is void for usury on the part of the said bank in making the loan, the same not having been made in money, but that it was received as at par in bonds of the Municipality No. 2, which were then at depreciation at from twenty to twenty-five per cent., at their real current market value; and that the said bank had no authority to make the said contract or to accept or execute the mortgage given by the bankrupt, and that the contract and mortgage are utterly void, and should be so decreed by the court.

The prayer of the petition is, that the sheriff's adjudication of the said property may be declared null and void, and that the said property may be adjudged to form part of the bank-
[*310] ruptcy and given up *to the petitioner to be by him administered and disposed of in the said bankruptcy and according to law; that the said debt and mortgage may be decreed to be null and void, and the estate of the said bankrupt discharged from the payment thereof; and that if the said adjudication shall be held valid, and the debt and mortgage maintained by the court, then that the amount of the said adjudication may be ordered to be paid over by the said bank to the petitioner, to be accounted for and distributed by him according to law in the course of the settlement of the bankrupt's estate, and for all general and equitable relief in the premises.

To this petition the bank, by way of answer, pleaded various pleas: 1. That the District Court had no jurisdiction to decide upon the premises in the petition; 2. That the subject had already become *res judicata* in two suits of *D. T. Walden* v. *The City Bank*, and *The City Bank* v. *D. T. Walden*, in the State courts, and by the District Court upon the petition of D. T. Walden for an injunction (not stating the nature or subject matters of such suits, so as to ascertain the exact matters therein in controversy); 3. That the petition contained inconsistent demands, viz.: that the sale be set aside, and that the proceeds of the sale be decreed to the petitioner; and, 4. That the mortgages to the bank were valid upon adequate considerations; that the order of seizure and sale were duly granted, and the sale duly made with all legal formalities, and the property adjudicated to the bank; that the price of the adjudication was retained by the bank to satisfy the said mortgages, and that the bank became and were the lawful owners of the property. The pleas concluded with a denial of all the allegations in the petition, and prayed that the issues in fact involved in the petition be tried by a jury. It is unnecessary for us to consider whether such a mode of pleading is allowable in any proceedings in equity, whether they are summary or plenary.

Upon this state of pleadings the petitioner took exceptions to the answer of the bank, and three questions were adjourned into the Circuit Court for its decision. To these questions the Circuit Court returned the following answers. [See them quoted in the statement of the reporter.]

Subsequently the assignee filed a supplemental or amended petition in the District Court, stating the matters contained in the original petition more fully and at large, with more precise averments, and mainly relying thereon; and alleging, among other things, that the City Bank became a party to the proceedings in bankruptcy; and by a subsequent amendment or supplemental allegation the assignee averred, that the bank became a party to the proceedings in bankruptcy, first, by operation of law, the bank being at the time of the bankruptcy mortgage creditors of the bankrupt and named in his schedule; second, by their own act, having filed a petition in the court, in September, 1842, praying that the demand of the assignee *for the postponement of the sale of [*311 certain property be disregarded, that their privileges be recognized, and that the property be sold under an order of the court for cash; and that the court had since refused leave to the bank to withdraw and discontinue the latter application and petition.

To the supplemental and amended petition the bank put in an answer or plea, denying the jurisdiction of the District Court to take cognizance thereof, and insisting that they had never proved their debt in bankruptcy, but had prosecuted their remedy in the State courts against the mortgaged property, relying upon their mortgage as a lien wholly exempted from

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the operation of the bankruptcy by the express terms of the Bankrupt Act; that the District Court, sitting as a bankrupt court, and holding summary jurisdiction in matters of bankruptcy under the act of Congress, ought not to take cognizance of the petition and supplemental petition, inasmuch as all jurisdiction over the premises is by law vested in and of right belongs to the Circuit Court of the United States for the Eastern District of Louisiana, holding jurisdiction in equity, and proceeding according to the forms and principles of chancery as prescribed by law, or to the District Court of the United States, proceeding in the same manner, and vested with concurrent jurisdiction over all suits at law or in equity brought by an assignee against any person claiming an adverse interest, which courts are competent to entertain the suit of the petitioner and grant him the relief prayed for, if by law entitled to the same, and not this court; and the bank, therefore, prayed the said petition and supplemental petition to be dismissed for want of jurisdiction.

The District Court affirmed its jurisdiction, considering that the matters of the plea had been already determined by the decree of the Circuit Court already referred to, and overruled the plea, and ordered the bank to answer to the merits of the cause.

It is at this stage of the proceedings, so far as the record before us enables us to see, that the motion for the prohibition has been brought before this court for consideration and decision. Upon the argument the principal questions which have been discussed are, first, what is the true nature and extent of the jurisdiction of the District Court sitting in bankruptcy? Second, whether if the District Court has exceeded its jurisdiction in the present case, a writ of prohibition lies from this court to that court to stay further proceedings. Each of these questions is of great importance, and the first in an especial manner having given rise to some diversity of opinion in the different circuits, and lying at the foundation of all the proceedings in bankruptcy, is essential to be decided in order to a safe and just administration of justice under the Bankrupt Act.

In the first place, then, as to the jurisdiction of the District Court in matters of bankruptcy. Independent of the bankrupt Act of 1841, chap. 9, the district courts of the United States pos-
312*] sess no *equity jurisdiction whatsoever; for the previous legislation of Congress conferred no such authority upon them. Whatever jurisdiction, therefore, they now possess, is wholly derived from that act. And, as we shall presently see, the jurisdiction thus conferred is to be exercised by that court summarily in the nature of summary proceedings in equity.

The obvious design of the Bankrupt Act of 1841, chap. 9, was to secure a prompt and effectual administration and settlement of the estate of all bankrupts within a limited period. For this purpose it was indispensable that an entire system adequate to that end should be provided by Congress, capable of being worked out through the instrumentality of its own courts, independently of all aid and assistance from any other tribunals over which it could exercise no effectual control. The 10th section of the act declares, that in order to ensure a speedy settlement and close of the proceeding in each case in bankruptcy, it shall be the dut of the court to order and direct a collection c the assets, and a reduction of the same t money, and a distribution thereof at as earl period as practicable, consistently with a du regard to the interests of the creditors, an that such distribution of the assets, so far as ca be done consistently with the rights of thir persons having adverse claims thereto, shall b made as often as once in six months; and th all the proceedings in bankruptcy in each cas if practicable, shall be finally adjusted, settle and brought to a close by the court, within tw years after the decree declaring the bankruptc By another section of the act (sec. 3) the a signee is vested with all the rights, titles, pov ers, and authorities, to sell, manage, and di pose of the estate and property of the ban rupt, of every name and nature, and to sue f and defend the same, subject to the orders a directions of the court, as fully as the bankru might before his bankruptcy. By anoth section (sec. 9) all sales, transfers, and oth conveyances of the bankrupt's property, a rights of property, are required to be made b the assignee at such times and in such mann as shall be ordered and appointed by the cou in bankruptcy. By another section (sec. 1 the assignee is clothed with full authority, b and under the order and direction of the prop court in bankruptcy, to redeem and discha any mortgage, or other pledge or deposit, lien upon any property, real or personal, a to tender a due performance thereof, and compound any debts or other claims or secu ties due or belonging to the estate of the ban rupt.

From this brief review of these enactme it is manifest that the purposes so essential the just operation of the bankrupt syste could scarcely be accomplished except b clothing the courts of the United States sitti in bankruptcy with the most ample powers a jurisdiction to accomplish them: and it wo be a matter of extreme surprise if, when C gress had thus required the end, *they [*31 should at the same time have withheld t means by which alone it could be successfu reached. Accordingly we find that by the section of the act it is expressly provided "th the District Court in every district shall ha jurisdiction in all matters and proceedings bankruptcy arising under this act, and a other act which may hereafter be passed on t subject of bankruptcy, the said jurisdiction be exercised summarily in the nature of su mary proceedings in equity; and for this pu pose the said District Court shall be deem always open. And the district judge may a journ any point or question arising in any c in bankruptcy into the Circuit Court for t district, in his discretion, to be there heard a determined; and for this purpose the Circ Court of such district shall also be deem always open." If the section had stopped ha there could have been no reasonable ground doubt that it reached all cases where the righ claims, and property of the bankrupt, or th of his assignee, are concerned, since they matters arising under the act, and are nec sarily involved in the due administration a settlement of the bankrupt's estate. In this

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spect the language of the act seems to have been borrowed from the language of the Constitution, in which the judicial power is declared to extend to cases arising under the Constitution, laws, or treaties of the United States. But the section does not stop here, but in order to avoid all doubt it goes on to enumerate certain specific classes of cases to which the jurisdiction shall be deemed to extend, not by way of limitation, but in explanation and illustration of the generality of the preceding language. The section further declares: "And the jurisdiction hereby conferred on the District Court shall extend to all cases and controversies in bankruptcy arising between the bankrupt and any creditor or creditors, who shall claim any debt or demand under the bankruptcy; to all cases and controversies between such creditor or creditors and the assignee of the estate, whether in office or removed; and to all acts, matters, and things, to be done under and in virtue of the bankruptcy until the final distribution and settlement of the estate of the bankrupt, and the close of the proceedings in bankruptcy." This last clause is manifestly added in order to prevent the force of any argument that the specific enumeration of the particular classes of cases ought to be construed as excluding all others not enumerated, upon the known maxim, often incorrectly applied, *expressio unius est exclusio alterius*. The 8th section of the act further illustrates this subject. It is there provided "that the Circuit Court within and for the district where the decree of bankruptcy is passed, shall have concurrent jurisdiction with the District Court of the same district, of all suits at law and in equity which may and shall be brought by any assignee of the bankrupt against any person or persons claiming an adverse interest, or by such person against such assignee touching any property or rights of property of such bankrupt transferable to or [14*] vested in such *assignee." Now, this case certainly supposes either that the District Court, in virtue of the 6th section above cited, is already in full possession of the jurisdiction, in the class of cases here mentioned, at least so far as they are of an equitable nature, and then confers the like concurrent jurisdiction on the Circuit Court, or it intends to confer on both courts a co extensive authority over at least every class of cases, and thereby demonstrates that Congress did not intend to limit the jurisdiction of the District Court to the classes of cases specifically enumerated in the sixth section, but to bring within its reach all adverse claims. Of course, in whichever court such adverse suit should be first brought, that would give such court full jurisdiction thereof, to the exclusion of the other, but in no shape whatsoever can this clause be construed otherwise to abridge the exclusive jurisdiction of the District Court over all other "matters and proceedings in bankruptcy arising under the act," or over "all acts, and matters and things to be done under and in virtue of the bankruptcy." One ground urged in the declinatory plea of the bank to the supplemental petition, and also in the argument here, is, that the District Court would have had jurisdiction in equity over the present case, if the suit had been by a formal bill and other plenary proceedings according to the common course of such suits in the Circuit Court, but that it has no right to sustain the suit in its present form of a summary proceeding in equity. Now, without stopping to consider whether the petition of the assignee in the present case is not in substance, and for all useful purposes, a bill in equity, it is clear that the suggestion has no foundation whatsoever in the language or objects of the 6th or 8th sections of the Bankrupt Act. There is no provision in the former section authorizing or requiring the District Court to proceed in equity otherwise than "summarily in the nature of summary proceedings in equity;" and that court is by the same section clothed with full power and authority, and indeed it is made its duty, "from time to time to prescribe suitable rules, and regulations, and forms of proceedings, in all matters in bankruptcy," subject to the revision of the Circuit Court; and it is added: "And in all such rules, and regulations, and forms, it shall be the duty of the said courts to make them as simple and brief as practicable, to the end to avoid all unnecessary expenses, and to facilitate the use thereof by "the public at large." If any inference is to be drawn from this language, it is, not that the District Court should in any case proceed by plenary proceedings in equity in cases of bankruptcy, but that the Circuit Court should, by the interposition of its revising power, aid in the suppression of any such plenary proceedings if they should be attempted therein. The manifest object of the act was to provide speedy proceedings, and the ascertainment and adjustment of all claims and rights in favor of or against the bankrupt's estate, in the most expeditious manner, *consistent with jus- [*315 tice and equity, without being retarded or obstructed by formal proceedings, according to the general course of equity practice, which had nothing to do with the merits.

Another ground of objection insisted on in the argument is, that the language of the 6th section, where it refers to "any creditor, or creditors, who shall claim any debt or demand under the bankruptcy," is exclusively limited to such creditors as come in and prove their debts under the bankruptcy, and does not apply to creditors who claim adversely thereto. If this argument were well founded, it would be sufficient to say, that the case would then fall within the concurrent jurisdiction given by the 8th section already cited, and therefore not avail for the City Bank. But we do not so interpret the language. When creditors are spoken of "who claim a debt or demand under the bankruptcy," we understand the meaning to be that they are creditors of the bankrupt, and that their debts constitute present subsisting claims upon the bankrupt's estate, unextinguished in fact or in law, and capable of being asserted under the bankruptcy in any manner and form which the creditors might elect, whether they have a security by way of pledge or mortgage therefor or not. If they have a pledge or mortgage therefor, they may apply to the court to have the same sold, and the proceeds thereof applied towards the payment of their debts *pro tanto*, and to prove for the residue; or, on the other hand, the assignee may contest their claims in the court or seek to ascertain the true amount thereof, and have the residue of the property, after satisfying their claims, applied

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for the benefit of the other creditors. Still, the debts or demands are in either view debts or demands under the bankruptcy, and they are required by the Bankrupt Act to be included by the bankrupt in the list of the debts due to his creditors when he applies for the benefit of the act; so that there is nothing in the language or intent of the 6th section to justify the conclusion which the argument seeks to arrive at. The 5th section of the Bankrupt Act is framed *diverso intuitu*. It does not speak of creditors who shall claim any debt or demand under the bankruptcy, but it uses other qualifying language. The words are: "All creditors coming in and proving their debts under such bankruptcy in the manner hereinafter prescribed, the same being *bona fide* debts, shall be entitled to share in the bankrupt's property and effects *pro rata*, &c.; and no creditor or other person coming in or proving his debt or other claim, shall be allowed to maintain any suit at law or in equity therefor, but shall be deemed thereby to have waived all right of action and suit against such bankrupt." But this provision by no means interferes with the right of any creditor to proceed against the assignee under the bankruptcy to have the benefit of any mortgage, pledge, or other security, *pro tanto* for his debt, if he elects so to do, or with the rights of the **316*]** assignee to redeem the *same, or otherwise to contest the validity of the debt or security under the bankruptcy.

It is also suggested that the proviso of the 2d section of the act declares, "That nothing in this act shall be construed to annul, destroy, or impair any lawful rights of married women or minors, or any liens, mortgages, or other securities on property, real or personal, which may be valid by the laws of the States respectively, and which may not be inconsistent with the provisions of the 2d and 5th sections of this act;" and that thereby such liens, mortgages, and other securities are saved from the operation of the Bankrupt Act, and by inference from the jurisdiction of the District Court. But we are of opinion that the inference thus attempted to be drawn, is not justified by the premises. There is no doubt that the liens, mortgages, or other securities within the purview of this proviso, so far as they are valid by the State laws, are not to be annulled, destroyed, or impaired under the proceedings in bankruptcy; but they are to be held of equal obligation and validity in the courts of the United States as they would be in the State courts. The District Court, sitting in bankruptcy, is bound to respect and protect them. But this does not and cannot interfere with the jurisdiction and right of the District Court to inquire into and ascertain the validity and extent of such liens, mortgages, and other securities, and to grant the same remedial justice and relief to all the parties interested therein as the State courts might or ought to grant. If the argument has any force, it would go equally to establish, that no court of the United States, neither the Circuit Court, nor the District Court, could entertain any jurisdiction over any such cases, but that they exclusively belong to the jurisdiction of the State courts. Such a conclusion would be at war with the whole theory and practice under the judicial power given by the Constitution and laws of the United States. The rights and the remedies in such cases are entirely distinct. While th former are to be fully recognized in all courts the latter belong to the *lex fori*, and are withi the competency of the national courts equall with the State courts.

Let us sift this argument a little more in de tail. The 8th section of the Bankrupt Act (a we have already seen) confers on the Circu Court concurrent jurisdiction with the Distric Court of all suits at law and in equity brough by the assignee against any person claiming a adverse interest, and *e converso* by such perso against the assignee. Now, the argument the bar supposes, that a creditor having an lien, mortgage, or other security, falls withi the category here described as having an ad verse interest. Assuming this to be true (o which we give no opinion, and the clause ce tainly does include persons claiming by titl paramount and not under the bankrupt), sti it must be admitted that, under the 8th sectio a bill in equity may be brought by or again such creditor in the Circuit Court to redeem foreclose, or to enforce, or to set *aside [*31 such a lien, mortgage, or other security. If can be, then the lien, mortgage, or other sec rity, is not saved from the cognizance of t Circuit Court having jurisdiction in bankrup cy, but the most ample remedies lie there; a although the rights of such creditors are to protected, they are subject to the entire exam nation and decision of the court as much they would be if brought before the court the exercise of its ordinary jurisdiction. then, the jurisdiction over such liens, mo gages, and securities exists in the Circuit Cou it follows from the very words of the Bankru Act, that the District Court has a concurr jurisdiction to the same extent and with t same powers.

But it is objected that the jurisdiction of t District Court is summary in equity and wi out appeal to any higher court. This we re ily admit. But this was a matter for the co sideration of Congress in framing the act. C gress possess the sole right to say what sh be the forms of proceedings, either in equity at law, in the courts of the United States; a in what cases an appeal shall be allowed or n It is a matter of sound discretion, and to be ercised by Congress in such a manner as sh in their judgment best promote the public co venience and the true interests of the citize Because the proceedings are to be in the natu of summary proceedings in equity, it by means follows that they are not entirely co sistent with the principles of justice and ada ed to promote the interest as well as the co venience of all suitors. Because there is no peal given, it by no means follows that the risdiction is either oppressive or dangerous. appeal lies from the judgments either of t District or Circuit Court in criminal cases: a yet within the cognizance of one or both those courts are all crimes and offenses agai the United States, from those which are capi down to the lowest misdemeanors, affecting liberty and the property of the citizens. A yet there can be no doubt that this denial appellate jurisdiction is founded in a wise p tective public policy. The same reasoni would apply to the appellate jurisdiction fr the decrees and judgments of the Circuit Cou

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which are limited to cases above $2,000, and cases below that sum embrace a large proportion of the business of that court.

But, in the present instance, the public policy of confiding the whole jurisdiction to the District Court without appeal in ordinary cases requires no elaborate argument for its vindication. The district judges are presumed to be entirely competent to all the duties imposed upon them by the Bankrupt Act. In cases of doubt or difficulty, the judges have full authority given to them to adjourn any questions into the Circuit Court for a final decision. That very course was adopted in the present case. In the next place, in one class of cases, that of adverse interests between the assignee and third persons, either party is at liberty to institute original proceedings in the Circuit Court, if a prior suit has not been brought therefor [*318] *in the District Court. So that here the act has afforded effectual means to have the aid and assistance of the judge of the Circuit Court, wherever it may seem to be either expedient or necessary to resolve any questions of importance or difficulty, and it has also secured to parties having an adverse interest a right at their election to proceed in the District or the Circuit Court for any remedial justice which their case may require. On the other hand the avowed policy of the Bankrupt Act, that of ensuring a speedy administration and distribution of the bankrupt's effects, would (as has been already suggested) be greatly retarded, if not utterly defeated by the delays necessarily incident to regular and plenary proceedings in equity in the District Court, or by allowing appeals from the District Court to the Circuit Court in all matters arising under the bankruptcy.

It is further objected that, if the jurisdiction of the District Court is as broad and comprehensive as the terms of the act justify according to the interpretation here insisted on, it operates or may operate to suspend or control all proceedings in the State courts either then pending or thereafter to be brought by any creditor or person having any adverse interest to enforce his rights or obtain remedial redress against the bankrupt or his assets after the bankruptcy. We entertain no doubt that, under the provisions of the 6th section of the act, the District Court does possess full jurisdiction to suspend or control such proceedings in the State courts, not by acting on the courts, over which it possesses no authority; but by acting on the parties through the instrumentality of an injunction or other remedial proceedings in equity upon due application made by the assignee and a proper case being laid before the court requiring such interference. Such a course is very familiar in courts of chancery, in cases were a creditor's bill is filed for the administration of the estate of a deceased person, and it becomes necessary or proper to take the whole assets into the hands of the courts for the purpose of collecting and marshaling the assets, ascertaining and adjusting conflicting priorities and claims, and accomplishing a due and equitable distribution among all the parties in interest in the estate. Similar proceedings have been instituted in England in cases of bankruptcy; and they were without doubt in the contemplation of Congress as indispensable to the practical working of the bankrupt system. But because the District Court does possess such a jurisdiction under the act, there is nothing in the act which requires that it should in all cases be absolutely exercised. On the contrary, where suits are pending in the State courts, and there is nothing in them which requires the equitable interference of the District Court to prevent any mischief or wrong to other creditors under the bankruptcy, or any waste or misapplication of the assets, the parties may well be permitted to proceed in such suits and consummate them by proper decrees and judgments, especially where there is no suggestion of any fraud or injustice on the part of the plaintiffs in those suits. *The act itself contemplates that such [*319 suits may be prosecuted and further proceedings had in the State courts; for the assignee is by the 3d section authorized to sue for and defend the property vested in him under the bankruptcy, "subject to the orders and directions of the District Court," and all suits at law and in equity then pending in which such bankrupt is a party, may be prosecuted and defended by such assignee to its final conclusion in the same way and manner and with the same effect as they might have been by the bankrupt." So that here the prosecution or defense of any such suits in the State courts is obviously intended to be placed under the discretionary authority of the District Court. And in point of fact, as we all know, very few, comparatively speaking, of the numerous suits pending in the State courts at the time of the bankruptcy ever have been interfered with, and never, unless some equity intervened which required the interposition of the District Court to sustain or protect it.

It would be easy to put cases in which the exercise of this authority may be indispensable on the part of the District Court, to prevent irreparable injury, or loss, or waste, of the assets, without adverting to the case at bar, where, upon the allegations in the petition and supplemental petition, the creditors of the bankrupt are attempting to enforce a mortgage asserted to be illegal and invalid, and to procure a forced sale of the property by the sheriff, in an illegal and irregular manner, thereby sacrificing the interest of the other creditors under the bankruptcy. Let us put the case of numerous suits pending, or to be brought in the State courts, upon different mortgages, by the mortgagees, upon various tracts of land and other property, some of the mortgages being upon the whole of the tracts of land or other property; some upon a part only thereof; some of them involving a conflict of independent titles; some of them involving questions as to the extinguishment, or satisfaction, or validity, of the debts; and some of them involving very doubtful questions as to the construction of the terms and extent of the conveyances. If all such suits may be brought by the separate mortgagees, in the different State tribunals, and the mortgagees cannot be compelled to join in, or to be made parties defendant to one single bill (as is certainly the case in those States where general equity jurisdiction is not given to the State courts), it is most obvious that, as each of the State tribunals may or must proceed upon the single case only

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before it, the most conflicting decisions may be made, and gross and irreparable injustice may be done to the other mortgagees, as well as to the general creditors under the bankruptcy. All this, however, is completely avoided, by bringing the whole matters in controversy between all the mortgagees before the District or Circuit Court, making them all parties to the summary proceedings in equity, and thus enabling the court to marshal the rights, and priorities, and claims, of all the parties, and by a sale and other proper proceedings, after **320*]** satisfying *the just claims of all the mortgagees, applying the residue of the assets, if any, for the benefit of the general creditors. Similar considerations would apply to other liens and securities, held by different parties in the same property, or furnishing grounds of conflict and controversy as to their respective rights and claims.

Besides, how is the bankrupt court or the assignee, in a great variety of cases of liens, mortgages, and other securities, to ascertain the just and full amount thereof after the deduction of all payments and equitable set-offs, unless it can entertain a suit in equity, for a discovery of the debts, and payments, and set-offs, and grant suitable relief in the premises? The bankrupt is not, in his schedule, bound to specify them; and if he did, *non constat* that the other parties would admit their correctness, or that the general creditors would admit their validity and amount. The 11th section of the act gives the assignee full power and authority, by and under the order and direction of the proper court in bankruptcy, to redeem and discharge any mortgage or other pledge, or deposit, or lien, upon any property, and to tender a due performance of the conditions thereof. But how can this be effectually done, unless the Bankrupt Court and assignee can, by proceedings in that very court, ascertain what is the amount of such mortgage, or pledge, or deposit, or lien, and what acts are to be done as a performance of the mortgage, or pledge, or deposit, through the instrumentality of a suit in the nature of a summary proceeding in equity for a discovery and relief? If we are told that resort may be had to the State courts for redress, one answer is, that in some of the States no adequate jurisdiction exists in the State courts, since they are not clothed with general jurisdiction in equity. But a stronger and more conclusive answer is, that Congress did not intend to trust the working of the bankrupt system solely to the State courts of twenty-six States, which were independent of any control by the general government, and were under no obligations to carry the system into effect. The judicial power of the United States is, by the Constitution, competent to all such purposes; and Congress, by the act, intended to secure the complete administration of the whole system in its own courts, as it constitutionally might do.

Let us look at another provision of the act already referred to, which declares, "that in order to insure a speedy settlement and close of the proceedings in each case in bankruptcy, it shall be the duty of the court to order and direct a collection of the assets, and a reduction of the same to money, and a distribution thereof, at as early periods as practicable." Now, here again, it may be repeated, that the end is required, and can it be doubted that adequate means to accomplish the end are intended to be given? Construing the language of the 6th section as we construe it, adequate means are given; construing it the other way, and it excludes the jurisdiction, if not of the whole subject, at least of the most important parts of *the system, and they are left [***321** solely to the cognizance of the tribunals of twenty-six different States, no one of which is bound by the acts of the others, or is under the control of the national courts. If it be admitted (what cannot well be denied) that the District Court may order a sale of the property of the bankrupt, under this section, how can that sale be made safe to the purchasers, until all claims thereon have been ascertained and adjusted? How can any distribution of the assets be made until all such claims are definitively liquidated? How can the proceedings be brought to a close at all, far less within the two years, unless all parties claiming an interest, adverse or otherwise, can be brought before the Bankrupt Court, to assert and maintain them? Besides, independently of the delays which must necessarily be incident to a resort to State tribunals to adjust the matters and rights affected by or arising in bankruptcy, considering the vast number of cases pending in those courts, in the due administration of their own jurisprudence and laws, there could hardly fail to be a conflict in the decisions, as to the priority and extent of the various claims of the creditors, pursuing their remedies therein in distinct and independent suits, and perhaps, also, in different State tribunals of co-ordinate jurisdiction. These are but a few of the cases which may be put to show the propriety, nay, the necessity, of the jurisdiction of the District Court to the full extent of reaching all cases arising out of the Bankrupt Act.

The truth is (as has been already asserted) that in no other way could the bankrupt system be put into operation, without interminable doubts, controversies, embarrassments, and difficulties, or in such a manner as to achieve the true end and design thereof. Its success was dependent upon the national machinery being made adequate to all the exigencies of the act. Prompt and ready action, without heavy charges or expenses, could be safely relied on, when the whole jurisdiction was confided to a single court, in the collection of the assets; in the ascertainment and liquidation of the liens and other specific claims thereon; in adjusting the various priorities and conflicting interests; in marshaling the different funds and assets; in directing the sales at such times and in such a manner as should best subserve the interests of all concerned; in preventing, by injunction or otherwise, any particular creditor or person, having an adverse interest, from obtaining an unjust and inequitable preference over the general creditors, by an improper use of his rights or his remedies in the State tribunals; and finally, in making a due distribution of the assets, and bringing to a close, within a reasonable time, the whole proceedings in bankruptcy. Sound policy, therefore, and a just regard to public as well as private interests, manifestly dictated to Congress the propriety of vesting in the District Court full and complete jurisdic-

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tion over all cases arising, or acts done, or matters involved, in the due administration and final settlement of the bankrupt's estate; and it is accordingly, in our judgment, designedly 322*] *given by the 6th section of the act. In this view of the matter, the District Court has not exceeded its jurisdiction in entertaining the present suit, but it has full power and authority to proceed to the due adjudication thereof upon its merits.

This view of the subject disposes, also, of the other questions made at the bar, whether this court has jurisdiction to issue a writ of prohibition to the District Court in cases in bankruptcy, if it has exceeded its proper jurisdiction. As the District Court has not exceeded its jurisdiction in the present case, the question is not absolutely necessary to be decided. But it may be proper to say, as the point has been fully argued, that we possess no revising power over the decrees of the District Court sitting in bankruptcy; that the District Court, in the present case, has not interfered with, or in any manner evaded or obstructed, the appellate authority of this court, by entertaining the present writ; and that we know of no case where this court is authorized to issue a writ of prohibition to the District Court, except in the cases expressly provided for by the 13th section of the Judiciary Act of 1789, chap. 20, that is to say, where the district courts are "proceeding as courts of admiralty and maritime jurisdiction."

Upon the whole, the motion for a writ of prohibition is overruled.

Mr. Justice CATRON:

By the 14th section of the Judiciary Act this court has power to issue writs proper and necessary for the exercise of its jurisdiction; having no jurisdiction in any given case, it can issue no writ: that it has none to revise the proceedings of a bankrupt court is our unanimous opinion. So far we adjudge; and in this I concur. For further views why the prohibition cannot issue, I refer to the conclusion of the principal opinion. But a majority of my brethren see proper to go further, and express their views at large on the jurisdiction of the Bankrupt Court. In this course I cannot concur; perhaps it is the result of timidity growing out of long established judicial habits in courts of error elsewhere, never to hazard an opinion where no case was before the court, and when that opinion might be justly arraigned as extrajudicial, and a mere *dictum* by courts and lawyers; be partly disregarded while I was living, and almost certainly be denounced as undue assumption when I was no more. A measure of disregard awarded with an unsparing hand, here and elsewhere, to the *dicta* of State judges under similar circumstances: and it is due to the occasion and to myself to say, that I have no doubt the *dicta* of this court will only be treated with becoming respect before the court itself, so long as some of the judges who concurred in them are present on the bench; and afterwards be openly rejected as no authority—as they are not.

The case standing in the District Court of Louisiana will test it as well as another. The application for a prohibition was brought be- 323*] fore *us at last term; then the late *Mr. Justice* Baldwin was here, and one other of the judges now present was then absent; had the matter not then been laid over on advisement, and a decision been had adverse to our jurisdiction to award the writ; and an opinion been expressed by the majority of the judges then present, against the legality of the proceeding in the Bankrupt Court, declaring it void, and that in the State court valid; would the Bankrupt Court be bound to conform to such opinion; would it overrule the instructions given in the particular case by the Circuit Court on the questions adjourned, dismiss the petition of Christy, the assignee, and let the decree and sale foreclosing the mortgage made by the State courts stand? Will the Bankrupt Court of Pennsylvania be bound, either judicially or in comity, by the opinion now given by a majority of the judges present, to overthrow that of *Mr. Justice* Baldwin in the case hereto appended; or is it bound to conform? Are the bankrupt courts in all the districts that have held the State proceedings on liens to be valid, and not subject to their supervision, now bound to suppress such proceedings on the suggestion of assignees that they were erroneous or inconvenient, regardless of proof, as was done in Louisiana, and thereby overhaul cases in great numbers supposed to be settled? Certainly not. This court has no power over the bankrupt courts, more than they have over this court; the bankrupt law has made them altogether independent, and their decrees as binding as ours, and as final. We have as little power to control them as the State courts have; they may concur with the reasoning of either, or neither, at discretion. I therefore think we should refrain from expressing any extrajudicial opinion on the present occassion; we did so in *Nelson* v. *Carland* (1 How., 265), a case involving the constitutionality of the bankrupt law, and I then supposed most properly, by the majority of the court, who thought we had no jurisdiction: a more imposing application, requiring an opinion, could not have been presented, as twelve hundred cases depended on the decision of the District Court of Missouri, which was opposed to the constitutionality of the law; and to revise it the case was brought here. So in Dorr's application, at the present term, for a writ of *habeas corpus*, the same course was pursued. That application and this are not distinguishable in principle: in neither had this court power to bring a case for judgment into it; there, and here, we held nothing was before us, or could be brought before us. With this course I would now content myself, was it not that by acquiescing in silence with the opinion of my brethren I might be supposed to have agreed with them in the course pursued; and also in the views expressed in the affirmance of the jurisdiction exercised under the bankrupt law by the Circuit Court of Eastern Louisiana; to both of which my opinion is adverse, and that most decidedly. The case presented to that court was this:

*In 1839, Walden gave to the City [*324 Bank a mortgage to secure the payment of $200,000 loaned him, on a plantation and town lots.

In 1820, he instituted a suit in the District Court of the State, in New Orleans, to set the mortgage aside as void; a trial was had, and the court adjudged the mortgage valid; from

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this Walden appealed to the Supreme Court of Louisiana, and that court affirmed the judgment.

The bank then proceeded in the District Court of the State to foreclose the mortgage, and on the 17th of May, 1842, an order of seizure and sale was made; and an actual seizure of the property was executed on the 19th of May. The sale took place on the 27th of June.

The property was sold by lots, after appraisement, in conformity to the laws of Louisiana, and the bank became the purchaser at the price of $160,000.

That the sale was made in regular and due form, according to the modes of proceeding in the State courts, cannot be controverted.

On the 18th of June, 1842, Walden filed his petition for the benefit of the bankrupt law; and on the 18th of July was declared a bankrupt, and an assignee appointed. The $200,000 was on Walden's creditor list, but the bank refused to prove its debt, and relied on the decree of foreclosure, and the force of its lien, by the mortgage.

Christy, the assignee, filed his petition in the Bankrupt Court, and as part of the proceeding in bankruptcy, to have the sale declared void: 1. Because it was made after Walden applied for the benefit of the bankrupt law. 2. Because the sale had been unfairly conducted. 3. Because the proceeding in the State court was erroneous. 4. Because the debt was affected with usury, and therefore the mortgage void originally; and should be so decreed by the Bankrupt Court.

The bank appeared, and pleaded to the jurisdiction of the Bankrupt Court; and relied on the proceedings of the State court as valid by answer. Exceptions were taken to this plea and answer, which were adjourned to the Circuit Court; there it was adjudged, and the District Court instructed:

1. That it had full and ample jurisdiction to try all the questions set forth in the petition of the assignee; and to try, adjudge, and determine the same between the parties.

2. That the seizure and sale of the State court were void; and that the District Court of the United States do declare it void.

3. That the District Court has full power and authority to try and determine the validity of the mortgage; and if proved on the trial void, to declare it so, and to make a decree ordering the property to be sold for the benefit of the creditors generally; but if found valid, the bank to have the benefit of its lien.

This decree pronounced void the judgment **325*]** of the Supreme Court *of Louisiana, affirming that of the inferior court declaring the mortgage valid, and not affected with usury; which was conclusive between Walden and the bank before the bankrupt law existed. 2. It declared void the decree and order of seizure made before Walden applied for the benefit of the act—and it declared void the sale. In short, it annulled all the judgments of the State courts, and assumed to extinguish the title acquired under them; and has extinguished in form and fact, if the views of a majority of my present brethren be correct, a title indisputable according to the laws of Louisiana standing alone; this is manifest from the slightest examination of the facts, and laws applicable to them. On the 18th of July the decree declaring Walden a bankrupt was passed; up to this date he might or might not be declared a bankrupt, either at his own instance, or that of the court; therefore he was a proper party before the State-court until that time; afterwards he was represented by his assignee; his property was under execution when he was declared a bankrupt; if he had then died, still the duty of the officer would have been to sell the execution having commenced. a natural or civil death could not defeat it, as the property was in the custody of the law.

If it be true that this title is void, it follows every other is void where a sale has taken place after the defendant to the execution (is sued by a State court) had applied for the benefit of the bankrupt law; and this whether the execution was awarded in the form usual to courts of law, or by decree in a court of chancery, ordering a seizure and sale by force of the decree. Every sheriff, or commissioner in chancery, executing such writ or decree must have been a trespasser; and all persons taking under such sales deluded purchasers. In the eighth circuit there are very many such cases beyond doubt; they are founded on my opinion acting with the district judges, who fully concurred with me, that such sales were lawful, and the titles acquired under them valid. In two other circuits at least, similar views have been entertained, and no doubt similar consequences have followed. It is therefore, due to interests so extensive, affecting so many titles, that they should not be overthrown until a case calling for the authoritative adjudication of this court is presented involving them, and therefore these brief views have been expressed; not on the jurisdiction of the bankrupt courts generally; but on the precise facts presented as the ground on which the prohibition was demanded.

On the force of the lien, and the remedy to enforce it, as a right excepted from the bankrupt law, I have said nothing, because my late brother Baldwin was called on to follow the decision given in Louisiana and refused. As he decided under the responsibility of passing on men's rights, and from whose judgment there was no appeal, his opinion is judicial and authoritative throughout his late circuit whereas mine on the present occasion would be extrajudicial, *and therefore I ap- [*326 pend his instead of any I may entertain individually.

In the aforegoing opinion of *Mr. Justice* Catron, *Mr. Justice* Daniel concurs.

Opinion of *Mr. Justice* Baldwin, adopted by *Mr. Justice* Catron as part of his dissenting opinion.

In the matter of John Kerlin, a Bankrupt.

Oct. 26, 1843.

On the 18th of May, 1843, the assignees of John Kerlin, a bankrupt, presented their petition to the judge of the District Court for the Eastern District of Pennsylvania, praying for an order, authorizing them to sell certain real estate of the bankrupt, in Delaware County. On the face of the petition it appeared that at the time of the decree of bankruptcy, the property was subjected to incumbrances amount-

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ing to $14,800: that it had been sold by the sheriff of Delaware County on the 11th of May, 1843, for the sum of $8,000, by virtue of proceedings issued by the Court of Common Pleas of Delaware County, under one of the mortgages recorded before the decree of bankruptcy, but the purchaser had not complied with the terms of the sale. The assignee in bankruptcy contended that the sheriff could not make title to the premises, and under a decision of the Circuit Court in Louisiana, claimed the right to sell. The district judge (Randall) refused to grant the order, but at request of the parties adjourned the question to the Circuit Court, where the following opinion was delivered by Baldwin, *J.:*

The following questions have been certified by the district judge for the opinion of this court:

"1st. Does a sale by a sheriff after a decree of bankruptcy, by virtue of process issued on a judgment or mortgage, which was a lien on the property of the bankrupt before and at the time of the decree, devest the title of the assignee in bankruptcy?"

"2. In case of a sale made by the assignee under an order of the court, if the whole of the purchase money is not sufficient to discharge the liens existing at the time of the decree, are the liens devested by such sale?"

The leading principle which has governed this court in the construction of the Bankrupt Act of 1841 has been to consider it as establishing a uniform law on the subject of bankruptcies, in the most comprehensive sense of the words as used in the Constitution, in which there is no other restriction on the power of Congress than that the laws shall be uniform throughout the United States. To make it so in its practical operation, it must be taken as it reads, its words must receive their appropriate meaning, with reference to the whole law, and the policy developed in its various provisions.

These constitute that system which it was in-
327*] tended to establish, *not by assuming that the design of the law was to adopt any pre-existing rules and principles found only in the former legislation of Congress, or in other countries, and then to so apply it as to effectuate a supposed policy not apparent in the law itself, nor consistent with its language, the insertion of which into the system must make it operate according to the intention of other Legislatures, and require a mode of construction which will do violence to the plainest terms used to denote and declare the policy and general principles which Congress have actually established.

That the Act of 1841 is anomalous in its provisions, unlike any other known in any legislation here or elsewhere, cannot be doubted. In the great outlines as well as in the details of the system, we feel the exercise of an express plenary power, competent to act at its own unlimited discretion (so that the action be uniform), either by adopting or modifying some old system on the subject of bankruptcy or prescribing a new one: the latter mode has seemed the better in the eye of the Legislature, and the duty of the judicial department is to consider its intention and to carry it into effect.

In applying this principle to the solution of the first question now submitted, there seems no difficulty as to the policy and intentions of the law from its unequivocal language, which, as we have heretofore held, contains an express prohibition to the judicial power, not to so construe any provision as to annul, destroy, or impair any lien, mortgage, or other security, on property which is valid by the laws of the States respectively, and not inconsistent with the 2d or 5th sections.

The validity of a mortgage or judgment is submitted to no other test than these—the laws of the States and these two sections; if they stand this scrutiny, the duty of the courts is imperative. The Bankrupt Act protects all valid judgments or mortgages against any construction which shall impair them, to the same extent as the Constitution guards the obligation of contracts when attempted to be impaired by State laws. Having heretofore given this as, not the construction merely, but the inevitable result of language incapable of being mistaken in any fair reading of the last proviso in the 2d section, and stated the reasons therefor at large, it is not deemed either necessary or useful to now resume the investigation of that provision of the law, as no doubt was then or is now entertained of its meaning. (*Vide Ex-parte Dudley et al.*, Pennsylvania Law Journal, 302.) If additional reasons could be requisite to elucidate this view of that proviso, they will be found in the 11th section, which is framed to meet its provisions—by authorizing the assignee with the order of the court, to redeem and discharge any mortgage or lien upon any property of the bankrupt, though payable at a future day, and to tender performance of its conditions.

This authority to redeem and discharge a lien presupposes its validity, that it cannot be impaired by any power of the court, and *that the assignee of the bankrupt could [***328** not take the property so bound before the lien was discharged, on any other terms than those on which it was held by the bankrupt himself, before any decree of bankruptcy had vested his rights in the assignee, else why should it have been deemed necessary to authorize him to redeem or discharge the lien, if it was not in full force as well after as before the petition or decree? Neither the proviso to the 2d or the 11th section discriminate between a lien existing before the petion filed or after it; both comprehend all liens existing at the time of the decree as burdens on the property, and contemplate the necessity of their payment in full before any other creditor can come in upon it. The only fund for their payment being the assets of the bankrupt in the hands of the assignee, it is clear that the rights of those creditors who have liens, are, and must be, paramount to any which accrue under the bankruptcy to the assignee or general creditor. When liens are paid, then the property which they bound becomes distributable by the assignee; if not paid, the rights of the lien creditor remaining incapable of being impaired by any authority conferred by the Bankrupt Act, stands perfect as if that act had not been passed; so that, if valid by the law of the State, and not inconsistent with the 2d or 5th sections of that law, they may consequently be enforced by a sale or other pro-

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cess conformably to the existing laws of the State for enforcing liens, which no court can annul, destroy, or impair, by any proceeding in bankruptcy. On this subject, the principles established by the Supreme Court, in the case of *Bronson* v. *Kenzie*, are replete with the soundest rules of jurisprudence and constitutional law, and directly applicable to the question now under consideration, which is, in all respects, analogous to the one then before that court on the nature of the obligation, of the extent of the mortgage and the rights of the mortgagee; and the validity of the State law, which impaired his rights to enforce the payment of the mortgage money. In that case, the court declared that the obligation of the contract, the rights which the mortgagee acquired in the mortgage premises, depended on the then existing laws of the State, which "created and defined the legal and equitable obligation of the mortgage contract." (1 How., 315.) That the Constitution equally prohibits the impairing them by a State law, acting on the remedy or directly on the contract itself, "if it so changes the nature and extent of existing remedies as materially to impair the rights and interests of the owner, they are just as much a violation of the compact as if they directly overturned his rights and interests in it." (1 How., 316.) "That it may be seriously impaired by burdening the proceedings with new conditions and restrictions, so as to make the remedy hardly worth pursuing." (1 How., 307.) "That the rights and remedies of mortgageor and mortgagee by the law then in force, were a part of the law of the contract without any express agreement of the parties—they were annexed [*329] to the *contract at the time it was made and formed a part of it, and any subsequent law impairing the rights thus acquired, impairs the obligations which the contract imposed." (1 How., 319.) And on these principles a State law which incumbered the remedy of the mortgagee by conditions imposed after its obligation had attached was null and void. In this case the question presented is, whether a court of the United States, sitting in bankruptcy, can, by any rule, order, or decree, impair the right of a creditor by mortgage or judgment, to enforce the payment of his debts by a sale of the property mortgaged or incumbered by the lien of a judgment, according to the provisions of the State laws. If the right and power to sell can be taken from the creditors and conferred on the assignee of a bankrupt, who is a debtor by a mortgage or judgment existing at the time of the decree of bankruptcy: if the validity of the liens, the time, and terms of sale, and the distribution of the proceeds, can, under the bankrupt law, be determined, and regulated by a judge in a proceeding in bankruptcy, from which there can be no appeal, then the remedy for enforcing a mortgage or judgment is no longer annexed to the contract or a part of it. The empty right still remains in the mortgagee, yet the remedy is taken from him by the assignee of his debtor. The final adjudication, and even his ultimate rights, and the mode of administering the remedy, is made dependent on the discretion of a judge, exercised by the summary proceedings prescribed by the Bankrupt Act, instead of the regular course of the law as administered in the courts of a State. For such a course, there is not only no warrant in the law, but it is a direct violation of the prohibition in the section, by so construing the law as to negative its express language, and taking from lien creditors, by mere judicial power, those very rights and remedies which are placed beyond its exercise, in terms positively forbidding it, in as plain and emphatic language as that in which the Constitution declares that "no State shall pass any law impairing the obligation of contracts." The principles of the Supreme Court in the case of *Bronson*, must be repudiated before a judge can exercise a power under the Bankrupt Act which is forbidden to a State by the Constitution. If either the obligation or the remedy is impaired, it matters not by whom it is done; no State has any power to do it; Congress can only do it by a "uniform law on the subject of bankruptcy," nor when the law is silent can the courts do it without the usurpation of legislative power. But the law is not silent; it speaks to the judge; it forbids him to do any act which impairs any lien then existing, and, in deciding the first question submitted in this case, I answer in the affirmative, and repeat the language of the Supreme Court; "and it would ill become this court under any circumstances to depart from the plain meaning of the words used, and to sanction a distinction between the right and the remedy which would render this provision illusive and nugatory; mere words of [*330 form, offering no protection and producing no practical result." (1 Howard, 318.)

But were the Bankrupt Act open to construction, and the proviso of the 2d section left out of view, the result would be the same. There is no provision in the act that interferes with the laws of a State, which create and defend the obligation of a contract which is a lien on the property; there is nothing which professes to effect the remedies attached to such contract, one incident of which is the power of the creditor to sell or extend as the laws of the respective States have prescribed; it requires the plenary and unlimited power of Congress over the whole subject of bankruptcies to abrogate State laws relating to liens, or to take from State courts the administration of remedies to enforce them, and above all to prohibit the creditor from resorting for his remedy to that law which prescribed it, and substituting the assignee of a bankrupt, the mere creature and servant of a judge of the District Court, in his place, without and against the will of the creditor. Congress may delegate such power to a judge or a court, but it must be in plain terms, leaving no doubt of their intention to do so; but the proposition is a bold one, indeed, that judicial power is competent to do it, when the Legislature has not given its sanction to its exercise; it would give the Constitution a construction which would authorize the courts to exercise the power granted to the Congress, without the passage of a law delegating it to the judicial department. So far as the Bankrupt Act, by express words, or necessary implication, affects State laws, State rights, the power of State courts, or the rights and remedies of suitors therein, it must be paramount, yet too much caution cannot be observed on this subject by the courts of the United States.

The settled course of jurisprudence in the

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State is to be overlooked only when such is the intention of the law; no intention to do so is to be presumed, no policy is to be assumed as the basis of the law, other than what its words indicate, and nothing is to be borrowed from any other system which is not consistent with that which Congress has thought proper to create. A leading feature of that system is the protection of all liens existing at the time of the decree of bankruptcy; they are created by contracts which by their own force create a remedy to enforce them; this remedy is the right of the creditor, the rule for its exercise is the law of the State, the power to sell in this State is the essence of both right and remedy. Congress has not impaired either, and forbidden it to be done by any construction of the Bankrupt Act; a sale made pursuant to the laws of the State must therefore devest the title of the assignee in bankruptcy.

If the foregoing views are sound, they dispose of the two questions; an order of the court in bankruptcy can confer on the assignee no power which Congress has not conferred on the court; its powers are what the law has dele-
331*] gated, and none other; the law *may and must be construed where it is open to construction, but where the law itself forbids construction it must be taken and followed as it reads. If, therefore, an order of court is made that would, in its execution by an assignee, impair a lien protected by the proviso in the 2d section, it is an excess of authority, and therefore void; *a fortiori* the devesting of a lien in the case put in this question is a much higher act of power than merely impairing it by affecting the remedy. The property bound by the lien is taken from the creditor, his whole right is extinguished, and his debt is lost entirely, unless he comes in for his dividend of the assets of the bankrupt's estate.

Every principle established by the Supreme Court in the case of *Bronson*, as well as the protection given to liens by the Bankrupt Act, would be utterly prostrated, if a sale by an assignee would disencumber property mortgaged or bound by a judgment; such a doctrine would equally militate with other plain provisions of the law, which clearly point out what passes by the decree of bankruptcy to the assignee, when it passes, the extent of his, and the power of the court, and the nature of a purchaser's title. The 8d section vests all the property and the rights of property of the bankrupt in the assignee "from the time of the decree of bankruptcy;" he then stands in the position of the bankrupt "before and at the time of his bankruptcy declared;" standing in the place of the bankrupt, the measure of his rights of property is necessarily that of the assignee, who can take nothing which did not belong to the bankrupt when the law made the conveyance of all his rights of property. To the property which was mortgaged, the only right of the assignee was to redeem it; if it was bound by judgment or other lien, the bankrupt held it subject to its payment; he could sell the equity of redemption on the land itself, subject to the lien, but the purchaser could not hold without paying it. The assignee can have no other rights by force of the decree, which is a conveyance by operation of law, than he could acquire by the deed to the bankrupt; nor could the assignee convey a greater interest than the law devolved on him; or the court by their order make his or the estate of a purchaser under him, an absolute one discharged of the lien without payment. The 11th section is framed to meet this view of the 3d; by giving power to the court to authorize the assignee to redeem, and omitting any power to order a sale, it is manifestly intended merely to put the assignee in the place of the bankrupt, but in no other respect than enabling the assignee to appropriate the assets in his hands to disencumber the property by payment. Following the proviso in the 2d section, the 11th withholds the power of sale, as that might impair the lien; we thus find that it was deemed necessary to provide for the power of the assignee to redeem; it cannot have been intended that there should be by implication alone the higher power of sale, that in its exercise would take from the creditor *the protection given so carefully [*332
by the 2d section; the words of the 11th admit of no such construction, and even if they did, the court could not give it without overlooking the plain language of the 15th section. "And be it further enacted, That a copy of any decree of bankruptcy, and the appointment of assignee, as directed by the 3d section of this act, shall be recited in every deed of lands belonging to the bankrupt, sold and conveyed by any assignee under and by virtue of this act; and that such recital, together with a certified copy of such order, shall be full and complete evidence both of the bankruptcy and assignment therein recited, and supersede the necessity of every other proof of such bankruptcy and assignment to validate the said deed; and all deeds containing such recital, and supported by such proof, shall be as effectual to pass the title of the bankrupt of, in, and to the lands therein mentioned and described to the purchaser, as fully to all intents and purposes as if made by such bankrupt himself immediately before such order." Here is as precise and perfect a definition of the title which passes to the purchaser by a sale by the assignee under an order of court, or otherwise by virtue of the Bankrupt Act, with the effect thereof; "it is the same to all intents and purposes as if made by such bankrupt himself immediately before such order," in the words of the 15th section, with or without an order of sale. There is no express provision giving the court power to order a sale. The 3d section authorizes the assignee "to sell, manage, and dispose of the property, to sue for and defend the same, subject to the orders and directions of the court, as fully to all intents and purposes as if the same were vested in or might be exercised by such bankrupt before or at the time of his bankruptcy, declared as aforesaid." Connecting this with the 15th section, declaring the effect of a sale by an assignee, the answer to the second question is most obvious. Such sale has the same effect as if made by the bankrupt, and no other. It can devest no lien existing at the time of the decree or order declaring him a bankrupt. The word "order" in the 15th section refers either to that or to the order of sale; it is not material to which. If to the decree, then the deed of the assignee conveys only such title and estate as the bankrupt then had; if to the order of sale, then that is the time to which

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his right is referred. But in neither case can a sale devest a lien "existing before or at the time," or "immediately" before such order. Thus taken, the Bankrupt Act is an affirmance of the universal principle as laid down by the Supreme Court in *Rankin* v. *Scott* (12 Wheaton, 179), "that a prior lien gives a prior claim, which is entitled to a prior satisfaction out of the subject it binds," unless it be defective, or the party holding it has done some act to postpone him; and that a purchaser is bound by the lien unless there is a prior act of the Legislature to protect him from it. (12 Wheat., 80.) The second question, therefore, is answered in the negative.

Cited—3 How., 437, 439; 6 How., 506; 13 How., 11; 16 How., 287; 1 Black, 505; 10 Wall., 543; 11 Wall., 80; 14 Wall., 424; 23 Wall., 134; 3 Otto, 135; 5 Otto, 72, 77; 2 Bank. Reg., 239, 460; 3 Bank. Reg., 483; 4 Bank. Reg., 515, 517, 519, 718; 5 Bank. Reg., 316; 7 Bank. Reg., 415; 8 Bank. Reg., 153, 170, 394; 9 Bank. Reg., 311; 11 Bank. Reg., 413; 12 Bank. Reg., 149; Deady, 436; 1 Dill., 503, 505, 507; 2 Biss., 389; 3 Biss., 230; 1 Sawy., 262, 263; 7 Blatchf., 161; 2 Story, 661; 3 McLean, 589; 3 Wood. & M., 65; 1 Low., 317.

333*] *WILLIAM OLIVER AND MICAJAH T. WILLIAMS ET AL., *Appellants*,

v.

ROBERT PIATT.

Trusts—option of cestui que trust *to take proceeds or follow property into hands of one not a bona fide purchaser not controlled by repurchase by trustee—judgment against trust property—collusion of trustee with purchaser*—cestui que trust *not party to foreclosure—appointment by two land companies of one agent to buy at sale of public land not a fraud—subsisting trust—lapse of time no bar—laches of some of the* cestuis que trust—*joinder of parties as defendants—multifariousness—objections—warranty of ancestors no estoppel of heirs claiming by purchase.*

In cases of trust, where the trustee has violated his trust by an illegal conversion of the trust property, the *cestui que trust* has a right to follow the property into whosoever hands he may find it, not being a *bona fide* purchaser for a valuable consideration, without notice.

Where a trustee has, in violation of his trust, invested the trust property or its proceeds in any other property, the *cestui que trust* has his option, either to hold the substituted property liable to the original trust, or to hold the trustee himself personally liable for the breach of the trust.

The option, however, belongs to the *cestui que trust* alone, and is for his benefit, and not for the benefit of the trustee.

If the trustee, after such an unlawful conversion of the trust property, should repurchase it, the *cestui que trust* may, at his option, either hold the original property subject to the trust, or take the substituted property in which it has been invested, in lieu thereof. And the trustee, in such a case, has no right to insist that the trust shall, upon the repurchase, attach exclusively to the original trust property.

Where the trust property has been unlawfully invested, with other funds of the trustee, in other property, the latter, in the hands of the trustee, is chargeable *pro tanto* to the amount or value of the original trust property.

What constitutes notice of a trust?

An agent, employed by a trustee in the management of the trust property, and who thereby acquires a knowledge of the trust, is, if he afterwards becomes possessed of the trust property, bound by the trust, in the same manner as the trustee.

Where, upon the face of the title papers, the purchaser has full means of acquiring complete knowledge of the title from the references therein made to the origin and consideration thereof, he will be deemed to have constructive notice thereof.

A coproprietor of real property, derived under the same title as the other proprietors, is presumed to have full knowledge of the objects and purposes and trusts attached to the original purchase, and for which it is then held for their common benefit.

A purchaser by a deed of quitclaim without any covenant or warranty, is not entitled to protection in a court of equity as a purchaser for a valuable consideration, without notice; and he takes only what the vendor could lawfully convey.

A warranty, either lineal or collateral, is no bar to an heir who does not claim the property to which the warranty is attached by descent, but as a purchaser thereof.

Whether a bill in equity is open to the objection of multifariousness or not, must be decided upon all the circumstances of the particular case. No general rule can be laid down upon the subject; and much must be left to the discretion of the court.

The objection of multifariousness can be taken by a party to the bill only by demurrer, or plea, or answer, and cannot be taken at the hearing of the cause. But the court itself may take the objection at any time—at the hearing or otherwise. The objection cannot be taken by a party in the appellate court.

Lapse of time is no bar to a subsisting trust in real property. The bar does not begin to run until knowledge of some overt act of an adverse claim or right set up by the trustee is brought home to the *cestui que trust*. The lapse of any period less than twenty years will not bar the *cestui que trust* of his remedy in equity, although he may have been guilty of some negligence, where *the [*334 suit is brought against his trustee, who is guilty of the breach of trust, or others claiming under him with notice.

Where exceptions are taken to a master's report, it is not necessary for the court formally to allow or disallow them on the record. It will be sufficient if it appears from the record that all of them have been considered by the court, and allowed or disallowed, and the report reformed accordingly.

There is no principle of the common law which forbids individuals from associating together to purchase lands of the United States on joint account at a public sale.

THIS was an appeal from the Circuit Court of the United States for the District of Ohio, sitting as a court of equity.

The record was very voluminous, consisting of nearly eight hundred printed pages. The acts and declarations of the parties were given in evidence, running through a period of twenty years; and the case being an appeal from the decree of the Circuit Court, as a court of equity, all this matter was brought up to the Supreme Court. It is impossible, therefore, to put into this statement all the circumstances which had a bearing upon the point in issue, which was, whether a trust did or did

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NOTE.—Cestui que trust *may follow trust property in hands of third person who purchases, unless he is a bona fide purchaser without notice for value. Purchaser of trust estate, with knowledge of the trust, is subject to all the duties of the original trustee in respect to the same.* See note to Wormly v. Wormly, 8 Wheat., 419; and note to Hughes v. Edwards, 9 Wheat., 489.

Trustee cannot purchase trust property. Employed to buy for another cannot buy for himself. His purchase enures to the benefit of the principal. See note to Massie v. Watts, 6 Cranch, 148.

Deed from cestui qu trust *to trustee, ward to guardian, heir to executor, is void.* See note to Harding v. Handy, 11 Wheat., 103.

Length of time is no bar to a trust. When time begins to run. See note to Prevost v. Gratz, 6 Wheat., 481.

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not continue in a valuable body of land. The leading incidents in the history of the case are these:

In the summer of 1817, two distinct companies were formed at Cincinnati for the purpose of purchasing lands at the public sales of the United States, to be shortly held at Wooster, in the State of Ohio; the object being to lay out and establish a town in the reserve of twelve miles square on the Miami of Lake Erie, since called the Maumee River.

One company, called the Piatt Company, was composed of the following persons: John H. Piatt, William M. Worthington, Gorham A Worth, and Robert Piatt, the plaintiff in the suit below, and now defendant in error.

The other company was called the Baum Company, and composed of the following persons: Martin Baum, Jacob Burnett, William C. Schenck, William Barr, William Oliver (one of the plaintiffs in error), Andrew Mack, and Jesse Hunt.

What the articles of agreement were between the members of the Piatt Company the record did not show.

On the 7th of June, 1817, the Baum Company entered into the following articles of agreement—Mack being admitted to half a share, the whole interest was divided into thirteen parts, whereof Mack held one thirteenth and each of the other persons two thirteenths:

"We, the undersigned, agree to enter into a partnership for the purpose of purchasing lands and lots at the public sales to be held at Wooster, on the seventh and fifteenth of July next; and for the purpose of effecting the said purchases, we agree to borrow, at the office of discount and deposit at Cincinnati, the sum of eight thousand dollars, for which sum, and for all purchases made by our agents, either at the public sales or otherwise, we hold ourselves 335*] *jointly and equally liable. And we do further agree that William C. Schenck, William Barr, and William Oliver shall be our agents to explore the lands and make the purchases. And we do agree to confirm and comply with any contracts that our agents aforesaid may make on our account. And it is further agreed that our said agents shall be authorized to take in any other partner or partners that they may see proper, on such terms as they may esteem advantageous. And it is further agreed that in consideration of the services to be performed by the agents above, their expenses, incident to making the purchases aforesaid, shall be defrayed by the other individuals comprising the company.

"In witness whereof, we have hereunto set our hands and seals, at Cincinnati, this the seventh day of June, eighteen hundred and seventeen.

MARTIN BAUM, [SEAL.]
" JESSE HUNT, [SEAL.]
" J. BURNET, [SEAL.]
" W. C. SCHENCK, [SEAL.]
" W. BARR, [SEAL.]
" WILLIAM OLIVER, [SEAL.]"

The Piatt Company appointed Robert Piatt its agent.

On the 23d of June, 1817, Worthington, John H. Piatt, and Worth addressed a letter of instructions to Robert Piatt, their agent, directing him how to proceed, and inclosing $4,000 to make the first payment on the lots of land which he might purchase.

The agents having made their selections, met at Wooster to attend the sales, and then ascertained that they had each selected the following tracts, viz.: 1, 2, 3, 4, 86, and 87. In consequence of this, the following agreement was entered into, viz.:

"We, the undersigned, agree, on behalf of the companies we represent, to wit: William C. Schenck, of Warren County, Ohio, and William Oliver, of Cincinnati, Ohio, for themselves, and for Jacob Burnet, Martin Baum, Jesse Hunt, William Barr, and Andrew Mack, all of Hamilton County, Ohio; and Robert Piatt, of Boon County, Kentucky, for himself, and for William M. Worthington, John H. Piatt, and Gorham A. Worth, all of Hamilton County, Ohio, to purchase at the public sales, in July, 1817, at Wooster, lots numbered 1, 2, 3, and 4, at, and including, the mouth of Swan Creek, in township No. 3, in the United States reserve, at the foot of the rapids of the Miami of the Lakes, for the joint benefit of both companies: that is, one company to have one half interest in the whole, and the other company to have the other half; each company paying one half of the purchase money. It is further agreed that Robert Piatt, in behalf of his company and the company of Schenck and Oliver, shall be the bidder for lots Nos. 1 and 2, and William Oliver for lots Nos. 3 and 4, they being the above four lots at the mouth of Swan Creek.

*"In witness whereof, the parties [*336 have hereunto interchangeably set their hands and seals, this 17th day of July, 1817.

" W. C. SCHENCK, [SEAL.]
" WILLIAM OLIVER, [SEAL.]
" ROBERT PIATT. [SEAL.]"

And afterwards the following:

" The undersigned have agreed to purchase, for the joint benefit of their companies, lots or tracts of land numbered 86 and 87, opposite the mouth of Swan Creek, on the same principles that lots numbered 1, 2, 3, and 4, at the mouth of Swan Creek, were purchased, as per agreement between William C. Schenck and William Oliver, for themselves and others, and Robert Piatt for himself and others, bearing date 17th July, 1817.

" ROBERT PIATT, [SEAL.]
" WILLIAM OLIVER. [SEAL.]"

On the 18th of July, 1817, in conformity with the above agreements, William Oliver bid in lots No. 3 and 4, and on the 19th of July, Robert Piatt bid in tracts 1, 2, 86 and 87. The original certificates for the tracts bid in by Oliver, were made out in his name, and for the tracts bid in by Piatt, in the names of himself, John H. Piatt, Worth, and Worthington, in conformity with the letter of instructions addressed to him on the 23d of June.

On the 21st of July, 1817, Robert Piatt bid in, for the separate account of the Piatt Company, the following other tracts, viz.:

Northwest quarter-section 2, township 3.
Southwest quarter-section 2, township 3.
Southwest quarter-section 3, township 3.
Northwest quarter-section 3, township 3.
Southeast quarter-section 3, township 3.

The first installment of the purchase money for which was paid by the Piatt Company.

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On the 4th of August, 1817, Robert Piatt settled an account with the Piatt Company, giving them credit for the four thousand dollars above mentioned, and charging them with one half of the installments which had been paid upon Nos. 1, 2, 3, and 4, and with the whole of the installments which had been paid upon Nos. 86 and 87, and upon the five quarter-sections.

After the return of the agents to Cincinnati, a meeting of both companies was held; the acts of the agents at Wooster were ratified, and the two companies were, in respect to their joint purchases, consolidated in a new company called the Port Lawrence Company. Martin Baum was appointed trustee, for the purpose of carrying out a resolution of the company that a town should be laid out upon a part of the land. It was further agreed that Oliver should be appointed an agent to lay out the town and make sale of the lots; and he was directed, in perform-
337*] ing this duty, to call to his *assistance William C. Schenck, another of the original members of the Baum Company.

Each of the companies purchased other lands upon its own private account.

On the 14th of August, 1817, Oliver executed a bond to Baum in the penal sum of twenty thousand dollars, the condition of which was as follows:

"Whereas, the above named Martin Baum hath this day constituted and appointed the before bound William Oliver his agent, with power to lay out a town at the mouth of Swan Creek, on the Miami of the Lakes, and hath authorized the said William to sell and dispose of the lots in said town, agreeably to a letter of instructions, and to receive payment for the same from the purchasers, and to execute and deliver certificates, in the nature of title bonds, for the lots by him sold. Now, the condition of the above obligation is such, that if the said William Oliver shall in all things well and truly execute the trust reposed in him by the said Martin Baum, and shall render a true account of his proceedings, when required, and shall faithfully pay over to the said Martin all moneys by him received for or on account of sales made in the town to be laid off by him, as aforesaid, when thereto required, then, and in such case, the above obligation shall cease and determine, otherwise remain in full force and virtue."

On the same day, Baum executed a power of attorney to Oliver, as follows:

"Know all men by these presents, that I, Martin Baum, of Cincinnati, in the State of Ohio, for divers good causes and considerations me thereunto moving, have made, constituted and appointed, and by these presents do make, constitute, and appoint William Oliver, of said place, my true and lawful attorney, for me and in my name, to sell and dispose of the lots in a town to be laid off at Swan Creek, on the Miami of the Lakes, agreeably to a letter of instructions therewith delivered, and to receive payment for the same from the purchasers, and to execute and deliver certificates, in the nature of title bonds, for the lots by him sold, and to do all lawful acts requisite for effecting the premises, hereby ratifying and confirming all that my said attorney shall lawfully do therein by virtue hereof. In testimony whereof," &c.

On the same day Baum delivered to Oliver a letter and a set of instructions. The letter is as follows:

"CINCINNATI, August 14th, 1817.

"Sir: You will observe by the power of attorney this day handed to you, that you are appointed an agent to lay out a town at the mouth of Swan Creek, on the Miami of Lake Erie. Your appointment is for one year, commencing this day; for which services so rendered, you are entitled to receive from the proprietors twelve hundred dollars. And the proprietors of the lands lying in that country, but *which is a distinct concern from the [*338 above, have agreed to allow you three hundred dollars for attending to their separate buisness.

"Your obedient servant,

"Mr. W. OLIVER. MARTIN BAUM."

The instructions were as follows:

"CINCINNATI, 14th August, 1817.

"DEAR SIR: As agent for the proprietors of the land recently purchased at Swan Creek you will, immediately upon the receipt of these instructions, proceed to that place, and commence the laying off a town. General Schenck who accompanies you, will assist in the survey of the ground, in determining the site, and in the arrangement and formation of the plat. In running the streets, and in the division of the lots, it is not the wish of the proprietors that interest or convenience should be sacrified to form; that the growth of the place should be retarded by useless adherence to any particular figure, or to any fanciful uniformity of squares. The number of lots to be laid off may be from three to five hundred, and, with the exception of water lots and fractional sections, of about sixty feet in front, and one hundred and twenty feet in depth. The principal or central streets should be at least one hundred and sixty feet wide; others from eighty to a hundred; the alleys from twelve to fifteen. Let there be three lots each of one hundred and twenty feet square, set off for public uses, churches, schools, &c.; and one, of two hundred and forty feet square, for court-house and jail. There should also be reserved one or two suitable lots out of the town for burying grounds. It is not, however, the intention of the proprietors to tie the agent down to any specific number of feet and inches in the width of the streets or size of the lots, but they leave to him the exercise of his own judgment, and recommend to him the use of that sound discretion which his better knowledge of the ground, and his practical information, will enable him to display, to the interest and advantage of all concerned.

"As soon as the surveys have been made, and a plat of the town formed, it is necessary that a copy of them should be immediately forwarded to the proprietors, as also a notice of the time of sale, which, if practicable, should correspond with the time of holding the treaty with the Indians; and on this subject it is necessary that the agent should obtain the earliest information. In the disposition and arrangements of the lots for sale, let one third of the whole number taken in different sections of the town be reserved for the use and benefit of the proprietors, or for future disposal.

"The terms of sale, one fourth down, and the residue in three equal annual installments

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with interest from date, if not punctually paid; subject, however, to such variations as the judgment of the agent may dictate, or particular circumstances require. An immediate correspondence is to be opened by the agent with 339*] Martin *Baum, Esq., of this city, who will act as trustee for the proprietors, and any informations given to him in relation to the business of the agency, the sale of the lots, and the progress of the town, that may be thought of any consequence to the interests of the proprietors, or that may be required by the trustee. It is the intention of the proprietors to give public notice of the time of the sale, and it is necessary that this notice should be as general and as widely spread as possible; the agent will, therefore, immediately, upon the times being fixed, forward the proper advertisement to Detroit, Buffalo, Albany, New York, Philadelphia, Pittsburg, Chillicothe, and to the trustee in this city, for publication. The instructions of the trustee are, in all respects, to be regarded as coming from the proprietors themselves.

"Wishing you a safe and pleasant journey, and an easy and prosperous management of the trust committed to your care, we remain, with great respect, &c., your obedient servant,

"MARTIN BAUM,
"Trustee for the Proprietors.

"To Major WM. OLIVER."

In another part of the record, the same paper is found, with a few and unimportant variations, but the names of these persons are signed to it, viz., Barr, Mack, Burnet, Worthington, Hunt, John H. Piatt, Worth, and Baum.

The agents proceeded to lay out a town, and on the 20th September, 1817, offered the lots for sale, according to the following advertisement:

"TERMS OF SALE.

"Terms of sale of lots in the town of Port Lawrence: One fourth down; the balance in three equal annual installments, with interest from the date of purchase, if not punctually paid; and if the whole amount of the purchase money is not paid when the last installment becomes due, the lots now purchased shall revert to the proprietors of Port Lawrence. The undersigned reserve the privilege of one bid on each lot offered.

"W. C. SCHENCK,
"WILLIAM OLIVER, Agents.

"Miami Rapids, Sept. 20, 1817."

At the sale, seventy-nine lots were sold. Two of them, viz., Nos. 223 and 224, were purchased by Oliver himself, with the assent, as he alleged in his answer, of the company, and of Martin Baum, the trustee.

On the 5th of October, 1817, Schenck gave to Oliver the following receipt:

"MIAMI RAPIDS, Oct. 5, 1817.

"Received from William Oliver, agent, eight hundred and fifty-five dollars and thirty-three cents, the proceeds of sales of lots in the 340*] *town of Port Lawrence, for which I am accountable to Martin Baum, of Cincinnati.

"$855.33. (Signed duplicates.)

"W. C. SCHENCK."

In January, 1818, Oliver went to Port Lawrence, and spent the winter there. In May, 1818, he returned to Cincinnati, about which time he was elected cashier of the Miami Exporting Company, and entered upon the duties of his office on the 1st of July, 1818.

On the 14th of August, 1818, Oliver, as it was alleged by him in his answer to the bill, sold and transferred one half of his interest in the Baum Company, and also in the Port Lawrence Company, to Steele & Lytle, they assuming all outstanding liabilities; and in an early part of the ensuing spring, the remaining half of his interest in both companies to Embree & Williams.

On the 19th of September, 1818, Oliver and Worthington made a division of the lots in the town of Port Lawrence, between Martin Baum and John H. Piatt, these persons representing their respective companies. One hundred and fifty-seven lots were assigned to Piatt, and one hundred and fifty-eight to Baum.

On the 24th of April, 1820, Congress passed an act, entitled "An Act making further provision for the sale of the public lands," changing the mode of selling lands from credit to cash, and reducing the price from two dollars to one dollar and twenty-five cents per acre. The effect of this law, and of the general embarrassment in the business of the country which occurred about this period, was, as it was alleged in the answer to the bill, to depress the prospects of the companies before mentioned, and the pecuniary condition of the individual members thereof, to such an extent that they resolved to abandon the lands, and forfeit them to the United States, rather than pay the installments which were still due. But before this was done, the intention was changed by another act of Congress.

On the 2d of March, 1821, Congress passed "An Act for the relief of the purchasers of public lands prior to the first day of July, 1820," which allowed a purchaser to file a relinquishment of the land so purchased, upon which the whole purchase money had not been paid, and apply the sums which had already been paid for such land, to the completion of payments which might be due upon any other land.

On the 15th of September, 1821, Oliver transferred to Baum the certificates of Nos. 3 and 4, which he had bid for at the public sale, as heretofore described; and on the 17th of September, John H. Piatt, Robert Piatt, G. A. Worth, and William M. Worthington, united in transferring to Baum the certificates for the Nos. 1, 2, 86, and 87, which they had bid for at the sale; and by the same instrument the last mentioned parties also transferred to Baum the certificates for the five quarter-sections, which it has already been stated the Piatt Company purchased on their own private account, at the *public sale. Both transfers were [*341 absolute, to Martin Baum, his heirs and assigns, forever.

On the 27th of September, 1821, Baum, to whom the certificates had thus been assigned, filed, by Micajah T. Williams, his attorney in fact, a relinquishment of tracts Nos. 1 and 2, and requested that the proceeds of former installments might be applied to the completion of the payments still due upon 3, 4, 86, 87, and the five quarter-sections. The consequence of this transaction was, that as Nos. 1 and 2 had been bought at a much higher price than the other tracts, the credit acquired on the books of the government by their relinquishment was

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more than enough to complete the payments for all the other lands mentioned above, and a surplus existed, in the form of land script, which might either have been sold or applied to a payment for other lands. Four hundred and seventy-four dollars and fifty-nine cents of this script belonged to the Piatt Company, and was applied by the Baum Company in payment for lands which that company had purchased. The following is the account:

LANDS SURRENDERED.

Tract No. 1.	
Amount paid on it - -	$1,015 05½
Tract No. 2.	
Amount paid on it - -	3,802 50

LANDS NOT SURRENDERED.

Swan Creek, 3 - - -	$607 35½
" " 4 - - -	271 73½
" " 86 - - -	373 31½
" " 87 - - -	149 96½
5 quarter-sections - - -	1248 00

On the 27th of September, 1821, Oliver made a memorandum, or addressed a letter to some person, stating several particulars which he had attended to at Maumee, directing the land to be run out, counsel to be employed, &c., &c.

On the 20th of January, 1822, Baum presented a petition to Congress, representing that he had laid out a town upon tracts Nos. 1 and 2, and sold a number of lots to persons to whom he was bound to give a title; that in consequence of the late law of Congress, reducing the price of the public lands, he had been obliged to surrender them; and praying that Congress would authorize an immediate sale of those two tracts of land, so as to give him an opportunity to repurchase them at a fair price, and thus be enabled to fulfill his engagements to those who had purchased of him.

On the 10th of September, 1822, Baum gave to Oliver the following certificate:

"CINCINNATI, Sept. 10, 1822.

"It is hereby certified, that there is due William Oliver, from the Port Lawrence Company, two hundred and thirteen dollars and seven cents, which said Oliver refunded, by request of the company, to purchasers of lots in Port Lawrence, the title of which has been relinquished to the United States by the company; **342*]** it being the *amount due on the shares originally owned by John H. Piatt, Robert Piatt, G. A. Worth, and William M. Worthington. MARTIN BAUM,

"Agent for the Port Lawrence Land Company."

On the 25th of December, 1822, Baum addressed a letter to the Hon. E. A. Brown, Washington city, inclosing his petition, to be again presented, and saying, amongst other things, "though it is signed by myself only, still others have an interest in it, to wit, Jacob Burnet, William Steele, M. T. Williams, S. R. Miller, John Rowan, of Kentucky; but, for the sake of convenience, all the lands of the company were transferred to me. The petition gives a true statement of facts; the grounds why those tracts were surrendered to the United States; the injurious operation of the law of Congress (called the relief law) in the case; and the just claim which (I think) I and my associates have on the government for redress," &c., &c.

In January, 1823, Baum came into arrangements with some of those who had purchased town lots, and to whom he was unable to give a title, agreeing for himself and his associates to repurchase the lots and refund the money which he had received on them.

On the 3d of February, 1823, Oliver addressed the following letter to Robert Piatt, which was received by him:

"CINCINNATI, February 3d, 1823.

"DEAR SIR: I have been anxious to see you in relation to the Port Lawrence business, and was on the eve of setting off yesterday for your house, but have concluded to write, requesting the favor of your attention to the matter. In consequence of the company's securing the Port Lawrence property, they are liable to the purchasers for the money received for lots; and as some of my friends in Detroit were disposed to bear pretty hard on me for advising them to purchase, I authorized Colonel Hunt to redeem the certificates of sale from those who had purchased by my advice. The payments made in this way were upwards of $400. M. Baum's company have refunded their proportion, but my claim ($213.07, which is from the 10th of last September, 1822) against you is unsatisfied; and as we are at a loss to know the particular interest of the members of your company, I must ask the favor of your stating the present proprietors, and their respective interests in the concern. Please say when it will be convenient for you to arrange your proportion, as also to request Mr. Grandon to pay on his share or shares. Respectfully, your obedient servant,

"WILL. OLIVER.

"R. PIATT, Esq."

On the 6th of February, 1823, Baum addressed another letter to Mr. Brown upon the subject of his petition, representing that the case was a ruinous one to him and his associates, &c., &c.

On the 3d of June, 1823, Oliver exhibited an account against *"Martin Baum and [*343 his associates," running from 1818 to June, 1823, and bringing them in debt to Oliver in the sum of $1,835.47.

On the 27th of August, 1823, Baum mortgaged to Oliver tracts Nos. 3, 4, 86, and 87, to secure the payment of the above sum of $1,835.47 with interest from the 1st of September, 1823. The payment was to be made on or before the 1st of January, 1824.

On the 31st of January, 1824, Baum addressed a letter to the proprietors of the Maumee and Sandusky Land Company, accompanied by an account between himself and the proprietors of Port Lawrence. The letter was as follows:

"CINCINNATI, 31st January, 1824.

"To the Proprietors of the Maumee and Sandusky Land Co.

"DEAR SIR: Inclosed, I hand you a statement of the Port Lawrence land speculation by which you can see how that business stands to wit, a balance due me by the company of upwards of $4,755, and is daily increasing with interest. Suits have been commenced against me for the restoration of the money which was paid the company for lots, and the

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amount of improvements made thereon, as well as for damages. I was obliged to borrow money to compromise and quiet those claims, for fear of incurring heavy damages, great expenses, and much trouble, and probably a total loss of the company's property by sales, or judgments and executions. The lands have consequently been mortgaged for the money borrowed, and unless it is shortly refunded, the lands may yet be sold under the mortgage; it is therefore necessary that the proprietors pay to me their respective quotas, to save their lands from sale. I am extremely anxious to close this business, and therefore propose that I will exonerate you from paying any more money, if you will sell and convey me your interest in all those lands. But, lest you should think that I wish to make a speculation out of you, if you will exonerate me from paying any more, I will sell you my interest in these lands, and will thank you to accept the latter proposition. It is needless to go into an explanation, as the account will do it of itself; and my proposition will satisfy you as to the prospects of gain. Please inform me soon what course you intend to pursue.

"Yours, respectfully, MARTIN BAUM."

One of these letters appears to have been directed to Mr. Robert Piatt, and another to W. M. Worthington, Esq.

On the 23d of April, 1824, Baum authorized and empowered Major William Oliver to lease, let, and rent all the lands, in and out-lots, houses, and other property which he owned, or of which he had the control, situate and being within the United States reservation on the Maumee River for the then present season; and also to collect all rents which might be then due on all or any of the said property.

344*] *On the 28th of August, 1824, Baum addressed a letter to G. A. Worth, Esq., a part of which is as follows:

"CINCINNATI, 28th August, 1824.

"DEAR SIR: Your favor of the 10th April last came duly to hand—contents noticed. The land speculation has truly been an unfortunate business, and no one can be more tired of it than I am; for it's me who has to stand the brunt of the company—suits, judgments, executions, with all its attendant vexations. First, our agents were crazy in making purchases at such high rates—then the madness of Congress in reducing the price of the public lands—change of times—scarcity of money—the impossibility of managing that species of property where so many are concerned; the change of sentiments of persons in holding real estate; in fact all and everything has operated against such speculations; and were I relieved of that concern, an immense burden would be taken off my shoulders." &c., &c.

On the 21st of September, 1825, Baum gave to Oliver the following power:

"CINCINNATI, 21st Sept., 1825.

"I have and hereby authorize and empower Major William Oliver to lease, let, and rent all the lands, in and out-lots, houses, and other property which I own, or of which I have the control, situate, lying, and being within the United States reservation, on the Maumee River, for the ensuing season; and also to collect all rents or other moneys due me in and about the town of Maumee and Port Lawrence. MARTIN BAUM."

On the 5th of October, 1825, Oliver commenced proceedings in attachment in Michigan, by making the following affidavit:

"Martin Baum, agent for John H. Piatt (since deceased), Robert Piatt, G. A. Worth, and William M. Worthington, to William Oliver, debtor, for the sum of two hundred and thirteen dollars and seven cents, being the amount refunded to purchasers of the lots in Port Lawrence, by request of said Baum, with interest from the 10th day of September, 1822.

"*Michigan, Monroe County, ss:*

"I, William Oliver, of lawful age, do solemnly swear that the sum mentioned in the above account is justly due from the persons therein named; that they do not reside within the territory of Michigan, and that he has reason to fear, unless an attachment issues upon the property of the persons above named, his debt cannot be recovered.

"WILL. OLIVER."

"Sworn this 5th day of October, 1825, before me, PETER P. FERRY,

"Justice of the Peace."

On the 7th of October, 1825, an order was filed in the office of the clerk of Monroe County Court, for an attachment against the rights *and credits, moneys and effects, goods [*345 and chattels, lands and tenements of the parties above named. The writ was issued on the same day.

On the 15th of October, 1825, an attachment was laid upon the

Southwest quarter of section 2, township 3.
Northwest quarter of section 3, township 3.
Southwest quarter of section 3.
Southwest quarter of section 4.

The three first of these were included in the original purchase by Piatt and subsequent transfer to Baum. The fourth belonged to some other transaction, and is not involved in this case. The whole four were appraised, collectively, at $1,200.

The suit went on, no one appearing for the defendants, until October, 1826, when it appearing that notice to defendants in attachment had been published nine months, judgment was entered against them, a *fieri facias* issued, and, on the 5th of April, 1828, the property was sold to Charles Noble for $241.60, who on the same day conveyed it to Oliver.

Having traced out the proceedings under the attachment to their consummation, it is necessary to go back to the year 1825.

On the 13th of October, 1825, Oliver filed a bill in the Supreme Court of the Territory of Michigan, sitting as a court of chancery, to foreclose the mortgage which had been given by Baum on the 27th of August, 1823. Baum being a non-resident, a notice to him to appear was published for nine weeks successively in a newspaper published at Monroe.

On the 7th of December, 1827, the bill was taken *pro confesso*, and on the 5th of September, 1828, the court decreed that the property should be sold, which was accordingly done. Oliver became the purchaser, and received a deed from the register, who had been directed to make the sale.

To return again to the chronological order of events.

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Congress having made a donation of land to the University of Michigan, the trustees of that institution resolved, on the 25th of June, 1827, to accept of No. 1 in lieu of a section, in the expectation that in the event that lot No. 2 should revert to the United States, then the same should be considered a part of the section to which they were entitled under the act, and requested the chairman to advertise the Treasury Department thereof.

On the 20th of July, 1827, Baum addressed a long letter to the commissioner of the general land office, giving a history of the Port Lawrence Company, and expressing a desire to repossess Nos. 1 and 2. He then says, "It has been hinted that the trustees of the seminary lands of the Michigan territory have had sufficient influence to delay the sale, with a view to get the privilege of locating these two tracts for that purpose. If this is the fact, I protest against such an arrangement. They have no claim to them whatever, but mine is a **346*]** *strong one, and I am determined to pursue it in every possible way till I obtain justice."

In August, 1827, Oliver went to Detroit to ascertain if the tracts 1 and 2 could be obtained from the university, but nothing was then done.

On the 18th of October, 1827, Charles Noble wrote to Benjamin H. Platt, one of the heirs of John H. Platt, who had died, and inclosed him a copy of the proceedings in the attachment at the suit of Oliver.

On the 18th of February, 1828, Platt acknowledged the receipt of this letter, and desired further information.

On the 1st of April, 1828, Noble replied, and inclosed a copy of the advertisement of the auditor for the sale of the three quarter-sections of land as before mentioned. The sale was to take place on the 5th of April, 1828.

On the 12th of August, 1828, Oliver opened a negotiation with the University of Michigan, proposing to give other lands in exchange for Nos. 1 and 2, which was prosecuted without success for some time.

On the 1st of September, 1828, Charles W. Whipple, the assistant register of Michigan, executed to Oliver a deed for Nos. 3, 4, 86 (excepting sixty acres, which Baum had sold to Prentiss and Tromley in 1823), and 87. The deed recited the proceedings for a foreclosure of the mortgage, and conveyed the property to Oliver, his heirs and assigns, forever.

On the 13th of January, 1830, Congress passed an act, entitled "An Act to authorize the exchange of certain lots of land between the University of Michigan and Martin Baum and others."

On the 16th of August, 1830, Oliver (called in the proceedings of the board the agent of Martin Baum and others) appeared before the trustees of the university on the subject of the exchange of lands, which subject was discussed from time to time.

In December, 1830, Oliver (having previously received an assignment of the final certificates from Baum) obtained patents for the following:

Lot No. 3.
Lot No. 4.
Northwest quarter of section 3.
Southwest quarter of section 3.
Southeast quarter of section 3.
Southwest quarter of section 2.

Being the whole of the five quarter-sections originally purchased by the Piatt Company, except the northwest quarter of section 2.

On the 7th of February, 1831, an exchange took place between Oliver and the university; the negotiation therefor having resulted in an agreement. Oliver ceded to the trustees:

Lot No. 3, except ten acres reserved.
*Lot No. 4. [*347
The northwest quarter of section 3.
The southwest quarter of section 3; and
The southwest quarter of section 2.

The university deeded to Oliver lots Nos. 1 and 2, and authorized the President of the United States to issue a patent or patents to the said William Oliver.

On the 4th of March, 1831, a patent was issued to Oliver for these lots Nos. 1 and 2.

On the 16th of May, 1831, Oliver sold to Baum and Micajah T. Williams each one undivided third part of lots Nos. 1, 2, 86, and 87, excepting sixty acres of No. 86, which had been sold by Baum to Prentiss and Tromley. Each of the two parties were to pay $1,555. The necessary provision was made for laying out a town on the property where Port Lawrence was formerly laid out, making partition, &c. The 8th article was as follows: "The parties agree to admit a fourth person as a proprietor—a man of enterprise and character—on equal terms with themselves, on his establishing himself permanently at Port Lawrence, and devoting himself to the improvement of the place."

On the 19th of September, 1832, under the article just mentioned, Stephen B. Comstock was admitted to have an undivided fourth part.

On the 22d of October, 1833, Oliver repurchased from Baum's heirs (for he had died before this time) the whole of Baum's interest under the contract of the 16th May, 1831.

On the 8th of May, 1834, Oliver and Williams sold to Edward Bissel one fourth part of lots Nos. 1 and 2, for $7,000.

On the 23d of May, 1834, Oliver sold to Williams an undivided moiety of 86 and 87.

On the 17th of October, 1834, Oliver sold to Pratt and Taylor one undivided sixteenth part of Nos. 1 and 2, for $4,000. They were also to erect a warehouse, two dwelling-houses, and arrange for a line of steamboats to stop at Toledo, as the town was now called. And on the same day, he sold to Smith and Macy another undivided sixteenth, on the same terms.

On the 30th of June, 1835, Oliver sold a portion of the property to Lynde and Raymond, for $13,000; in September, 1835, another portion to Lot Clark, for $1,000, and in January, 1836, another portion to Philander Raymond, for $22,000.

On the 21st of April, 1836, Robert Piatt, the appellee in the present case, filed his bill of complaint in the Circuit Court of the United States for the District of Ohio, against Oliver and others. But before narrating the proceedings under this bill, it is proper to close the history of the transaction of the parties by stating that on the 5th of May, 1837, Oliver received a deed from the trustees of the University of Michigan for the property which he had given to *them in exchange, as pre- [*348
viously related. The property thus conveyed

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to Oliver consisted of tracts Nos. 3 and 4, the southwest quarter of section No. 2, the northwest quarter of section No. 3, and the southwest quarter of section No. 3. The consideration was $5,000, and the sale was stated in the deed to be made "pursuant to a contract entered into between the said trustees and the said William Oliver, on the twenty-fourth and twenty-fifth days of October, 1834."

To return to the bill, which was filed in 1836. It made Oliver and Williams and a number of other persons, who were the representatives of the original parties, respondents, most of whom appeared. After the pleas, which were filed by the defendants, were overruled, an amended bill was filed.

These bills recite the formation of the Piatt and Baum companies; their union in the Port Lawrence Company under the circumstances already related; the acceptance of the trust by Baum; the assignment to him of the certificates of purchase; the appointment of Oliver as agent; his acceptance thereof; the instructions, bond, and power of attorney; the laying out of the town; the sales of lots, for which the respondents are called upon to account; the relinquishment of Nos. 1 and 2; the application of the credits arising therefrom to the completion of the payments due upon the other tracts; the understanding of the parties that Nos. 1 and 2 should be repurchased for the benefit of all concerned, whenever it should be possible to do so; the application to Congress; the death of John H. Piatt in 1822; the formation, some short time thereafter, of a fraudulent combination and confederacy between Baum, as trustee, and Oliver and Williams, as agents, for the purpose of cheating the members of the Piatt Company out of their entire interest and claims; that in pursuance of this fraudulent combination Baum issued to Oliver the certificate of debt; that the complainant resided at a short distance from Cincinnati; that about that time, and prior, and long subsequently thereto, he was during some part of nearly every week in Cincinnati in company with said Baum and Oliver, or one of them; that they knew the complainant to be a man of property, well able and willing to pay his just debts; that neither Baum nor Oliver ever gave him the slightest information that any such certificate had been given; that he had received a letter from Oliver, dated on the 3d of February, 1823; that the mortgage given by Baum to Oliver was without authority, and fraudulent and void; that the assignment of the certificates for the quarter-sections were also fraudulent and void; the circumstances under which the exchange of lands took place with the University of Michigan; the circumstances also under which Williams became interested; that the proceedings in Michigan were *coram non judice* and void; that if they vested a title in Oliver, it was to constitute him a trustee for the complainant with others, and that Oliver and Williams were acting with a sole view [*349] to benefit themselves at the expense of the complainant and the other co-proprietors.

The bill then enumerates the original parties who were dead, states their representatives and the assignees of the living, and prays that they may all be made defendants.

It then prays for an injunction, a receiver, &c., &c.

Most of the parties answered, but a notice of Oliver's and Williams's will be sufficient.

Oliver's answer admitted the formation of the Baum Company, of the Port Lawrence Company, but denied that after the sales any agreement was made to unite the interests in the several tracts; the appointment of Baum as the trustee of the Port Lawrence Company, but denied that the object of the trust was fully stated in the bill; alleged that Baum was authorized to sell and dispose of any of the property on speculation, or for payment of claims against the company, &c.; that Baum had also a right to dispose of the quarter-sections to pay the debts of the Piatt Company; admitted the instructions, except some of the signatures; the laying out of the town; the power of attorney from Baum; the letter from Baum fixing the appointment for one year, and the compensation therefor; the sale of lots in the town; alleged that he surrendered up the agency to Baum at the time of his appointment as cashier of the Miami Exporting Company, and that he then closed up his accounts; that his subsequent acts as temporary agent were only to accommodate Baum; that he and Baum had erected a warehouse on one of the lots which he had purchased at the sale, which circumstance drew him often to the town; that he had transferred one half of his interest in the Baum Company to Steele and Lytle in 1818, and the remaining half to Embree and Williams in 1819; admitted the relinquishment; denied the intention to repurchase; that Baum authorized to negotiate with the university, but that he did so in his own right and upon his own account; alleged that the certificate of debt and mortgage were given upon *bona fide* considerations; that the members of the Piatt Company, and especially the complainant, were repeatedly urged to satisfy the claims and release the lands; that he, the respondent, bid the full value for the lands, and more than they would have been sold for to others for cash; that the assignment of the certificates was in good faith; explained the reasons which led to an exchange of land with the university; that he purchased back from the university the lands which he had conveyed to it, long after all agency for the companies or for Baum was ended and settled up; denied all fraud and combination; admitted that he had united Baum and Williams in the subsequent attempt to build up a town, and relied upon the lapse of time, the defaults, laches, and acquiescence of the complainant and the statutes of limitation, in bar of the claim set up in the bill. The respondent, moreover, admitted or explained a number of papers respecting *which he had been interrogated, and [*350 then prayed that his answer might be considered as a cross-bill.

The answer of Williams admitted the formation of the Baum Company, the subsequent formation of the Port Lawrence Company; averred that in the spring of 1819, Embree, the partner of the respondent, whilst the respondent was absent in Illinois, purchased from Oliver an interest of one thirteenth in the Baum Company; admitted the relinquishment to the United States of Nos. 1 and 2, which was made by the respondent himself; that the proceeds of

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the large number of tracts standing in the name of Baum, and thus relinquished, were ascertained in gross, and a credit entered to that amount on the lands retained; that the proceeds of tracts Nos. 1 and 2, were $4,817.55½, and the amount due to the United States, on tracts 3, 4, 86, 87, was $1,372.36, and upon the five quarter-sections $1,248; averred that he did not know what became of the balance of $474.60, except that John H. Piatt and Baum arranged it to their mutual satisfaction; denied that there was any agreement, understanding, or intention, amongst the members of the Port Lawrence Company, to repurchase tracts 1 and 2; averred that after the relinquishment the members of the Port Lawrence Company abandoned Baum, and left him to settle the liabilities of the company as he could; denied all knowledge or belief that the complainant or Baum attended the public sales in 1827 with the intention of repurchasing said tracts for the benefit of the company, but on the contrary intended to purchase them on account of other persons; denied all knowledge or belief that Oliver was authorized by Baum to open a negotiation with the trustees of the Michigan University; averred that in May, 1831, Oliver offered to sell to the respondent one fourth of tracts 1 and 2, 86 and 87, except sixty acres of 86, for a specified sum, and at the same time offered another fourth each to Martin Baum and Jacob Burnet, which offer the respondent accepted, taking one third instead of one fourth, as Burnet declined becoming interested; and in 1832, the respondent purchased an additional sixth from Oliver, which purchases together gave him an interest of one half, for which he received a deed in fee-simple from Oliver and wife; averred that at the time of paying the purchase money and receiving the deeds, he had no notice or knowledge of any right, title, claim, demand, or interest, of the complainant, or the Port Lawrence Company, or any of the members thereof, nor had he any notice, knowledge, information, suspicion, or belief, of any fraud, or breach of trust, or other transactions, matters or things, affecting the titles of said lands, but maintained that he purchased the same *bona fide*, in good faith, and for a full and fair consideration actually paid.

To all these answers a general replication was filed.

In December, 1840, the bill was taken as confessed by all the defendants who had failed to plead, demur, or answer, and the cause came 351*] *on for hearing upon the bills, answers, replications, testimony and exhibits, when the court passed the following decree:

"The court do here find that the law and equity of the case are with the complainant; but because the court here are not fully advised as to the exact nature and extent of the relief to which the complainant is entitled, so as to enable them to render up a final decree in the premises, it is therefore adjudged, ordered and decreed that this cause be, and the same is hereby, referred to Aaron F. Perry, as special master commissioner, who is hereby instructed to make out, and report to us at our next term, an amount of the sales made in whole or in part of tracts one, two, three, four, eighty-six, eighty-seven, and the five quarter-sections, designating the date and amount of sales in each tract, title made, moneys received and due, and also an account of all moneys expended, either in the purchase or improvement of each tract, by the defendants Williams and Oliver, or either of them, including compensation for the agency exercised in the general management of the property, and such other matters of fact and calculations as either party may deem necessary, in order to a just and equitable decree in the premises; and for that purpose he is hereby invested with power to demand the production of any books, papers, and accounts in possession of either of the parties, to examine them, if necessary under oath, touching any particular matter or thing connected with the matters in contest, to examine and take the deposition of witnesses, to withdraw any exhibit or paper now on file with the clerk, giving a receipt therefor, and perform every act necessary to a proper adjustment of the accounts and transactions of the parties. He is hereby required to deliver to each party demanding the same, a copy of his report, twenty days previous to the next term of this court, until which time this cause is continued."

In addition to the points upon which the master was directed in the decree to report, the solicitor for the complainant stated twenty-five others, and the respondent fourteen, as matters of fact and calculation which they respectively deemed necessary.

On the 3d of July, 1841, the master presented a very voluminous report, occupying nearly five hundred pages of the printed record.

To this report the complainant filed twenty-one exceptions, and the defendants ten. They related chiefly to matters of detail and account, which it would be difficult to understand unless the whole report were here inserted.

In July, 1842, other parties were made in place of those who had died; and John Rowan, a citizen of Kentucky, filed his answer voluntarily, claiming an interest of six thirteenths in the Baum Company.

At the same term the court referred the case to Edward D. Mansfield, master, to report the deduction of title as claimed by each of the parties.

*On the 22d of July, 1842, the master, [*352 in conformity with the above reference, reported the deduction and then condition of the several titles.

At the same term, additional parties were made, to represent the dead, and the case was again referred to Mansfield, with the following instructions, viz.: "To state separate accounts of the compensation, which, under all the circumstances, ought to be made to the said William Oliver and to the said Micajah T. Williams for their services; and also an account for expenses in the procurement, management, and improvement, in the value of the trust property, consisting of tracts 1, 2, 86, 87, and the ten acres in No. 3; and that the said master also restate separate accounts touching the moneys or other proceeds arising to said Oliver and Williams, from sales made prior to the filing of the bill, of any parts of said trust property; and also of the account of said Oliver against the Port Lawrence or Piatt Company, for advances not heretofore re-imbursed.

In estimating services, expenses, &c., the master is to have reference to the advantage

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derived from said expenses and services, &c., as well to tracts Nos. 3 and 4, and the half-section No. 3, and southwest quarter-section No. 2, township 3, as to the tracts before named. And that in performing this order, the master, besides having reference to the papers, depositions, &c., now on file, may take further testimony, or further examine the parties if he deems it necessary.

On the 27th of July, 1842, the master filed a report, entering minutely into the several matters of account, to which four of the defendants took four exceptions.

On the 29th of July, fresh parties were made in the place of some more who had died, and the master made two additional reports, to which Oliver and Williams took twelve exceptions.

On the 30th of July, the court pronounced the following final decree:

"1st. That Philip Grandin and Hannah C. Grandin, his wife, Mary P. Ewing, Egbert T. Smith and Sarah R. Smith, his wife, Nathanial G. Pendleton, William J. Van Horn and Margaret Van Horn, his wife, John Spencer and Susan Spencer, his wife, Samuel Perry, as administrator of Martin Baum, deceased, Jacob Burnet, the administrator of William C. Schenck, deceased, William J. Van Horn, as administrator of William Barr, deceased, having been duly served with process requiring them to appear and answer the complainant's bills, and they not having appeared, plead, demurred to, or answered the same, as required by the rules of this court, the said bills, and the matters therein contained, are hereby, as against them respectively, declared to be taken as confessed.

"2d. That the rights of the defendants, Isaac Dunn, the unknown heirs of William Steele, deceased, Alexander Findley and Ann Ellen Findley, his wife, Woodhull S. Schenck, 353*] Andrew Mack, Israel T. *Canby, and Gorham A. Worth, who are not inhabitants of the State of Ohio, or found within the district of Ohio and jurisdiction of this honorable court, if any they or either of them have, or hath, in and to the lands and premises in question, be, and the same are hereby reserved to them respectively, in as full and ample manner as if this decree had never been rendered.

"3d. That Eleanor Baum, Egbert T. Schenck, Elizabeth Schenck, James F. Schenck, Jun., Susan Louisa Pendleton, Martha Pendleton, George Hunt Pendleton, Elliott Hunt Pendleton, Ann Pierce Pendleton, Nathanial Pendleton, Mary Barr, William W. Barr, and David Barr, the infants, defendants, are hereby respectively allowed six months after attaining majority, to show cause, if any he, she or they, hath or have against this decree.

"4th. And the court further decree, that all *bona fide* sales, interests, and undivided interests, in and to lots in the town of Toledo, in the ten acres of tract number three, and in the lots 86 and 87, made by the said Oliver and Williams, before the filing of the original bill in this case, together with the sixty acres sold by Martin Baum to Tromley and Prentiss in tract 86, be, and the same are hereby ratified and confirmed; and as to any of said sales not yet perfected by conveyances, and as to which the outstanding claims upon the purchasers have been reported on, it is decreed that the same inure to the said Oliver and Williams, and they are empowered to receive the amounts due thereon to their own use, and to convey the land to the purchasers. And all donations, appropriations, and dedications of any parts of said several tracts of land for any public use, heretofore made, be, and the same are hereby confirmed to the original purpose of the donation, appropriation, or dedication. And inasmuch as Benjamin S. Brown, to whom, by the resolution of the proprietors, on the 17th September, 1837, the lots Nos. 109, 110, 111, were to be conveyed for the purpose of the appropriation of those lots, has departed this life, it is ordered with the assent of the parties to this suit, in interest, that Richard Mott be, and he is hereby appointed trustee, instead of said Brown, to carry out said appropriation. And the partition heretofore made between the said Oliver and Williams, and their assignees of interests, be, and the same is hereby ratified and confirmed to the respective parties thereto, according to the original intent of the same; and it is further decreed, that the lease made by the said Williams to Garret D. Palmer, on the 24th November, 1840, be, and the same is hereby confirmed; and the rents accruing and to accrue on said lease, since the 1st day of July, 1842, inure to the benefit of the parties in interest, as settled by this decree.

"5th. That the said Oliver and Williams hold the legal title to the following tracts of lands mentioned in the pleadings, not otherwise disposed of in this decree, that is to say: tracts 1 and 2, 86, 87, and ten acres of tract 3, in trust, for themselves and the other *members of [*354 the Port Lawrence Company, so called, and those now holding and representing their interests, as tenants in common, in the proportions affixed to their names, that is to say, dividing the whole into 2,882 parts, then the said trust is

For Alexander H. Ewing -	989 6-10 parts.
John Rowan - - -	496 6-10
Robert Piatt - - -	219 5-10
John G. Worthington -	219 5-10
William Oliver - -	165 5-10
Micajah T. Williams -	82 8-10
the heirs of William M. Worthington - -	219 5-10

the heirs of John H. Piatt, 439 parts. For the said heirs of J. H. Piatt, being Benjamin M. Piatt, Abraham S. Piatt, Hannah C. Grandin, wife of Philip Grandin, each one fourth part of the said 439 parts, and for the heirs of Frances Dunn the other fourth, viz.: John P. Dunn, Jacob P. Dunn, George Dunn, Strange S. Dunn, Hannah M. Tousey, wife of George Tousey, Sarah Jane Layton, wife of William Layton, each one seventh of said fourth; and Francis E. Smith, and Adam C. Smith, each one fourteenth of said fourth.

"6th. And the court do further order, adjudge and decree, that the said Oliver and Williams do, within five months from the date of this decree, by deeds, with special covenants, to be prepared by each of said parties for their respective interests, convey to each of said parties, in fee-simple, the undivided proportion of said trust estate affixed to his or her name as aforesaid, together with the undivided interests in the same proportions in the wharves,

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ferries, &c., heretofore reserved for the use of the said Oliver and Williams, in their former conveyances; and also the same proportions of all public edifices, materials, and advantages heretofore reserved to the said Oliver and Williams, saving to said Oliver and Williams the hotel materials; and also, in the same proportions, the interests remaining in the said Oliver and Williams in and to the following common and other property, that is to say: lots numbered 109, 110, 111, 119, 120, 121, 162, and 163, in the town of Toledo, and any others in which there is any such interest in said Oliver and Williams, they, the said Oliver and Williams, retaining in themselves only the proportions pertaining to them and ascertained as aforesaid. And it is further decreed, that the said Oliver and Williams permit the said parties, respectively, to enter into the possession and enjoyment of their said portion of said estate as tenants in common. And it is further ordered and decreed, that the said Oliver and Williams do, within the said sixty days, transfer to the said parties respectively, without recourse, in the same proportions, the demand on the books of said Oliver and Williams against Andrew Palmer, as agent, now amounting, according to the report of the master, to the sum of $5,568.79; and the like demand against Edward Bissell, now amounting, according to said report, to the sum of
355*] *$2,427.35; and also the like demand against Stephen B. Comstock, now amounting, according to said report, to the sum of $976.62; the said three sums being reported as due from the said Palmer, Bissell, and Comstock, of moneys which came to their hands as agents connected with the sale of lots and improvements in said town of Toledo.

"7th. It is further ordered and decreed, in respect of the moneys heretofore received by the said Oliver and Williams, or either of them, from sales, rents, or otherwise, arising from either of said tracts of land, which is not allowed to the said Oliver and Williams for compensation for their services, or for expenses on account of said trust property, that there remains in their hands, as said trustees, the sum of $2,237.35; which said sum is held by them in trust for themselves and the other parties, in the same proportions hereinbefore found and decreed as to the said trust lands; and apportioning the same according to said rule, the parties will be entitled to the following sums:

To said Alexander H. Ewing	$781.76
John Rowan	392.35
Robert Piatt	173.40
John G. Worthington	173.40
William Oliver	130.78
Micajah T. Williams	65.39
Alice Worthington, executrix and trustee of Wm. M. W.	173.40
heirs of John H. Piatt	346.80

"And of the share of the said John H. Piatt, the following are the portions of his heirs, that is to say,

To Benjamin M. Piatt	$86.70
Abraham S. Piatt	86.70
Hannah C. Grandin	86.70
John P. Dunn	12.33
Jacob P. Dunn	12.33
George Dunn	12.33
Strange S. Dunn	12.33
Hannah M. Tousey	12.33
Sarah Jane Layton	12.33
Francis E. Smith	6.16
Adam C. Smith	6.16

"And the court order and decree, that the said Oliver and Williams pay, within five months from the date of this decree, the said several sums, except those opposite their own names, with interest; and in default thereof, that execution issue therefor as at law.

"8th. That the said William Oliver, having held the legal title to the southeast quarter of section 3, township 3, in the said reserve, as trustee, in trust for the complainant and the other members of the Piatt Company, on the 25th day of July, 1835, at the time he sold and *conveyed the same to William J. [*356 Daniels, for the sum of $1,000, whereby the said complainant and the other members of said company, their heirs or legal representatives, became, and are now entitled to their proportionate shares of the avails of said sale, with the interest which has accrued thereon, amounting, in the aggregate, to $1,420; that is to say, each are entitled to the proportionate shares of said avails annexed to their names respectively, viz.:

The complainant, one eighth part,	$177.50
Alexander H. Ewing, three eighth parts,	532.20
John G. Worthington, one eighth part,	177.50
Alice Worthington, as executrix and trustee of Wm. M. Worthington, dec'd, one eighth part,	177.50
The heirs of J. H. Piatt, deceased, two eighth parts,	355.00

That is to say, of the share of the said John H. Piatt, his heirs are entitled as follows, to wit.:

Benjamin M. Piatt the sum of	$88.75
Abraham S. Piatt	88.75
Hannah C. Grandin	88.75
John P. Dunn	12.68
Jacob P. Dunn	12.68
George Dunn	12.68
Strange S. Dunn	12.68
Hannah M. Tousey	12.68
Sarah Jane Layton	12.68
Francis E. Smith	6.34
Adam C. Smith	6.34

"It is therefore further decreed, that the said defendant, Oliver, do, within five months from this date, pay to the complainant and the heirs and legal representatives of the original proprietors of the Piatt Company the above sums, annexed to their respective names, with interest from this date, or that executions issue therefor as on judgments at law.

"9th. That Mary P. Ewing, in her own right, and the said Alexander H. Ewing, in right of his wife, the said Mary P. Ewing, being invested with the legal title to the northwest quarter of section 2, township 3, in said reserve, as trustee, in trust for the complainant and those now holding and representing their interest in the Piatt Company: that is to say, in trust for the persons, and in the proportions annexed to their respective names, as follows:

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The complainant, one eighth part,	20 acres.
Alexander H. Ewing, three eighth parts,	60
John G. Worthington, one eighth part,	20
Alice Worthington, executrix and trustee of Wm. M. Worthington, deceased, one eighth part,	20
Heirs of John H. Piatt, deceased, two eighth parts,	40

That is to say:

Benjamin M. Piatt	10
[*357] *Abraham S. Piatt	10
Hannah C. Grandin, wife of Phillip Grandin,	10
John P. Dunn	1 3-7
Jacob P. Dunn	1 3-7
George Dunn	1 3-7
Strange S. Dunn	1 3-7
Hannah M. Tousey, wife of George Tousey	1 3-7
Sarah Jane Layton, wife of Wm. Layton.	1 3-7
Francis E. Smith	5-7
Adam C. Smith	5-7

"It is therefore further decreed, that the said Alexander H. Ewing and Mary P. Ewing, his wife, do, within sixty days from the date of this decree, by deed, with special covenants (to be prepared by each of said parties for their respective interests), convey to the said parties in fee-simple, except the said John G. Worthington, to whom a conveyance of his proportion has already been made, the undivided proportion of said trust estate affixed to his or her name as aforesaid; they, the said Alexander H. Ewing and Mary P. Ewing, retaining in themselves the proportion pertaining to them as ascertained as aforesaid. And it is further decreed, that the said Alexander H. Ewing and Mary P. Ewing permit the said parties respectively to enter into the possession and enjoyment of their said portions of said estate as tenants in common.

"10th. As to the account on file and reported upon by the master, for advances made by Martin Baum for the Port Lawrence Company, the court find that the amount of the same, with interest to this time, is $2,063.96, which is chargeable upon the said trust estate; and the court further find that the said claim is now held by the defendant, Alexander H. Ewing, and should be apportioned to the several interests in said property, except the proportion of the said Oliver and Williams, which has been satisfied. The proportions of said demand remaining to be satisfied are as follows, to wit:

John Rowan to pay	$360.08
John H. Piatt's heirs to pay	320.38
Robert Piatt to pay	160.19
J. G. Worthington to pay	160.19
Wm. M. Worthington's heirs to pay	160.19
Alexander H. Ewing's share	721.29
William Oliver's share	120.36
M. T. Williams' share	60.18

"And thereupon the court further decree, that the said John Rowan, the heirs of John H. Piatt, according to their portions ascertained in this decree, Robert Piatt, John G. Worthington, the heirs of Wm. M. Worthington, shall each pay the proportion of said account affixed to their names, with accruing interest, within five months or in default, that execution issue against each for his or her proportion.

"11th. As to the claim set up by [*358 Robert C. Schenck's answer to lot No. 1 in the original plat of Port Lawence, which was sold to William C. Schenck, and for which Martin Baum, trustee, in his lifetime issued a certificate to Egbert T. Smith, who afterwards assigned the same to the said Robert C. Schenck, who now holds it in his own right, the bill is dismissed, without any prejudice to his (the said Schenck's) right, and he has leave to withdraw from the files of this court his answer and other papers relating thereto.

"12th. As to the costs in this suit, it is ordered that the costs of this suit be paid by the defendants, according to their several interests ascertained by this decree, within four months, into the hands of the clerk, one docket fee only to be taxed, and that to the complainant; and in default of payment, execution may issue as by law. And the court allow to Master Perry the sum of $618 for his services and expenses, to be taxed in the costs—of which there has been paid to him $50 by the defendant, A. H. Ewing, and $50 by the said Robert Piatt; the balance of the allowance only to be paid said Perry, and the said Ewing and Piatt to be credited with their said advances. And the court allow to Master Mansfield, to be taxed, the sum of $75, for his services in this case."

From this decree an appeal brought the case up to this court.

Messrs. Stanberry and *Ewing* for the appellants.

Messrs. Pirtle and *Scott* for the appellees.

The printed briefs in the case occupied nearly one hundred pages. It is difficult to give a condensed statement of the arguments of the counsel, because many of them were founded upon matters of evidence, which it was impossible to embrace in the foregoing statement of the case.

Mr. Stanberry divided his argument into the following heads, under each of which he referred to various portions of the record:

1. The formation of Port Lawrence Company.

After narrating its history, he said:

The Port Lawrence Company was strictly an association of companies, rather than of individuals; each of its constituent companies continued its separate existence, and held separate estate; the union only extended to the property held in common: the eleven members of the new company entered into no new arrangement, changing the quantum of interest of the members of its constituent companies. All that was settled, in that respect, was, that each company should contribute one half to capital and expenses, and own one half of the stock, leaving each company to adjust the interests of its respective members in its moiety of the concern.

In every sense, this was a partnership, not simply a tenantcy in common. The capital was real estate, not acquired for division among the owners, but for speculation. It was to be laid out in a *city, requiring further [*359 advances from the partners in the way of ex-

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penditures, and to be sold, in parcels, for the common profit.

The Baum Company, in their articles, call themselves a partnership.

See letter of instructions of Piatt Company, in which they say their object is to buy for sale and profit, for their common benefit.

The modern authorities are full to the point, that, in the estimation of a court of equity, real estate, held as partnership assets, is considered as personal estate.

Mr. Justice Story, in his Commentaries on Equity, Vol. I., page 624, in treating of partnership property, says: "A court of equity considers the real estate, to all intents and purposes, as personal estate, and subjects it to all the equitable rights and liens of the partners which would apply to it if it were personal estate. And this doctrine not only prevails as between the partners themselves and their creditors, but (as it should seem) between the representatives of the partners also. So that real estate, held in fee for the partnership, and as a part of its funds, will, upon the death of one partner, belong, in equity, not to the heirs-at-law, but to the personal representatives," &c.

Mr. Stanberry then quoted Collyer on Partnership, 76, and 7 Cond. Eng. Ch. R., 215; 5 Cond. Eng. Rep., 383; 8 Ohio Rep., 364.

2. Operations and state of the Port Lawrence Company, from its organizaton until September, 1821.

The history of the company was traced from year to year.

3. General allegation of fraud, and the transactions subsequent to relinquishment.

We have, first, the general allegation of fraudulent combination between Baum, Oliver, and Williams, to cheat the Piatt Company out of their five quarter-sections, and their moiety of the Port Lawrence Company Lands. The rules of pleading in equity do not admit this general allegation of fraud, but require the facts which constitute it to be averred, that issue may be taken on them. In answer to such general allegation, a general denial is sufficient. (*White* v. *Hall*, 12 Ves., 323.)

The time of this combination is laid in the early part of the year 1822. The allegation is first made in 1836, years after the death of Baum. It therefore affects the dead as well as the living. It is, besides, an allegation of breach of trust, as well as fraud. The sort of proof which is required to make out such a case, is well stated by *Mr. Justice* Story, in *Prevost* v. *Gratz* (6 Wheat., 498).

"Fraud or breach of trust ought not lightly to be imputed to the living, for the legal presumption is the other way; and as to the dead, who are not here to answer for themselves, it would be the height of injustice and cruelty to disturb their ashes, and violate the sanctity of the grave, unless the evidence of fraud be clear beyond a reasonable doubt."

360*] *Baum lived many years after this transaction, and during his life it was not questioned. He is not here to answer for himself, and those who represent him, and have had the custody of his papers, make common cause with the complainant. (See A. H. Ewing's answer, p. 81, and his deposition, p. 361.)

It is very proper in such a case, where fraud and breach of trust are imputed to the dead, and attempted to be raised upon presumptions from conduct, to look to the character of the deceased.

The whole case shows that Baum was esteemed by all parties a man of the strictest honor, and had the fullest confidence of his associates.

4. Oliver's agency.

The bill alleges that, on the 14th August, 1817, Baum, with the advice and consent of the company, appointed Oliver agent to lay out the town (with Schenck's assistance), and to attend to the concerns of the company; which agency Oliver accepted, and has continued such agent ever since.

Oliver answers that he was appointed agent August 14, 1817; that his appointment was for one year; that about the month of May, 1818, he was elected cashier of the Miami Exporting Company, a bank at Cincinnati; that he entered upon his duties of cashier about the 1st of July, 1818, and considering these duties incompatible with his Port Lawrence agency, before entering on his duties as cashier, he resigned his agency to Baum, settled his accounts, and delivered to Baum all moneys and papers relating thereto.

On the 14th August, 1818, Oliver sold half his interest in Port Lawrence Company to Steele and Lytle, they assuming all liabilities; and in March, 1819, he sold, in like manner, the other half to Embree and Williams.

The allegation of the continuing agency of Oliver is met by the direct denial of the answers, which allege that, as originally constituted, it was to continue but one year, and actually terminated in less than a year, on the 4th July, 1818.

Next, and what is much more satisfactory, we have the express limitation of the agency to the period of one year, and the salary of $1,200, in the letter of Baum to Oliver, of August 14, 1817; the testimony of Gano, that Oliver's whole time from July, 1818, for the succeeding four years, was directed to his duties as cashier: the allowance of the salary down to July 4, 1818, and no longer; the total absence of evidence of any renewal of the appointment of agent, or the payment of any salary after that date, and the special power given by Baum to Oliver, on the 1st September, 1825, to collect money due to Baum on the Port Lawrence concern.

It well appears, therefore, that Oliver's relation to Port Lawrence Company, as agent, ceased on the 4th July, 1818, and that his relation as partner ceased in the month of March, 1819, when he sold his remaining interest, without recourse, to Embree and Williams. *From that time his only relation to [*361 this company was as a purchaser of lots in Port Lawrence.

But if his relation as agent continued, there was nothing in that to prevent his purchase of the lands of the company, in payment or collection of a *bona fide* debt.

5. The certificate of $213.07.

The bill alleges that this was a false certificate, purporting to have been given to Oliver by Baum, for moneys refunded by Oliver to purchasers of lots in Port Lawrence; that the transactions in respect to it were secret; that instead of making personal demand of the

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plaintiff and other members of the Piatt Company, Oliver fraudulently attached three of their five quarter-sections, and purchased them under that proceeding.

[*Mr. Stanberry* here referred to many parts of the record, to show that the debt was just; that personal demands were made for payment from the plaintiff and other members of the Piatt Company; and that the transaction was not a secret one.]

Three objections are taken in the bill to the proceedings in attachment under this certificate of debt.

1st. That Michigan had no jurisdiction.

2d. That certificate was not a valid claim.

3d. That the proceedings were fraudulent.

The court below decided against their validity, upon another ground, viz., that the estate of the parties to the attachment could not be reached by that process.

See the Michigan statute as to attachments, which embraces all "rights, credits, moneys and effects, goods and chattels, lands and tenements." (Laws of Michigan Territory, chap. 23, No. 189, Cong. Law Lib., 399.)

Baum was a party, and he held the final certificate showing full payment. The debt was still due, primarily from him, as the acting partner, and was raised by advances at his request, in discharge of his personal covenants. The land attached was a fund he held as indemnity against those advances. He certainly had an estate, a right. Subordinate to his estate or lien on these lands, the members of Piatt Company had a right in these lands; they were entitled to them after the debts were discharged; their interest was simply an equity of redemption.

It seems to us a startling doctrine, upon a bill filed in another jurisdiction, collaterally, to hold these attachment proceedings a nullity. The court of Michigan had exclusive jurisdiction of the territory in which these lands were situate. That was decided in the Circuit Court. The court in Michigan specially ordered a sale of these lands (210), and now it is claimed that the whole proceeding is void, not simply voidable on writ of error, but absolutely null; and this, too, by a court of another jurisdiction, in a collateral proceeding.

362*] *The proceeding differs wholly from the ordinary sale of lands on execution, in which the judgment of the court is one thing, and the proceeding by execution quite another, and carried on by the party.

This is a proceeding *in rem*, in which the court acts upon the thing, and takes, specially, jurisdiction of it.

We think the authorities cited in the Circuit Court do not sustain this doctrine.

Cases relied on in Circuit Court. (*Piatt et al.* v. *Law et al.*, 9 Cranch, 496.)

The questions of the validity of the sale of an equity of redemption in lands, under the attachment law of Maryland, was raised; and it appeared that question had not been decided by the Supreme Court of Maryland. The statute of Maryland, of 1715, chap. 40, makes "goods and chattels, credits, &c.," liable to attachment. The statute of 1795, chap. 56, in "lands, tenements, goods, chattels, and credits." This court, in the above case, held that the decree of the court of Maryland, if it did not fix the law as to the attachment, at least, fixed the fate of the lands attached beyond reversal, p. 496.

One judge doubted if the Attachment Act, making the equitable interest tangible, did also make it subject to execution. The court was of opinion that the condemnation gave the court power to issue final process of execution, p. 496.

Haven v. *Law* (2 N. Hampshire Rep., 13) was a case of pledge of personalty; and it was held that the interest of the owner could not be seized in attachment. The court say such an interest is made liable in some of the States by statute.

It appears from the case of *Kitteridge* v. *Bellows* (7 N. Hamp. Rep., 899), that an equity of redemption in land is subject to attachment, even in that State.

(*Badlam* v. *Tucker*, 1 Pick. Rep., 399.) The court say it is only by statute that equities or rights to redeem are subject to attachment by ordinary process, and no statute, in Massachusetts, has authorized the attachment of such interest in personal property.

See revised statutes of Massachusetts of 1836, chap. 90, sec. 23, and 24. The attachment in that State is ordinary mesne process, and execution upon it by statute provision only goes against such interests as are subject to execution at law.

Jackson, ex dem. Ireland, v. *Hull* (20 John's Rep., 81), cited by Circuit Court to show that an equity of redemption cannot be attached.

It was a sale under judgment and execution of the equity of redemption of mortgageor. Held, that the equity of redemption did pass by the sale; and it appearing the sale did not satisfy the judgment (which was on the mortgage debt), it was held that the purchaser took, subject *to the remainder due on the judg- [*363 ment. (See *Waters et al.* v. *Stewart*, 1 Caines' Cases in Error, 67, to same point.)

6. The mortgage.

On the 27th August, 1823, Baum, for the consideration of $1,835.47, conveys to Oliver, in fee, tracts 3, 4, 86 and 87, except sixty acres off upper end of 86, sold to Tromley and Prentiss. Baum covenants that he is the true owner, and hath full power to sell, and with general warranty. The condition is, that upon payment of $1,835.47, "the sum due Oliver from Baum and his associates, in the purchase of said property," on or before the 1st January, 1824, with interest from September 1, 1823, the mortgage to be void.

The bill alleges that this mortgage was a fraudulent, secret contrivance to cheat the owners out of their property.

That the pretense that there was $1,835.47 due to Oliver was false.

That Baum had no power to sell, mortgage, or in any manner to convey any lands, except 1 and 2.

Mr. Stanberry here examined the record and contended that there was nothing fraudulent or secret about it; that the debt was justly due, and that Baum had full power to sell or mortgage. With regard to Baum's powers, he said:

It is, then, not disputed that there was no written appointment, power of attorney, or declaration of the powers or trust vested in Baum. He was made the agent or trustee for the six tracts—all the lands of Port Lawrence Com-

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pany. At the time of his appointment, the certificates of title stood in the names of the agents who made the purchase at Wooster. It is admitted, by the amended bill, that it was then agreed that all the certificates should be assigned to him; but it is alleged in the same bill that the assignments were made just prior to the relinquishment in 1821. The answers are express, that all the tracts were assigned in 1817, and the subsequent and more formal assignments were made necessary on the relinquishment.

The nature of the business required that the title should be vested in Baum:

1st. To prevent difficulties from deaths in a company of eleven members, thereby embarrassing the transfer of title to a multitude of purchasers.

2d. Baum sold with his personal covenants to make title, which necessarily implied that the title was in him.

He had power to sell all the lands, on speculation, or for the debts of the company.

The bill alleges that no power of sale or mortgage was given as to any other lands than 1 and 2.

364*] *The answers are responsive, and expressly allege the contrary; and there is nothing contradictory in the proof.

We have so far considered Baum's powers as originally granted; but at the date of the mortgage they stand on different ground.

A power originally conferred, even by writing, may be enlarged subsequently, and this enlargement be proved by parol. (Story Eq., 97.)

It is admitted that the title to the unrelinquished lands was formally transferred to Baum in September, 1821.

The bill alleges that this transfer was for the sole purpose of the relinquishment and appropriation to the unrelinquished lands.

This allegation is denied by the answers, and no proof to contradict.

The complainant introduces Baum's letters to Brown of 1822 and 1823; which state that all the lands were transferred to him for convenience of sale and conveyance.

Clothing a person with apparent ownership and right to sell, implies that the apparent is the real authority. (Story on Agency, 108.)

Now, had Baum power to mortgage for the debts of the company?

1st. On bill and answer that power must be taken to have been expressly given in the beginning, and consequently existed in August, 1823, the date of the mortgage.

2d. But it is necessarily implied, at that time, the title was in him, without limitation. He had incurred liabilities for the company, and there was no other fund provided for the debts but these lands. He might even sell them—for a power to raise money out of an estate authorizes a sale. (1 Atk., 421.)

3d. It is further implied by acquiescence. (Story on Agency, 60.) In January, 1823, Baum sells thirty acres to Prentiss and thirty acres to Tromley, of which the company are notified by the circular of 1824, and to which no objection is made.

So, too, the acquiescence in this mortgage, notified to the company, by the same circular.

4th. But the powers of Baum are greatly enlarged when we regard his true character—no an agent, but the managing partner of a par nership in real estate—the "*præpositus negoti societatis*"—holding all the title—managing a the business—incurring, by his personal cov nants, the primary liabilities.

5th. Besides this power of disposal over th assets, as managing partner, he stands in an other relation to these lands after his advance

At the time of the mortgage, his debt agains the partnership, for advances and liabilities amounted to $4,755.25. (Wyllis on Trustee 164; *Lambert* v. *Bainton*, 1 Cha. Ca., 199; *Do* v. *Langston*, Plowd., 186, at top; *Chalmer* v *Bradley*, 1 Jac. & Walk., 51.)

*The cases are to the point, that a [*365 trustee, to sell, becomes in effect the owner, by advancing to the value.

There may be a question whether this doctrine applies, in its full force, to realty as well as personalty. *Lambert* v. *Bainton* was real estate, and the lord keeper there held the doctrine.

In *Chalmer* v. *Bradley*, which was also a case of real estate, the Master of the Rolls says he is aware of a distinction between personal and real estate; nevertheless, he seems disposed to act upon the analogy.

We maintain that the doctrine applies, in all its force, to the case at bar, for the shares in this real estate partnership, carefully separated as they were from the title, and cognizable only in equity, are uniformly treated in this court as personalty.

Baum, then, might have held this land as his own. He might have sold it; instead of which he mortgages it, and with great regard for the interests of his delinquent associates.

Several objections are taken to the proceedings by which the mortgage was foreclosed: First, that they were carried on secretly. The bill alleges that the plaintiff had no knowledge of the mortgage or the proceedings until after Oliver had obtained the patents (which was in December, 1830), except only through Baum's circular of January, 1824.

Oliver answers, that when the debt secured by the mortgage became due, he applied to the different members of the company, and especially to the plaintiff, for payment, but in vain. That during the pendency of proceedings under the mortgage, the members of the company were cognizant thereof; that he advised the plaintiff of the proceedings, and urged him to pay the debt, or his proportion of it, to prevent the necessity of a sale, but the plaintiff paid no attention to the request.

There is not a particle of proof of the alleged secrecy, nor do these proceedings show any anxious haste to acquire this property, but quite the contrary.

Oliver submits to a postponement of payment of four months. He delays the commencement of legal proceedings for upwards of two years, and delays a sale for five years; in the meantime endeavoring in vain to get his money from his debtors.

The next objection to these proceedings, and the one on which most reliance was placed by the Circuit Court, is the want of parties. It is said the different members of the Port Lawrence Company, or those representing their interests, ought to have been made parties. We

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maintain this objection would not have been fatal if made by demurrer, or at the hearing in the court in Michigan. The title was in Baum alone. He fully represented all the members of the company. Even if he stood in the mere relation of a trustee, it is doubtful if this objection would have prevailed. (*Campbell* v. 366*] **Watson*, 8 Ohio Rep., 498; 11 Ves., 443; 3 P. Wms., 92; Story's Eq. Pl., 145.)

But his true standing was that of acting partner, with the title to all the assets. The other members of the company were dormant partners, and by the rules of chancery practice need not to have been made parties defendant. (*Lloyd* v. *Archbowle*, 2 Taunt., 324; *Ex-parte Norfolk*, 19 Ves., 455.)

But if Oliver acquired no title to the three quarter-sections by the attachment, nor to the other tracts by the chancery proceedings under the mortgage, yet he did acquire the legal title to all these lands, by the subsequent assignment of the certificates to him by Baum, and the granting of the patents.

7. Assignment of final certificates by Baum to Oliver.

In December, 1828, Baum assigned to Oliver the final certificates for tracts 3 and 4, and the three quarter-sections, purchased under the attachment; and in December, 1829, the final certificates for tracts 86 and 87; and in August, 1830, the final certificate for another of the quarter-sections. Under which assignments, Oliver obtained patents in December, 1830, for all but tracts 86 and 87.

[*Mr. Stanberry* here examined the charge that this assignment was fraudulent.]

In the opinion of the court below, it seems to be intimated that Baum's whole power of sale and transfer was exhausted by the mortgage. However that may be in the execution of strict specified powers, it is supposed the doctrine does not apply to the case at bar. Here the title was in Baum, without any express limitation or declaration of trust. It was not a power carried out from the estate, but the whole estate was vested. (Dougl., 292, 293; *Perkins* v. *Walker*, 1 Vern., 97, that a mortgage is not an exhaustion of a power of sale.)

Besides, the transfer was not the exercise of any new power, but the confirmation of the first act; the ratification of Oliver's title under the mortgage, after his purchase at a judicial sale. Baum might have made an absolute sale to Oliver in the first place, instead of which he mortgages the land, obtains further time, and puts Oliver to the necessity of a purchase under judicial proceedings, at a public sale, open to competition. He then makes the transfer of the certificates; a very proper act, and such an one as a court of equity would have compelled him to do; such an act, therefore, as in conscience he was bound to perform.

Here, as well as in every part of this case, in which a question is raised as to Baum's powers, his true situation must not be forgotten. He was not merely an agent or trustee, but a joint owner, and the acting partner; invested with the title to all the assets having made advances, and incurred personal liabilities, to their full value.

Under these proceedings and transfers, Oliver 367*] acquired the legal *title to the four quarter-sections, and the lands included in the mortgage, by patents issued to him in December, 1830. The plaintiff comes to be relieved, and to impeach the transactions under which that title was obtainted. From first to last he has been under no disability. He pretends to have been ignorant of these transactions, but his full and current knowledge of them is established by the answers. In fact he admits notice upon the emanation of the patents.

Now, if there was good faith in these transactions, it is out of the question to ask this court to disturb a legal title upon any of the grounds of irregularity or want of power which are alleged. This is especially so when the laches of the plaintiff is taken into the account.

The case of *Bergen* v. *Bennett* (1 Caines, 1) is very much in point here. That was the case of a purchase by a trustee; a mortgagee with power to sell; sixteen years afterwards the mortgageor brought his bill to redeem. Kent, *Justice*, whilst he acknowleges the incapacity of the trustee to purchase, holds the title good, simply by the acquiescence. He states the distinction between the case of a bill brought against the trustee to set aside his legal title, and a bill brought by him to complete his purchase, and that equity would not interfere, as of course in the former case. He says, "the *cestui que trust* must come in a reasonable time to set aside the sale, or he will not be heard; and that what shall be termed a reasonable time, is not susceptible of a definite rule, but mustin a degree depend upon the circumstances of the particular case, and be guided by the sound discretion of the court. In this case the *cestui que trust* comes after sixteen years, finding it a gaining bargain, and being all that time under no disability." The learned judge then goes on to enumerate several cases of much shorter acquiescence, which were held barred.

Gregory v. *Gregory* (1 Coop. Chan. Ca., 201), was a purchase by a trustee from *cestui que trust*, at an undervalue. The master of the Rolls said he would have set it aside if the application had been made in a reasonable time, but a delay of eighteen years was too great.

Chalmer v. *Bradley* (1 Jac. & Walk., 51), is to the same point, as to the effect of acquiescence in a breach of trust.

But this being a partnership, requiring regular contributions to meet liabilities, refusal or neglect to contribute works a forfeiture, and implies acquiescence, under circumstances less strong than in ordinary cases.

Prendergast v. *Turton* (Younge & Collyer, Ch. Rep., 98), decided in the English chancery in 1841, was the case of a mining partnership, in which a delay of nine years to meet contributions was held fatal to the plaintiff.

The bill alleges that the plaintiff was always willing to contribute *his proportion, [*368 but was never called upon. The answers deny this allegation, and set out repeated and earnest requests, and total disregard of them.

How, then, stands the case of the plaintiff? He had engaged in a partnership adventure in real estate; debts were contracted by the acting partner, who was primarily liable upon his personal covenants. That acting partner is also deeply harassed with his own individual liabilities. The plaintiff is under no disability, is a

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man of property, is fully advised of the condition of affairs, and deliberately, for a series of years, abandons the property and the acting partner. In process of time, after the property has changed hands and greatly appreciated by the labor of others, he comes into a court of equity for relief. Is it not clear that but for this unexpected increase in value we should never have heard of this case?

8. Exchange with the Michigan University.

If the court should be against the appellants on all the foregoing points, and be of opinion that Oliver held tracts 3, 4, 86, and 87 for the Port Lawrence Company, and the quarter-sections in trust for the Piatt Company, we claim next, that the decree was erroneous in giving to these *cestuis* tracts 1 and 2, instead of making the value of the lands exchanged a charge on 1 and 2.

These tracts, several years after the relinquishment, had been granted by Congress to the University of Michigan, and were acquired from the trustees by Oliver, in exchange for tracts 3 (except ten acres in northeast corner), 4, and the three quarter-sections purchased under the attachment. The journal of the trustees is exhibited to show the negotiation.

This part of the decree is attempted to be sustained on two grounds: that Oliver made the exchange as agent for the Port Lawrence Company, in conformity with an understanding formed at the time of the relinquishment to repurchase these tracts; or if not, that as they were acquired with the lands of the Port Lawrence and Piatt companies, a trust results for their use.

First, as to the alleged intention to repurchase, and the exchange by Oliver in conformity to it.

The original and amended bills both allege that at the time of the relinquishment of 1 and 2, it was understood and agreed by the parties, that when at any time they should be offered for sale by the United States, they should be repurchased for the benefit of all concerned.

The answer of Oliver expressly denies such understanding or intention, and states that he (Oliver) often conversed with members of the company on the subject of the relinquishment.

The answer of Williams is, that he was a member of the Port Lawrence Company at the time of the relinquishment, intimately acquainted with all its concerns and the views of its members, and never heard of such intention, then or afterwards.

369*] *[*Mr. Stanberry* here examined the evidence touching this point.]

It is therefore quite clear that there was no agreement on the part of the company to repurchase tracts 1 and 2; that the subsequent acts and declarations of Baum were upon his own motion, and the motive was to secure himself first, and his associates ultimately, from loss. If he had then suceeded in the re-acquisition, his old associates might have had the election to come in or not, for they gave him no authority to bind them to new speculations.

However it might have been at the time of the memorial, yet in 1828, when the negotiation for the exchange was begun with the University, the idea of repurchase for the old Port Lawrence Company is absurd, for at that date a majority of its members were dead or gone to distant parts, and the remainder had for seven years abandoned the concern.

There was then no agreement to bind the consciences of Oliver or Baum, and nothing in their relations of trustee or agent, if those relations continued, to disable them from acquiring these lands upon their own account.

When 1 and 2 were relinquished, the subject matter of the trust and agency in regard to those tracts was ended. There was no pre emption right in the company—no tenant right of renewal—no advantage obtained by reason of the trust.

"If, from being in possession, trustees have an opportunity of renewing the leasehold, such renewal can only be for their *cestuis que trust;* but where the old lease and all the trusts respecting it are determined, and there is no tenant right of renewal, the former trustee is *quoad hoc* trustee no longer. The fiduciary relation ceases for want of an object, and there is no ground for excluding the *quondam* trustee from being a purchaser." (Hov. on Frauds, 481, 482.)

So, during the continuance of a lease, the trustee may purchase the reversion in fee, though by this means he debars the *cestui que trust* of a chance of renewal. (*Ibid.*, 482.)

Next, as to the claim that a trust results in 1 and 2 for the owners of the tracts which Oliver gave for them in the exchange.

The first objection to this claim is founded on its multifariousness. Here is trust property belonging exclusively to the Piatt Company, and other trust property belonging exclusively to the Port Lawrence Company, all of which has been applied by Oliver in the purchase of tracts 1 and 2, and which trust property was afterwards reclaimed by Oliver. This bill seeks relief for these independent *cestuis que trust* by demanding for each company its share in 1 and 2, and also its original fund afterwards regained by Oliver.

This makes such a case of multifariousness as would compel the court *sua sponte*, at the hearing, to refuse relief. (1 Story's Eq. Pl., 224, *note* 2; 10 Ohio Rep., 459; *Campbell* v. *McKay*, 1 Mylne & Craig, Ch. Rep., 603.)

There are other insuperable objections to this resulting trust in 1 *and 2. It was [***370** formerly doubted whether trust moneys could be followed into land, so as to operate even as a lien, in exclusion of other creditors. It is now settled that the lands may be charged with the trust fund, and that is ordinarily the sort of relief given to the *cestui*. (Hov. on Frauds, 468, 471; *Wallace* v. *Duffield*, 2 Serg. & Rawle, 521.)

In some cases a trust in the land so purchased results to the *cestui*, but the case at bar is not of that class, because,

1st. Where in the misappropriation of a trust fund it has been confused with any other fund, the uniform rule is, simply to make the trust fund a charge on the new acquisition. (*Crop* v. *Norton*, 2 Atk., 75.) The only limitation upon the doctrine as established by Lord Hardwicke in *Crop* v. *Norton*, that a trust never results, except were all the money is paid by one person, is, that where the joint advance is in conformity with an agreement of purchase a trust will result. (*Wray* v. *Steele*, 2 Ves. &

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Bea., 388; *Bottsford* v. *Burr*, 2 Johns. Ch. Rep., 410.)

2d. Another objection to a resulting trust in tracts 1 and 2 is, that they were acquired in part by the individual funds of Oliver.

Under the mortgage proceedings and the subsequent assignment of the certificates, Oliver acquired, at the least, the interest of Baum in tracts 3 and 4, which tracts formed a part of the consideration for tracts 1 and 2.

Where land is purchased partly with trust and partly with individual funds, the trust fund so applied is simply a charge on the land, and affects the title no further. (Willis on Trustees, 64; 1 Hov. on Frauds, 471, 472; *Lewis* v. *Maddocks*, 8 Ves., Jun., 150; S. C., 17 Ves., Jun., 47.)

3d. Oliver was not a strict trustee. He did not stand towards his *cestuis* in any one of the common fiduciary relations. He believed himself to be the sole owner of the fund with which he purchased 1 and 2.

Where land is purchased with a trust fund, but the party is not in a strict fiduciary relation and acts under a belief of his right to the fund, the rule in equity is, to make the trust fund or its value a charge simply. (*Savage* v. *Carroll*, 1 Ball & Beatty, 265; *Perry* v. *Philips*, 4 Ves., Jun., 108; *Cox* v. *Paxton*, 17 Ves., Jun., 329.)

4th. Oliver has re-acquired the very lands, the identical trust fund which he is said to have misappropriated in the exchange for 1 and 2. There is therefore no necessity for following the original fund into the new acquisition, either in the way of charge or resulting trust, for the original fund is here undiminished, and by giving it them the *cestuis* are in *statu quo*.

5th. Another objection to giving the *cestuis* 1 and 2, is the difficulty of apportioning their respective interests in the new acquisition.

We know that the parties to the exchange considered 1 and 2 as equal in value to 3, 4, and the three quarter-sections, but what relative 371*] *value they affixed to 3, 4, and the three quarter-sections, we do not know. Undoubtedly they had their own views of this relative value, and these views may have been very dissimilar. How can the court fix that relative value, and say what proportion in the new acquisition represents the distinct funds vested in it? In the ordinary case of a sale of lands, where the agreement settles all terms but the price, a court of chancery has never yet attempted to fix a price for the parties by the opinion of third persons. Even where the contract provides that the price shall be fixed by arbitration, a court of chancery will not compel the delinquent party to choose his arbitrator, or even appoint arbitrators for them.

6th. The vast increase in the value of 1 and 2 since the purchase by Oliver, an increase brought about, in a great measure, by the combined efforts of Oliver and Williams, forbids a resulting trust.

This property, at the time of its purchase, was worth only about $5,000. At the time of the filing of the bill it had advanced one hundred fold in value, mainly by the constant exertions of the appellants.

But if a trust did result, we claim that the decree is very far from establishing the true proportions of the parties in 1 and 2.

As to tracts 3, 4, 86, and 87, notwithstanding the proceedings in chancery, and the assignments of the certificates to be holden invalid, Oliver yet had title to them; his mortgage remained; by that he had the equitable estate. He subsequently obtained the legal title, in trust for all persons interested in the property. He sells the property for cash, and the *cestuis que trust* may affirm or disaffirm the sale. If they affirm it, how will equity compel him to apply the purchase money?

1st. To the expenses of the sale. 2d. To satisfy the mortgage in full. 3d. The residue to the mortgageors.

But if, instead of making this application, he lay out the money in other land, and if the court find they can pursue the money into the land, not merely as a charge upon it, but to raise a resulting trust in the land itself, then the land will be applied just as the money which bought it would have been applied, and in the same proportions.

If the mortgaged premises were exchanged for land, without the intermediate sale and reinvestment, the same consequences would follow.

If it be found that Oliver should share in equal proportion with the other persons interested, the profits of the bargain he has made, then we take the value of the property sold as the basis of our estimate, and it gives this result:

Lots 3, 4, 86, and 87, estimated by Hunt & Conant, - - -	$2,357 50
Mortgage (deducting all corrections claimed), with interest to 1830, -	2,218 00
Interest of P. L. Company, - -	$139 50

*If the court should be of opinion [*372 that equity ought not to give Oliver, the morgagee, any share in the profits of his own bargain, nor any compensation for time, trouble, and expenses in making it, then the proportions would be settled thus:

Value of 1 and 2 in 1830 (Hunt & Conant) - - - - - -	$4,030 00
Paid by Piatt Company, or Oliver, as the court shall find in another branch of the case, by the three quarter-sections, worth at same time (Hunt & Conant), - -	1,120 00
	3,010 00
Oliver's interest in the mortgaged premises, - - - - - -	2,218 00
Interest of Port Lawrence Company,	$792 00

Oliver's expenses, services, &c., if allowed, would, of course, be deducted ratably from the respective interests.

9. We claim, if a trust is established in 1 and 2, that it was erroneous to allow the share conveyed by Burnett to Mary P. Ewing to be set up against Oliver, being one thirteenth of Baum Company's shares.

Baum conveyed the lands included in the mortgage to Oliver, with covenants of warranty.

Assets descended, upon the death of Baum, to his heirs. With part of the assets so descended, *i. e.*, the amount due to Baum from the members of the Port Lawrence Company.

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for advances, Mary P. Ewing, one of his children and heirs, requires from Burnett title to an interest in the lands covered by the warranty of her father. The decree defeats the title to these lands, and allows the heir to recover upon the footing of the adverse interest so acquired.

We maintain she is estopped. (Co. Lit., 325.)

10. We claim, lastly, that the decree is erroneous as against Williams, who well maintains the ground of a *bona fide* purchaser, without notice.

The bill alleges notice, by Williams, of all the fraudulent combinations and transactions imputed to Baum and Oliver.

These allegations are met with full and unequivocal denials in the answer, which sets forth all the particulars required for the defense of a purchaser without notice.

There is not a particle of proof to impeach this answer, or to show that Williams had any knowledge of the fraudulent acts attempted to be made out against Oliver and Baum. He purchased an interest in the Port Lawrence Company in March, 1819. He was the agent to make the relinquishment of 1 and 2 in September, 1821, and does not appear again in the case until May, 1831, when he makes his first purchase from Oliver. He finds Oliver invested with the legal title to 1 and 2, which had been relinquished ten years before.

It is said Williams was one of the *cestuis* whose property was wrongfully conveyed by their trustee, Baum; that he must be presumed **373*]** *to have knowledge that Baum had no authority to sell or mortgage the property.

In the first place, we do not see, if this be so, how it affects his title to tracts 1 and 2. The trust, as to them, ceased at the relinquishment. Ten years after, he finds Oliver invested with the legal title, and then purchases from him.

Will it be said that the recitals in the patent to Oliver for tracts 1 and 2 affect him with notice?

The patent issued to Oliver on the 4th March, 1831, and recites, that, under the provisions of the Act of Congress of January 13, 1830, "to authorize the exchange of certain lots of land between the University and Martin Baum and others," the University had transferred 1 and 2 to Oliver, as the assignee of Baum.

In point of fact, Oliver was not the assignee of Baum, of tracts 1 and 2. No one pretends that this recital is not a mistake; nor can it be said the recitals in the act of Congress notified Williams that the phrase "Martin Baum and others" meant Martin Baum and the other members of the old Port Lawrence Company. The most conclusive argument to show it implies no such notice, is found in the testimony of Judge Burnett, who, like Williams, was a member of that company, and, being in the Senate of the United States, voted for the law, and had no idea that "Martin Baum and others" included the company.

As to the other tracts, Oliver held the patents without any recitals. Williams knew a part of them had once belonged to the Port Lawrence Company, but he knew nothing to impeach Oliver's title.

Mr. Pirtle, for appellees, denied that this was a case of partnership, and commented on the authorities referred to by *Mr. Stanberry*, which, he contended, did not justify the position. He then traced the history of the transaction, beginning with the purchase at the public sale, and said that courts will not enforce agreements in fraud of the law, or against public policy, is true. That an agreement not to bid at a sheriff's sale or at an auction of an executor would be against public policy, has been decided. The doctrine on this subject was thoroughly examined in the case of *Jones* v. *Caswell* (3 Johns. Cas., 29; 1 McLean's Rep., 300, 302; 2 McLean's Rep., 276, *et seq.*; 1 Story's Eq., 290.) But this doctrine has no application to this case. To apply it now, even if there were fraud, would be very much like a plea to an action of trover that the plaintiff had obtained the property in question of a stranger by deceitful practices, which would be absurd. This suit is not to enforce a contract. The contract had been completed years before the matters charged against the defendants.

There is nothing corrupt in such an agreement as that made by the parties in the instance stated in the plea. Nothing is more common than for several persons to join in a purchase of lands or other *valuable property at [*374 auction sales. There was no more harm in forming the Port Lawrence Company than there was in forming the Baum and Piatt companies. There was no agreement that one, for a certain price, should not bid against the other, but that certain tracts, desired by both, should be purchased for both.

This was a great sale advertised over the Union, at which great numbers of persons were collected from different quarters. It was not like a neighborhood sale of chattels by an officer, and there was no danger of injury to the government or of the misleading of any man's confidence. The United States had fixed a minimum price on these lands. There was strong competition; and a price so large was given for the lands, that the Port Lawrence Company were compelled to relinquish the site of the town to the government. So the effect, at any rate, was not a cheat to the country.

It would be a flagrant encouragement of fraud to say, that because Oliver and Piatt had formed such a partnership for their respective companies as that in 1817, Oliver and Williams (who bought of Oliver and thus came into the Port Lawrence Company) might in 1836 cheat all the others of the company out of their shares in the Port Lawrence lands.

It is contended that Baum did remain a trustee and agent for the Port Lawrence Company in respect to Nos. 1 and 2, after the surrender to the United States, as well as in respect to the other property of that company, and of the lands owned separately by the Baum Company and by the Piatt Company. That he was agent and trustee as to all the other lands, except 1 and 2, is perfectly apparent; and that Oliver acted for him, that he acted only through Oliver for all the time, is just as apparent upon this record. Baum never was on these lands—never was in that region of the county—all was intrusted to Oliver. Some temporary business was done by another Mr. Oliver, but under the instruction and assistance of this appellant. The duty of surrendering the lots was done by Williams, but this was a single act.

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Oliver could not stand on any better ground than Baum, whether he knew what Baum's powers were or not; or whether he acted as the sub-agent of Baum, or merely as his friend and for his accommodation, or not. If he acted as a volunteer, he could claim nothing of Baum or the company; but his claim must be upon the ground that his acts were at the instance of one or the other. He cannot, then, separate himself from the character of agent. He was acting for the company, not for Baum alone. He stood, then, as the company's fiduciary, and was bound to know how Baum stood to the company. Baum continued to be the agent and trustee for the other lands. This is undeniable. It is only said his agency may have terminated sometime afterwards. He was just as much agent and trustee for the lots 1 and 2 after the relinquishment as before. The intention to reclaim them was manifested by his 375*] petitions to *Congress. These petitions are dated 30th January, 1822; the lands were relinquished 27th September, 1821. In his letter to Mr. Brown he says, "though the petition is signed by myself only, still others have an interest in it, to wit: Jacob Burnet, William Steele, M. T. Williams, J. R. Miller, and John Rowan, of Kentucky; but for the sake of convenience, all the lands by the company were transferred to me;" and after having referred to the argument in the petition he says, it will show " the just claim which, I think, I and my associates have on the government for redress." What was that redress? Why, that Congress should allow them to purchase the lots 1 and 2, so that they might build up the town laid off there, and in which they had sold lots.

By his associates, he meant to include the Port Lawrence Company; and although he does not name them all in this letter, he names J. H. Piatt and M. Worthington in the postscript; showing that he was not acting for himself and the persons first named only.

In his letter to Mr. Brown, of the 6th of February, 1823, he speaks of the case on which he is petitioning, as "a ruinous one to me and my associates, and has resulted so from the acts of Congress more than other causes;" and he says, "all the tracts stood in my name, in order to render it more convenient to sell and convey."

The possession of these lots, Nos. 1 and 2, on which the town was laid out, was not by any means given up when the surrender was made of the title to the United States, but it was held by Baum until the patent issued to Oliver, as far as it appears in this record.

[*Mr. Pirtle* referred to a great many parts of the record to establish this.]

The attachment in Michigan could give Oliver no title for several reasons. 1. No attachment would lie, because a mere equity, uncertain in its character, subject, according to the statements of Oliver, to balances due to Baum, could not be attached, and so the court had not jurisdiction. The old statutes of Pennsylvania are very general on the subject of foreign attachment; yet it has been held, that an attachment would not lie against executors (2 Dallas, 73); nor against money collected by a sheriff (1 Dallas, 355). " A claim resting in damages and depending on a possibility only, is not attachable by foreign attachment." "For the same reason, foreign attachment lies not of a claim in covenant, because it sounds merely in damages." (Serg. on Attachment, 76.) "A legacy cannot be attached in the hands of the executor by foreign attachment, because it is uncertain whether, after debts paid, the executor may have assets to discharge it." (Serg. on Attachment, 86.) The statute of 1794 of Massachusetts provides, that any creditor entitled to an action against his debtor "having any goods, effects, or credits so intrusted or deposited in the hands of others," &c., may cause not only the goods and estate of the debtor "to be attached in his own hands or possession, &c., *but also all his goods, effects, and [*376 credits so intrusted and deposited." In the case of *Picquet* v. *Swan et al.* (4 Mason's Rep., 446) *Mr. Justice* Story says: "It is an extraordinary process, and from its nature can afford but a very imperfect administration of rights and remedies as to the litigant parties. Nor, as far as my limited experience has gone, has it enabled me to say, that in complicated transactions, where various and conflicting rights have been brought forward for controversy, the result has in a general view been such as entitled it to peculiar public favor on account of its advancement of public justice," &c. In 7 Mass. Rep., 274, the Supreme Court, in exposition of this statute, remarks, that "pecuniary legacies in the hands of an executor are not goods or effects; and it is equally clear, that in no proper sense can they be denominated credits." (See, also, 1 Pick. Rep., 399.) These opinions go to show how this statute of Michigan should be construed.

2. But if the court had jurisdiction, this was an improper procedure against the Piatt Company. The debt, if any, was against the Port Lawrence Company, and it was not in the power of Baum or of Oliver to fix it on the Piatt Company alone. There was no debt of the Piatt Company.

3. This attachment was evidently sued out for the purpose of getting hold of the lands; and not merely for the purpose of making the money pretended to be due. These lands were of much greater value at the time of the attachment than is pretended. The three sections attached were valued at the time, by the commissioners appointed for the purpose, to $1,200. The sum pretended to be due was $213.07. Piatt and Oliver lived near each other; Piatt was a man of wealth, at any rate of very competent means, and was weekly in the city where Oliver lived. It was much more convenient to Oliver, if he knew this demand to be just, to have made his money by coercion, or otherwise, in his own neighborhood, than to proceed in a wilderness and remote region—hundreds of miles off.

It is a principle of universal justice, that a party shall not be affected by the judgment of a court who has not been party to the suit in which it was made. Who was the party that was to be warned to pay the money due on the mortgage by the decree *nisi*? Not Baum, for Oliver would not have received it of him; but the parties owing the debt, the Port Lawrence Company. Who was expected to defend the suit? Not Baum. Whose property was to be sold? The property of the Port Lawrence Com-

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pany; and to be sold to their agent upon their agent's suit! It would be strange, indeed, if they were not necessary parties in such judicial performances as this. The doctrine of necessary parties is stated in so many books, it would fatigue the court to cite them. (See Story on Eq. Pl., 187; 4 Peters, 202.)

Had a third person, ignorant of the rights of [*377] the company, purchased *the property under this decree, he might have held, just as he might have held under a purchase from Baum without notice. But Oliver's purchase was nothing. The assignment from Baum afterwards was nothing.

This purchase was on the 1st of September, 1828, and a few weeks before on the 12th of August a negotiation was commenced with the Michigan University by Oliver, for the exchange of lots 1 and 2 for other lands in the neighborhood.

Oliver says he made the proposition for himself; but the records of the University show that he made it in behalf of "Baum and others." Baum had been struggling with the government for these lots, 1 and 2, for several years, and the act of Congress passed for the benefit of Baum and others and not for the benefit of Oliver. The government had been made to understand that Baum and his associates had suffered great loss in the purchase of the lots 1 and 2, which they had been compelled to relinquish after having laid out a town, and sold lots, &c. The deed from the University to Oliver purports to be made to carry into effect the act of Congress; and the patent that issued to Oliver purports to be issued "to carry into effect the intent of the aforesaid Act of the 13th January, 1830." The application of Oliver to the university for the exchange in behalf of Martin Baum and others, was calculated to delude the members of the Port Lawrence Company; and the act of Congress, purporting to be for their benefit, and to carry out, in substance, what Baum had been asking of the government for eight years, was directly calculated to quiet their anxiety, and mislead them.

[*Mr. Pirtle* here referred to many parts of the evidence to show that Oliver had created an impression that he was acting for Baum and others.]

Suppose there was no combination between these parties, or any of them, and that the other members of the company were not necessary parties to the suit, yet Oliver, according to his statement, was a mere volunteer; he had made the payments to purchasers, by which his demand was created, because they were his friends and old associates, and he had obtained the mortgage from Baum, with the knowledge that Baum held the title for a special object only; and how can he be allowed to hold the property under such circumstances? The assignments by Baum to him are all of apiece with the sale under the decree. What court ever supported a transfer by an agent and trustee, of all the subject of the agency and trusteeship, to his friend, or sub-agent, under pretense of paying debts? The assignments were made by Baum to enable Oliver to seize the Port Lawrence property. The foreclosure of the mortgage had been made for that purpose. Thus the matter was fixed up between them to take all, in and out of Port Lawrence, and let the *cestuis que trust* lose all the money paid out for all the land, all *paid to Oliver, to Baum, and to every- [*378] body else; and a balance, the whole of Baum's account rendered, and two thirds of Oliver's, still outstanding!

The lots 1 and 2 having been obtained with the lands of the Port Lawrence Company, by such means, and by persons standing in the relation in which Baum and Oliver stood, and in which Williams also stood, must be held in trust for the Port Lawrence Company. Williams was one of that company, and was bound to have notice of the manner in which Baum held, and the relation in which Oliver stood; and his denials amount to nothing. I need not trouble this court with reference to authority to support the general doctrine, that a fiduciary cannot hold for himself the subject purchased with the funds intrusted. There are some qualifications of the rule. But why should there be any here? This is not a case where so much money has been laid out in lands by one who held money in trust, either to lay it out in lands, or for any other purpose; that money has no ear-mark, does not make a difficulty here. It is not a case, either, where justice cannot be rendered to the parties purchasing the land, if anything further than a specific lien were given to the land purchased. But this is a case where the lands exchanged have been improperly obtained, and applied to the exclusive use of parties standing in a relation to compel them, in good faith, to divide the lands acquired, taking to themselves a sufficient compensation. It is not necessary that there shall be a direct violation of a formal trust, to allow the parties, claiming to have the benefit of the purchase, that privilege. (*Docker* v. *Somes*, 2 Mylne & Keene, 655; 4 Kent's Com., 306; *Holt* v. *Holt*, 1 Ch. Ca., 19; *Walley* v. *Walley*, 1 Vern., 484; *Palmer* v. *Young*, 1 Vern., 276; *Lane* v. *Dighton*, Ambler, 409; 1 Bro. Ch. Rep., 232; 2 Bro. Ch. Rep., 287; *Phillips* v. *Crammond*, 2 Wash. C. C. Rep., 441; *Holeridge* v. *Gillespie*, 2 Johns. Ch. Rep., 33.) This case is very similar in its principles to the cases of a renewed lease, procured by an executor or guardian, when he shall be a trustee of the new lease; and of a surrender by one partner and a new lease taken to himself, where his partners shall hold him as a trustee, as in some of the cases just cited. The doctrine contended for has been uniform, from the decision of Lord Keeper Bridgman, in *Holt* v. *Holt*, says Chancellor Kent, to the present time.

Mr. Scott, on the same side, for appellees:

This cause is brought before this court by appeal from a decree of the Circuit Court of the United States, seventh circuit, and District of Ohio; and in its discussion we shall assume the following positions:

1. At the time lots 3 and 4 (except ten acres, part of lot 3, reserved), and the three quarter-sections in the bill named, were transferred by William Oliver to the trustees of the Michigan University, *in exchange for [*379] lots 1 and 2, said Oliver was the trustee, and Robert Piatt, the original complainant, and others, the *cestuis que trust* of the lands then given in exchange for lots 1 and 2—of the ten acres reserved, part of lot 3; of lot 86 (except sixty acres, parts thereof sold to Prentis

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and Tromley); of lot 87, and the southeast quarter of section 3, of township 3—all in the twelve miles reservation, at the foot of the rapids of the Miami of Lake Erie.

2. When Oliver received conveyances from the trustees of the Michigan University (and assignments of the original first certificates from Baum, and obtained a patent therefor) of lots 1 and 2, in exchange for the three quarter-sections of land which belonged to the Piatt Company, and for part of lot 3 and lot 4, which belonged to the Port Lawrence Company, he became invested with the legal title to said lots 1 and 2, as trustee, in trust for said Piatt and Port Lawrence companies, from whom the consideration given for said lots 1 and 2 proceeded.

3. M. T. Williams is not an innocent *bona fide* purchaser. He is effected with notice at and prior to the respective periods in which he received conveyances from Oliver, of portions of the lands in question, and therefore holds the same as trustee, for the uses and purposes originally designed. (1 Phillips's Evidence, 410, 411; Comyn's Digest, tit. Evidence, B. 5; Plowden, 284, 430, 434; 2 Serg. & Rawle, 507; Gilbert's Evidence, 87; 1 Salk., 285; *Marchioness of Anandale* v. *Harris*, 2 Peere Williams, 432; *Shelby* v. *Wright*, Willis, 11; Com. Dig., tit. Estoppel, A. 2.)

4. Oliver as agent, and Oliver and Williams as trustees, are bound to account with and pay to the original complainant, Robert Piatt, his just proportion of the money and notes received by them on the sales of lots in Port Lawrence and Toledo, and lands adjacent, and to convey to him his just proportion of such parts thereof as remain unsold.

5. Oliver and Williams have no just cause to complain of the decree which has been rendered against them in the Circuit Court, as ample and more than liberal justice has been awarded to them, even if their conduct in the premises had been entirely untainted by fraud or a fraudulent design, and they had been merely acting under an entirely innocent but mistaken view of their legal rights. But it is respectfully submitted, that Robert Piatt, the heirs of Martin Baum, and the other defendants in interest, have just cause to complain of that decree.

The answers of all the defendants, except Oliver and Williams, to the amended bill of the original complainant, Robert Piatt, are in the nature of cross-bills, and respectively ask for similar relief, as respected him or themselves, to that prayed for by the complainant, Robert Piatt.

It was therefore proper for the court, in ren-
**380*] dering the decree, to *adjust and settle the interests and claims of all the parties to the record.

I. [*Mr. Scott* related the formation of the Port Lawrence Company.]

The partnership thus formed was neither universal nor general, but limited and confined to the objects set forth in the instructions, &c., given to Oliver, and the facts to which we shall refer, from which the rights, duties, and obligations of Baum, the trustee, and Oliver, the agent, are to be ascertained.

It is conceded that Baum continued to act as trustee until his death. That Baum's powers were restricted to a general oversight of the company's business, and the execution of conveyances of the lots and lands when sold, we also infer from the following facts:

Baum, in his letter to Brown, 25th December, 1822, says: "For the sake of convenience, all the lands, by the company, were transferred to me." In his letter to the same, February 6th, 1823, he also says: "All the tracts stood in my name, in order to render it more convenient to sell and convey;" and in his letter to the commissioner of the general land office, July 20th, 1827, he says: "These lands, though bought in sundry persons' names, were afterwards transferred to me as agent, for the purpose of managing and conveying them in case of sales." All the certificates, for the purposes aforesaid, were assigned to Baum.

Oliver, as agent, with the assistance of Schenck, proceeded to lay out the town, advertised a sale of lots, and sold a number of lots. His instructions confined him to the sale of a certain portion of the lots, fixed the terms of sale, and required him to give certificates of purchase, in the nature of title bonds, for a conveyance by Baum, the trustee. He was to open an immediate correspondence with Baum relative to the interests of the company, and was informed that any instructions he might thereafter receive from Baum, the trustee, were to be considered as coming directly from the proprietors themselves. This is all shown by his instructions, his bond to Baum, and power of attorney from Baum.

The letter given by Baum to Oliver, notifying him of his appointment, which relates particularly to the salary he was to receive, would seem to restrict his agency to one year; but his appointment by the company was without limit as to time. His appointment being without limit as to time, the law presumes a continuance of his agency. (See Starkie's Evid., 46, 50, 51, cited.) Oliver insists that he never acted as agent of the Port Lawrence Company after his resignation, in May or June, 1818. But the following facts and circumstances show that his agency extended beyond that period, and that he still stands in that relation to the company.

[*Mr. Scott* here referred to numerous parts of the record.]

We thus deem the agency of Oliver, from August, 1817, the date of his original appointment, down to the 20th June, 1834, established; *the consequences resulting from which [*381 agency will be examined hereafter.

Oliver was one of the original proprietors of Port Lawrence; and, although he may have transferred his interest in the company to others, in 1818 and 1819, as he alleges in his answer, yet all the liabilities against said company had accrued prior to said transfers. These transfers did not discharge him from the liability to persons who had claims growing out of purchases made prior to his transfers, which liabilities have not yet been entirely satisfied. (See Collyer on Partnerships, 4, 105; and Story on Partnerships, sec. 358.) No settlement among the original proprietors or their legal representatives or assignees has ever been made; his relation, therefore, to the company, as one of the original partners, still remains, and the consequences of this relation will

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also be examined during the progress of the cause.

The pressure of the times and other causes rendered it indispensably necessary for the company to avail themselves of the benefit of the Act of Congress for the relief of purchasers of the public lands prior to the 1st day of July, 1820, by the relinquishment of lots 1 and 2, and the application of the money paid thereon to the payment of the purchase money of other lands bought by them. The amount paid on tracts 1 and 2 was $4,817.55½. The balance due on lots 3, 4, 86, and 87, was $1,402.36½; and the balance due by the Piatt Company, for their five quarter-sections, was $1,248. In order to facilitate, therefore, the application of the moneys paid on said lots 1 and 2, the original first certificates of the purchase of said lots 1, 2, 3, 4, 86, and 87, and the five quarter-sections, were all assigned to Baum.

M. T. Williams, as agent, made the relinquishment of said tracts 1 and 2, and applied the moneys arising therefrom to the discharge of the balances due on the lands retained, September 27, 1821, and the surplus remaining after such payment was $949.21, one half of which, viz., $474.60½, belonged to the Piatt Company. This balance, by arrangement between the parties, was applied to the payment of lands which had been purchased by the Maumee & Sandusky Company, and which was to be accounted for as part of the Piatt Company's portion of the liabilities of the Port Lawrence Company.

All the defendants, except Oliver and Williams, distinctly admit that the five quarter-sections were assigned to Baum for the purposes above named, and that no consideration moved, or was intended to move, from Baum to the Piatt Company, as an inducement to said assignments. Neither Oliver nor Williams deny that the assignments were made for the above purposes. The assignments being thus made for the above purposes, those purposes being accomplished, a trust resulted to the Piatt Company in said five quarter-sections. (See *Jackson* v. *Mills*, 13 Johns. R., 463; *Boyd* **382*** v. *Lane*, 1 Johns. *Chan. R., 582; *Wallace* v. *Duffield*, 2 Serg. & Rawle, R., 521; *Foote* v. *Calden*, 3 Johns. R., 216; *Trustees of the Methodist Episcopal Church* v. *Jacques*, 1 Johns. Ch. R., 450; *Botsford* v. *Burr*, 2 Johns. Ch. R., 405; *Huston* v. *Hamilton*, 2 Binn. R., 387; *Deg* v. *Deg*, 2 P. Williams, 412.)

Mr. Scott then referred to various parts of the record to show that when lots 1 and 2 were relinquished, it was done with an understanding and determination, among the original proprietors, to repurchase them, and go forward with the enterprise of building up a town; and then argued, from the following propositions, that Oliver intended to defraud his associates:

1. In order to place himself in a situation in which he might secure to himself a part or the whole of the five quarter-sections belonging to the Piatt Company, Oliver procured from M. Baum the certificate dated September, 10, 1822.

The giving of that certificate did not fall within the scope of Baum's authority as trustee. (See Story on Partnerships, sec. 111.)

The accounts between the partners could not be split up, as contemplated by that certificate, so as to render one partner liable in his individual capacity for claims against the whole of the partners.

At the time that certificate was given, nothing was due from the Piatt Company to the Port Lawrence Company, but, on the contrary, the sum of $191 was due from the latter to the former. No suit at law could be maintained by Oliver, the agent, for the recovery of the amount of said certificate, it being fraudulent and void; and if a just demand, it was due from the Port Lawrence Company, and not the Piatt Company, and a suit could not be maintained on it against the Piatt Company. (See Story on Partnerships, secs. 234, 235, 236, and 128; *Jackson* v. *Rawlins*, 2 Vernon, 95; *Maddox* v. *Jackson*, 3 Atkins, 406; Anon., 2 Freeman, 27.)

2. Oliver's letter to R. Piatt, February 3, 1823.

3. No demand for payment of said certificate was ever made upon the Piatt Company, or any of its members; nor was there ever any legal proceedings instituted against them where they resided.

4. The very fact of instituting legal proceedings in a foreign jurisdiction, against the property of the Piatt Company, at a point situated more than two hundred and fifty miles from the residence of any of the members of the Piatt Company, and which point could only be reached by passing through a dense and uninhabited wilderness, whilst most of those members resided in the immediate neighborhood of Oliver, furnishes strong evidence of a fraudulent and ulterior design on the part of Mr. Oliver to secure to himself the property of the Piatt Company.

5. At October Term of the County Court of Monroe County, Michigan Territory, 1825, Oliver sued out a writ of foreign attachment on the aforesaid certificate, against Martin Baum, Robert Piatt, *George A. Worth, and Will- [*383 iam M. Worthington, survivors of Martin Baum, John H. Piatt (deceased), Robert Piatt, George A. Worth, and William M. Worthington, late joint partners. The manner in which this attachment was sued out would seem to furnish conclusive evidence of a fraudulent intent. George A. Worth never was a partner, nor had any interest in the Piatt Company; nor were Martin Baum, John H. Piatt (deceased), Robert Piatt, George A. Worth, William M. Worthington, late joint partners. The three quarter-sections on which the attachment was levied did not belong to the persons named in the attachment, but to the representatives of John H. Piatt (deceased), Robert Piatt, Gorham A. Worth, and William M. Worthington. This is not like the case where process has been served on an individual by a wrong name, in which case he has an opportunity of appearing in court and pleading the misnomer in abatement. In attachment, the proceedings being *in rem*, if the property on which the attachment be levied belong not to the defendants named in the writ, it is respectfully submitted that the court has no jurisdiction in the case. Even if the notice which seems to have been given of the pendency of the attachment had by accident reached the members of the Piatt Company, they could not have supposed that they were the persons intended. The plaintiff, in all such cases, proceeds at his peril. (*Kilbourn* v. *Woodworth*, 5

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Johns., Ch. R., 40; *Fisher* v. *Lane*, 3 Wils., 297; *Phelps* v. *Holkirk*, 1 Dall., 261; *Kibby* v. *Kibby*, Kirby, 119; *Buchanan* v. *Bucker*, 9 East, 192; *S. P. Robertson* v. *Ex'rs of Ward*, 8 Johns. R.; and *Fenton* v. *Garlick*, *Ibid.*, 152; also, Manuscript F, p. 6.)

At the time of the levy, judgment, and sale, under the attachment, the legal title to the three quarter-sections levied on remained in the United States; the evidence of the equitable title was vested in Baum; and the only claim which the Piatt Company had was a mere resulting trust, not subject to be levied on under attachment or execution; and, consequently, the whole proceedings under the attachment, the conveyance to Noble, and by him to Oliver, were absolutely null and void. (*Lessee of Abraham's Heirs* v. *Will et al.*, 6 Ohio R., 164; 2 Powell on Mortgages, p. 457, A; Co. Lit., 35, A; MS. p. 7, &c.; and the opinion and authorities cited by His Honor *Judge* McLean, in giving his opinion in this case, pp. 20, 21.)

Oliver's title to the three quarter-sections purchased under the attachment was not strengthened by taking assignments of the original first certificates of purchase from Baum, nor by the attainment of patents under them; for by having notice of the trust, he himself became the trustee to the Piatt Company. (See *Lucas* v. *Mitchell*, 3 Marshall, 244; MS. letter G, p. 9.) The procuring an assignment of the original first certificate of purchase of the fourth quarter-section from Baum, and obtaining a patent 384*] under it, he having notice of the *trust, constituted him a trustee to the Piatt Company for that quarter-section.

6. On the 27th day of August, 1828, Oliver fraudulently, and in violation of the great confidence reposed in him by Baum, the trustee, obtained from him a mortgage of all the property belonging to the Port Lawrence Company. This mortgage was obtained in order to secure Oliver for his proportion of the moneys for the purchase and improvements of lots 223 and 224, in Port Lawrence; the amount contracted to be paid to B. F. Stickney, for lots and improvements in Port Lawrence which he surrendered; and the amount charged for his (Oliver's) services and expenses in settling with Stickney, and transacting other business for the company, to the entire exclusion of the interests of Baum, and all the other proprietors and creditors of the Port Lawrence Company.

Baum, as trustee, had no authority to execute the mortgage, as his powers were limited, from his own showing, to that of executing conveyances for the lots or lands, in case of sales of lots by the agent, Oliver, or of the lands by order of the *cestuis que trust* themselves. (Story on Partnerships, sec. 111 and 101, commencing on p. 146; and Manuscript p. 20, letter M.) Oliver could not sell the lands to himself, and it is clear that no sale was made to him by the *cestuis que trust*.

The mortgage is fraudulent, as it related to Baum, and given to rid himself of the importunity of Oliver.

No notice of the existence of this mortgage seems ever to have been given to the members of the Port Lawrence Company by Oliver.

In October, 1825, Oliver filed his bill in the Supreme Court of Michigan Territory, sitting as a court of chancery, against Baum, praying a decree for payment of the moneys due on said mortgage, by a short day, to be named; and, in default thereof, that Baum, and all claiming under him, might be forebound of and from all equity of redemption, of, in, and to, the mortgage premises, and might deliver over to the plaintiff all patents, deeds, demises, and writings, whatever, relating to said premises. In 1828, it was decreed that the defendant redeem the mortgage premises by payment to the complainant of $2,305,96 and costs, by the 1st of July next thereafter, or, in default thereof, that the mortgage premises be sold. The mortgage premises were afterwards sold to Oliver, by the assistant register, for the sum of $618.56, and a deed made to Oliver.

The proceedings, decree, and sale, under the mortgage, were they valid, have not extinguished the rights of the *cestuis que trust* of Baum, they not having been made parties to the suit. (See 4th section of an Act of the territory of Michigan, approved April 12, 1827, page 204, directing the mode of procedure in chancery; *Gore* v. *Stackpole*, 1 Dow. Par. R., 1831; 8 Powell on Mortgages, 978 *a*, in note; *Haines et al.* v. *Beach et al.*, 8 Johns. Ch. R., 459; *Draper* *v. *The Earl of Clarendon*, 2 Vern., [*385 517; *Godfrey* v. *Chadwell*, 2 Vern., 601; *Moret* v. *Westiene*, 2 Vern., 663; *Hobert* v. *Abbot*, 2 P. Wms., 643; *Tell* v. *Brown*, 2 Bro., 276; *Polk* v. *Clinton*, 12 Ves., 48, 59; *The Bishop of Winchester* v. *Beaver*, 3 Ves., 314; *Same* v. *Paine*, 11 Ves., 19 and 198; *Shannon* v. *Cox*, 3 Ch. R., 46; *Needler* v. *Deeble*, 1 Ch. Cases, 299; *Monday* v. *Monday*, 4 Ves. & B., 223; *Calvery* v. *Phelps et al.* 6 Madd., 229; MS. letter H, p. 9.)

7. A part of the debt, to secure which the mortgage was given, was due from Oliver himself; only a part of the debt was at all justly due by the company, as the rents of the warehouse, as before stated, should have been deducted therefrom.

If it were not intended by Baum and Oliver that the repurchase of lots 1 and 2 should inure to the benefit of the Port Lawrence Company, then the following facts and circumstances furnish additional evidence of a fraudulent intention:

8. Baum's letter to the commissioner of the general land office, dated January 20, 1827.

9. Oliver's negotiation with the trustees of the University of Michigan Territory.

10. The several acts of Congress above referred to, authorizing the exchange of lands by the University of Michigan Territory, with Oliver, for lots 1 and 2, and the issuing of the patent to Oliver for said tracts. (6 Laws U. S., 550.)

11. The assignments by Baum to Oliver of the original first certificates of purchase of the mortgage premises and the four quarter-sections. The procurement of those assignments did not better the condition of Oliver. (See *Freeman* v. *Barnes*, and *Dihton* v. *Greenville*, 1 Vent., 82; *Ibid.*, 239, and 1 Sid., 460; *Focus* v. *Salsbury*, Hard., 400; *Bowles* v. *Stewart*, 1 Sho. & Lef., 228; *Keneday* v. *Daily*, *Ibid.*, 379; *Lord Portsmouth* v. *Vincent*, cited in *Lord Ponflet* v. *Wardson*, 2 Ves., 476; *Thynne* v. *Carey*, W. Jones, 416; *Kennoul* v. *Greeville*, 1 Ch. Cas., 295; *Bovey* v. *Smith*, 18th Dec., 1676; *Salesbury* v. *Bugot*, Lord Not., MSS. 2, Swanst., 610, and MS. letter I, p. 12.)

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12. The contract between Oliver, Baum, and Williams.

13. The change of the name of the town of Port Lawrence, which was established by the proprietors in 1817, to that of Toledo, in 1835, long subsequent to the death of Baum.

14. The sale of shares, and town lots, and tracts of land, belonging to the Port Lawrence Company, in violation of the trust and confidence reposed in him by the proprietors of that company.

15. The enormous amount of money recklessly and most injudiciously expended, under the plea of improvements, without the authority or concurrence of the owners, viz., $42,-813.41.

16. The pleas interposed by Oliver and Williams, in order to prevent a disclosure of their frauds, and to bar the proprietors from asserting their rights.

386*] *17. After the rendition of the interlocutory decree, when Oliver and Williams were compelled to render an account, the enormous and unconscionable demands made by them, before the master, for compensation for their services in an abortive attempt to wrest the property from its rightful owners, in order to swallow up the large amount of money in their hands belonging to their *cestuis que trust*, furnishes conclusive evidence of their fraudulent designs.

We have thus traced the course of Mr. Oliver from 1817, the time at which he became a member of the Port Lawrence Company, and was appointed the agent to manage its concerns, and the course of M. T. Williams from 1819, when he became a proprietor in the Port Lawrence Company, down to a period subsequent to the exchange of lands made by Oliver with the trustees of the University of Michigan Territory, for lots 1 and 2; and we therefore respectfully submit, that we have clearly established the position with which we set out, namely, "that at the time lots 3 and 4 (except ten acres, part of lot 3 reserved) and the three quarter-sections, in the bill named, were transferred by William Oliver to the trustees of the Michigan University, in exchange for lots 1 and 2, said Oliver was the trustee, and Robert Piatt the original complainant, and others, the *cestuis que trust* of the lands then given in exchange for lots 1 and 2—of the ten acres reserved, part of lot 3—of lots 86 (except sixty acres, parts thereof sold to Prentiss and Tromley)—of lot 87, and the southeast quarter of section 3, of township 3, all in the twelve miles reservation at the foot of the rapids of the Miami of Lake Erie.

At the time of the exchange, the parties stood related to each other as follows: Oliver was the trustee and the Piatt Company were the *cestuis que trust* of the four quarter-sections, and Oliver was also the trustee, and the Port Lawrence Company were the *cestuis que trust* of lots 3, 4, 86, and 87 (except sixty acres, parts of 86, sold to Prentiss and Tromley).

II. When Oliver received conveyances from the trustees of the Michigan University (and assignments of the original first certificates from Baum, and obtained a patent therefor) of lots 1 and 2, in exchange for the three quarter-sections of land which belonged to the Piatt Company, and for part of lots 3 and 4, which belonged to the Port Lawrence Company, he became invested with the legal title to said lots 1 and 2, as trustee in trust for said Piatt and Port Lawrence companies, from whom the consideration given for said lots 1 and 2 proceeded.

1. The relation in which Oliver stood connected with the Port Lawrence Company, as an original proprietor, partner, and agent, many of the accounts and claims against which remained unadjusted and unsatisfied at the time of the exchange, he could not, consistent with the principles of equity, acquire property for his own use, the obtaining of which would defeat the very object of the *original association. [*387

(See *Parkhurst* v. *Alexander*, 1 Johns. Ch. R., 394; *Green* v. *Winter*, 1 Johns. Ch. R., 26; *Everston* v. *Tappan*, 5 Johns. R. 497; *Halley* v. *Manlius*, 7 Johns. Ch. R., 174; *Mathews* v. *Degaud*, 3 Desaus., 28; *Anderson* v. *Stark*, Hen. & Mun., 245; *Hudson* v. *Hudson*, 5 Munf., 180; *Mosley's Administrator* v. *Buck & Brander*, 3 Munf., 232; *Buck & Brander* v. *Copeland*, 2 Call., 218; *Provost* v. *Gratz*, 1 Peters, 373; *Hart* v. *Tenyke*, 2 Johns. Ch. R., 62, 104; *White* v. *Brown*, 2 Car. Law R., 429; *Howell* v. *Baker*, 4 Johns. Ch. R., 118; *McClenneghan* v. *Henderson*, 2 Marsh, 329; *Van Horne* v. *Fonda*, 5 Johns. Ch. R., 388; *Holdridge* v. *Gillespee*, 2 Johns. Ch. R., 30, 252; *Reyden* v. *Jones*, 1 Hawk., 497; *Conway* v. *Greene*, 1 Harr. & Johns. 151; Mathews, 389; 2 Sim. & Stu., 49, 50; 1 Wils. Ch. Cases, 1; 10 Ves., 428, 429; 6 Ves., 625; *Lucas* v. *Mitchel*, 3 Marshall, 244; Hon. J. McLean's opinion in this case, and the authorities cited by him, p. 31; MS. letter E, p. 3, and letter G, p. 9.)

2. As the entire consideration given for lots 1 and 2 proceeded not from Oliver, but from the Port Lawrence and Piatt companies, a trust resulted to them in the lands thus acquired with their means. (See the authorities relating to resulting trusts, and trusts arising by operation of law, hereinbefore referred to, MS. letter D, p. 2.)

We have now, we submit, demonstrated the original complainant, Robert Piatt's, right to a decree against Oliver and Williams, for his just proportion of lots 1, 2, 86, 87, of the ten acres reserved in 3, and the one quarter-section named in the bill remaining unsold, and for his just proportion of the moneys, &c., remaining in their hands, arising from the sales to others of part of the lots and lands in question.

3. M. T. Williams is not an innocent *bona fide* purchaser. He is affected with notice at and prior to the respective periods in which he received conveyances from Oliver, of portions of the lands in question, and therefore holds the same as trustee, for the uses and purposes originally designed. (1 Phillips's Evidence, 410, 411; Com. Dig., tit. Evidence, bk. 5; Plowd., 234, 430, 434; 2 Serg. & Rawle, 507; Gilbert's Evidence, 87; 1 Salk., 285; *Marchioness of Annandale* v. *Harris*, 2 Peere Williams, 432; *Shelby* v. *Wright*, Willis, 11; Com. Dig., tit. Estoppel A, 2; MS. letter K, p. 16.

4. Oliver as agent, and Oliver and Williams as trustees, are bound to account with and pay to the original complainant, Robert Piatt, his just proportion of the money and notes received by them on the sale of lots in Port

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Lawrence and Toledo and lands adjacent, and to convey to him his just proportion of the lots remaining unsold.

Mr. Ewing, for appellants, in reply and conclusion, divided his argument into different heads, and directed his attention chiefly to the facts in the case.

388*] *1. The agency of Oliver.

This commenced on 14th August, 1817, by three papers of that date. 1. Power of attorney. 2. Letter of instructions. 3. Letter limiting it to one year.

The account presented by Oliver to Baum, referred to in the answer, is now a file in the cause, and is also inserted *in extenso*, in the master's report. By this it appears, taking the date as our guide, that Oliver was paid his salary down to the 4th day of July, 1818. To this the sum allowed him also conforms. He entered into the service of the company on the 14th of August, 1817. He was allowed a salary of $1,200 a year. He was paid on settlement $1,070, which would be the amount due him on the day the item bears date. The same paper shows a full settlement and payment by him of all the funds in his hands, and a balance overpaid by him was placed to his credit on the private books of Baum, and passed by Baum to his own credit as against the company. All the papers relating to this settlement, which are referred to in the answer of Oliver, as delivered over to Baum, are found in bundle A, of papers accompanying the master's report, numbered in blue ink from 374 to 382. Among them is an account of Baum with the Port Lawrence Company, showing a final settlement with Oliver, and charging separately to each of the two companies whose union constituted the Port Lawrence Company, its half of the amount found due to Maj. Oliver, and paid over by them to Baum. On a simple view of these facts it is difficult to perceive how it can be contended for a moment that the agency in which Oliver was engaged in 1817, was a perdurable, continuing agency. It expired by its express limitation at the end of one year—so says the answer of Oliver—so says the letter of Baum, accompanying the power. The answer states that before the year expired, in the beginning of July, 1818, the agency was ended by mutual consent, the accounts of the agency closed, and all the papers relative thereto surrendered. The file above referred to, from Nos. 374 to 382 (original papers) shows conclusively the same fact. (See Story's Agency, 499.)

There was no agency on the part of Oliver from July 4, 1817, until after the relinquishment in September, 1821, and this will be considered under the seventh head.

2. Oliver a partner.

It is said by the other side that he was a partner. But he sold out his shares in 1818 and 1819, and both his vendees were acknowledged as partners. At the time of these sales, the partnership was not indebted. It is true he could not have exonerated himself from liability to those persons to whom lots had been sold. He was bound to make his contract with them good. But he was not a party to the relinquishment in 1821, and it may be doubted whether he would have been liable in equity, to the other partners, for a debt created by the relinquishment. The funds obtained by it from the *United States were applied [*389 to the payment for other lands, instead of going to cancel the obligations outstanding to purchasers of lots.

3. The nature of the partnership and the powers of Baum to and at the time of the relinquishment.

The company was a *quasi* corporation, represented by a head or committee. The books are full of such cases. When these associations are legal, they are recognized both at law and in equity. One is called in Vesey the "fruit club," and the court said that it was sufficient to make the "committee" parties, and not necessary to include all the members of the club. So in the Covent Garden case. Baum had all the title, and in consequence of his own extensive powers, granted a power to Oliver. We must judge of Baum's powers by his acts. The certificates were held by him. It is said that this power ceased when 1 and 2 were relinquished. But at that time a large debt existed. Seventy-nine covenants of Baum were all broken, and a debt of more than $4,000 created at the instant of relinquishment. The avails, amounting to $4,817.55, were applied to other lands, and those lands ought to have been placed in the hands of Baum as a security for his liabilities. The partnership was not over; the debts had to be paid. The bill says that Baum had no power to sell, but the answer asserts that he had, and this is confirmed by the evidence. In 1821, at the relinquishment, Baum had the title. All covenants were made by him in his own name, or by Oliver in the name of Baum; and these covenants, such as the sale to Tromley and Prentiss, were acquiesced in. He was liable for all the improvements on 1 and 2, and it was natural that the certificates for the lands which had been fully paid for, should be placed in his hands. The court below say that no debts existed; but this is an error. It is said that the defendants (except Oliver) admit that the transfer of the certificates was made to Baum only to enable him to perfect the title. This is admitted by one of the nominal defendants, but the active prosecutor, who has admitted $100,000 into his own pocket. It does not bind us. There was no necessity for such a transfer to enable Baum to complete the title (for the script was receivable for any lands within the district), without reference to their being owned by the same man who held the script. The only good reason that can be given is, that it was done to secure Baum. This claim was not made until he died. How does it happen that the title to the quarter-sections was suffered to remain in Baum for fourteen years, unless it had been placed in his hands as security. Equity would have kept it there, if an effort had been made to take it away. The security was scarcely sufficient, because the lands had been bought at $2, and the price of lands reduced to $1.25 per acre. The interpretation which must be given to these acts of the parties concerned is, "we mean to pay you, but if we do not, there is an adequate fund"; of course, the property *was sub- [*390 ject to sale by Baum to pay debts, and he had a right to pay a debt due to himself as well as one due to another person.

4. Fraudulent combination between Baum and Oliver.

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It is charged that as early as 1821 there was a plan laid by these two men to defraud the other members of the Port Lawrence Company of this property; and that such combination was carried on for six succeeding years, until 1828, when, at last, they got possession in the name of Oliver by virtue of a sale in chancery.

The cost of these tracts at the sale in 1817 was less than $1,800; their value from 1822 to 1828 was less than $1,000. It is taxing the credulity of men greatly indeed to ask them to believe, that for the possession of wild land such as this, so remote from his residence and so little attractive as it then was, Baum would combine with Oliver or anyone else, and by a long train of artifice and fraud, continued and practiced for a series of years, pursue this as the great and absorbing object of his life.

But if the motive were adequate, and the supposition not contradicted by probability, the evidence in the case wholly repels such a conclusion.

Baum was not the man who would engage in such a dishonest combination. He was not in a condition to do it, if he had been base enough for the purpose. His state of mind at the time was such as wholly precludes the idea. On these points there is abundant evidence, to some of which I will refer.

[*Mr. Ewing* here referred to various parts of the record.] It appears, then, that there were seventy-nine outstanding covenants by Baum, some as small as $15, some as large as $1,000, but all vexatious. He was the only person troubled about them, and had been, during all his previous life, a nervously punctual man. Some of the witnesses say, "they feared for his intellect." In this condition he applied to Oliver, a young man whom he had taken by the hand and who was familiar with the subject. The first measure of relief was to buy up the small vexatious claims. Ten were bought up for $231. The people there all knew Oliver—he had been out in the northwestern campaign. Baum paid these claims: that is the fraud; and paid them through Oliver: that is the combination. Was it wrong in Oliver to do this? His conduct is consistent with the best as well as with the worst motives. Baum is now dead, and his son-in-law, to whom his papers descended, now comes here to fasten fraud upon him. He wished to refund the money which Oliver had thus advanced, but not being able to do so, gave him a certificate, acknowledging the debt.

5. The certificate of $213.07.

The complainant, for the purpose of making out a case of fraudulent concealment and sinister purpose upon the part of Major Oliver, avers, that though he, the complainant, lives, and lived at that time, on the Ohio River, within forty miles of Cincinnati, and was **391*** weekly *in the city, where Baum and the defendant resided, he never knew anything of the alleged indebtedness, until he received a letter from Major Oliver, sometime in 1823; and that this was all the knowledge he had upon the subject, for the order never was presented to him to be paid or rejected, until suit was brought upon it, in attachment, in Michigan.

In reply to these allegations, the defendant, Oliver, answers, and "denies that there was any fraud or unfairness in said certificate for $213.07, dated September 10th, 1822, mentioned in the bill; and he says that the same was justly due to him from the Piatt Company, for one half the amount previously advanced by him, at the request of Baum, to re-imburse purchasers of lots in Port Lawrence, for which an account was rendered to said Baum at the time, with the vouchers therefor. This defendant has not in his possession the means of restating that account, but believes that the exhibit Q, attached to complainant's bill, contains a true statement of that matter, and that the item of $426.14 on the debit side of that account shows the lots for the refunding the purchase money of which said certificate was given in part, being the half thereof, due from said Piatt Company; and that said defendant repeatedly, at different times, in 1822 and afterwards, requested said complainant to refund to him the amount of said certificate, which the said complainant always avoided or refused to do; and this respondent distinctly told the complainant that he would attach said quarter-section to satisfy said debt unless it was otherwise paid; and defendant repeatedly requested payment of the same both before and after his letter to complainant of February 3d, 1823, referred to in the bill, and even offered to surrender up or release to said complainant said land after he had acquired the title, if said complainant would pay said debt of defendant."

This statement in the answer is responsive to the bill, and therefore evidence in the case; it shows an early and repeated request on the part of Major Oliver to the complainant to pay him in behalf of his company what was justly due to him. It shows that the complainant evaded or glanced off every attempt on the part of this creditor to converse with him about the matter, until at last Oliver felt it was necessary to act, or submit to the loss of what he had advanced. He, therefore, on the 3d of February, 1823, five months after the date of the certificate, inclosed a letter to the complainant, in which he states to him the reasons why he incurred the liability, and the fact that the one half due by the Baum Company had been paid him. It is obvious from the letter that he recognizes the complainant, since the death of J. H. Piatt, as the head of the Piatt Company, and he requests him to use his influence with the administrators of John H. Piatt to pay their proportion, and advise him of the names of the members of the Piatt Company as then existing, and their several interests.

*In the argument in the court below, [***392** we thought this account could not be re opened for examination. It was a statement of a partnership account by the acting partner, communicated to all concerned, and acquiesced in by them for twelve years; especially after the trustee was dead, and his papers were in the hands of an interested party; and more especially, that those who claimed collaterally, who had no custody of these accounts or power over them, ought not to be called upon, under such circumstances, to vouch the account or forfeit their right. We thought that, explained or unexplained, the account was binding on the parties, so far as third persons were con-

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cerned. The learned judge held otherwise, and this error, as we respectfully contend it is, combined with important mistakes in point of fact, lies at the foundation of the decision below. [*Mr. Ewing* here went into an elaborate examination of the record for the purpose of showing that the account was correct.]

6. The mortgage.

In the month of August, 1823, Oliver stated an account of payments made by himself and Baum for lots 223 and 224, and also an exact account, confirmed by original vouchers, of all the expenditures in improving the lots. He credits Baum with one half the expenses, borne by himself, for which he had from time to time advanced money to Oliver. He charges also what he had paid to Benjamin F. Stickney for his advances and improvements upon his lot, as compromised pending his suit, and the whole account, amounting to $1,835.47, was presented to Baum for liquidation. Baum, being without funds of the company, and owing to his own pecuniary embarrassments, which then pressed heavily upon him, unable himself to advance anything, mortgaged the property of the company which remained in his hands to Oliver, and by his circular of January 31st, 1824, informed the individual members of the company of what he had done and the state of their indebtedness, and earnestly solicited them to make some provision or put it in his power to provide for the payment, so that the property might be made available to cover their liabilities, which, he assures them, is the most that can possibly be expected. The other members of the company, who had placed Baum in the front of difficulty and trouble, turned a deaf ear to his suggestions and remonstrances; they did not even deign to answer his letter. The complainant, who resided but forty miles from Cincinnati, and who was in the city weekly, did not even call to examine the account, to inquire into the state of affairs, or speak a single word of cheering or encouragement to his partner and agent, who was left to bear, himself, their accumulated burden of misfortune and loss.

It seems to me that there was openness and publicity enough upon the part of Baum in this and all his other acts to secure even a man of doubtful character from the imputation of fraud, design, or concealment. And in the case of the mortgage he had magnanimously 393*] *cast out of the account all that applied to himself—his own payments to the company for the lots—his expenditures on their improvement, and contented himself as well as he could to suffer the loss, so that those who had trusted to him, and relied upon his good faith, should come by no injury.

Proceedings upon this mortgage were not commenced by Oliver until about twelve months after the money fell due. In the mean time, he avers in his answer, which, though responsive to no special allegation, is clearly so to the general scope and tenor of the bill, that he used every effort to collect this money of the parties, and especially, that he repeatedly applied for that purpose to the complainant. I do not, however, conceive this to be a matter of great importance. The indisputable fact is shown by the letter of Baum to all the partners, in 1824, that they all knew that such mortgage had been given to pay the debts of the company, and that, if the money were not paid, the property would be proceeded against by the mortgagee in due course of law. There is, therefore, no ground to complain of secrecy or concealment, and the question arises solely upon the legality of the transfer, including the execution of the mortgage, the proceedings in chancery under it, the decree, the purchase, and the final assignment of the certificates by Baum to Oliver after the sale. These are questions of great importance, and merit a careful consideration.

The right of Baum to sell and convey rests on two grounds:

1st. Because the property was personalty in his hands as acting partner.

2d. As trustee of the real estate vested in him for the payment of debts.

1st. It was personalty.

It is objected, that the land in this case cannot be considered as personalty, on the authority of the case where land connected with a factory was drawn into question. But there the land was not the subject matter of the trade. Portions of the freehold in a mine have been severed and sold. It is true, that in the case before us there was no authority to reinvest; but in principle, why should this make a difference? The land here was bought to sell again, and partnership debts were contracted. What good reason can be given why it should not vest in the acting partner in the same manner as goods?

2d. But Baum was a trustee.

Having the title in himself without any expressed restriction, he is presumed to hold it for all the purposes to which equity would apply it, and his act was confirmed by acquiescence in the sales to Prentiss and Tromley, and in this mortgage for twelve years. It is objected that an unreasonable amount of property was mortgaged. But the debt was $1,835.47, and the first cost of the tracts mortgaged *was [*394 $1,679.14, and their value had been reduced by the act of Congress reducing the price of public lands, to $1,049.14; estimated in proportion. It was the duty of Baum to audit accounts and to sell and convey property to pay debts. A mortgage by him, and a decree of foreclosure against him, are equivalent to his deed of bargain and sale. We hold that the sale under the mortgage gave to Oliver all the title of Baum, and a right to a patent. But if not, if there be anything irregular or imperfect in the pursuit of our right, it is cured by the assignment of the certificates and the patent. How stands the case? Oliver has the legal title, and he is called upon to surrender it. He has got it in payment of a debt, fairly, from a person having power to settle the debt and convey the land. But this trustee, so empowered, took two steps instead of one. He first mortgaged, then assigned. In law, his mere assignment is good enough. Can this difficulty as to mode affect us in equity? There is no reason why this legal title, so acquired, should be now disturbed. The complainant had full notice of the mortgage, and of the suit thereon. He stood by; suffered the suit upon the mortgage to proceed without coming in and making himself a party, as he might have done; suffered the sale to be made without

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objection; the certificates to be assigned and the patent to issue; suffered Oliver to enter upon the property, expend his time, and talents, and money upon it; and we now claim that it is too late for him to go into chancery. (3 Vesey, 170.)

The complainant should have made his election without waiting for future developments. It is not a statutory bar that interposes, but acquiescence.

[*Mr. Ewing* here went into calculations to show the value of the property then, and until 1832.]

Up to the issuing of the patents in 1830, the value of the property did not change. Suppose this bill had been filed in 1832. No chancellor could have acted on the future use which Oliver might make of the property. But that further use, and the enhanced value of the property, blends itself everywhere with the opinion of the court below, and is made to give a character to past transactions.

1st. There is an impression that the tracts purchased under the mortgage and the attachment were of great value; but, according to the evidence, the whole property, at any time from 1822 to 1830, was not worth, in cash, $1,200.

2d. In making Oliver's exchange with the Michigan University re-act upon and affect his purchase of the other tracts.

3d. It fixes upon Oliver a knowledge of the contingent future. The bill to foreclose and the attachment were in 1825, and it is supposed that Oliver's design in acquiring the other tracts was to repossess 1 and 2; but at that time 1 and 2 belonged to the United States, and there was no prospect that anything but money would [*395 *ever purchase them. The University did not select until June 25th, 1827.

7. Oliver's agency after the relinquishment.

At Baum's request he paid with his own money debts of the Port Lawrence Company; and the vouchers show great accuracy and strict justice. Did this disable him from recovering the money so paid?

8. Agreement to repurchase.

The evidence shows an intention on the part of Baum to repurchase, but there was no contract or understanding to that effect. Nor does any evidence show how he proposed to carry out his design, whether with his own money or a fund raised by contribution.

9. Suppose Baum had purchased and paid his money, would the members of the Port Lawrence Company have been bound to contribute; or would any trust have resulted to them; or if Piatt had made the purchase, could Baum have held any part of the property? Neither of the parties ought to have purchased for the benefit of their old partners. There would have been absent persons, insolvent estates, infants, *femes covert*, all to unite in the expenses and incur the hazard of what counsel would have called a reckless and extravagant expenditure to build up a city. The purchase required capacity, consent, contribution, and also situation and ability, to join in its management. The negotiation with the United States entirely failed.

10. The exchange for 1 and 2, and resulting trust.

It is contended that a trust results to the Port Lawrence Company on two grounds:

1st. That the purchase was for Baum and his associates, who were the Port Lawrence Company. This is charged in the bill and denied in the answer; and the record shows that Oliver is sometimes spoken of, in the records of the university, as acting for himself, and sometimes for others. It was probably an error of Mr. Wing, and corrected by Oliver as soon as discovered.

2d. That a trust resulted, because the sale on the attachment passed no title to Oliver, and therefore the quarter-sections still belonged to the Piatt Company; and because the sale under the mortgage passed no title except that of Baum himself, therefore, with that exception, the tracts 3 and 4 belonged to the Port Lawrence Company; and that Oliver having exchanged 3 and 4 and the quarter-sections for 1 and 2, a trust results therein to the Port Lawrence Company, and to the Piatt Company.

But a member of the Port Lawrence Company has joined with a member of the Piatt Company, and filed this bill. That the partners in the different companies happen to be the same individuals, does not help the case; it is a joinder of different claims in the same bill, which becomes multifarious. If so, the difficulty lies deeper than mere pleading; for without such joinder the party cannot *pre- [*396 sent this multifarious case. No such case has ever been sustained. If there had been an agreement between these two companies that their land should be so exchanged, and they had vested the title in Oliver for the purpose, the bill would lie. But there was no such agreement, and no trust assumed on the part of Oliver. He purchased the two tracts of land at judicial sales, was in possession, claimed title, and made the exchange for himself. The books, we believe, show no case in which the separate funds of several individuals can be followed into a joint investment, so as to raise a trust in the property. [See the authorities referred to by *Mr. Stanberry*.]

The vast enhancement of the value of the fund with which 1 and 2 were purchased, by applying to it the labor and skill of Oliver and Williams; the time, and efforts, and skill of Oliver, in bringing about the exchange, should be considered as a fund which helped to pay for 1 and 2 as fully as so much cash. The property has thus been made to be worth more than an hundred fold as much as it was at the time of the exchange. And this is all to be restored if the court hold both, or either of the parties claiming, to be entitled to it.

11. Estoppel.

Baum conveyed the lands included in the mortgage to Oliver, with covenants of warranty. Assets descended to his heirs, who are estopped. (Co. Litt., 325.)

12. Williams is a *bona fide* purchaser without notice.

[See this head discussed at the conclusion of *Mr. Stanberry's* argument.]

Mr. Justice STORY delivered the opinion of the court:

This is the case of an appeal from the decree of the Circuit Court of the District of Ohio, sitting in equity, rendered in favor of the original plaintiff, and it is brought to this court by the original defendants, who are now the

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appellants. The record is exceedingly voluminous, and the facts and proceedings complicated and perplexed by a variety of details. A general outline of the leading facts is given in the printed opinion of the court below, with which we have been favored; and those facts cannot be more succinctly stated than they are in that summary. We shall therefore avail ourselves of it upon the present occasion. It is as follows: "In the summer of 1817, the complainant, in connection with John H. Piatt, William M. Worthington, and Gorham A. Worth, formed an association to purchase lands of the United States, at a public sale, which was shortly to take place at Wooster, in this State; and the complainant was appointed the agent of the company, to attend the sale for that purpose.

"Another association consisting of Martin Baum, Jesse Hunt, Jacob Burnet, William C. Schenck, William Barr, William Oliver, and 397*] *Andrew Mack, was formed for the same object; and William Oliver and William C. Schenck were appointed its agents to attend the sale.

"Before the sale took place, it was discovered that both companies were desirous of purchasing the same tracts of land, and the agents agreed that they would purchase tracts 1, 2, 3, and 4, at, and including the mouth of Swan Creek, in the United States reserve, at the foot of the rapids of the Miami; and also Nos. 86 and 87 on the other side of the river, opposite the mouth of Swan Creek, for the joint benefit of both companies; each company to have one half of the lands purchased, and to pay at the same rate. Nos. 86 and 87 were bid off by Oliver, and the certificates of purchase issued to him. The other tracts were bid off by the complainant, and the certificates of purchase were issued in the names of the association represented by him.

"At the same sale, the complainant, in behalf of his company, purchased the northwest quarter of section 2, township 3, the southwest quarter of the same section, the northwest quarter of section 3, township 3, and also the southeast and southwest quarters of the same section, in said reserve; and one fourth of the purchase money on each tract being paid, certificates of purchase were made out in the names of the company. And the other agents purchased for their company, at the same sale, other tracts of land.

"On the return of the agents to Cincinnati, their acts were ratified by both companies. One company was designated the Piatt Company, the other the Baum Company; and the union of both, in regard to the lands jointly purchased, was called the Port Lawrence Company. The joint, or Port Lawrence Company, having made their purchase with the view of laying out a town, to be called Port Lawrence, appointed Baum a trustee, and authorized him to sell lots, and do other things in relation to his agency, for the benefit of the company.

"On the 14th August, 1817, Baum appointed Oliver his attorney, to sell lots in the town to be laid out, receive the money, and give certificates of sale, in the nature of title bonds, to the purchasers; and he, in association with William C. Schenck, was authorized to lay out the town. Baum, and also the proprietors, gave to Oliver a letter of instructions in relation to the plan of the town, the sale of the lots, &c. By the conditions of sale, one fourth of the purchase money was to be paid down, and the residue in three equal annual payments.

"At the sale of lots, the sum of $855.33 was received by Schenck, for which he was to be accountable to Baum.

"At the sale, Oliver purchased lots 223 and 224, an undivided half of which he afterwards conveyed to Baum, and they erected a warehouse and other improvements on them.

*"In August, 1818, he sold one half [*398 of his interest in the Port Lawrence Company to William Steele and William Lytle; and in March, 1819, he sold the residue of his interest to Micajah T. Williams, one of the defendants, and his partner Embre.

"By the reduction of the price of the public lands, and the pressure of the times, the Port Lawrence Company were under the necessity of relinquishing to the United States tracts 1 and 2, having agreed to pay for the same about $20,000; and of appropriating the money paid on them to the payment in full of the residue of the tracts purchased by them, and by the Baum and Piatt Companies respectively. In pursuance of this object, the five quarter-sections purchased by the Piatt Company were assigned to Baum, the 17th September, 1821; and on the same day, tracts numbered 1, 2, 86, and 87, purchased in the name of the Piatt Company for the Port Lawrence Company; and also tracts 3 and 4, purchased by Oliver for the same company, were assigned to Baum. It is alleged that these tracts had been previously assigned to Baum, of which there is no evidence.

On the 27th September, 1821, Baum, through his agent, Micajah T. Williams, one of the defendants, relinquished, to the United States, tracts 1 and 2. On these tracts there had been paid the sum of $4,817.55. $1,372.34 of this sum were applied to complete the payments on tracts 3, 4, 86, and 87, the residue of the tracts purchased at the sale by the Port Lawrence Company. From the relinquished tracts, there still remained $3,445.21. Of this sum, one-half belonged to the Piatt Company. $1,248 were applied to complete the payment on the five quarter-sections, which left a balance of $474.60 still due to the Piatt Company; but which was applied in payment of lands held by the Baum Company.

"After the relinquishment of the tracts on which the town had been laid out, the purchasers of town lots claimed a return of the money paid by them, with interest, and also damages for their improvements.

"On the 10th September, 1822, Baum gave to Oliver a certificate, which stated there was due him, by the Port Lawrence Company, the sum of $213.02, which he refunded to the purchasers of lots, by the request of the company, "it being the amount due on the shares originally owned by John H. Piatt, Robert Piatt, G. A. Worth, and William M. Worthington."

"And on the 27th August, 1823, Oliver having made out an account against the Port Lawrence Company, for money paid by him to purchasers of lots, and services rendered as agent, Baum admitted his account, amounting to the sum of $1,885.47; to secure the payment

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of which, Baum executed to him a mortgage on tracts 3, 4, 86, and 87. The payment was to be made, with interest, on or before the 1st of January, 1824.

"The 7th October, 1825, Oliver caused an **399*]** attachment to be *issued by the clerk of Monroe County, in the Michigan territory, against Baum and the members of the Piatt Company, on the certificate of indebtment given by Baum. This attachment was levied on four of the five quarter-sections owned by the Piatt Company, and such proceedings were had on the attachment, as to obtain an order of sale of the property attached; three of the quarters were sold, by the auditors appointed, for the sum of $241.60, to Noble, the agent of Oliver. Noble, shortly afterwards, conveyed these tracts to his principal.

"A bill to foreclose the mortgage given to Oliver was filed by him in the Supreme Court of Michigan, the 13th of October, 1825. And a final decree having been obtained, the mortgaged premises were sold, by the assistant register of the Chancery Court, to Oliver, the 1st September, 1828, for $618.56.

"By the Act of 20th May, 1826, the Secretary of the Treasury was authorized to select, for the benefit of the University of the Michigan territory, a certain number of acres of the public lands within the territory, and he selected tracts 1 and 2, which had been relinquished.

"In the summer of 1828, as appears from the report of the committee of the trustees of the university, Oliver, as the agent of Baum and others, proposed to exchange certain lands owned by Baum, in the vicinity of Port Lawrence, or any of the public lands subject to entry, for tracts 1 and 2, on which the town of Port Lawrence had been laid out.

"A law of Congress was passed, authorizing the exchange, the 13th January, 1830. Previous to this, Baum assigned to Oliver the final certificates for the tracts he purchased under the attachment, and also under the decree of foreclosure; and one of the quarter-sections levied on by the attachment, but not sold under it, in payment of the balance of the judgment on the attachment, which enabled Oliver to obtain patents for the same in his own name. And on his conveying to the university tracts numbered 3 and 4, except ten acres reserved of number 3, and the northwest quarter of section 2, township 3, and also the northwest and southwest quarters of section 3, township 3, he received an assignment from the university of their rights to tracts 1 and 2, for which patents were issued in the name of Oliver.

"After the exchange was effected, Baum, and the defendant Williams, each purchased an interest of one third in tracts 1 and 2, 86 and 87. After Baum's death, in 1832, Oliver purchased his interest from his heirs. And the 1st December, 1832, Oliver conveyed to Williams an undivided half of the ten acres reserved in number 3. On the 23d May, 1834, he conveyed to him an undivided half of tracts 86 and 87, except sixty acres which had been sold to Prentiss and Tromley; and on the ——— day of November, he conveyed to him 'one undivided **400*]** *half of lots 1 and 2, on which Port Lawrence was laid out,' together 'with a like interest in all sales and improvements thereunto belonging.'

"Oliver, Baum, and Williams agreed to lay out the town of Toledo on the site of Port Lawrence, and to make titles to the Port Lawrence purchasers of lots, on their complying with their contracts.

"Some years after this, Oliver purchased from the Michigan University the tracts of land he conveyed to it in exchange for tracts 1 and 2.

"Of the Piatt Company, John H. Piatt is deceased, and his administrators and heirs are made parties to this suit. William M. Worthington assigned one half his interest in the Port Lawrence Company, and it is claimed and represented by John E. Worthington. The interest of Worth has been assigned to the defendant Ewing, who also claims the entire interest of Baum, Mack, Barr, Burnet, and half the interest of the complainant.

"Of the Baum Company, Martin Baum, Jesse Hunt, William C. Schenck, and William Barr, are deceased."

Such is a general outline of the leading facts. There are others which may be required to be adverted to in the progress of this opinion; but there are many details which must necessarily be passed over in silence, as they would tend to embarrass the discussion of the main questions in the cause, and obscure rather than illustrate the merits thereof.

The object of the bill is to subject the tracts No. 1 and No. 2, now constituting the site of the town of Toledo, formerly known as Port Lawrence, to the rights of the Port Lawrence Company, composed, as we have seen, of the Piatt Company and the Baum Company, and those who claim under them, now in the possession of Oliver and Williams, under a title derived from the grant of the Michigan University, upon the ground that a trust has attached to those tracts in favor of the Piatt and Port Lawrence companies, under the circumstances which will be presently stated. These circumstances are, that the lands given in exchange to the Michigan University, for tracts No. 1 and No. 2, under the negotiation with the university, were, at the time, the property of the Piatt and Port Lawrence companies, as *cestuis que trust* thereof; that the facts were at the time well known to Baum, and Oliver, and Williams, and consequently that the trust by operation of law attached thereto in the hands of those parties. To this conclusion several objections have been taken by the counsel for the appellants. In the first place, that no such trust attached to the lands so given in exchange to the Michigan University, at the time of the transfer, and consequently none to tracts Nos. 1 and 2, taken in the exchange. In the second place, that if it did, as Oliver afterwards repurchased the exchanged lands from the university, and Oliver and Williams under him now hold some parts thereof, the trust is revived, and has re-attached *to these lands, and [***401** thus has displaced any supposed trust upon tracts No. 1 and No. 2, at least *pro tanto*. In the next place, that Oliver and Williams are purchasers without notice of the trust, or of any misapplication of the trust property by the trustee.

Before proceeding to the considerations applicable to the first and third points, it may be well to dispose of that which grows out of the

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second point, as it involves a most important principle in equity jurisprudence. It is a clearly established principle in that jurisprudence, that whenever the trustee has been guilty of a breach of the trust, and has transferred the property, by sale or otherwise, to any third person, the *cestui que trust* has a full right to follow such property into the hands of such third person, unless he stands in the predicament of a *bona fide* purchaser, for a valuable consideration, without notice. And if the trustee has invested the trust property, or its proceeds, in any other property into which it can be distinctly traced, the *cestui que trust* has his election either to follow the same into the new investment, or to hold the trustee personally liable for the breach of the trust. This right or option of the *cestui que trust* is one which positively and exclusively belongs to him, and it is not in the power of the trustee to deprive him of it by any subsequent repurchase of the trust property, although in the latter case the *cestui que trust* may, if he pleases, avail himself of his own right, and take back the property and hold the trust property upon the original trust; but he is not compellable so to do. The reason is, that this would enable the trustee to avail himself of his own wrong; and if he had made a profitable investment of the trust fund, to appropriate the profit to his own benefit, and by a repurchase of the trust fund to charge the loss or deterioration in value, if any such there had been, in the mean time, to the account of the *cestui que trust*—whereas the rule in equity is, that all the gain made by the trustee, by a wrongful appropriation of the trust fund, shall go to the *cestui que trust*, and all the losses shall be borne by the trustee himself. The option, in such case, to take the new or the original fund, is therefore (as has been already suggested) exclusively given to the *cestui que trust*, and is given to him for the wisest purposes and upon the soundest public policy. It is to aid in the maintenance of right and in the suppression of meditated wrong. Many cases on this subject will be found collected in the elementary writers. (See 2 Sugden on Vendors, chap. 14, sec. 3, p. 148, &c., 9th edit.; 2 Story Eq. Jurisp. sec. 1258 to sec 1265, 3d edit.; Com. Dig., Chancery, 4 W, 25, to 4 W, 26): and the rule will be found fully discussed and recognized in *Ryall* v. *Ryall* (1 Atk., 59), *Lane* v. *Dighton* (Ambler, 409), *Lench* v. *Lench* (10 Ves., 511), and *Docker* v. *Somes* (2 Mylne & Keen, 655), in many of its important bearings. Lord Ellenborough, in the case of *Taylor* v. *Plumer* (3 Maule & Selw., 562), examined and confirmed the doctrine in its application to cases at law, and cited and approved the decisions in equity; so that it is plain upon 402*] authority, and the *same would be equally true upon principle, that if the tracts Nos. 1 and 2 were purchased with the trust fund belonging to the Piatt and Port Lawrence companies, the latter are at full liberty to follow the same into the hands of any persons not being *bona fide* purchasers for a valuable consideration without notice, and the circumstance that there has since been a repurchase of the original trust property by Oliver, does not in any manner affect, or control, or vary, the right or option of the *cestuis que trust*. The case is not like that put at the bar, where a part of the funds of the *cestuis que trust* have been mixed up with other funds exclusively belonging to the trustee in the new purchase or investment. In such a case there may be ground to hold the trust fund in charge *pro tanto* therein. Here, the whole consideration of the purchase was a fund wholly and exclusively belonging to the *cestuis que trust*, if they have made out any title at all, which we shall hereafter consider.

Let us, then, proceed to the consideration of the other questions above stated. And the first is, whether at the time of the exchange with the Michigan University, the lands given in exchange for tracts Nos. 1 and 2, were, in the hands of the party or parties making that exchange, affected with any trust such as has been already suggested And this leads us to the consideration of the antecedent state of facts between the parties to this record.

We have seen that the original purchase of tracts Nos. 1, 2, 3, and 4, and Nos. 86 and 87, was made for the account and benefit of the Port Lawrence Company; and the object of the purchase was to lay out a town thereon, and to sell the lots to purchasers. Baum was appointed a trustee and agent for this purpose, and he was to make sale of the lots and conduct the other affairs of the agency. With the consent of the company, in August, 1817, he employed Oliver as a sub-agent, who received instructions from the company in relation to the plan of the town (which he was to lay out in conjunction with Wm. C. Schenck) and the sale of the lots. This agency of Oliver, under Baum, was originally (as it should seem) limited to one year, but it was certainly continued, if not for all, at least for some purposes, to a much later period. In August, 1818, Oliver sold one half of his interest in the Port Lawrence Company to Steele & Lytle, and in March, 1819, he sold the residue to the defendant Williams, and his partner Embre. And these facts are most important to be borne in mind, since they clearly establish that Oliver, as an original proprietor, and Williams, as a derivative proprietor, under Oliver, in the Port Lawrence company, had full and complete notice of the nature and objects of the original purchase by that company, and of the trust and agency of Baum in accomplishing those objects. In truth, the laying out of a town on those tracts, and the sale of the lots, seems to have been an enterprise always cherished by some of the company with uncommon solicitude and sanguine expectations of profit.

*In consequence of the reduction of [*403 the price of the public lands by Congress, and the pressure of the times, the Port Lawrence Company found themselves compelled, in 1821, to relinquish a part of their tracts to the government. For this purpose they assigned all the four tracts to Baum, in September, 1821; and the Piatt Company at the same time assigned to Baum their five quarter-sections; and he, through the defendant, Williams, thereupon relinquished tracts Nos. 1 and 2 to the United States, and the return purchase money was applied *pro tanto* to complete the payments due on the other tracts (Nos. 3 and 4, and Nos. 86 and 87) and the residue was applied partly to pay the balance due on the five quarter-sections, purchased by the Piatt Company, and

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partly to pay a balance due on other lands purchased by the Baum Company.

Pausing here, for a moment, it is apparent that the original trust created in tracts Nos. 1 and 2, under the agency and assignment to Baum, for the benefit of the Port Lawrence Company, was, by this relinquishment to the government, entirely displaced and extinguished. These tracts afterwards, in the summer of 1828, under the Act of 20th of May, 1826, were selected by the Secretary of the Treasury for the Michigan University, and certainly came into the possession of the latter discharged of the trust. Still, however, it is obvious from the papers in the cause, that in the intermediate time between the relinquishment of these tracts and the grant thereof to the university, the original plan of establishing a town on the site, remained a favorite project of Baum as agent of the Port Lawrence Company, and he made strenuous efforts by applications to Congress, and to the general land office, to re-acquire the title thereof, not for himself alone, but, as his applications and letters show, on behalf of himself and his associates. He constantly held himself out as acting for the benefit of the concern; and there is every reason to suppose that some, if not all, of his associates were lulled into security, and contemplated, if he should be successful, to resume the original plan. This may serve in some measure to explain their inactivity; and to show that they continued to place unlimited confidence in Baum, that all his proceedings would be for their benefit, and not for his own sole advantage. Baum petitioned Congress on the subject as early as January, 1822, and in his letter to Mr. Brown (a senator in Congress), of the 25th of December, 1822, inclosing a duplicate of his petition, he says: "Inclosed is the petition signed by myself only, till others have an interest in it;" and he names in the letter, and its postscript, Williams, Piatt, and others. In another letter to the same senator, dated the 6th of February, 1823 he says: "The tracts purchased by myself and associates in that quarter; those retained and relinquished can be ascertained in the land office." In another letter addressed to the commissioner of the general land office, as late as the 27th of July, 1827, he says: "In consequence of the President's proclamation, 404*] announcing *the sales of lands, I attended, at Delaware, on the 9th instant, but was much disappointed to find there instructions of the general land office, to withhold from sale all lands situate north of the line which divided the State of Ohio and the Michigan Territory, for I went there for the express purpose of repurchasing tracts Nos. 1 and 2, in the Maumee reservation, which I formerly owned, and which I have relinquished." He adds: "These lands, though bought in sundry persons' names, were afterwards transferred to me as agent for the purpose of managing and conveying them in case of sales. In the same letter he protests against the trustees of the Michigan University having a grant of these tracts, as they have no claim to the same, and that he has a strong claim upon the government.

To repel the inferences deducible from these facts, it is said that the testimony of Carneal establishes that Piatt attended that very sale at Delaware for the purpose of buying these tracts, not for the Port Lawrence Company, but for another company consisting of Colston, Carneal, and himself; and that Baum also attended on his own account, and not for the Port Lawrence Company. Of transactions of this nature, after such a lapse of time, it is perhaps not easy to ascertain all the facts which then regulated the conduct of the parties, when they depend upon the frail recollections of witnesses. It is quite possible that the circumstances might have been explained, and nothing have been intended by either party really injurious to the interests of the Port Lawrence Company. But as no sale took place of these tracts upon that occasion, the only effect which can be properly attributed to the testimony, admitting it in its fullest latitude, is, that it weakens our confidence in Piatt's own conduct, and diminishes the force of the inference as to Baum's then acting as an agent for the Port Lawrence Company. But the written statements of Baum in the letters above cited are evidence of his intentions and acts, of a far higher character, which the lapse of time has not obscured or varied, and those letters are, as to himself, most conclusive to show that he did not deem himself as acting for his own interest alone, but for that of his associates also, in his whole proceedings to re-acquire those tracts.

As soon as the Michigan University had obtained a title to tracts Nos. 1 and 2 (in the summer of 1828), Oliver, avowedly on behalf of Baum, made an application to the trustees of that university for an exchange of those tracts for other tracts in the vicinity. These negotiations were begun as early as the 12th of August, 1828, and various propositions were made and negotiations were had by the trustees and Oliver, as agent of Baum, between that time and the 4th of January, 1831, when the consent of Congress having been obtained for the exchange, by an act approved on the 13th of January, 1830, the university agreed to make the exchange: and accordingly, by their deed, dated the 7th day of February, 1830, did *con- [*405 vey their right and title to tracts Nos. 1 and 2 to Oliver in fee-simple, in consideration of receiving a deed from Oliver of certain tracts, containing seven hundred and sixty-seven and a half acres, viz.: the whole of tracts No. 3 and 4, the southwest quarter of section 2, and the west half of section 3; the tracts being part of the purchase of the Port Lawrence Company, and the quarter and half-sections being part of the purchase of the Piatt Company, in 1817. We thus trace the trust property home to the Michigan University, as obtained by a conveyance from and under Baum and Oliver in pursuance of a negotiation, avowedly made by Oliver on behalf and as agent of Baum, as the sole consideration of the grant of Nos. 1 and 2 to Oliver by the university.

And this conducts us to the consideration of that which is the main hinge on which the present case turns; that is, whether the tracts, so conveyed by Oliver to the university, were at the time affected with the trust in favor of the Piatt and Port Lawrence companies, with which they were originally chargeable in the hands of Baum. This necessarily involves a review of the title of Oliver to the tracts (the three quarter-sections) belonging to the Piatt

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Company under the attachment proceedings in Michigan, and also of his title under the mortgage of tracts Nos. 3 and 4, and Nos. 86 and 87, belonging to the Port Lawrence Company and the foreclosure thereof, in connection with the subsequent acts of Baum and Oliver in the premises. Unless the title thus derived is beyond all legal exception (*omni exceptione major*) as an adverse and unimpeachable title, it is plain that the original trust attached at the time of the exchange to the tracts so conveyed, and consequently (as has been already suggested) it was, at the option of the *cestuis que trust*, transferable and transferred to tracts Nos. 1 and 2. For it is in our judgment beyond all question, that Oliver at the time of the exchange had full notice of the trust and title originally invested in Baum, and that his acts in making the exchange are to be deemed the acts of Baum, and affected by the same considerations as if personally transacted by Baum himself, and were designed by mutual consent to promote the contemplated objects and interests of both.

And, first, let us review the proceedings under the attachment. In September, 1822, Baum gave a certificate to Oliver, stating that a debt of $213.02 was due to him from the Port Lawrence Company for money refunded to purchasers of lots at the request of the company, "it being the amount due on the shares originally owned by John H. Piatt, Robert Piatt, G. A. Worth, and Wm. M. Worthington." These persons constituted the Piatt Company; and consequently the claim thus asserted was a subdivision of a debt confessedly due from the Port Lawrence Company, in which the Piatt Company had a moiety of the interest only. Whether Baum had, in virtue of his general agency, the right to give such a certificate, thus severing a joint debt, so as to be binding upon the Piatt Company alone, with-
406*] out *their consent, and whether this certificate was *bona fide* given under justifiable circumstances, it is unnecessary to consider, although the transaction is certainly open to some observation in point of authority as well as propriety in the then unlinquidated concerns of the Port Lawrence Company. Assuming, however, the transaction to have been perfectly correct and binding in all respects, let us examine the subsequent proceedings consequent thereon. Upon this certificate Oliver, in October, 1823, instituted a suit by attachment in Monroe County, in the territory of Michigan, against Baum, Robert Piatt, G. A. Worth, and William Worthington (John H. Piatt being then deceased), alleging them to be joint partners and survivors, and all residing out of the territory—upon which four of the quarter-sections of land owned by the Piatt Company in that county were attached. At the October Term, 1826, of the same court, judgment was obtained by default against all the defendants, no appearance having been entered for them; and upon the execution issuing thereon, three of the four sections (those which were afterwards conveyed to the Michigan University) were sold, and bid off by an agent of Oliver, and were afterwards conveyed by him to Oliver. Of this suit there is no pretense to say that any of the defendants, except Baum, had any notice, if indeed he had any, although some of them resided in the same State where Oliver resided, and one of them in a neighboring State, at no great distance, who was known to be a man of large property. The other members of the Port Lawrence Company were not made parties to the suit. It was brought in a distant territory, almost then a wilderness, more than two hundred miles from the residence of the defendants; and if it had been the design of Oliver to procure a judgment against the parties, without any notice to them, which should be obligatory upon them, and to give Oliver a good title to the lands at a comparatively trivial price, better means could scarcely have been devised to accomplish the purpose. For the institution and consummation of this suit behind the backs and without the knowledge of the parties in interest, no better excuse can now be found than that Oliver did not choose to institute a suit against them at home, as it might give them offense and break up some former ties of acquaintance. How far such an excuse is admissible we do not stop to inquire. It rather tends to cast a shade upon the transaction than to vindicate it. But what was the title thus acquired, supposing all the proceedings to be *bona fide*? It was a mere naked title in equity to the tracts, the title to which still remained in the United States; and the legal title could not be consummated, unless the certificates of the purchase and payments for the tracts were first surrendered to the United States. Those certificates were then in the hands of Baum, as trustee of the Piatt Company; and he had no right under the circumstances to assign or surrender those certificates to Oliver to enable him to make his title available at law, without the express consent of the *Piatt Company. If he had refused, [*407 Oliver could not have obtained them, unless upon a bill in equity to which all the proprietors should be made parties, and in which they would have been at full liberty to examine into the validity and merits of the original claim of Oliver, on which his attachment was founded, and also into the regularity and *bona fides* of the transactions in and under the suit. Yet Baum, in December, 1828, assigned and surrendered up these certificates to Oliver, and thus enabled him to consummate his title and reduce it to a legal title, by obtaining a patent, without any such consent; and in so doing he was guilty of a manifest breach of trust, of which Oliver cannot now be permitted to pretend ignorance. It is also a fact of no small signficance, that the surrender of the secertificates was contemporaneous with the surrender to Oliver of the certificates of tracts Nos. 3 and 4; and subsequently in December, 1829, a like surrender of Nos. 86 and 87; belonging to the Port Lawrence Company, under the foreclosure of the mortgage, which we shall have occasion to review; and that all this was done pending the negotiations with the Michigan University by Oliver on behalf of Baum for the exchange.

This view of the matter releases us from no small doubt and difficulty in relation to an argument pressed at the bar with great earnestness; and that is, whether such an equity was attachable and vendible under the attachment law of Michigan. There is great difficulty in maintaining the affirmative, for the reasons stated in the opinion of the learned judge in

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the court below; and especially if, as has been suggested, the act is but a transcript of an act of New Jersey, and the courts of that State have, as has been asserted at the bar, held no such equity attachable.

Then, as to the mortgage and the proceedings under it. The mortgage was given upon tracts Nos. 3 and 4, and Nos. 86 and 87, by Baum to Oliver, in August, 1823, upon an account then adjusted between him and Oliver against the Port Lawrence Company (and which does not appear ever to have been examined or sanctioned by the company itself) for a balance of $1,835.47, then supposed to be due to him for money paid and services rendered by him as agent of the company. In October, 1825, a bill was filed in the Supreme Court of Michigan (within which these tracts were situate) to foreclose the mortgage; and such proceedings were had upon this suit, that, in September, 1828, the tracts were sold, and at the sale bought by Oliver for the sum of $618.56, and a deed of conveyance thereof was accordingly made to him. To this suit Baum alone was made a party; none of the other proprietors of the Port Lawrence Company being made parties, although Oliver knew perfectly well who they were, and that Baum was merely their trustee, and that they were the *cestuis que trust*, possessing the beneficial interest in the premises. Under such circumstances, to allow the foreclosure to stand, so as to conclude the rights of the *cestuis que trust*, would be a viola-
408*] tion of *all the doctrines of courts of equity upon this subject. The decree must be treated, as to them, as wholly inoperative and void.

But there is another view of the matter which is conclusive. The mortgage was of a mere equity, the legal title being still outstanding in the United States; and supposing that this equity could have been foreclosed in such a suit (which, considering the defect of the real parties in interest, it clearly could not), still it was a naked equity, which could be made available to obtain a legal title from the United States, only by an assignment and surrender of the certificates of the purchase and payments, then held by Baum for the benefit and use of the Port Lawrence Company. And here, again, the same considerations apply, which have been already suggested. Oliver could not obtain an assignment and surrender of those certificates, except by a bill in equity against Baum, to which the other proprietors in the Port Lawrence Company must have been made parties, as they were necessary parties; and thus the whole merit of the mortgage and foreclosure must have been brought directly before the court for adjudication. Yet Baum, without any consultation with or assent of those proprietors, assigned and surrendered the certificates of those tracts also to Oliver, and thus enabled him to obtain a patent therefor from the United States, in subversion of their rights and his duty. This was a gross breach of trust, and was done (let it be repeated) in December, 1828 and 1829, pending the negotiations with the Michigan University, obviously for the purpose of enabling Oliver in his (Baum's) name, and on his behalf, to consummate the exchange. And, finally, when the negotiation was consummated by means of these very certificates, Oliver, with the consent of Baum, was enabled to obtain a patent therefor, on the 4th of March, 1831.

Very soon after the patent was so obtained, viz., on the 16th of May, 1831, we find that Baum, Oliver, and Williams, entered into a written agreement, by which Oliver purported to sell, in fee-simple, to Baum and Williams, each one third part of the tracts Nos. 1 and 2, and Nos. 86 and 87, with the exception of sixty acres out of No. 86; and they were to receive a quitclaim deed therefor from him accordingly, for the sum of $1,555 for each third part. The parties further agreed to lay out a town upon the old site, with some change of the plan, and to bring the lots into the market for sale; and they were to contribute to the charges and expenses according to their respective interests. After the death of Baum, Oliver purchased his share of the tracts from his heirs; and by certain deeds or quitclaim, executed in December, 1832, in May, 1834, and in November, 1834, Oliver conveyed one half of the premises to Williams.

Now, looking at these transactions together, it seems almost impossible to escape from the conclusion that Baum and Oliver had a mutual interest in the negotiation with the Michigan university; that it was not only carried on in the name of Baum, and apparently for his account but that Oliver acted as his agent throughout; that the *deed from the [*409 university was made directly to Oliver, with the consent of Baum; that the assignment and surrender of all the certificates by Baum, to Oliver, was for the express purpose of enabling Oliver to complete the bargain with the university; and that the agreement between Baum, Oliver, and Williams, which followed almost immediately upon the grant of the patent, was made in pursuance of a prior understanding between all the parties, and was but a consummation of the objects originally contemplated by Baum and Oliver, from the period of their first negotiation with the university down to the time of the execution of that agreement. And all this was done by Baum and Oliver, without the knowledge, or consent, or approbation of the Piatt and Port Lawrence companies, and was never sanctioned by them. Under such circumstances, what is the true duty of a court of equity? It is, to hold the parties engaged in these transactions, with full notice of the title and the trust in Baum, bound by that trust, and to enforce that trust against the tracts Nos. 1 and 2, so far as they remain in their hands unaffected by the rights of purchasers under them, *bona fide* for a valuable consideration, without notice. In our judgment, no reasoning can make the proposition more clear than a simple recital of the facts, and the statement of the general doctrine of equity jurisprudence that the *cestuis que trust* have an option to follow their property, or its proceeds, into any other property into which it has been converted by a breach of the trust, subject only to the rights of such purchasers as have been just referred to. Indeed, the question, as against Baum and Oliver, seems absolutely closed by the state of the evidence; and their intimate knowledge of the whole concern requires neither illustration nor commentary.

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Let us, then, proceed to the consideration of the case as to Williams. It is said that he stands in the predicament of a *bona fide* purchaser for a valuable consideration, without notice; and if he does, he is certainly entitled to protection. Williams, in his answer, asserts himself to be such a purchaser, but it is difficult to maintain that averment in its just legal sense, looking to all the circumstances of the case. In 1819, he became a purchaser of one half of the interest of Oliver in the Port Lawrence Company, and, as such, he could not fail to know that tracts Nos. 1 and 2, 3 and 4, and Nos. 86 and 87, belonged to that company; and he has never ceased to be a member of that company. In 1821, he was employed by Baum, the acknowledged trustee and agent of the company, to surrender tracts Nos. 1 and 2 to the government of the United States; and through him the relinquishment took place. He says that he did not know of the negotiation between Oliver and the university, for an exchange of the lands, until after its consummation, and never heard of the details of said negotiations, nor what lands were given in exchange, except parts of tracts Nos. 3 and 4. Now, these very tracts belonged to the Port Lawrence Company, so that he was necessarily 410*] *put upon the inquiry by what means Baum had parted with them, and Oliver had become possessed of them. Besides, in his negotiation and surrender of tracts Nos. 1 and 2 to the government, and the apportionment of the funds arising from the relinquished lands, first to the remaining lands of the Port Lawrence Company, and then to the lands respectively purchased by the Piatt and Baum companies, he necessarily became acquainted with the relative interests of all these companies therein. The origin and title of the Michigan University to the tracts Nos. 1 and 2, and the exchange thereof with Oliver, were matters of public notoriety, and proclaimed in the acts of Congress under which the exchange was made. The deed from the university to Oliver recited the material facts respecting the lands given in exchange, and referred to the records of the antecedent negotiations; and the patent itself, from the government, of tracts Nos. 1 and 2, referred to the deed of Oliver to the university, of the lands given in exchange; so that it is most manifest that Williams, as a proprietor in the Port Lawrence Company, and as agent thereof in the relinquishment above referred to, and as a purchaser under Oliver, not only had the most ample means of knowing the nature and character and extent of the title of Oliver to the lands under consideration, but he was positively put upon inquiry in relation to the whole matter. If, under such circumstances, he chose to remain in indolent ignorance or indifference to the title, it was a voluntary ignorance and indifference, which ought not to be permitted to avail him against the rights of the *cestuis que trust*. If we add to this the fact that within two months after the patent was obtained by Oliver, he and Baum united in an agreement with Oliver, by which each was to take a third part in the tracts Nos. 1 and 2, and Nos. 86 and 87 (these tracts never having been relinquished by the Port Lawrence Company to the government), to be laid out as a town, and the lots sold on joint account, it would seem almost incredible that he should not have made some inquiries on the subject. And the only reasonable conclusion seems to be, that he was in as full possession of all the facts as were his partners Oliver and Baum. Another significant circumstance is, that this very agreement contained a stipulation that Oliver should give a quitclaim deed only for the tracts; and the subsequent deeds given by Oliver to him accordingly were drawn up without any covenants of warranty, except against persons claiming under Oliver, or his heirs and assigns. In legal effect, therefore, they did convey no more than Oliver's right, title, and interest, in the property; and under such circumstances, it is difficult to conceive how he can claim protection as a *bona fide* purchaser, for a valuable consideration, without notice, against any title paramount to that of Oliver, which attached itself as an unextinguished trust to the tracts.

And here, in our judgment, the merits of the case would seem to be brought to a close. But certain objections have been made to the right *of the plaintiff to maintain the bill [*411 upon other collateral grounds. In the court below an objection was taken, by way of plea, that the original agreement of the Piatt and Baum companies, in regard to the purchases of these tracts at the public sale in 1817, was an illegal combination in fraud of the rights of the United States, and therefore it makes the whole purchase an utter nullity. This objection was fully answered in the opinion of the Circuit Court, in which, on this point, we fully concur. It has been abandoned by the learned counsel here; and, indeed, in our opinion, properly abandoned, as unmaintainable in point of fact as well as law.

Another objection is to the lapse of time. The mere lapse of time constitutes of itself no bar to the enforcement of a subsisting trust; and time begins to run against a trust only from the time when it is openly disavowed by the trustee, who insists upon an adverse right and interest, which is fully and unequivocally made known to the *cestui que trust*. Now, until 1831, no final overt act was done by Baum in violation of his duty as trustee; and the first and great breach of that duty, on his part, was the surrender of the certificates of the tracts to Oliver at different periods between 1828 and 1831. At what particular period the subsequent acts of Baum, Oliver, and Williams, became first known to the plaintiff and the other proprietors of the Piatt and Port Lawrence companies having the same interest, does not distinctly appear; but the facts could not have been fully known or understood until within a few years before the filing of the bill, and at most, probably not exceeding eight or ten. That period, upon admitted principles, is far too short to interpose any positive bar to relief in equity. There may have been an unjustifiable delay, and gross inattention on the part of some of the proprietors. But as against persons perfectly connusant of the trust it can furnish no ground for any denial of the relief which the case otherwise requires.

Another objection urged at the argument is, that the bill is multifarious in uniting the trust property owned by the Piatt Company and the Port Lawrence Company in one bill, as the

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interests of each are separate and distinct in the tracts conveyed by Oliver to the Michigan University. We are of opinion that the bill is in no just sense multifarious. It is true that it embraces the claims of both the companies; but their interests are so mixed up in all these transactions that entire justice could scarcely be done, at least not conveniently done, without a union of the proprietors of both companies; and if they had not been joined, the bill would have been open to the opposite objection that all the proper parties were not before the court, so as to enable it to make a final and conclusive decree touching all their interests, several as well as joint. It was well observed by Lord Cottenham in *Campbell* v. *Mackay* (1 Mylne & Craig, 603), and the same doctrine was affirmed in this court in *Gaines et ux.* v. *Relf & Chew* (2 How., 619, 642), that it **412*]** is *impracticable to lay down any rule, as to what constitutes multifariousness, as an abstract proposition; that each case must depend upon its own circumstances; and much must necessarily be left, where the authorities leave it, to the sound discretion of the court.[1] But, if the objection were tenable (as we are of opinion it is not), it would be quite too late to insist upon it. The objection of multifariousness cannot, as a matter of right, be taken by the parties, except by demurrer, or plea, or answer; and if not so taken, it is deemed to be waived. It cannot be insisted upon by the parties even at the hearing in the court below, although it may at any time be taken by the court *sua sponte*, wherever it is deemed by the court to be necessary or proper to assist it in the due administration of justice. And at so late a period as the hearing, so reluctant is the court to countenance the objection, that, if it can get on in the cause to a final decree without serious embarrassment, it will do so, disregarding the fault or error, when it has been acquiesced in by the parties up to that time. *A fortiori* an appellate court would scarcely entertain the objection, if it was not forced upon it by a moral necessity. There is no pretense to say that such is the predicament of the present cause in this court.

Another objection taken at the argument is, that Baum's heirs cannot insist upon any title to the property in question, because they are bound by the warranty of their ancestor in the conveyance thereof to Oliver. But this objection has no foundation whatsoever in law, whether the warranty be lineal or collateral; for the heirs here do not claim any title to the property by descent, but simply by purchase; and it is only to cases of descent that the doctrine of warranty applies. For this it is sufficient to cite Litt. sec. 735; Co. Litt., 365; Com. Dig., Guaranty, I., 2, and Bac. Abridgement, Warranty, G, H, I, L. The fact, therefore, that assets descended upon Mary P. Ewing, one of the childern and heirs of Baum, can have no influence upon the right of her husband or herself to enter the land in controversy by purchase, however it might repel their right to take it by descent.

Another objection suggested at the argument was the difficulty of apportioning the respective interests of the *cestuis que trust* in the tracts Nos. 1 and 2. But this difficulty has been overcome; and it constitutes no matter of difference between the Piatt and the Port Lawrence companies, so far as their own interests are concerned, as distinguished from that of Oliver and Williams.

As to the report of the master and the exceptions thereto in the court below, although those exceptions were not formally overruled or allowed; yet it is plain that in the final decree they were all disposed of, some being allowed and others disallowed; and no argument has *been addressed to us upon the present [*413 occasion which points out any specific errors, which require correction beyond those which have been already incidentally hinted at.

We pass over some other objections, which were suggested at the argument, without remark, as this opinion has already been protracted to an unusual length. We need only say, that we see nothing in those objections which requires us to reform the decree of the court below.

Upon the whole, the decree of the Circuit Court is affirmed, with costs.

Cited—4 How., 556; 9 How., 447; 6 Wall., 316; 8 Wall., 214; 9 Wall., 607; 12 Wall., 339; 2 Otto, 186; 8 Otto, 245; 10 Otto, 584; 1 Woods, 59; 11 Bank. Reg., 285; 13 Bank. Reg., 436; 6 McLean, 144; 3 Cliff., 629, 632; 3 McAr., 322.

WASHINGTON BRIDGE COMPANY, *Appellant*,
v.
WILLIAM STEWART, JAMES STEWART, AND JOHN GLENN.

Appeals—jurisdiction—second appeal—what reviewed on—this court has no power to review its decisions—at expiration of term, decree finally conclusive.

After a case has been decided upon its merits, and remanded to the court below, if it is again brought up on a second appeal, it is then too late to allege that the court had not jurisdiction to try the first appeal.

The Supreme Court has no power to review its decisions, whether in a case at law or in equity. A final decree in chancery is as conclusive as a judgment at law.

An affirmance by a divided court, either upon a writ of error or appeal, is conclusive upon the rights of the parties.

THIS was an appeal from the Circuit Court of the United States for the District of Columbia, held in and for the County of Washington, sitting as a court of equity.

The same case was before the court at January Term, 1840, and the decree of the court below affirmed by the Supreme Court, but in consequence of the court being equally divided, no opinion was given, and no report of the case published. It now came up on an allegation that it was improperly brought up before, as the decree, from which the appeal was taken, was said not to be a final decree.

The case was this:

The Washington Bridge Company were the owners of a bridge across the Potomac River, under a charter granted in 1808. In [illegible] 1831, a large part of the bridge was [illegible]

1.—See, also, Story Eq. Plead., sec. 530 to sec. 540, and the authorities there cited. Attorney-General v. Cradock, 3 Mylne & Craig, 85.

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and carried away by the ice and flood; and in April the president and directors called for an installment of ten dollars per share from the stockholders for the purpose of repairing it. The defendants in error did not pay, and their shares were forfeited on the 21st of June, 1832, under the 8th section of the charter.

On the 14th of July, 1832, Congress passed an act to purchase the bridge, and appropriated $20,000 for that purpose, which they directed to be divided amongst the stockholders in the manner therein pointed out.

In May, 1833, the defendants in error filed a [*414] bill in the Circuit *Court, claiming to be stockholders, and, as such, to be entitled to a distributive share of the purchase money. The bridge company resisted the claim on the ground that their shares had been forfeited, and in November, 1838, the cause came on for hearing on the bill, answers, exhibits, depositions, and general replication, when the court made the following decree:

"This cause having been set for hearing upon the bill, answer, general replication, exhibits, and evidence, and coming on to be heard and argued by counsel, it is, on this twenty-ninth day of November, in the year eighteen hundred and thirty-eight, after full consideration, ordered, decreed and adjudged, that the rights and interests of the complainants, and the other stockholders in said bill of complaint mentioned, and who have come in, or may come in, before the final determination of this cause, and procure themselves to be made parties to these proceedings, have not been, and were not forfeited under and by virtue of the proceedings of said bridge company, stated and set forth in the said answer, and exhibits, and evidence, but that the same remain in full force and virtue, and that the said parties are respectively entitled to their proportion of the sum of $20,000, mentioned and stated in said bill of complaint as stockholders in said company; and that, in order to fix and adjust the said proportions or shares of said parties, there be first deducted the sum of $10,561.55, mentioned in said answer, being the sum advanced by certain stockholders, as therein mentioned, with interest thereon from the time the same was advanced to the time of the receipt of the said $20,000, being an average of nine months, for which said interest is to be calculated; also the sum of $568.25, being the amount of unclaimed dividends expended on the said bridge, with interest thereon from the time of said expenditure to the receipt of said $20,000, and that subject to such deductions; and, after the same shall have been made, the said complainants are respectively entitled to, and shall receive their full share and proportion of the interest on the same, which shall have been earned and made of the said sums so due to them respectively pending this suit, under the investment made thereof by complainants.

"And it is ordered, that other items claimed to be deducted be rejected, no evidence having been offered to show their character or their amount.

"And it is further ordered, that the case be referred to the auditor, to state an account in conformity with the principles laid down in this decree."

From this decree the bridge company prayed an appeal to the Supreme Court, where, as has already been stated, it was affirmed by a divided court.

In April, 1840, the case was referred by the Circuit Court to the auditor, who made the following report in November, 1841:

"The undersigned auditor, to whom was referred the papers in *this cause on the [*415 29th of April, 1840, has had the same under examination, and, after a full consideration of the same, begs leave to make the following report: That the amount of funds in the hands of Frederick May, president and treasurer of the Washington Bridge Company, including interest on corporation stock received and to be received, on the 30th June, 1841, is $22,221.52. That the amount refunded the stockholders of fifteen hundred and nineteen shares, which they had advanced towards repairing the bridge, with interest thereon according to the decree; the amount of unclaimed dividends which had been expended for said repair, and also directed to be refunded with interest for nine months; for debt due from the bridge company, including costs of suit; the trustee's commission, auditor's bill, &c., and the payment to said fifteen hundred and nineteen shareholders of ten per cent. upon the cost of their stock, as per statement herewith submitted, amount to $18,991.11, leaving a balance in the trustee's hands of $3,222.41.

"That the holders of the four hundred and seventy-three shares, which were deemed by the company to have been forfeited (but which the court decided were not forfeited), according to the cost of the same, amount to $20,749.17, ten per cent. on the same (being the dividend paid to the first mentioned stockholders) amounts to $2,074.91, as per statement B herewith, leaving a balance, after paying said amount, in the hands of the trustee of $1,147.50.

"In ascertaining the cost of the shares to the present claimants, the auditor has taken pains, as far as possible, to ascertain the same. The principal claimants are John Glenn and the Messrs. Stewarts. In the case of Mr. Glenn, he states on oath that the stock belongs to the estate of Robert Barry, and is held by him as trustee or administrator. Barry was an original subscriber. In the case of the Stewarts, they claim as having obtained it from D. Stewart's estate in the course of distribution, not as purchaser. D. Stewart was an original subscriber. In all other cases, the scale furnished from the president of the company of the current price of the stock at the periods of transfer, have been the sole guide by which to fix the value. Several of the stockholders on the list are known to be dead, and it is not known to the auditor who their representatives are; but in making a distribution of this fund, their rights ought to be preserved, and their fair dividend paid when demanded.

"Doctor May, the trustee, claims $1,000 for his commission on the money received from the treasury ($20,000) for the sale of the bridge. The charge has been objected to by some of the claimants, and the auditor has reduced it to $500; if he has erred in this, the court can correct it.

"The amount of the unclaimed dividends used for repairing the bridge, $568.25, and nine

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months' interest thereon, $25.57, making $593.-82, has been in part paid, but a very considérable part, in all probability, never will be called
416* for, as many of the persons who *were entitled to it are dead, and some insolvent; their representatives knowing nothing of the small amount so many years due. The complainants, however, in the present cause, have no claim on the unclaimed money due to others.

"As regards the disposition to be made of the balance which will remain in the hands of the trustee ($1,147.50), after paying the stockholders ten per cent., the auditor begs reference to his remarks on the general statement herewith. Submitted by

"JOSEPH FORREST, Auditor."

Whereupon the court made the following decree in the premises:

"The report of the auditor in this case having been filed, together with the accompanying statements by him made, and constituting part of the same, and being fully considered by the court, it is, this 4th day of June, eighteen hundred and forty-two, ordered and decreed that the same be, and it is in all respects confirmed. And the said cause coming on for final hearing upon the bill, answer, replication, exhibits, evidence, report of auditor, &c., and being maturely considered, it is further ordered, adjudged and decreed, that the complainants are entitled to the relief prayed, in conformity with the report of said auditor as aforesaid, and that the relief be extended to the other stockholders in said company in the proportions and for the sums mentioned in the statement by the auditor of the stockholders in said company who have not participated in the dividends of said bridge company. And it is further ordered and decreed that the said defendants pay over to said parties respectively, or to their solicitors on record, the said sum so due to them respectively, in conformity with said report and statement and of this decree, together with the costs of this suit to be taxed by the clerk, including the costs of the Supreme Court, on or before the first day of July, 1842, and file with said clerk, on or before said first day of July, 1842, a statement of said payments so made.

"By order of the court."

From this decree the bridge company appealed to the Supreme Court.

Mr. Bradley for the appellants.

Mr. Coxe for the appellees.

Mr. Bradley referred to the record to show that the decree first appealed from was an interlocutory, and not a final decree, and that the Supreme Court had not jurisdiction in such a case. He then proceeded thus:

The appellants are not estopped from denying the jurisdiction of the Supreme Court to which they appealed in that cause, as the want of jurisdiction is apparent in the record. (See *Wilson* v. *Hobday*, 4 M. & S., 120.)

417* *That was debt on a replevin bond given by the defendant to the mayor of Canterbury, and the breach assigned was, that the defendant did not appear and prosecute his replevin in the Mayor's Court. The defendant demurred to the declaration, and, among other things, assigned as cause of demurrer, that it did not appear upon the declaration that the mayor had jurisdiction to grant replevins, and to take bond, &c.

The court was of opinion that it did sufficiently appear, that the mayor *prima facie* had jurisdiction, and upon that ground only overruled the demurrer; whereas if they had been of opinion that the defendant was estopped to deny the jurisdiction, because he had resorted to that court for relief, they would have decided the case upon that ground rather than on the doubtful ground, that the mayor had jurisdiction, and which they took great pains to support.

(See, also, *Ketland* v. *The Cassius*, 2 Dallas, 368.) "The court is bound to take notice of a question of jurisdiction whenever it may occur, and however it may be proposed; for, if we are satisfied that we have not legal cognizance of any cause, or in terms less direct, if we are not satisfied that we have cognizance, we ought not to proceed to a decision or an investigation upon its merits." (Per Wilson, *J.*)

A plaintiff may assign for error the want of jurisdiction in that court to which he had chosen to resort. It is the duty of the court to see that they have jurisdiction, for the consent of parties cannot give it; and if they decide a case of which they have no jurisdiction, it is the error of the court. The decision is void because *coram non judice*. (*Capron* v. *Van Noorden*, 2 Cranch, 126.)

(*Crow* v. *Edwards*, Hobart 5.) "Consent of parties cannot change the law:" *a fortiori*, cannot give jurisdiction.

"The courts of the United States are all of limited jurisdiction, and their proceedings are erroneous, if the jurisdiction be not shown upon them;" but *quære*, whether judgments in such cases are absolute nullities, which may be totally disregarded. For, it does not follow that the court had not jurisdiction, because all the circumstances necessary to give jurisdiction do not appear in the proceedings. It is error, however, not to state them; and the judgment may therefore be reversed. But, if it does appear upon the proceedings that the court had not jurisdiction, the judgment is an absolute nullity, and may be totally disregarded. See *Kempe's Lessee* v. *Kennedy* (5 Cranch, 185), *The Life Insurance Company* v. *Adams* (9 Peters 602, before cited), *Decatur* v. *Paulding* (14 Peters, Appendix, 609), and *Skillern's Ex.* v. *May's Ex.* 6 (Cranch, 268), in which the Supreme Court decided, and as the merits of the cause had been finally decided in that court, and its mandate required only the execution of its decree, the Circuit Court was bound to carry this decree into execution, although the jurisdiction of that court was not alleged in the pleadings.

*Letters of administration, granted [*418 while there is a qualified executor capable of acting, are absolutely void. (*Griffith* v. *Frazier*, 8 Cranch, 26.)

In the case of *Houston* v. *Moore* (3 Wheat. 433), the court said, that the jurisdiction of the Supreme Court under the 25th section of the Judiciary Act of 1789 extends only to a final judgment or decree; and that a judgment reversing that of an inferior court, and awarding a *venire de novo*, is not a final judgment; and in *Martin* v. *Hunter* (1 Wheat., 355), that a decree affirming an interlocutory decree is not a final decree; and in *Weston* v. *City of Charleston* (2 Peters, 454), that a final judgment is that which determines the particular cause: it nec

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not finally decide upon the rights litigated; and in *Rutherford* v. *Fisher* (4 Dallas, 22), that a decree, overruling in equity a plea of limitations, and ordering the defendant to answer, is not a final judgment; and Chase, *J.*, said, that "in England a writ of error may be brought upon an interlocutory decree or order; but here the words of the act allow it only in the case of a final judgment." In *Young* v. *Grundy* (6 Cranch, 51), the Supreme Court said no appeal or writ of error will lie to an interlocutory decree dissolving an injunction—the same in *Gibbons & Ogden* (6 Wheat., 448); and in *The Palmyra* (10 Wheat., 502), a decree for restitution, with costs and damages, before the court had acted upon the report of the commissioner as to the damages, was held not to be a final decree.

In *Owen* v. *Hurd* (2 T. R., 643, 644), it appeared that the court had no jurisdiction, because the arbitration had not been made a rule of court. The parties agreed to waive the objection and go into the merits, but Lord Kenyon, *Ch. J.*, said, "that could not be done; for the court were bound to take notice that they had no jurisdiction; and he remembered an instance, many years ago, when, there being no title to the affidavits in the cause, the court said they could not take any notice of them, even though the counsel on the other side did not wish to take the objection." (See *Bingham* v. *Cabot et al.*, 3 Dallas, 32, *note.*) In *Ross* v. *Triplett* (3 Wheat., 600), the Supreme Court said that its jurisdiction extends only to final judgments and decrees of the Circuit Court of the District of Columbia, not to cases where the opinion of the judges of that court were divided.

In the case of *The Abby* (1 Mason, 363, 364), *Mr. Justice* Story said: "It cannot be admitted that any party can first affirm the jurisdiction by taking the property on bail, and then turn round and deny the same jurisdiction, when the court can no longer administer effectual relief to the interests of other persons. The party is estopped by his own acts from such a proceeding. A plea to the merits is an admission that the jurisdiction of the court is well founded, and a decree upon those merits cannot afterwards be arrested, unless the defect of jurisdiction be apparent on the face of the record."

419*] *But if the defect of jurisdiction be already apparent on the face of the record, and there is no necessity to introduce into the record any fact to show the want of jurisdiction, the party is not estopped from availing himself of such defect, and the court is as much bound to take notice of it as if it had been pleaded.

So in *Fisher* v. *Harnden* (1 Paine, 58), *Mr. Justice* Livingston said: "Where a court has jurisdiction, it has a right to decide every question that occurs in the cause; and, whether its decision be correct or otherwise, its judgment, until reversed, is considered as binding. But if it act without authority, its judgments are considered as nullities, and form no bar to a recovery, which may be sought in opposition to them, even prior to a reversal."

If, then, the judgment of this court, thus technically affirming the interlocutory decree of the Circuit Court, is a mere nullity, as we think it is, the cause now comes before this court for the first time upon its real merits, and the counsel for the original defendants, now appellants, respectfully submit the following argument.

[The argument of *Mr. Bradley* upon the merits of the case is omitted, because the decision of the court turned upon the preceding point.]

Mr. Coxe, for appellees:

This case originated in a bill in equity filed by the appellees, on behalf of themselves and others in the Circuit Court for the County of Washington, in May, 1833.

After a tedious prosecution of the cause, a decree was rendered in November Term, 1838, by the Circuit Court. The chief judge, Cranch, being interested in the case, as one of the defendants, did not sit in the cause, and, consequently, the decree was made by the concurring opinions of the two other judges.

The decree having been made, the defendants, now the appellants, prayed an appeal to the Supreme Court, and, in January Term, 1840, the decree of the Circuit Court was affirmed with costs. The mandate from the Supreme Court directed to the Circuit Court, commanding that such execution and proceedings be had in the said case, as, according to right and justice, and the law of the United States ought to be had, was filed on the 3d April, 1840.

The case was referred to the auditor to state an account in conformity with the principles laid down in the decree. The auditor made his report in November Term, 1841. To this report no exceptions were taken by either party, and it was accordingly, in conformity with the practice of the Circuit Court, confirmed 4th June, 1842.

From this decree the defendants again appeal, and thus the case is for the second time brought up for decision.

It will be observed by the court that the argument submitted on behalf of the appellants presents no objection to any proceeding or *action of the Circuit Court subsequent [*420 to the former decree of this court. It contains no objection to the report of the auditor, no allegation that it was not in precise accordance with the mandate of this court issued in January, 1840.

The argument now addressed to the court on the part of the appellants seeks to establish three positions:

1. That the former decree, having been made by a divided court, is not to be regarded as an adjudication of the rights of the parties.

2. That inasmuch as further proceedings were necessary to carry out that decree, the decree of the Circuit Court then appealed from was not final, and consequently the Supreme Court had no jurisdiction of the case, and all its proceedings, being *coram non judice*, are null and void.

3. That the real merits of the case being open now for the first time, this court will re-examine those merits, and decree in opposition to its former judgment.

These questions have an importance far beyond the interests involved in this particular case.

1. The question is not, what is to be recognized, here or elsewhere, as the authority of a decision of the Supreme Court when the judges were

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equally divided, in case such decision should be cited as an authoritative adjudication of principles? It is, however, insisted that this case was decided—that it passed into *rem judicatam*. The law is perfectly well settled that when this court is equally divided in opinion upon a writ of error, the judgment of the inferior court is affirmed. (*Etting* v. *Bank of United States*, 11 Wheat., 59.) The judgment has the same force and effect in every particular as if it had passed by the unanimous opinion of the court.

2. The decree of the Circuit Court upon which the decree of affirmance passed, not being a final judgment, this court had no jurisdiction.

This ground of objection is not entitled to much favor from this court. The now appellant was then the appellant. He invoked the jurisdiction of this court, and, having been unsuccessful in his application, now denies the validity of his own acts, disclaims a jurisdiction which he himself sought, and denies the authority of the court into which he himself compelled his antagonist to meet him.

But the answer to this objection is twofold:

1. The question is not now open whether or not this court had jurisdiction of the former case; nor has this court now jurisdiction to examine its own judgment passed four years since, and to reverse it for any cause of error. (*Skillern's Ex'rs* v. *May's Ex'rs*, 6 Cranch, 267.)

The question certified from the Circuit Court of Kentucky to the Superior Court for its decision, was, whether the cause could be dismissed from the Circuit Court for want of ju-
421*] risdiction after the *case had been removed by writ of error to the Supreme Court, and that court had acted upon and remanded the cause to the Circuit Court for further proceedings. It was held that the objection came too late.

It is manifest that if the Circuit Court had no jurisdiction of the case, that the only question over which this court could exercise authority was the single one of jurisdiction. When, therefore, it was held that it was too late to question the jurisdiction of the Circuit Court, *a fortiori* it was too late to question that of the Supreme Court.

The ground of objection now urged existed when the case was formerly before the Supreme Court. It might then have been urged. If not noticed by counsel, it was competent for the court *ex mero motu* to take cognizance of it, and to dismiss it for that cause. In adjudicating upon the merits of the case, this court has, by necessary implication, asserted its jurisdiction. It is alleged that the judgment was not final. This point was fully argued in *McDonough* v. *Millaudon*, at the present term. The whole law of the case was settled; nothing remained but the ministerial duty of stating the account, which is in the nature rather of an execution to carry out the decree.

If there be error in this, how can this error now be rectified? It will hardly be contended that this can be assimilated to some which have been cited, and that the judgment rendered in 1840 was *coram non judice*, and consequently an absolute nullity.

In *Kempe's Lessee v. Kennedy* (5 Cranch, 185), this court held that such was not the case in regard to the courts of the United States. If jurisdiction does not appear on the face of their proceedings, their judgments are erroneous and reversible, but they cannot be considered as nullities which may be totally disregarded.

In this aspect of the case, the present appeal, although nominally and in form an appeal from a decree of the Circuit Court rendered in June, 1842, is substantially an appeal from a decree of this court rendered in January, 1840.

It is contended upon this point,

1. That there is no mode pointed out by law in which an erroneous judgment of this court can be reviewed and reversed either in this or any other court.

2. That upon this appeal nothing is before this court but the proceedings of the Circuit Court upon and subsequent to the mandate.

Both of these points have been conclusively settled by a series of adjudications.

(*Himely* v. *Rose*, 5 Cranch, 316.) This cause came up a second time by an appeal, and the chief justice declared that nothing was before the court except what was subsequent to the mandate. In 316, in delivering the opinion of the court, he again says: "A decree *hav- [*422
ing been formerly rendered in this cause, the court is now to determine whether the decree has been executed according to its true intent and meaning."

(*Martin* v. *Hunter's Lessee*, 1 Wheat., 364.) This case was brought before the Supreme Court on a writ of error upon proceedings subsequent to the mandate formerly awarded, and the error assigned was in the judgment of the Court of Appeals of Virginia, which had solemnly decided that the Supreme Court did not possess the appellate jurisdiction which it had exercised in rendering the former judgment. The points of difference which distinguish that case from the one at bar, are, 1st, that in *Martin* v. *Hunter* the court below had adjudged that this court had no jurisdiction, and therefore its proceedings were *coram non judice;* here the Circuit Court has without hesitation recognized the authority of this court, and has in duty bound executed its mandate. 2d. In *Martin* v. *Hunter* the objection was made by a State court jealous of its rights and powers, and by parties brought unwillingly before the federal tribunal; here it is the suggestion of the very party who voluntarily invoked the appellate jurisdiction of this court. 3d. In that case the judgment of the inferior court embodied and asserted the defect of jurisdiction, and it was that judgment which was to be reviewed; in this case it is sought to give to this appeal the force and effect of an appeal directly from the decree of the Supreme Court itself.

In p. 355, the court says: "To this argument several answers may be given. In the first place, it is not admitted that upon this writ of error the former record is before us." "In the next place, in ordinary cases a second writ of error has never been supposed to draw in question the propriety of the first judgment and it is difficult to perceive how such a proceeding could be sustained upon principle. A final judgment of this court is supposed to be conclusive upon the rights which it decides, and no statute has provided any process by which this court can revise its own judgments.

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In several cases which have been formerly adjudged in this court, the same point was argued by counsel and expressly overruled. It was solemnly held that a final judgment of this court was conclusive upon the parties and could not be re-examined. (*Browder* v. *McArthur*, 7 Wheat., 58.)

On an appeal, after a mandate, counsel applied for a rehearing of the original case. The court refused to allow it, being of opinion that it was too late to grant a rehearing after the cause had been remitted to the court below, &c., and that a subsequent appeal from the Circuit Court for supposed error in carrying into effect such mandate, brought up only the proceedings subsequent to the mandate, and did not authorize an inquiry into the merits of the original decree. (*The Santa Maria*, 10 Wheat., 442.)

Himely & Rose is affirmed, and it is said that the original proceedings are before the court on 423* the second appeal only for the purpose* of enabling it to see and adjudge any new points which were not terminated by the original decree. (*Ex parte Sibbald*, 12 Peters, 492.)

We think proper to state our settled opinion of the course which is prescribed by the law for this court to take, after its final action upon a case brought within its appellate jurisdiction, as well as that which the court whose final decree or judgment has been thus verified ought to take. Appellate power is exercised over the proceedings of inferior courts, not on those of the appellate court. The Supreme Court have no power to review their decisions, whether in a case at law or equity. A final decree in chancery is as conclusive as a judgment at law. Both are conclusive on the rights of the parties thereby adjudicated.

No principle is better settled, or of more universal application, than that no court can reverse or annul its own final decrees or judgments, for errors of fact or law, after the term in which they have been rendered, except for clerical mistakes, or to re-instate a cause dismissed by mistake; from which it follows, that no change or modification can be made which can vary or affect it in any material thing.

When the Supreme Court have executed their power in a cause before them, and their final decree or judgment requires some further act to be done, it cannot issue an execution, but shall send a special mandate to the court below to award it. Whatever was before the court, and is disposed of, is considered as finally settled. The inferior court is bound by the decree, as the law of the case, and must carry it into execution according to the mandate. They cannot vary it, or examine it for any other purpose than execution; or give any other or further relief; or review it upon any matter decided on appeal, for error apparent; or intermeddle with it, further than to settle so much as has been remanded. After a mandate, no rehearing will be granted. It is never done in the House of Lords; and on a subsequent appeal nothing is brought up but the proceedings subsequent to the mandate. After this distinct exposition of the law by the Supreme Court, it would be a work of supererogation for me to vindicate it from the charge of usurping a jurisdiction not vested in it by law, or to establish the correctness of a judgment which this high tribunal has rendered. Should this be deemed important, I proffer myself ready to show that the former decree of the Circuit Court was a final decree, within the meaning of the Judicial Act and the practice of this court; and that the decree, as well as that affirming it, was right.

No exception having been taken to the report of the auditor, and no error being assigned in that or in the final decree, it is submitted that the case is within the 17th rule of the court, and that the decree of the Circuit should be affirmed, with ten per cent. damages.

*Mr. *Justice* WAYNE delivered the [*424 opinion of the court:

This cause is now before us upon an appeal from a decree of the Circuit Court, made by it upon an auditor's report, in conformity with the mandate issued by this court, when the cause was before it upon a former occasion.

The appellants did not except to the auditor's report, in the court below. When the cause was tried upon the first appeal, the decree of the Circuit Court was affirmed by a divided court.

We are now asked by the counsel for the appellants to permit him to re-examine the decree of the Circuit Court, upon its merits, affirmed as it was by the Supreme Court, upon the ground that the affirmance was made when this court had not jurisdiction of the case; the first appeal having been taken upon what has since been discovered to have been an interlocutory and not a final decree.

The Supreme Court certainly has only appellate jurisdiction, where the judgment or decree of the inferior court is final. But it does not follow, when it renders a decree, upon an interlocutory and not a final decree, that it can, or ought, on an appeal from a decree in the same cause, which is final, examine into its jurisdiction upon the former occasion. The cause is not brought here in such a case for any such purpose. It was an exception, of which advantage might have been taken by motion on the first appeal. The appeal would then have been dismissed for the want of jurisdiction, and the cause would have been sent back to the Circuit Court for further proceedings. But the exception not having been then made of the alleged want of jurisdiction, the cause was argued upon its merits, and the decree appealed from was affirmed by this court. Its having been affirmed by a divided court, can make no difference as to the conclusiveness of the affirmance upon the rights of the parties. It is settled, that when this court is equally divided upon a writ of error or appeal, the judgment of the court below stands affirmed. (*Etting* v. *Bank of the United States*, 11 Wheat., 59; the case of *The Antelope*, 10 Wheat., 66.) Having passed upon the merits of the decree, this court has now nothing before it but the proceedings subsequent to its mandate. So this court said in *Himely & Rose*, and in the case of *The Santa Maria* (5 Cranch, 314; 10 Wheat., 431). Its decree became a matter of record in the highest court in which the cause could be finally tried. To permit afterwards, upon an appeal from proceedings upon its mandate, a suggestion of the want of the jurisdiction in this court, upon the first appeal, as a sufficient cause for re-examining the judgment then given, would certainly

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be a novelty in the practice of a court of equity. The want of jurisdiction is a matter of abatement, and that is not capable of being shown for error to indorse a decree upon a bill of review. Shall the appellant be allowed to do more now than would be permitted on a bill of review, if this court had the power to grant him such a remedy? If he was, we should then have a mode for the review of the decrees of 425*]*this court, which have become matters of record, which could not be allowed as an assignment of error for a bill of review, in any of those courts of the United States in which that proceeding is the ordinary and appropriate remedy.

The application has been treated in this way, to show how much at variance it is with the established practice of courts of equity.

It might, however, have been dismissed, upon the authority of a case in this court, directly in point (*Skillern's Executors* v. *May's Executors*, 6 Cranch, 267), and upon the footing that there is no mode pointed out by law, in which an erroneous judgment by this court can be reviewed in this or any other court. In *Skillern's* case, the question certified by the court below to this court, for its decision, was, whether the cause could be dismissed from the Circuit Court, for want of jurisdiction, after the cause had been removed to the Supreme Court, and this court had acted upon and remanded the cause to the Circuit Court, for further proceedings. This court said: "It appearing that the merits of the cause had been finally decided in this court and that its mandate required only the execution of its decree, it is the opinion of this court that the Circuit Court is bound to carry that decree into execution, although the jurisdiction of that court is not alleged in the pleadings." The jurisdiction of this court, in that case, was as defective as it is said to have been in this. When that cause was before this court, though the judgment of the court below on it would have been reversed, upon motion, for the want of jurisdiction on the face of the record, the defect having escaped the notice of the court and of counsel, and the court having acted upon its merits, it determined that its decree should be executed. The reason for its judgment no doubt was, that the motion to dismiss the case, in the court below, for the want of jurisdiction, after it had been before the Supreme Court by writ of error, and had been acted upon, would have been equivalent, had it been allowed, to a decision that the judgment of this court might be reviewed, when the law points out no mode in which that can be done, either by this or any other court. The want of power in this court to review its judgments or decrees, has been so frequently determined by it, that it is not now an open question. Such is the result of what the court said in *Himely & Rose* (5 Cranch, 314). The court says, in *Martin* v. *Hunter's Lessee* (1 Wheat., 304), in reply to the allegation that its judgment had been rendered when it had not jurisdiction: "To this argument several answers may be given. In the first place, it is not admitted that upon this writ of error the former record is before us. In the next place, in ordinary cases, a second writ of error has never been supposed to draw in question the propriety of the first judgment, and it is difficult to perceive how such a proceeding could be sustained on principle. A final judgment of this court is supposed to be conclusive upon the rights it decides, and no statute has provided any process by which this court can reverse its *judgments. In several [*426 cases formerly adjudged in this court, the same point was argued, and expressly overruled. It was solemnly held, that a final judgment of this court was conclusive upon the parties, and could not be re-examined." In *Browder* v. *McArthur* (7 Wheat., 58), counsel applied for a rehearing; the court refused it, saying a subsequent appeal brought up only the proceedings subsequent to the mandate, and did not authorize an inquiry into the merits of the original decree. The same is said with equal positiveness in the case of *The Santa Maria* (10 Wheat., 442). To these cases we add an extract from the opinion of the court, given by the late Mr. *Justice* Baldwin, in *Ex-parte Sibbald* (12 Peters, 492). That case called for the most careful consideration of the court. "Before we proceed to consider the matter presented by these petitions, we think it proper to state our settled opinion of the course which is prescribed by the law for this court to take, after its final action upon a case, brought within its appellate jurisdiction, as well as that which the court, whose final decree or judgment has been thus verified, ought to take. Appellate power is exercised over the proceedings of inferior courts, not on those of the appellate court. The Supreme Court has no power to review its decisions, whether in a case at law or in equity. A final decree in chancery is as conclusive as a judgment at law. (1 Wheat., 355; 6 Wheat., 113, 116.) Both are conclusive of the rights of the parties thereby adjudicated."

These cases are decisive of the motion made in this case, and as the decree now appealed from carries into execution the mandate issued by this court upon the first appeal, we direct it to be affirmed.

Cited—6 How., 38; 18 How., 42; 20 How., 542; 12 Wall., 129, 603; 17 Wall., 283; 22 Wall., 246; 5 Otto, 143; 12 Otto, 255; 1 Brown, 22; 2 Wood. & M., 81; Blatchf. Pr., 265, 315; 2 Curt., 239.

RICHARD NUGENT, Assignee of ELIZABETH NORTON, in Bankruptcy, *Plaintiff in Error*,

v.

GEORGE W. BOYD, ISAAC T. PRESTON, AND ABNER PHELPS, *Defendants*.

Judgment prior to bankruptcy operating as mortgage—bill to deprive creditor of, dismissed.

The principles established in the case of *Ex-parte* The City Bank of New Orleans, in the matter of Christy, assignee of Walden, renewed and confirmed.

But this court does not decide, whether or not the jurisdiction of the District Court over all the property of a bankrupt, mortgaged or otherwise, is exclusive, so as to take away from the State courts in such cases.

THIS case came up by appeal from the Circuit Court of the United States for East Louisiana, sitting as a court of equity.

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The controversy was between the bankrupt's assignee, on one side, and a mortgage creditor and purchasers at the sale under State process of the mortgaged premises, on the other. The 427*] points to be *decided grew out of the bankrupt law, and especially out of the saving in favor of State liens in the 2d section, and the jurisdiction granted to the district and circuit courts of the United States in cases of bankruptcy by the 6th and 8th. The validity of certain rules established by the District Court of Louisiana, sitting in bankruptcy, was questioned, and the mortgage creditor, not having proved under the commission, claimed exemption from those rules, and asserted the right to pursue his prior lien in the State court.

The complainant's bill stated in substance, that Elizabeth Norton filed her petition to be declared a bankrupt, on the 9th May, 1842. On the 1st June, it was decreed accordingly, and Richard Nugent appointed assignee.

At the time, and long before the date of the petition, George W. Boyd, one of the defendants, was the holder of notes, secured by mortgage duly recorded according to the laws of Louisiana, for the sum of $9,000, on which judgment had been rendered, order of seizure and sale granted, and execution issued and been levied, all before the date of the bankrupt's petition. The levy took place on the 16th of February, 1842. The sale was the only proceeding after the date of the decree of bankruptcy; that decree being dated the 1st, and the sale taking place on the 4th of June, 1842.

The bill admitted that all the forms and notices, &c., required by the laws of Louisiana for the sale of mortgaged premises under execution, were observed; but set up the petition and decree of bankruptcy, made before the sale, and alleged, that before the property was sold the assignee gave written notice of the decree, and of his appointment as assignee under it, to the sheriff, the mortgage creditor, Boyd, and to Preston and Phelps, who afterwards became the purchasers of the mortgaged premises at sheriff's sale, cautioning them respectively, and claiming at the same time the right to stay the sale, and take the property into his own hands for sale and distribution under the rules of the bankrupt court. Copies of the proceedings in bankruptcy and of the rules of the Bankrupt Court were made exhibits to the bill. These general orders of the District Court of the United States for the District of Louisiana, sitting in bankruptcy, and purporting to be made in pursuance of the authority delegated to it by the Bankrupt Act, and especially the 6th section thereof, provided, in substance, that notice should be served on all creditors of the bankrupt who had any special mortgage, lien, or privilege. The assignee was authorized to take a rule on the mortgage creditor to show cause why the mortgaged premises should not be sold by the assignee; and the court would thereupon pass an order of sale, which order should *ipso facto* annul the mortgages, liens, &c., existing on the property sold, and upon its presentation to the recorder of mortgages, he should be required to cancel the inscription of all such mortgages, liens, &c., on his records; and the liens, privileges, &c., should attach to the proceeds in the 428*] hands *of the assignee. The mortgage creditor was entitled, under certain reservations, to prescribe the terms of sale, and at such sale might become the purchaser, but was required to pay the expenses and commissions on the sale, and the surplus, if any, over and above the amount of his mortgage; but these privileges were allowed only on the condition of his filing the proof of his debt in the registry of the court.

The complainant alleged, that by the act of Congress the rules aforesaid made in pursuance thereof, and the proceedings thereunder in the case of the bankrupt, the sale should have been stayed, and the said George W. Boyd having been notified and cited to appear and contest the proceedings in bankruptcy, all the acts done under color of the State process, after the date of the petition, were irregular and void; that Preston and Phelps having also been notified and cautioned, they derived no title from the sheriff's sale, such sale being invalid.

The bill prayed that the sheriff's sale might be set aside, the title of Preston and Phelps declared null; that George W. Boyd be compelled to come into the District Court, sitting in bankruptcy, and conform himself in all things to the rules of said court in such cases, and for other and general relief.

To this bill there was a demurrer, which, admitting all the facts, insisted, in point of law,

1. That the petition, decree, appointment of of the assignee, &c., did not prevent the mortgage creditor from enforcing his lien under the process of the State court.

2. That the District Court had no right to pass the rules insisted on.

3. That the mortgage creditor was not bound by law to submit his claims to the District Court, sitting in bankruptcy, but might elect not to prove his debt, and still pursue his lien and remedy under the law.

4. That the title obtained at the sheriff's sale was, according to the facts set forth by the complainant, a good title for the purchasers against the assignee.

On the hearing of the argument on the bill and demurrer, the Circuit Court sustained the demurrer, and ordered the bill of the complainant to be dismissed.

From this decree the complainant appealed.

The cause was submitted, upon printed arguments, by *Mr. Richard Nugent* for the appellant, and *Messrs. Wilde* and *Henderson* for the appellees.

The argument for the appellant was as follows:

It having been agreed by all parties to submit this case in printed briefs, so as to expedite its decision, and the final proceedings in the Bankrupt Court, the appellant respectfully represents, that the facts *set forth by [*429 the bill being admitted by the demurrer, and substantially set forth in the statement of the appellees, it is unnecessary here to repeat them. The contest is one entirely of law; and as the best and most conclusive argument he can present, the appellant annexes hereto certain decisions heretofore made on the points in controversy in similar cases, by the Supreme Court of Louisiana, and the Circuit Court of the United States for the Louisiana District. These decisions were all rendered after elabo-

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rate argument, on due deliberation, and disclose so fully the reasons on which they are founded, that it cannot be requisite for the appellant to do more than state the principles established by them. These courts have considered, that, to prevent confusion, and secure uniformity of action and decision, it is indispensable that all the claims of all the creditors, without distinction, be brought before the Bankrupt Court, and that all the property to which the bankrupt may have any claim shall be administered, sold, and distributed, under the authority of that court, no matter what liens exist upon it. These liens themselves cannot, indeed, be disputed or impaired, and against that the rules of the Bankrupt Court have made due provision; but they cannot be enforced under State laws and process, for that must inevitably disturb the uniform and harmonious administration of the Bankrupt Act.

Hence it has been held, that, from the moment of filing the petition, the bankrupt became incompetent to stand in judgment in the State courts, and that the assignee in bankruptcy has the right to cause the State process to be stayed, to take the property into his own possession, and to sell it free from the mortgage, leaving to the mortgagee the right to claim the proceeds in the court of bankruptcy, under such rules as that court may prescribe. Such has been the practice of the Bankrupt Court in Louisiana, and the rules annexed as an exhibit to the bill were adopted by the District Court of the United States, in analogy to, or conforming with them. The power to prescribe such rules is given by the 6th section of the Bankrupt Act, and they contain nothing repugnant to the proviso in the 2d section, since the State liens are saved.

There is also a distinction to be noted between the legal effects of a mortgage in the State of Louisiana, and the common law mortgage. Under the latter, the legal title passes to the mortgagee. According to that system, therefore, the assignee does not acquire the legal title by the assignment, and mortgaged property consequently is not subject to administration and sale, as part of the bankrupt's effects. The mortgage of Louisiana is thus defined: "Mortgage is a right granted to the creditor over the property of his debtor, for the security of his debt, and gives him the power of having the property seized and sold in default of payment." (Civil Code of Louisiana, art. 3245.)

Hence the legal estate in, and possession of, **430***] the mortgaged premises *in Louisiana, remains in the mortgageor, and passes to his assignee. Being seized of the legal estate and in possession, it is for him to sell. In other States, the legal title passing to the mortgagee does not rest in the assignee of the bankrupt mortgageor, and consequently the decisions in other States are not applicable here.

The argument for the appellees was the following:

The decisions of the Supreme Court of Louisiana, and the Circuit Court of the United States, for the Louisiana District, as well as the rules in cases of bankruptcy, adopted by the District Court, all of which are relied upon by the complainant, proceed upon the mistaken assumption of an analogy between the *cessio bonorum* or *concurso de acreadores* of the Louisiana Law, and the Bankrupt Act of the United States, and a supposed obligation or authority to model the one upon the other. There is no such analogy and no such authority.

The Louisiana *concurso* requires all the creditors of the bankrupt to come in, grants an immediate cessation of all actions of every description against him, and vests in the syndic all his property without distinction, with power to sell, cancelling all mortgages and liens, and conveying an absolute and clear title to the purchaser. The rights of the several creditors are settled contradictorily, and the liens on the property sold, which have been cancelled by order of the syndic, attach upon the proceeds of the property in his hands. (*Elsoes* v. *Estevan*, 1 Marl., 193; Code of 1824, art. 2172; Greiner Lou. Dig., tit. Insolvency, 237; and the authorities quoted in *Fisher* v. *Vose*, 3 Robinson, L. R., 475.)

In the bankrupt law there is nothing of all this. The mortgage creditor is not compellable to prove his debt under the bankruptcy. He may rely upon his lien, and assert and prosecute it under the State law and process. There is no authority to stay his proceedings, unless his mortgage is fraudulent or void, or alleged to be paid off, none of which is pretended here.

If he elects to come into the Bankrupt Court and prove his debt, he thereby relinquishes his mortgage or other lien, and stands upon the same footing as an ordinary creditor. There is no power given by the Bankrupt Act to the court, or to the assignee, to discriminate in the distribution of the proceeds of property sold by the assignee, between creditors holding liens on it and those holding none. The only authority the assignee has, is to redeem the mortgage under the order and direction of the court. (Sec. 11.) If he does not choose to redeem, he has no power to enjoin the proceedings of the mortgage creditor. That would be to impair the lien, contrary to the proviso of the 2d section.

To prevent or obstruct the recovery of debts, has been held impairing the obligation of contracts. To prevent or obstruct the assertion of a lien, and take away the existing remedy upon it, must impair the lien.

*All the decisions of this court upon [***431** the former subject are authorites for us.

The dissenting opinions of *Judge* Bullard, in the State of Louisiana, against the sheriff of the first judicial district, and J. D. Roasenda, for a prohibition, and in the case of *F. B. Conrad, Assignee of Thomas Banks*, for a *mandamus*, which are before your honors in this case, outweigh, as we humbly contend, in soundness and acuteness of argument, the contrary decisions of his brethren. *Scevola asscatior.*

The wide range of judicial legislation exercised by the District Court, in providing that "the order of sale shall, *ipso facto*, annul the mortgages, liens, &c., existing on the property sold," and the vast addition to, and alteration in, the bankrupt law, thus made, cannot receive the sanction of this court. What part of the act authorizes the District Court to attach liens on the proceeds of property sold, to distribute such proceeds otherwise than ratably, without discrimination, or to force into its forum a mortgage creditor who chooses to rely upon his lien, and not to prove his debt?

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Whence does that court derive its power to order a State register of mortgages to cancel the inscription of such mortgages on his records? If he refuses, how is such order to be enforced? If enforced, what is its effect? The Supreme Court of Louisiana, indeed, courteously lends its aid to enforce the decrees of the District Court sitting in bankruptcy, but will the courts of other States do so? If not, is the District Court of the United States armed with authority to enforce its own mandate against a State officer, in regard to his official duty under the laws of the State, as to the registration and cancellation of mortgages? Can such a pretension be maintained in all the States? And how is uniformity in the administration of the bankrupt law to be secured, by the adoption of rules going far beyond its text, and most certainly incapable of execution in many of the States?

This branch of the subject assumes a tenfold importance when the court considers that these rules and orders, and the decrees passed under them, constitute a part of the extraordinary bankrupt jurisdiction granted to the District Court alone, under the 6th section. Such decrees, this court had decided, are without appeal. (*Nelson* v. *Carland*, 1 Howard.)

While concurrent jurisdiction, therefore, is granted by the 8th section to the circuit and district courts, of all suits at law and in equity, which may be brought by an assignee against anyone claiming an adverse interest, or by such person against the assignee, and the suit so brought may be carried, by appeal, to this tribunal, the hasty and inconsiderate orders of the District Court in bankruptcy, though they may work irreparable injury, are not subject to any supervision.

On the score of authority, it cannot be ex-
432*] pected we should do *more than produce the decisions of circuit or district judges. These questions have not yet been adjudicated in this court.

We rely on the following cases, decided by judges of this court on their circuits or by district judges, respectable for learning and ability.

The decision of *Mr. Justice* Baldwin in the matter of *Kerlin, a bankrupt*, reported in the United States Gazette, of Philadelphia, of 26th October, 1843.

The decision of *Mr. Justice* Story in the case of *Mitchel, Assignee of Roper*, v. *Winslow et al.*, in the Circuit Court of Maine, reported in the Law Reporter of Boston, for December, 1843, pp. 347 and 360.

Mr. Justice McLean's decision in the case of *N. C. McLean, Assignee in Bankruptcy*, v. *The Lafayette Bank, J. S. Buckingham et al.*; to be found in the Western Law Journal for October, 1843, p. 15.

Mr. Justice McLean's decision in the case of *N. C. McLean, Assignee*, v. *James F. Meline*. (Western Law Journal for November, 1843, p. 51.)

Mr. Justice Story's decision in the case of *Muggridge* (5 Law Rep., 857); in *Ex-parte Cook* (5 Law Rep., 444); *Ex-parte Newhall* (5 Law R., 506); in *Dutton* v. *Freeman* (5 Law R., [illegible]).

Mr. Justice Thompson's decision in *Haughton* v. [illegible] (5 Law R., 506).

Judge Prentiss's (of Vermont) opinion in *Ex-parte Spear* (5 Law R., 399), and *Ex-parte Comstock* (5 Law R., 165).

Judge Conkling's (of New York) opinion in *Ex-parte Allen* (5 Law R., 368).

Judge Monroe's (of Kentucky) opinion in Niles's Register, 5th November, 1842; and those of Irwin, Randall, and Gilchrist. (*Ibid.*)

These cases, it is humbly submitted, established the doctrine for which the defendants contend, namely: that the State lien in this case was properly and rightfully enforced under the State law and process; that the rules of the District Court of Louisiana relied upon are void and without force, exceeding the jurisdiction of that court, and interpolating new principles into the Bankrupt Act; that the title required by Preston & Phillips, at Sheriff's sale, under execution founded upon the mortgage, is good, valid against the assignee; and that the demurrer was properly sustained, and the bill rightfully dismissed.

"Proceedings in bankruptcy," as per section 6, are of exclusive cognizance in the District Courts of the United States.

These proceedings are but acts of administration upon property and accounts, closely resembling the administration of the decedents' estates in the courts of probate. Proceedings in bankruptcy by virtue of the provisions of this section, are not "suits at law and equity," which may be brought by and against the assignee, touching *property or rights [*433 of property claimed to have belonged to the bankrupt, as per section 8. To entertain such suits, the circuit and district courts of the United States have "concurrent jurisdiction."

And of suits in court pending by and against a party who becomes bankrupt, such pending controversies do not abate by operation of the law upon the party's being declared bankrupt.

The jurisdiction of the State courts, as to such controversies, is not interfered with by the act of bankruptcy. The assignee becomes vested with the precise rights and condition of the bankrupt in respect to his property and controversies, which were possessed and sustained by the bankrupt on the day of his being "decreed" a bankrupt. And the bankrupt's suits pending are to be "prosecuted and defended (by the assignee) in the same way, and with the same effect, as they might have been by such bankrupt." (Section 8.)

In this case, the judgment of Boyd against the mortgageor, the order of seizure and sale and the levy of execution, were all before the party filed his petition in bankruptcy.

Now, by the express provision of section 8, the assignee's rights and duties in respect to this State proceeding upon the mortgage (irrespective of its being a question of mortgage), were neither more nor less than to present himself in the court where the case was progressing to final execution, and there make any defense Norton, the bankrupt, might have done. But it wholly subverts the provision of section 8, to indulge the assignee in disregarding such pending controversies, and then permit him to assume the attitude of plaintiff in the same case, commencing *de novo* in the District Court of the United States, and there to discard as *coram non judice* all

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that had been previously adjudged in the State court.

But besides that this was a case pending in a State court where the assignee should have made defense, as per section 3, as a question of mortgage, it has more distinction and immunity in the consideration of the bankrupt law. And in this aspect the District Court of the United States proceeding in bankruptcy had no jurisdiction of it (unless the mortgageor had chosen to file his claim), save and except to administer and sell the equity of redemption, or to redeem the mortgage, as per section 11.

There is no legitimate pretense this bill in chancery is a proceeding in bankruptcy. The District Court has no equity jurisdiction in this respect, but in virtue of section 8, and which confers it equally on the Circuit Court. And yet the bill seeks an administration in bankruptcy of this mortgaged property coercively against the mortgageor, within rules prescribed under the provisions of section 6. If this be so attainable, then the Circuit Court, too, which has no original jurisdiction in bankruptcy, may nevertheless obtain it by bill in equity.

434*] *But all the pretensions of this bill are conceived to be unparalleled in the conflicting and imperious results it proposes.

Section 2 of the Bankrupt Act is regarded as express authority to the assignee and the court in bankruptcy to impair, annul, and destroy this mortgage. And by the rule of court seizing upon the mortgage for administration in bankruptcy, to maintain a semblance of respect for the mandates of section 2, the provisions of section 5 are deliberately violated, which forbids any "priority or preference" to be awarded among private creditors. It assumes the right to treat as a nullity an ordinary State adjudication of a mortgage interest, fully rendered previous to any jurisdiction having attached to the Bankrupt Court. In truth, the State adjudication is adjudged of as an *ex post facto* usurpation. The jurisdiction was well enough in the State court inceptively, and throughout its progress to the rendition of judgment. But while the execution of the State court was being consummated, the debtor filed his petition. And this, the bill assumes, *ipso facto*, reversed the judgment of the State court or avoided it as a nullity.

In view of a fair interpretation of the Bankrupt Act, and of the disastrous considerations presented by the bill in this case, we assure ourselves with the belief that results so unjust, so inharmoniously absurd, will not be sustained in the reversal of this decree.

The lien of a judgment and execution attaches as to real estate upon the rendition of the judgment, as to personal property upon the seizure or levy of the execution. (Code of Practice, art. 722, 723; Civil Code, art. 3289, 3290, 3291, 3292; *Duffy* v. *Townsend*, 9 Mart. R., 585; *Bradbury & Foster* v. *Morgan*, 2 L. R., 479.)

Here the levy or seizure was before the date of the petition in bankruptcy, and the lien of the judgment had attached even if the property levied on had been personal, much more when it was real.

The order of seizure under a mortgage is by the law of Louisiana a judgment from which appeal lies to the Supreme Court, and on which, upon a proper case shown, injunction may issue. (*Gurlie* v. *Coquet*, 8 N. S., 498; *McDonough* v. *Zacharie*, 3 L. R., 316; Code of Practice, tit. Injunction, art. 296, 309; *Wells* v. *Hunter*, 6 N. S., 311; *Crane* v. *Phillips*, 7 N. S., 276; 8 N. S., 683; 3 N. S., 480; 4 N. S., 499.)

Mr. Chief Justice TANEY delivered the opinion of the court:

It appears in this case, that, in January, 1844, a bill was filed in the Circuit Court of the United States for the Eastern District of Louisiana, sitting in chancery, by Richard Nugent, assignee of the estate of Elizabeth Norton in bankruptcy, stating that the said Elizabeth Norton, on the 9th day of May, 1842, filed her petition in the District Court of the United States to be declared a bankrupt, and that she was accordingly decreed to be such about the 1st of June, in *the same year; that she [*435 returned in her schedule two lots of ground in the city of La Fayette, particularly described in the bill; and that George William Boyd was, among others, returned as a creditor for the sum of $9,000, and that notice was served on him of the proceedings in bankruptcy. The bill further states, that prior to and at the time of the petition in bankruptcy the two lots above mentioned were affected by a special mortgage to the said Boyd, which was valid by the laws of Louisiana, for the sum of $9,000 and upwards; that prior to the bankruptcy of Elizabeth Norton, that is to say, about the 11th of November, 1841, Boyd commenced suit upon his said mortgage in the proper State court of Louisiana, and obtained judgment, with the privileges of a mortgage, and issued execution thereon, which was levied upon the said property about the 16th of February, 1842; and on or about the 4th of June following the property was regularly sold by the sheriff under the execution to Isaac T. Preston and Abner Phelps, who took possession of the said two lots and continue to hold them, claiming as owners. The bill further states, that the complainant, having received notice of the levy and intended sale under the execution, duly notified the said Boyd, Preston, Phelps, and the sheriff, in writing, before the sale, of his appointment as assignee as aforesaid, and cautioned them not to proceed with the sale; but that the parties, continuing and intending to defeat the just rights of the complainant, proceeded to sell, and placed the purchasers above mentioned in possession of the property in question. The complainant refers to and exhibits with his bill certain rules adopted by the District Court of the United States for the disposition of real estate surrendered by bankrupts, and encumbered by mortgages; and charges, that by virtue of the Bankrupt Act all the proceedings in the State court ought to have been stayed, from the moment the petition of the bankrupt was filed; and that the subsequent proceedings were irregular, and conferred no title on the purchasers; and that the complainant was entitled to take the property from the hands of the sheriff, and to administer and sell the same under the direction of the District Court by virtue of the act of Congress and the rules of court above mentioned. The bill then prays process against Boyd, Preston, and

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Phelps, and that the proceedings under the execution subsequent to the petition in bankruptcy should be declared irregular; that the title of Preston and Phelps from the sheriff should be decreed to be null and invalid, and the said Preston and Phelps be ordered to restore the said lots to the possession of the complainant, to be administered and sold by him in conformity with the orders of the District Court of the United States, and in pursuance of the rules before referred to; and that Boyd should be directed to come into the District Court, and conform himself to the orders of the court and the rules aforesaid.

The defendants appeared, and demurred to 436*] the bill, and upon *final hearing on the demurrer, the following decree was passed by the Circuit Court:

"This is a bill in equity, presented by an assignee in bankruptcy, to set aside a certain sale, made under a writ of seizure and sale from the District Court of Louisiana, upon the ground that the District Court of the United States was, by the bankrupt law passed by Congress on the 19th of August, 1841, vested with exclusive jurisdiction over all matters appertaining to the settlement of the affairs of the bankrupt; and that, consequently, the sale made by the District Court of Louisiana has transferred no legal title to the property. The bill further claims the property sold as a part of the property of the bankrupt to be sold or otherwise disposed of under the orders of the District Court of the United States. It appears that the property in question consists of real estate, and that the same was sold to satisfy a special mortgage held by the creditor who obtained the order of seizure and sale from the State tribunal.

"I have, after an attentive consideration of the various allegations in the bill, ordered the same to be dismissed, and shall now proceed to state very briefly the grounds upon which I acted. In the first place, I do not consider that there is any equity in the bill; the property was specially mortgaged to satisfy the claim of the creditor who demanded the sale; and it does not appear that in the assertion of his right he has in any manner interfered with the rights of the other creditors of the bankrupt. It does not appear that any doubt existed as to the validity of the mortgage, or that the creditor has obtained any right or any advantage over the other creditors which the the District Court, sitting in bankruptcy, would not have been bound to award him under the express provisions of the bankrupt law. It is quite clear that the liens and mortgages which are valid under the State law must be protected by the District Court of the United States, sitting in bankruptcy, and it will not be pretended that the creditor at whose instance the property in question was sold would not have been entitled, under any and all circumstances, to the proceeds of that property to satisfy the amount alleged to be due him. What benefit would then accrue to the general creditors of the bankrupt by the interference of this court in a matter which seems to have been fairly and finally adjudicated? While I am well satisfied that no good would arise from such an interference, I am equally well satisfied that great injustice would be done both to the mortgage creditor and to the estate of the bankrupt, by subjecting both unnecessarily to additional costs and expenses.

"I agree fully in the opinion, that upon the ground of expediency the jurisdiction of the District Court of the United States over all the property of the bankrupt, mortgaged or otherwise, should be exclusive; but I do not understand the bankrupt law to render it so. Where a creditor, by virtue of a special mortgage, elects to foreclose that mortgage before a State tribunal, the federal court is not called upon *to interpose, except in cases where [*437 from the nature of the case wrong or injustice may be done to other creditors in interest, or where the mortgage itself may be contested.

"I wish it, however, to be distinctly understood, that I am fully of opinion that the District Court of the United States is vested with jurisdiction over mortgaged property belonging to the bankrupt, and that when a proper case is shown, it has power to foreclose a mortgage, and to do all other acts necessary to bring about a final distribution and settlement of the bankrupt estate. I am also of the opinion that in a case where a creditor calls in question the validity of a mortgage held by another creditor, it is the duty of the said court to exercise jurisdiction over the questions involved, and, if necessary, to declare the mortgage null and void.

"In the case before me, no such question is involved, and I see no reasons why the equity powers of this court should be exercised to do that which cannot change the rights of the parties interested, but which would have the effect of doing a positive injustice to the mortgage creditor, by subjecting his property to useless costs and expenses.

"It is therefore ordered that the complainant's bill be dismissed."

We have inserted the whole of this decree, because we think the court were not only right in dismissing the bill, but, with a single exception, we concur also in the principles and reasoning on which the learned judge founded his decision. The exception to which we allude is that part of the decree in which he expresses his opinion, that upon the ground of expediency the jurisdiction of the District Court of the United States over all the property of the bankrupt, mortgaged or otherwise, should be exclusive, so as to take away from the State courts any jurisdiction in such cases. Upon that subject it is not our province to decide, and we have no desire to express an opinion upon it. But in every other respect the decree conforms to the opinion delivered by this court, at the present term, upon the motion for a prohibition in the case *Ex-parte The City Bank of New Orleans, in the matter of Wm. Christy, Assignee of Daniel T. Walden, a bankrupt*, v. *The City Bank of New Orleans*. In that case the opinion of this court in relation to the jurisdiction of the District Court in matters of bankruptcy has been fully expressed, and need not be repeated here; and according to the principles therein stated the decree of the Circuit Court in this case must be affirmed.

Mr. Justice CATRON:

I think the adjudication in this case is in conflict with that made in the Circuit Court at

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New Orleans in Christy against the City Bank; and in support of which, a majority of my brethren saw proper to express their views at a previous day during this term, in the unsuccessful application of the bank for a prohibi-
438*] tion; but that the *cases are alike—and one cannot be maintained, and the other overthrown.

In that case the petition of the assignee set forth the entire legal grounds, why the District Court should annul the judgments in the State court, and pronounce the sale void.

1. That the property sold was given in by Walden, the bankrupt, as part of his effects.

2. That the bank had notice thereof, before the sale of the sheriff.

3. That the sale was void, being contrary to the bankrupt law, which operated to stay all further proceeding so soon as Walden's petition was filed, and was a bar to any further prosecution of the suit until an assignee should be appointed. That the sale with notice was a fraud upon the act of Congress, and the other creditors of Walden, by reason of the law, because the bank was endeavoring to obtain an illegal preference.

4. That at the sale the property was struck off in blocks, although consisting of different buildings, at two thirds of its value: "All of which actings and doings are prohibited by law, and render said sale null and void."

5. That the sale was in other respects irregular, the legal formalities not having been observed.

6. That the mortgage was void for usury, because in effecting the loan the bank gave Walden bonds on the second municipality instead of money, and they were then at a discount at from twenty to twenty-five per cent.

To these allegations the bank answered:

1. By plea that the District Court was not by law empowered to decide on the matters charged.

2. That all the matters and things set forth had already been decided by a court of competent jurisdiction—referring to the adjudications by name.

3. The defendant answers and avers that the mortgage was legal and valid, and given upon a full and adequate consideration.

4. That the order of sale was duly granted, and the writ thereon properly issued; and that the property described in the petition was lawfully seized, and after a compliance with all the legal formalities, was sold, and adjudicated to the defendants: that the price was fully paid by giving a credit—and that the property is held under an indefeasible title.

5. All the allegations in the petition not admitted, are denied, and a trial demanded of them.

This answer was excepted to as containing no legal grounds of defense; the question was adjourned, under the 6th section of the bankrupt law, to the Circuit Court, to be there heard and determined. It stood in that court as on bill and answer: the answer was taken of course as true in all its parts—the only question being
439*] whether *any legal ground of defense was furnished by the plea, supported by an answer, denying the alleged unfairness of the sale—presenting the same question in substance as did the case of *Harpending* v. *The Dutch Church*, in 16 Peters. By setting the case down on plea and answers, the proceedings in the supreme and inferior State courts were admitted of necessity to have been properly and fairly conducted; and the sale legally and fairly made. This was the undoubted aspect of the case as presented to and decided by the Circuit Court. Its decree, in the form of instructions to the bankrupt court, is, 1st. That the latter had full and ample powers to try all the questions presented in the assignee's petition. 2d. That the sale made under the seizure by order of the State court was void; and that the bankrupt court should declare it so. 3d. That the bankrupt court had full power to retry the validity of the mortgage and ascertain whether it was void for usury or otherwise; and this on the ground exclusively that the proceedings in the State courts were annulled by force of the bankrupt law, and the fact of Walden applying for its benefit.

Taking the petition and answer together, and a case existed in all its features like the present, on the title by execution; each being a fair and regular proceeding in the State court. One is suppressed and the other maintained. And on what ground does the district judge assume to act contrary to the former adjudication? Because it was equitable and for the best interests of the estate to be distributed, in his judgment. The obvious meaning of which is, that he had power to overthrow the title or not, at his discretion; and that such discretion was the law of the case and the tenure of the title, according to the true intention of the Bankrupt Act. On this assumption are the two cases attempted to be reconciled; and on no other can they avoid direct conflict, even in appearance. In reality, the one title is as good as the other. The tendency of such a doctrine is too threatening to titles to be silently acquiesced in. Did Congress intend that the force and effect of judgments and executions in a State court should depend on the sole discretion of a judge sitting in bankruptcy? Was it intended to discard the axiom, that unrestrained discretion in those that govern, is inconsistent with the rights of those that are governed, be they of property or person? It is very difficult to suppose so; and as difficult to accommodate the construction of the act to such a supposition. It is declared, "that it shall not be construed to annul, destroy, or impair, any liens or mortgages, on property real or personal, which may be valid by the laws of the States respectively."

Here two liens are combined; one by mortgage, the other by execution levied. In *Christy* v. *The City Bank*, as already stated, that by mortgage was recognized as a right protected by the act, but to be administered in the Bankrupt Court only; that by execution was pronounced *void. This decision the court [*440 below was asked to follow out, in the case before us, and refused.

By the execution levied, the lien "was valid by the laws of the State—in the words of the savings clause; the remedy by seizure created the right; to annul, or to stay the execution, impaired a right, excepted out of the act. Since the opinions were delivered in the *ex-parte* application of the City Bank, we have in effect so held at the present terms, in *Waller* v. *Best*.

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In making exceptions in favor of liens created by judgment and execution, Congress was governed by practical considerations. The States usually were large, the bankrupt courts in many of them far off from the creditors, the debts owing by the bankrupt small in amount to a great extent; for these recoveries would be had in the inferior courts and before magistrates; the property would be seized by execution, and he (the debtor) be driven into bankruptcy; this step might be taken secretly. The officer having possession of the property had to dispose of it according to the commands of the writ, and make return to the State tribunal; a return that the debtor had applied for the benefit of the bankrupt law would not be a legal return, as I have held, and always supposed; and that a decree declaring the party a bankrupt would not alter the case, as in either the lien would be not only impaired but destroyed where the levy alone gave it, as is the case in many instances. To drive the small creditor into the Bankrupt Court to establish his demand and effectuate his lien would often have been worth more in trouble and expense than the debt, and in the mean time the property, being abandoned by the officer, and not taken possession of by the assignee, would in many instances perish. These facts were too palpable for Congress to overlook. To protect such liens, I take it the exception was a compromise between the opponents and friends of the bill; the one side supporting rights secured by the State laws, and the other seeking to adopt a different rule under the Constitution of the United States, in regard to the relation of debtor and creditor.

In many cases the bankrupt might owe debts in other States than that where he would be declared bankrupt; then other difficulties would arise on executions being levied in the foreign jurisdiction, to which the powers of the Bankrupt Court could not extend. In all the cases enumerated the assignee had given to him the same powers the bankrupt previously had, to sue and defend, and no material difficulty could arise (or has arisen) in adjusting the claims in the State courts, to which the assignee was bound to apply.

That a mortgage can be foreclosed in the Bankrupt Court, and the lien given by it be preserved there, I have never doubted, if the jurisdiction of a State court had not attached, and was not ousted by the proceedings in bankruptcy.

For the foregoing reasons, I think the court 441*] of Louisiana was *mistaken when it assumed to have power to suppress the sale made by the sheriff, or to let it stand, at its discretion.

The decree is deemed entirely proper; nor would the reasons for it have been noticed had not my brethren adopted them to the extent above; and with which adoption I cannot concur.

Cited—6 How., 506; 3 Otto, 135; 1 Bank. Reg., 631; 2 Bank. Reg., 460; 3 Bank. Reg., 658; 4 Bank. Reg., 118; 8 Bank. Reg., 154, 170, 394; 11 Bank. Reg., 412; 12 Bank. Reg., 149, 480, 557; 13 Bank. Reg., 13; 1 Sawy., 283-285; 1 Low., 317; 17 Blatchf., 147, 587.

CHARLES H. CARROLL, *Complainant*,

v.

ORRIN SAFFORD, Treasurer of the County of Genessee, in the State of Michigan, *Defendant.*

Michigan law—taxable property—patent certificates issued.

When the purchaser of land from the United States has paid for it, and received a final certificate, it is taxable property, according to the statutes of Michigan, although a patent has not yet been issued.

Taxation upon land so held is not a violation of the ordinance of 1787, as an "interference with the primary disposition of the soil by Congress," nor is it "a tax on the lands of the United States." The State of Michigan could rightfully impose the tax.

It was competent for the State to assess and tax such lands at their full value as the absolute property of the holder of the final certificate, and in default of payment, to sell them as if he owned them in fee.

In case of controversy, a court of equity is the proper tribunal to prevent an injurious act by a public officer, for which the law might give no adequate redress, or to avoid a multiplicity of suits, or to prevent a cloud from being cast over the title.

THIS case came up on a certificate of division from the Circuit Court of the United States for the District of Michigan, sitting as a court of equity.

The complainant resided in the State of New York, and in 1836 purchased from the United States three thousand five hundred and forty-nine and seventy-one one hundredths acres of land in Genesee County, in Michigan. The lands were paid for in the way usually pursued by purchasers of the public domain, subject to private entry and sale. According to the laws of Congress, and the practice of the land officers, an individual wishing to purchase a tract of land makes application, in writing, to the register, specifying, in the application, the particular tract sought to be bought. The register examines and ascertains whether it is subject to entry. If it be, he gives to the applicant a memorandum, addressed to the receiver, stating the application, and that the land is subject to entry. This is taken to the receiver, and the money there paid. The receiver executes receipts in duplicate, specifying the particular tract sold, and the price paid for it. One of these is delivered to the purchaser, the other to the register; and this last is transmitted to the office at Washington as a voucher against the receiver. The register then makes out a final certificate, specifying the sale, and that the purchaser is entitled to a patent. It is competent for the *purchaser to demand and take [*442 this certificate from the register; but, in practice, it is rarely done. Almost invariably the register retains it until he makes his monthly returns, when he transmits this certificate to the office at Washington, and on it (if the government confirm the sale) the patent issues.

In this case, the register, immediately after the entry of the land, transmitted to the proper office at Washington the patent certificates, as the basis of the issue of patents for the land so entered by the complainant.

The complainant, previous to the issuing of the patents for the lands, did not enter into

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actual possession of them, nor exercise acts of ownership over them.

Patents were issued for this land by the United States on 12th August, 1837, and not before. They were dated on that day, and were shortly after their date transmitted to the register of the land office at Ionia, in Michigan, and subsequently were delivered to the complainant.

The delay in the issuing of the patents, after the entry of the land by the complainant, was not at the request or in any way by the procurement of the complainant.

The patents declare that "the United States give and grant" the lands to the patentee.

In the year 1837, and before the date and issue of the patents, these lands were assessed at their full value, and as if owned by the complainant in fee-simple, for township, county, and State taxes, by the proper local officers of Michigan (having full knowledge that the patents for the same had not issued), which taxes were not paid by the complainant.

The assessment rolls describe the land as owned by the complainant absolutely, and without any reservation or qualification. The valuation attached to it purported to be its entire value, as an absolute and unconditional estate in fee-simple.

By the laws of Michigan, applicable to this part of the case, it is made the duty of the county treasurer to sell such lands as have been taxed, and the taxes on which have not been paid on giving a certain notice. The defendant being then, and now, a citizen of the State of Michigan, as county treasurer of Genesee County, did so sell the lands described in the bill of complaint.

Two years are allowed by law for the person claiming title to the lands to redeem, by paying to the treasurer the tax and charges, and interest at the rate of twenty per cent. per annum. If not redeemed, the land was to be conveyed to the purchaser in fee-simple.

The two years, the period allowed for redemption, had not expired at the time of filing the bill of complaint. The bill prayed that the assessment and sale might be declared illegal, and declared void, and that the treasurer of the county might be enjoined from conveying the lands to the purchasers at the tax sale, for other relief.

443*] *The bill was filed in 1842, and was taken *pro confesso*. A motion was then made for a decree according to its prayer, upon which the following questions arose, upon which the opinions of the judges were opposed:

1. Whether the statutes of the State of Michigan did, in fact, authorize the assessment and sale of the lands in question, and whether said statutes were intended to direct the assessment for taxation of lands of the United States before the patents for them had been executed by the officers of the United States.

2. Whether the lands in question were, before the date and execution of the patents for them, subject to taxation at all, by the State of Michigan.

3. Whether, if they were subject to taxation by the State, before the execution of the patents for them, it was competent to assess and tax and sell them, as the absolute property of the complainant, and at their full value, as if he owned them in fee.

4. Whether the remedy by bill in equity, and the relief sought, are proper.

The statutes of Michigan, referred to in the above questions, were the following:

Law of April 22d, 1833.

"Sec. 1. Be it enacted by the Legislative Council of the Territory of Michigan, that the taxes hereafter to be levied in this territory, shall be assessed, levied, and paid in the manner hereinafter mentioned, upon a valuation of real and personal estate, including property and stock in any bank, insurance company, or other incorporation, to be made as hereinafter prescribed.

"Sec. 2. The assessors of each township may divide their townships, by mutual agreement, into such number of districts, to be called assessment districts, as they may deem convenient, not exceeding the number of assessors in any such township; and in every year, between the 15th day of April and the 1st day of May, shall individually, in their assessment districts, according to the best evidence in their power, make out a list or schedule of all the taxable property in the same, and bring the said lists or schedules together, and jointly value the property named in each, and set down in their assessment roll the value of buildings and lands in such township, owned or possessed by any person residing in such township, or any banking or insurance company, or other incorporation situated in such township, opposite the name of such person or incorporation; and shall also ascertain and set down in their said assessment rolls in like manner, the value of all the personal estate of every such person; and in case any person, not satisfied with such valuation, shall make oath before such assessor, or either of them, who are hereby authorized to administer such oath, that the value of his or her real or personal estate does not exceed a certain sum, specifying the same, then, and in every such case, the assessors shall value such *real and personal estate at the sums [*444 specified in such affidavit, and no more: and every person liable to be taxed for any personal estate as aforesaid, shall be taxed for the same in the township where such person shall reside at the time of making such assessment; and the assessors shall also ascertain what lands are situated in their townships, not owned by persons residing in such townships, and shall, in their assessment rolls, separate from the assessments made the estates of non-residents, and designate such land in the following manner: if the estate be a patent or tract of land of the subdivision of which the assessors cannot obtain correct information, they shall enter the name of the patent or tract, if known by any particular name, without regarding who may be the owner thereof; and if such tract be not known or designated by any particular name, they shall state by what other land the same is bounded, and shall set down the quantity of land contained therein, and the value thereof, in the proper columns for that purpose; and the assessors shall complete their assessments on or before the 1st day of May in every year, and make out a fair copy thereof to be left with one of the board, and thereupon cause notices to be put up at three or more public places in their township, setting forth that they have completed their assessment, and that

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a copy thereof is left with one of them, naming him, where the same may be seen and examined by any of the inhabitants during ten days; and that at the expiration of the said ten days, they shall meet on a certain day, at a place in the said notice to be specified, to review their said assessments, on the application of any person conceiving himself aggrieved; and it shall be the duty of the said assessors, with whom the said assessment roll shall be left as aforesaid, during the said ten days, to submit the said roll to the inspection of any person who shall apply for that purpose; and at the said time and place, the said assessors shall meet, and, on application of any person conceiving himself aggrieved, shall review the said assessment, and may alter the same, on sufficient cause being shown, to the satisfaction of the said assessors, or a majority of them; and the assessors, or a majority of them, shall make oath or affirmation, and attach the same to the said assessment roll in the following, or other equivalent form, to wit: 'We do severally swear (or affirm) that the sums at which property is assessed in the foregoing assessment roll, are, according to our best judgment, the fair cash value of such property.'

"Sec. 9. The person in possession of any real estate, at the time any tax is to be collected, shall be liable to pay the tax imposed thereon; and in case any other person, by agreement or otherwise, ought to pay such tax, or any part or proportion thereof, the person who shall pay the same shall and may recover the amount from the person who ought to have paid the same; and all taxes upon any real estate shall be a lien thereon, and shall be preferred in payment to all other charges; and all taxes upon any 445*] personal *estate shall, in case of the death or bankruptcy of the person taxed, be preferred in payment to all other demands.

"Sec. 14. Any tax heretofore laid by virtue of any law of this territory, or to be laid by virtue of this act, upon any real estate, and the interest and charges thereon, shall be a lien upon the same real estate, until the same tax, interest, and charges, shall be paid or recovered, notwithstanding the same real estate may have been divided or aliened, in the whole or in part; and whenever such tax, and the interest aforesaid accruing thereon, shall remain unpaid for two years from the 1st day of May following the year in which any such tax was or shall be laid, the treasurer of the proper county shall cause so much of the land charged with such tax and interest, to be sold at public auction, at the court-house of the county where such lands are situated, to the highest bidder, as shall be necessary to pay the said tax and interest, together with all charges thereon, first giving at least four months' notice of the time and place of sale, by advertisement, posted up in three or more public places in said county, and also, by causing a copy thereof to be published in one or more of the public newspapers printed or in circulation in said county."

"Sec. 15. On the day mentioned in the said notice, the treasurer shall commence the sale of the said lands, and continue the same from day to day, until so much thereof shall be sold as will pay the taxes, interest, and charges due, aforesaid and charged thereon as aforesaid; and the treasurer shall give to the purchaser or purchasers of any such lands, a certificate, in writing, describing the lands purchased, and the sum paid therefor, and the time when the purchaser will be entitled to a deed for the said lands; and if the person claiming title to the said lands, described in the said certificate, shall not, within two years from the date thereof, pay the treasurer, for the use of the purchaser, his heirs or assigns, the sum mentioned in such certificate, together with the interest thereon, at the rate of twenty per cent. per annum, from the date of the said certificate, the treasurer shall, at the expiration of the said two years, execute to the purchaser, his heirs or assigns, a conveyance of the lands so sold, which conveyance shall vest in the person or persons, to whom it shall be given, an absolute estate in fee-simple, subject to all the claims which the territory of Michigan shall have thereon, and the said conveyance shall be conclusive evidence that the sale was regular, according to the provisions of this act; and every such conveyance to be executed by the treasurer, under his hand and seal, and the execution thereof witnessed and acknowledged in the usual form, may be given in evidence and recorded, in the same manner, and with like effect, as a deed regularly acknowledged by the grantor may be given in evidence and recorded."

Mr. Nelson, Attorney-General, for the [*446 complainant.

Mr. Norvell for the defendant.

Mr. Nelson. for complainant:

A fundamental proposition, and one on which the whole equity of the complainant's case rests, is, that, until the issue of the patent, the fee of the land remains in the United States; that, after payment of the purchase money by the applicant, and the receipt of it by the officers of the United States, the United States may still decline, on various grounds, to perfect his title by the execution of a patent; that he cannot know after purchase, and before the patent issues, whether he is to receive an absolute conveyance or not; that nothing but the patent passes the fee, and that, before its issue, the purchaser has but a qualified and contingent estate in the lands.

These principles are involved in the following decisions: *Stringer et al.* v. *Lessee of Young et al.*, 3 Peters, 320, 344; *Boardman et al.* v. *Lessees of Reed & Ford et al.*, 6 Peters, 328, 342; *Bagnell et al.* v. *Broderick*, 13 Peters, 436, 450; *Wilcox* v. *Jackson*, 13 Peters, 498, 511, 516; *Brush* v. *Ware*, 15 Peters, 93, 107, 108; *Stoddart* v. *Chambers*, 2 How., 284, 318.

I refer also to the opinions of the Attorney-General, and the practice of the land office, as found in the 2d volume of Public Land Laws, Instructions and Opinions, published in 1838, not only to show that the sale is frequently cancelled by the government for a great variety of reasons; and that "the issuing a patent is not so purely a ministerial act as to follow a patent certificate as a matter of course," but also that it has been the settled policy of the government to regard lands thus situated as exempt from all taxation, and that "the legal title remains in the government until the patent issues." (See pp. 4, 14, 24, 25, 39, 76, 80, 84, 87, 160, 213, 214, and 1040; and Act of Congress, 12th January, 1825, chap. 318.)

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The payment of the money by an applicant for a part of the public domain is a proposition for a purchase. The register and receiver do not act judicially in admitting the application and receiving the money; their acts may be overruled, and the money returned, and a patent be refused for various reasons; and the fate of the application cannot be known by the purchaser until the patent be executed. Till then his title is imperfect, and his estate contingent. In ordinary cases between private individuals, where a legal contract for the sale of lands has been entered into, equity considers the vendee as the true owner of the lands, because the vendor is bound to convey by virtue of a contract, which can be enforced in a court of equity, and the obligation is mutual, as is also the remedy. (2 Story's Eq., 98, 99, sec. 790.) Not so in regard to applications for the purchase of the public lands. But even if this were, it would not affect the present argument.

Assuming, then, that at the time of the 447*] assessment of the lands *described in the bill, the fee of them was in the United States, the complainant's counsel insist:

1. The statutes of Michigan did not embrace the lands in question, and were not intended to authorize their assessment.

The statute directed the assessment of lands "owned or possessed by any person residing in the township."

This part of the statute is inapplicable, for the complainant is and was a non-resident; and the case shows that he was not in the actual possession of the land.

The statute then directs the lands not "owned" by residents to be separately assessed by the description of the tract without regard to the name of the "owner."

The assessment is to be according to the "fair cash value" of the lands; that is, of the fee-simple or absolute estate in the lands.

The assessment of real estate is to be according to its entire value, as in the case of personalty. The word "owner" is attached to both kinds of property as descriptive of the estate or interest to be taxed.

The taxes are made a lien upon the lands.

If not paid, and if the land be not redeemed after sale for nonpayment, the treasurer of the county in which the lands lie is directed to execute to the purchaser "a conveyance of the lands so sold; which conveyance shall vest in the person or persons to whom it shall be given an absolute estate in fee-simple, subject to all the claims which the territory (State) of Michigan shall have therein; and the said conveyance shall be conclusive evidence that the sale was regular according to the provisions of this act.

All the provisions of this statute are intended to operate upon the unencumbered fee of the lands assessed. This furnishes the measure of value—this regulates the conveyance of the purchaser.

Lands owned by the United States are not subject to taxation. The fee of these lands was in the United States at the time of the assessment. It is not to be supposed that there was any intention of taxing the property of the United States. This assessment is upon the fee. The conveyance operates as a transfer of the fee. How, then, can it be argued that the statutes intended to embrace these lands?

It does not aid the argument in this branch of it to say that the complainant had a valuable and taxable interest in these lands.

This may for the present be conceded. Our answer to it is, that the statute does not profess to tax such interest. It taxes the owner of the land and sells the fee if the tax be not paid.

2. The lands in question were not, before the date and execution of the patents for them, subject to taxation at all by the State of Michigan.

The proposition refers to the date and execution of the patents. It is not denied that, so soon as executed, they become operative; *and that the transmission of them to [*448 the register is in law a delivery to the purchaser through him as the agent of both parties.

The 4th article of the ordinance of 1787 for the government of the territory northwest of the river Ohio provides, that "the Legislatures of those districts or new States shall never interfere with the primary disposal of the soil by the United States in Congress assembled, nor with any regulations Congress may find necessary for securing the title in such soil to the *bona fide* purchasers. No tax shall be imposed on lands the property of the United States; and in no case shall non-resident proprietors be taxed higher than residents."

It has been shown that, after the receipt of the receiver and the transmission of the patent certificate, the patent may still be refused.

In point of fact this frequently occurs. Patents were, in several instances, refused to the complainant, and his certificates of purchase cancelled. In the case of *Ostrom* v. *The Auditor-General of Michigan*, which arose in the Circuit Court for the District of Michigan, in 1842, it appeared that, out of about one hundred certificates, fourteen were never allowed, and patents for them had been refused. The lands embraced in those certificates have been sold and conveyed in fee-simple by Michigan, by virtue of assessments on them as the property of Ostrom, to whom the United States refused to convey. The United States either retain these lands, or have conveyed them to third parties. These facts illustrate the principle; they may again occur. Is not this an interference with the primary dispcsal of the soil by the United States? If so in any degree, the amount of it does not affect the argument; and if such may be the consequence of admitting the operation of the principle, it is a conclusive argument against its allowance at all.

Again: It is provided that "no tax shall be imposed on lands the property of the United States."

Mark the phraseology. It is not that no tax shall be imposed on the interest or estate of the United States in any lands, but that lands while they remain property of the United States shall not be taxed at all by the States. This is the plain import of the terms. The question is then narrowed to this: When do the lands embraced in the public domain cease to be the property of the United States? This question we think, has been fully answered by the authorities already cited.

The reasoning of the court in the case of *Wilcox* v. *Jackson* is strong and clear upon this question:

"We think it unnecessary to go into a detail

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examination of the various acts of Congress," say the court, "for the purpose of showing what we consider to be true in regard to the public lands, that with the exception of a few cases, nothing but a patent passes a perfect and consummate title." (13 Peters, 516.)

And again:

449*] *"A much stronger ground, however, has been taken in argument. It has been said that the State of Illinois has a right to declare by law, that a title derived from the United States, which, by their laws, is only inchoate and imperfect, shall be deemed as perfect a title as if a patent had issued from the United States; and the construction of her own courts seems to give that effect to her statute. That State has an undoubted right to legislate as she may please in regard to the remedies to be prosecuted in her courts, and to regulate the disposition of the property of her citizens by descent, devise, or alienation. But the property in question was a part of the public domain of the United States. Congress is invested by the Constitution with the power of disposing of and making needful rules and regulations respecting it. Congress has declared, as we have said, by its legislation, that in such a case as this a patent is necessary to complete the title. But in this case no patent has issued; and, therefore, by the laws of the United States, the legal title has not passed, but remains in the United States. Now, if it were competent for a State Legislature to say that, notwithstanding this, the title shall be deemed to have passed, the effect of this would be, not that Congress had the power of disposing of the public lands, and prescribing the rules and regulations concerning that disposition, but that Illinois possessed it. That would be to make the laws of Illinois paramount to those of Congress in relation to a subject confided by the Constitution to Congress only. And the practical result in this very case would be, by force of State legislation, to take from the United States their own land, against their own will, and against their own laws. We hold the true principle to be this: that whenever the question in any court, State or federal, is, whether a title to land which had once been the property of the United States has passed, that question must be resolved by the laws of the United States; but that, whenever, according to those laws, the title shall have passed, then that property, like all other property in the State, is subject to State legislation, so far as that legislation is consistent with the admission that the title passed and vested according to the laws of the United States." (13 Peters, 516, 517.)

The Act of Congress (15 June, 1836) admitting Michigan into the Union, is even stronger in its terms than the ordinance of 1787. It is as follows:

"Sec. 4. And be it further enacted, that nothing in this act contained, or in the admission of the said State into the Union as one of the United States of America, upon an equal footing with the original States in all respects whatever, shall be so construed or understood as to confer upon the people, Legislature, or other authorities of the said State of Michigan, any authority or right to interfere with the sale by the United States, and under their authority, of the vacant and unsold lands within the limits of the said State; but that the subject of the public lands and the interests which may be given of the said *State therein, [*450 shall be regulated by future action between Congress, on the part of the United States: and the said State of Michigan shall in no case, and under no pretense whatsoever, impose any tax, assessment, or imposition of any description, upon any of the lands of the United States within its limits.

This exemption from taxation of the lands of the United States, and the prohibition of the States in which they are located to interfere with their disposal, were designed, as they were calculated, to facilitate their sale, and to hold out inducements to purchasers, and enter, as one of its elements, into the price of such lands; and as, from the very nature of the contract of purchase, a buyer cannot prudently improve, or expend money on the land, before his title is consummate. All the principles of equity, as well as of law, concur in securing to the citizen an exoneration from the burdens of State assessment, until the moment that he may be recompensed by the enjoyment of the profits of the land purchased, and that is, when his title is perfected by patent.

The Legislature of the State of Michigan illustrates this view. By her act providing for the disposition of her university lands, she has provided, that the land held by a certificate of purchase from the State, shall be taxed as personal property; that such certificate shall enable the purchaser to support an action of trespass on the lands and entitle him to the immediate possession thereof. (Laws of Michigan, 1844, No. 68, sec. 19.) And it has been decided by her courts that the holder of a certificate of purchase from the United States cannot maintain ejectment on it. This I learn from the profession, for there are no reports published of their decisions. The same doctrine is the settled law of Ohio. (1 Ohio Rep., 313, 314; 6 *Ibid.*, 165; 7 *Ibid.*, 151 and 252.) In Illinois, the holder of certificate of purchase may maintain ejectment, &c., by virtue of positive statutory enactment. (Revised Laws, p. 199.)

But we think that, independent of these statutes, the claim of the State to tax these lands is indefensible.

The property of the United States is not taxable by the several States.

The subjects over which the sovereign power of a State extends, are objects of taxation; but those over which it does not extend, are exempt from taxation. (*McCulloch* v. *The State of Maryland*, 4 Wheat., 316.) The power of legislation, and consequently of taxation, operates on all the persons and property belonging to the body politic. (*Providence Bank* v. *Billings & Pitman*, 4 Peters, 563.)

These principles exempt the United States and their property from taxation by the States. (See *Weston et al.* v. *City Council of Charleston*, 2 Peters, 449.)

The exemption extends to the lands in controversy, unless the inchoate title acquired by the applicant for the purchase of them subjects them to taxation.

*There certainly is no express legis- [*451 lation to this effect.

How does the case stand on general princi-

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ples? In order to place it in the most unfavorable light for our argument, let the situation of the complainant be assimilated to that of a vendee after contract, but before deed, who has a perfect right to a conveyance. Before conveyance actually made, who is to pay taxes on the lands agreed to be conveyed?

Taxation is a legal question. Taxes are levied against the legal owner. They are prescribed by express statutes. Legal rights are alone looked to in the assessment and levy of taxes.

Under the old credit system, lands were confessedly exempt from taxation until after the patent issued. A purchaser of them, even before the payment of the money, was as much an equitable owner as now. He was styled the purchaser of the land so soon as he made the payment of twenty per cent. and received his certificate.

Look at the absurdity of the opposite doctrine: If a tax assessor is to inquire into the equitable rights and interests of parties, then when money has been agreed to be laid out in lands, it should be assessed and returned as lands, and *vice versa*, in regard to lands contracted to be sold.

This very point arose in the case of *Wilson's Exec.* v. *Tappan* (6 Cond. Ohio Rep., 80; 7 Hammond, 172), and it was there decided, that the vendor was bound to pay them; and that, if not paid, the warranty in the deed of freedom from incumberances would indemnify the vendee against them.

The patents issued by the United States for the public lands contain the words "give and grant." These words imply a warranty. (See Caines' Rep., 188; 7 Johns. Rep., 258; 8 Cowen, 36; 1 Coke, 384 A; 4 Kent's Com., ed. of 1844, 474, and cases there cited.) If the complainant can be compelled to pay these taxes, he has a right to be re-imbursed by the United States.

The public domain, as such, cannot be taxed by the States. The lands of the complainant were not severed from it until conveyed to him by patent. After he had paid his money to the receiver on his application to purchase the lands, he could have been personally assessed for such sum, if he had been within the jurisdiction of Michigan. His property was not diminished by such a payment; for, if the patent were refused, the money would be refunded. If actual possession had been taken of the lands, inasmuch as such possession is protected by the laws of the State, its value might be the subject of a personal tax. All this may be granted, and yet nothing will have been conceded tending to establish the right of the State to impose a tax upon the land itself, which does not constitute a charge against the purchaser personally, but is to be satisfied out of the land and by a sale of it. This is the character of the present tax, and must be of any land tax. Such tax is a proceeding *in rem*. It cannot be apportioned and split up, so as to sell 452*] the interest of *the purchaser in the land, and transfer an interest in it, without the assent or co-operation of the United States, and yet not interfere with the absolute rights of property and control belonging to the latter.

The federal government, though limited in the subject of its powers, is sovereign in their exercise; and in all cases where its powers are exclusive, or where the exercise of a concurrent power, by a State conflicts with the beneficial and perfect exercise of it by the United States, the federal authority is supreme. The extent of the alleged interference is not a question to be considered in determining its invalidity.

The case of *Dobbins* v. *Commissioner of Erie Co.* (16 Peters, 435) applies this principle to a question of taxation. It also shows clearly, that this is a tax on the property assessed, and not a personal charge (p. 446), and that such a tax, when it acts upon the property or agents of the United States, is entirely illegal.

The public domain is exclusively within the control of the United States, and is an important source of its revenue. The "perfect execution" of the power of its sale and management is certainly interfered with by the acts complained of, and the principles established in the above case (p. 447) control the present.

3. If the lands were subject to taxation to any extent by the State of Michigan, before the execution of the patents for them, it was not competent to assess, and tax, and sell them as the absolute property of the complainant, and at their full value, as if he owned them in fee.

That such is the effect of the law complained of will not be denied. That it is illegal we think is already shown. The fee of the United States cannot be devested by the legislation of the State. The State could only give the purchaser at the tax sale an equitable interest, for the complainant himself had no other.

4. The case is properly cognizable in equity, and the relief sought is appropriate.

As to the principle on which equity exercises its jurisdiction, there are equitable rights and legal rights incident to property.

Courts of law will not take notice of mere equitable rights; they can be enforced only in equity, and hence arises the exclusive jurisdiction of courts of equity.

But in cases where legal right are defined and settled by the rules of law, then equity follows the law.

The right to tax, and the mode of taxation, are defined by statute, and the construction of statutes is the same at law and in equity.

In support of these principles I refer to 1 Story's Eq., 14, 15, 16, 17, 72.

Our rights, then, are settled by the law, and will be construed in the same manner in courts of law and of equity. Indeed, is it not manifest that the legality or illegality of the tax must be decided in *the same way by [*453 courts of law and equity? Can that be a valid assessment in equity which is invalid at law, where there can be but one legal mode of assessment in any case? Why, then, if we rely upon our legal rights, do we ask the interference of equity.

We come for the remedy. The most important source of jurisdiction of an equity court is that which is concurrent with courts of law. Rights in each court are the same, but a party is at liberty to ask the aid of a court of equity to protect him in his legal rights on account of the better remedy which results from the modes of administering relief in equity; and equity will interfere in all cases where the remedy at law is not plain, adequate, and complete. (See 1 Story, 93, 94; 2 Story, 155, 168; 8 Peters, 215.)

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When this is done, the rights of parties in the subject matter of the litigation are construed as at law. The remedy is according to equity, and it will be granted in all cases, with the simple condition, that a party who asks it shall do equity himself.

What is meant by this? Not the wild notions as to natural equity which were suggested on the argument below; but simply, that where legal and conscientious matters are mingled in the same transaction with those of a fraudulent and illegal character, a party shall discharge the former part of the contract before he will be relieved as to the latter. (1 Story's Com., 77.)

This maxim has here no application, until it be shown that a part of these taxes are legal and proper.

The sole point that is left for discussion is, as to the reasons which render the remedy at law inadequate, and require the interference of this court. These reasons are the following:

1st. To prevent a cloud being cast over the complainant's title. (See following authorities: *Corporation of Washington* v. *Pratt*, 8 Wheat., 682; *Burnett* v. *City of Cincinnati*, 3 Ohio Rep., 86; *Gouverneur* v. *City of New York*, 2 Paige, 435; *Pettit* v. *Shepherd*, 5 Paige Rep., 493, 501; *Hamilton* v. *Cummings*, 1 Johns. Ch. Rep., 517; *Ward* v. *Ward*, 2 Hayw. Rep., 226; *Leigh* v. *Beerhart, Exec.*, 4 Munf. Rep., 380; *Grover* v. *Hugel*, 3 Russ. Ch. Rep., 432; Harrington's Rep., 3; *Ostrom* v. *Bank of the United States*, 5 Pet. Cond., 759.)

2d. To prevent a multiplicity of suits and unnecessary litigation. (1 Story, 82, 83, 84; 6 Paige Rep., 88.) Better for both complainant and the State that the matter should now be decided.

3d. To restrain public officers from doing an illegal act. If the act be consummated, there may be no redress; equity, therefore, interferes to prevent the consequent failure of justice by enjoining the act. (*Osborn* v. *Bank of the United States*, 6 Paige, 88; 2 Kent, 339, *note*, 3d ed.)

The claim of the State to tax lands in the situation of those described in the complainant's bill are exceedingly inequitable. The lands are not actually nor theoretically separa-
454*] ted from the public *domain. The purchaser has taken no possession of them, nor exercised any acts of ownership over them. A tax on the unimproved and vacant lands of non-residents is generally inequitable, and, at best, oppressive and onerous. (See 2 Kent's Com., 382.) Just so soon as an individual proposes to buy the lands of the United States, the agents of the State rush in and fasten on it, and demand, on pain of forfeiture of the whole of it, that he pay taxes on it for an interest which he does not own, and which he cannot know he will receive, until, perchance, the land has been sold and lost.

Mr. Norvell, for defendant:

The questions of difference involved in this case are of deep importance to the State of Michigan, affecting, as they do, her right to tax lands as soon as they are purchased, and paid for, from the United States, and obliging her, if they should be decided adversely to the defendant, to refund to individuals a large amount of money received into her treasury from the taxation of lands so situated.

1. The first question is, "whether the statutes of the State of Michigan did, in fact, authorize the assessment and sale of the lands of the complainant, and whether said statutes were intended to direct the assessment for taxation of lands of the United States before the patents for them had been executed by the officers of the United States."

The statutes of Michigan did and do authorize the assessment, taxation, and sale of lands for nonpayment of the taxes, situated as those of the complainant were. The lands of the complainant had, prior to their assessment, been purchased from the United States, and he had received the regular certificates of purchase and payment from the receiver of public moneys. These lands were not, it is believed, sold for the taxes, before the patents were dated and executed. But whether they were, or not, is not material to the right decision of this cause.

The Act passed by the legislative council of the territory of Michigan, and approved on the 22d of April, 1833, authorizes, in its first section, the assessment, levy, and collection of taxes, upon the valuation of real and personal property, to be made as prescribed in the subsequent sections of the same act.

The 2d section directs the proper officers to ascertain, assess, and make out a separate and distinct list of the lands situated in their respective townships, "not owned by persons residing in such township," and prescribes the manner in which the lands of non-residents shall be described and entered in the assessment rolls.

This is precisely the same language used with regard to the lands owned by non-residents, and assessed for taxation, in the laws of Michigan, passed by her Legislature, after she became a State.

The 14th section of the Act of April 22, 1833, provides that whenever the taxes on lands of non-residents, as well as residents, shall remain *unpaid for two years, the treas- [*455
urer of the proper county shall cause so much of the land charged with such taxes and interest, as shall be necessary to pay the same, to be advertised and sold for that purpose, giving at least four months' notice, in certain public newspapers, of the time and place of sale.

The long notice directed to be thus given, before the sale could take place, affords conclusive evidence that the lands of non-residents living out of the State were included in the terms and provisions of the act directing the assessment, taxation, and sale of real and personal estate, if the taxes were not duly paid thereon.

The succeeding section of the law prescribes the time within which, and the conditions on which, the lands in question, thus assessed, taxed, and sold for the taxes, might be redeemed by the owners.

I refer to the Act of April 22, 1833, at page 88 of the Session Laws of 1833, to be found here in the Department of State.

The laws of Michigan make no distinction between the lands for which patents have not been issued, and those for which they have been issued, in providing for their assessment, taxation, and sale for the nonpayment of taxes. As soon as the lands are purchased of the Unit-

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ed States, the money paid for them, and the duplicate receipts and certificates of purchase signed, and issued by the receivers of the public moneys at the land offices within the State, they become, according to the invariable interpretation of the tax laws of that State, and the usage in their execution, objects of assessment, taxation, and sale.

An act was passed by the legislative council of Michigan, and approved December 30, 1834, "making the certificates of the purchase of public lands" evidence of their possession by the persons holding such certificates of purchase of such lands, as against any person or persons not having a better title than actual possession. This act illustrates the general light in which the duplicate receipts or certificates of the purchase of public lands, signed by the receivers, were reviewed by the legislative authorities of Michigan. The statute remains unrepealed. And I am not aware that any of the courts of Michigan have decided "that the holder of a certificate of purchase from the United States cannot maintain ejectment upon it." On the contrary, the very law making these certificates evidence of possession was intended to authorize the holder to maintain action of ejectment in any of her courts, and it expressly provides that they shall be evidence in such courts that possession is in the person holding the certificate. And, as secretary of the legislative council when the act was passed, I remember it was maintained in debate, that lands which had been purchased, and for which certificates of purchase from the United States had been issued at the land offices, were as lawfully and rightfully the subjects of taxation as if the patents had been issued from the proper depart-
456*] ment at Washington. *(See the Session Laws of Michigan, passed at the second session of legislative council in 1834, pp. 88, 89.)

The Act of the Legislature of the State of Michigan, approved April 19, 1839, makes it the duty of the several county treasurers to collect all non-resident taxes assessed prior to 1838, remaining unpaid, as if the laws under which said taxes were assessed still continued in force. (See Session Laws of 1839, pp. 168 and 177.)

An act to regulate tax sales for 1843 authorizes the sale of all lands for delinquent taxes assessed in the years 1836, 1837, and 1838. The several county treasurers are to make the sales under the direction of the Auditor-General. (See Session Laws of Michigan of 1843, pp. 55 and 70.)

It is clear, then, that "the lands in question," belonging to the complainant, were authorized by the statutes of Michigan to be assessed for taxation, and to be sold for the nonpayment of taxes.

It is equally clear, from the plain language of the statutes, and from the practical interpretation put upon them by all the public authorities of Michigan, that "they were intended to direct the assessment for taxation of lands" purchased from "the United States, before the patents for them had been executed by the officers of the United States," but after the money had been paid for them, and certificates of purchase and payment had been received from the proper land officer.

2. To the question, "whether the lands in question were, before the date and execution of the patents for them, subject to taxation at all by the State of Michigan," I answer in the affirmative.

In the case of *John H. Ostrom et al.* v. *Charles G. Hammond, Auditor-General of the State*, tried in the Circuit Court of the United States for the District of Michigan, at the June Term of 1842, before *Judge* Wilkins, it was decided that the entry of public lands, the payment of the purchase money, and the certificate of the receiver, constituted such an equitable interest and title in the land as to authorize its taxation by the State, and its sale for the nonpayment of the taxes.

At the succeeding October Term of the same court, *Judge* McLean presiding, the decision of the court, at the preceding term, in the case of *Ostrom* v. *Hammond, the Auditor-General*, was confirmed, both judges concurring in opinion.

Newspaper reports of the case have alone, as yet, been published. But the decision must remain fresh in the memory of *Mr. Justice* McLean, of this court.

In the case of *Douglas* v. *Dangerfield*, in the Supreme Court of Ohio, the court stated that the right to tax lands within the borders of that State, before they become the property of individuals, was a right which had been exercised from the earliest period of the State government, with respect to all lands except those belonging to the United States, while so held, or for a limited period after the same *were sold. This [*457 limited period has reference to the five years' exemption, which the compact of admission between the United States and Ohio secures to purchasers of public lands in that State, after they have made their purchases. No such exemption is stipulated in the compact which admitted Michigan into the Union. She has the right to tax as soon as the public lands are purchased.

Judge Hitchcock adds, in this same case, that "if the right to tax exists, and that it does there has not been any serious question for many years at least, it would seem to follow, that the right to collect must also exist, although in making collection it might become necessary to transfer to a new proprietor the thing taxed." When, however, this question "does arise, it must be purely a legal question, to be settled by a court of law." (10 Wilcox, Ohio Rep., 156; see, also, pp. 154, 155.)

In Ohio, it is well known that lands entered and surveyed in the military land district, have for years been taxed, and sold for taxes, before they were patented. This is stated in the report of the case of *Hennick et al.* v. *Wallace* (8 Ohio Rep., 540), where the court say, that in another case, which was cited, "it was expressly held, that where lands have been entered and surveyed in the military land district, and sold for taxes before patented, that when patented, the patentee must hold the land subject to any claim which a purchaser at tax sale may have in consequence of such sale." In the case of *Hennick*, just referred to, the land was sold for taxes before patented, and the court said that the sale was legal, so far as anything appeared to it in the case. (8 Ohio Rep., 541.)

In the case of *The Lessee of Stuart et al.* v. *Parish* (Supreme Court of Ohio, at the December Term, 1833, 6 Hammond, part 1, 476, 477), Stuart purchased the tract No. 5, in the San-

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dusky Reserve, in 1817, and made the first payment. He afterwards took the benefit of the eight years' credit, under the laws which then prevailed. Stuart did not complete the payment for the land until 1830. Four years before that the land was taxed. The court would not entertain the question whether the land was liable to taxation before patent issued, but admitting the legality of the sale for taxes, said that the legal title of the patentee was not affected by such sale. In other words, the tax title could not convey an interest to the purchaser superior to that of the owner at the time of the sale for taxes.

In Alabama, before public lands finally pass into the hands of the purchaser by patent, the collector may rent at auction so much as will pay the tax, but cannot sell until the title is complete.

The Supreme Court of the United States, in the case of *Bagnell et al.* v. *Broderick* (13 Peters, 436), decided, that "no doubt is entertained of the power of the States to pass laws to authorize purchasers to prosecute actions of ejectment, or certificates of purchase, against trespassers on the lands purchased." If conflicting patents issue, the State courts may give effect to the better right.

458*] *In Pennsylvania, where the consideration for the land has been paid, a survey, though unaccompanied by a patent, gives a legal right of entry. (3 Dall., 457.)

The authorities, then, clearly show that lands are subject to taxation by the State, on certificates of purchase, before the patent issues. It would be very extraordinary if an individual could purchase lands of the United States, settle, improve, and cultivate them, on certificates of purchase, and yet, because, from the neglect and delay of the proper department, the patents are not issued for several years, they are exempt from taxation, while his neighbor was compelled to pay taxes, when he was deriving no greater advantage from the possession and cultivation of his land.

Lands purchased and paid for at the land offices, are not thereafter the property of the United States. The United States cannot withhold the patents, except in a few specified cases, as where the sale was illegal; where a prior sale or reservation, or a prior grant, may have been made; where the land had not previously been offered at public sale, or where it had been directed by government to be withheld from sale. These are rare exceptions, and do not affect or impair the general principle that, as soon as the public land is purchased and paid for, it becomes the property of the purchaser, and may be sold and transferred by him, as is constantly the case, before it is patented. If the authorities and decisions were not in favor of the right of the State to tax such land or certificates of purchase, reason and common sense would demonstrate its equity and justice.

3. It follows from these views, which show that lands are subject to taxation before they are patented, that it is competent for the State to assess, tax, and sell them, as the property of the owner, as if they had been patented.

If, from accident, or the exceptions adverted to under the preceding head, the certificates of purchase should not be matured into patents, the purchaser at a tax sale could not acquire a better title than the holder of the certificate. That is his risk. But in the case of the present complainant, it is not pretended that his titles were not perfected. On the contrary, the record brought up here alleges and admits that the patents for his lands were issued on the 12th of August, 1837. And this was before the lands were sold for the taxes.

4. It is doubted whether the remedy sought in this case, by a bill in equity, is proper. In the case of *Ostrom* v. *The Auditor-General*, involving the same principles as the case of the complainant involves, *Judge* Wilkins said that the complainants had an adequate and complete remedy in the State courts for any injury they might sustain by the sale of their lands for taxes, if the taxation and sale were illegal. And the 16th section of the Act of 1789, establishing the courts of the United States, provides that suits in equity shall not be sustained in the courts of the United States, in any case where a plain, adequate, and complete remedy may be had at law.

*Mr. *Justice* MCLEAN delivered the [*459 opinion of the court:

The complainant filed his bill in the Circuit Court of the United States, in Michigan, stating that he is the owner in fee-simple of certain lands lying in Genesee County, amounting to three thousand five hundred and forty-nine and seventy-one hundredths acres, and of the value of $7,500. That, in 1836, he entered these lands, paid for them, and received from the land office a final certificate. Patents were issued for them on the 12th of August, 1837. That the delay in issuing the patents was not at the instance of complainant. Before the emanation of the patents, the lands were assessed for taxation, and sold by the defendant for the taxes thus assessed. Two years are allowed the owner to redeem the land by the act of Michigan, on the payment of the tax, charges, and interest, at the rate of twenty per cent. per annum. When this bill was filed, the time of redemption had not expired. The bill prays, that the assessment and sale may be declared illegal and void, and that the defendant may be enjoined from conveying the land, and other relief, &c.

The case was considered as on a demurrer to the bill, and on the argument, the opinion of the judges were opposed on the following points:

1. "Whether the statutes of the State of Michigan did, in fact, authorize the assessment and sale of the lands in question, and whether said statutes were intended to direct the assessment for taxation of lands of the United States, before the patents for them had been executed by the officers of the United States.

2. "Whether the lands in question were, before the date and execution of the patents for them, subject to taxation at all by the State of Michigan.

3. "Whether if they were subject to taxation, by the State, before the execution of the patents for them, it was competent to assess, and tax, and sell them, as the absolute property of the complainant, and at their full value, as if he owned them in fee.

4. "Whether the remedy by bill in equity, and the relief sought, are proper."

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The 1st section of the Act of the 22d of April, 1833, of the territory of Michigan, provides "that the taxes hereafter to be levied in the territory shall be assessed, levied, and paid in the manner hereinafter mentioned, upon a valuation of real and personal estate," &c.

By the 2d section the assessors of the different districts, "according to the best evidence in their power," are required to make out "a list or schedule of all the taxable property in the same," and bring the said lists or schedules together, and jointly value the property named in each, and set down in their assessment roll the value of buildings in such township, owned or possessed by any person residing in such township, &c. "And the assessors shall ascer-
460*] tain *what lands are situated in their townships, not owned by persons residing in such townships, and shall, in their assessment rolls, separate from the assessments made the estates of non-residents, and designate such land in the following manner: if the estate be a patent or tract of land of the subdivision of which the assessors cannot obtain correct information, they shall enter the name of the patent or tract, if known by any particular name, without regarding who may be the owner thereof; and if such tract be not known or designated by any particular name, they shall state by what other land the same is bounded, and shall set down the quantity of land contained therein in the proper columns for that purpose." By the 14th section, the tax, interest, and charges thereon, constitute a lien on the land, though aliened, and unless paid within two years from the 1st of May succeeding the assessment of such tax, the treasurer of the proper county, after giving notice, is required to sell the same. And if the person claiming title to said lands shall not pay to the treasurer, for the use of the purchaser, his heirs or assigns, the sum paid by him for the lands, with interest at the rate of twenty per cent. per annum, the treasurer shall execute to the purchaser, his heirs or assigns, "a conveyance of the lands so sold, which conveyance shall vest in the person or persons to whom it shall be given an absolute estate in fee-simple, &c.; "and such deed may be given in evidence, and recorded in the same manner and with like effect as a deed regularly acknowledged by the grantor may be given in evidence and recorded."

It is first contended "that the statutes of Michigan did not embrace the land in question, and were not intended to authorize their assessment."

In answer to this, it may be said, that a different construction has been put upon the above statutes by the authorities of the territory, and, also, of the State since its admission into the Union. The practical construction of local laws is, perhaps, the best evidence of the intention of the law makers. The courts of the United States adopt as a rule of decision the established construction of local laws. And it cannot be material, whether such construction has been established by long usage or a judicial decision.

But independently of the force of usage, we think the construction is sustainable. When the land was purchased and paid for, it was no longer the property of the United States, but of the purchaser. He held for it a final certificate, which could no more be cancelled by the United States than a patent. It is true, if the land had been previously sold by the United States, or reserved from sale, the certificate or patent might be recalled by the United States, as having been issued through mistake. In this respect there is no difference between the certificate holder and the patentee.

It is said, the fee is not in the purchaser, but in the United States, until the patent shall be issued. This is so, technically, at law, but not
*in equity. The land in the hands of [*461 the purchaser is real estate, descends to his heirs, and does not go to his executors or administrators. In every legal and equitable aspect it is considered as belonging to the realty. Now, why cannot such property be taxed by its proper denomination as real estate? In the words of the statute, "as lands owned by non-residents." And if the name of the owner could not be ascertained, the tract was required to be described by its boundaries or any particular name. We can entertain no doubt that the construction given to this act by the authorities of Michigan, in regard to the taxation of land sold by the United States, whether patented or not, carried out the intention of the law making power.

But it is insisted, "that the lands in question were not, before the date and execution of the patents for them, subject to taxation at all by the State of Michigan.

It is supposed that taxation of such lands is "an interference with the primary disposition of the soil by Congress," in violation of the ordinance of 1787; and that it is "a tax on the lands of the United States," which is inhibited by the ordinance. Now, lands which have been sold by the United States can in no sense be called the property of the United States. They are no more the property of the United States than lands patented. So far as the rights of the purchaser are considered, they are protected under the patent certificate as fully as under the patent. Suppose the officers of the government had sold a tract of land, received the purchase money, and issued a patent certificate, can it be contended that they could sell it again, and convey a good title? They could no more do this than they could sell land a second time which had been previously patented. When sold, the government, until the patent shall issue, holds the mere legal title for the land in trust for the purchaser: and any second purchaser would take the land charged with the trust.

But it is supposed that because on some certificates patents may not be issued, taxation of unpatented land is an interference "with the primary disposition of the land." And it is said that in the case of *Ostrom* v. *Hammond, Auditor-General of Michigan*, before the Circuit Court in 1842, out of one hundred certificates patents were refused on fourteen of them; that those lands had been sold for taxes and conveyed under the statutes of Michigan; and that the United States either retain those lands or have conveyed them to third parties.

Michigan does not warrant the title to lands sold for taxes. The deed, by the express words of the statute, when duly executed and recorded, "may be given in evidence in the

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same manner, and with like effect, as a deed regularly acknowledged by the grantor," &c. The government has no right to refuse a patent to a *bona fide* purchaser of land offered for sale. But where there has been fraud, or mistake, the patent may be withheld, and every 462*] purchaser at a tax sale *incurs the risk as to the validity of the title he purchases. He incurs the same risk after the emanation of the patent. But how this interferes with "the primary disposition of the public lands," by the United States, is not perceived. The sale for taxes is made on the presumption that the purchase from the government has been *bona fide*, and if not so made, the purchaser at the tax sale acquires no title, and consequently no embarrassment can arise in the future disposition of the same land by the government.

It is known to be universally the practice in the west, where lands are purchased for a residence and cultivation, that the purchaser enters immediately into the possession of them. And it may also be observed, that in all the new States, lands purchased of the United States have uniformly been held liable to be taxed before they are patented. And, indeed, in Ohio, under the credit system, lands were taxed after the expiration of five years from the time of their purchase, although they had not been paid for in full. There was no compact made with Michigan, as with Ohio, not to tax lands sold by the United States until after the expiration of five years from the time of sale. The court think that the lands in question were liable to taxation under the authorities of Michigan.

It is contended "that such lands should not be taxed at their full value, nor should they be sold as if the claimant owned them in fee."

The statute does provide that the conveyance, under a tax sale, "shall vest in the purchaser an absolute estate in fee-simple," &c. Two years and more are required to elapse after the tax shall become due, before the land is liable to be sold; and the deed is not to be executed before the lapse of two years after the sale, during which time the owner has a right to redeem. This is a tardy proceeding, and gives ample time to non-residents for the payment of their taxes, &c. The land should be estimated at its full value, as the owner, having paid for it, is subjected to no additional charge for the obtainment of the patent. And although the statute may purport to give a higher interest in the land than the owner could convey, yet it does not follow that such title is inoperative. It must at least convey the interest which the owner has in the lands. Or it may be that a higher interest is conveyed. But whether such a conveyance shall take effect as in fee, under the statute, when executed, or when the patent shall be issued, or at any time, it cannot be necessary now to inquire. The only inquiry is, whether the land should not be estimated at its full value, and sold by the State for the tax regularly assessed upon it. The effect of the title is not now before us for consideration. The conveyance of real estate, whether by deed or by operation of law, is subject to the law of the State; and it is difficult to say that any restraint can be imposed upon the local power on this subject. It cannot, however, convey a better title to the land sold for taxes than the owner of such land, *to whom it stands charged, possessed [*463 at the time the taxes constituted a lien, or when the land was sold. Whether the Legislature may not change the character of a title, so as to make that a legal title which before was only an equity, is a very different question.

In the case of *The Lessee of Wallace* v. *Semour and Renich* (7 Ohio Rep., 156), the court held "that a purchaser at a sale for taxes can acquire a right which can be enforced in equity, although he has been defeated at law." But that case grew out of the peculiar phraseology of the statute. It was also decided that "where lands have been entered and surveyed in the military district, and sold for taxes before patented, that when patented, the patentee should hold the land subject to any claim which a purchaser at tax sale may have in consequence of such sale." And in *Lessee of Stuart* v. *O. Parish* (6 Ohio Rep., 477), that a purchaser of land at a tax sale, before a patent was issued, could not set up, in an action of ejectment, the tax deed against the patentee. In *Douglass* v. *Dangerfield* (10 Ohio Rep., 156), the court say, in reference to taxing lands before the patent has been issued, "if the right to tax exists, and that it does there has not been any serious question for many years at least, it would seem to follow that the right to collect must also exist."

Under the Michigan statutes, we have no doubt, the law making power intended to tax lands that had been entered and paid for, as the lands in question, and that it had the power to impose the tax. The nature of the title of such lands, under a tax sale, not being involved in the points certified, we will not further discuss.

In regard to the fourth point certified, we entertain no doubt, that, in a proper case, relief may be given in a court of equity. This may be done on the ground to prevent a cloud from being cast on the complainant's title, or to remove such cloud; to prevent multiplicity of suits, or to prevent an injurious act by a public officer, for which the law might give no adequate redress.

We answer all the questions certified in the affirmative.

Cited—3 How., 482; 4 How., 19; 9 How., 447; 4 Wall., 219; 2 Sawy., 455.

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*JOHN LANE AND SARAH C. [*464 LANE, wife of the said JOHN, AND ELIZABETH IRION, an infant under twenty-one years, who sues by JOHN LANE, her next friend, *Complainants and Appellants*,

v.

JOHN W. VICK, SARGEANT S. PRENTISS ET AL., *Defendants.*

Will devising lands, construction of—this court not bound by construction made by State court.

Newit Vick made the following devises, viz.:
2d. I will and bequeath unto my beloved wife, Elizabeth Vick, one equal share of all my personal estate, as is to be divided between her and all of my

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children, as her own right, and at her own disposal during her natural life; and also, for the term of her life on earth, the tract of land at the Open Woods on which I now reside, or the tracts near the river, as she may choose, reserving two hundred acres, however, on the upper part of the uppermost tract, to be laid off in town lots at the discretion of my executrix and executors.

3d. I will and dispose to each of my daughters, one equal portion with my sons and wife, of all my personal estate as they come of age or marry; and to my sons, one equal part of said personal estate as they come of age, together with all of my lands, all of which lands I wish to be appraised, valued, and divided when my son Westley arrives at the age of twenty-one years, the said Westley having one part, and my son William having the other part of the tracts unclaimed by my wife, Elizabeth; and I bequeath to my son Newit, at the death of my said wife, that tract which she may prefer to occupy. I wish it to be distinctly understood, that that part of my estate which my son Hartwell has received shall be valued, considered as his, and as a part of his portion of my estate.

I wish my executors, furthermore, to remember, that the town lots now laid off, and hereafter to be laid off, on the aforementioned two hundred acres of land, should be sold to pay my just debts, or other engagements, in preference to any other of my property, for the use and benefit of all my heirs.

From the provisions of the will it appears not to have been the intention of the testator to include the town lots in the devise of his lands to his sons.

But these town lots must be sold, after the payment of debts, for the use and benefit of all the heirs of the testator.

The mere construction of a will by a State court, does not, as the construction of a statute of the State, constitute a rule of decision for the courts of the United States. If such construction by a State court had been long acquiesced in, so as to become a rule of property, this court would follow it.

THIS was an appeal from the Circuit Court of the United States for the Southern District of Mississippi, sitting as a court of equity.

The case was this:

In 1819, Newit Vick, a citizen of the State of Mississippi, died, leaving a wife and the following children:

Sons—Hartwell Vick, John Westley Vick, William Vick, Newit H. Vick.

Daughters—Nancy, Sarah, Mary, Eliza, Lucy, Matilda, Amanda, Martha, Emily.

The wife, however, died in a few minutes after her husband.

In October, 1819, the will of the deceased was admitted to probate in the Orphan's Court of Warren County, and was as follows:

"In the name of God, Amen! I, Newit Vick, of Warren County, and State of Mississippi, being of perfect mind and memory, and 465*] *calling to mind the mortality of life, and knowing that it was appointed for all men once to die, do make and ordain this my last will and testament, in the manner and form following, to wit:

"Primarily, and first of all, I give and dispose my soul into the hands of Almighty God, who gave it, and my body, I recommend to be buried in a Christianlike and decent manner, according to the discretion of my executors.

"2d. I will and bequeath unto my beloved wife, Elizabeth Vick, one equal share of all my personal estate, as is to be divided between her and all of my children, as her own right, and at her own disposal during her natural life; and also, for the term of her life on earth, the tract of land at the Open Woods on which I now reside, or the tracts near the river, as she may choose, reserving two hundred acres, however, on the upper part of the uppermost tract, to be laid off in town lots at the discretion of my executrix and executors.

"3d. I will and dispose to each of my daughters, one equal proportion with my sons and wife, of all my personal estate as they come of age or marry; and to my sons, one equal part of said personal estate as they come of age, together with all of my lands, all of which lands I wish to be appraised, valued, and divided when my son Westley arrives at the age of twenty-one years, the said Westley having one part, and my son William having the other part of the tracts unclaimed by my wife, Elizabeth; and I bequeath to my son Newit, at the death of my said wife, that tract which she may prefer to occupy. I wish it to be distinctly understood, that that part of my estate which my son Hartwell has received shall be valued, considered as his, and as a part of his portion of my estate.

"4th and last. I hereby nominate and appoint my beloved wife Elizabeth, my son Hartwell, and my nephew Willis B. Vick, my sole and only executrix and executors of this my last will and testament. It is, however, furthermore my wish that the aforesaid Elizabeth should keep together the whole of my property, both real, personal, reserving the provisions before made, for the raising, educating, and benefit of the before mentioned children.

"It must be remembered, that the lot of two acres on the bank of the river on which a sawmill house is erected, belongs to myself, son Hartwell, and James H. Center, when the said Center pays his proportional part.

"I wish my executors, furthermore, to remember, that the town lots now laid off, and hereafter to be laid off, on the aforementioned two hundred acres of land, should be sold to pay my just debts, or other engagements, in preference to any other of my property, for the use and benefit of all my heirs, and that James H. Center have a title made to him for one lot already laid off of half an acre in said two hundred acres, and on which he has builded, when he pays to my executors the sum of three hundred dollars.

*"In testimony whereof, I have here- [*466 unto set my hand and seal, this 22d day of August, in the year of our Lord 1819.

"The words interlined, 'for the use and benefit of all my heirs,' before signed.

"FOSTER COOK, NEWIT VICK. [SEAL.]
"EDWIN COOK,
"B. VICK."

The wife being dead, Hartwell, one of the executors, virtually renounced the executorship, and Willis, the other executor, gave the necessary bond and took out letters testamentary; but being in bad health, he was, with his own consent, removed. John Lane, one of the complainants, who had married Sarah, one of the daughters of the testator, then took out letters of administration with the will annexed, and filed accounts, from time to time, until the year 1829, when he filed his final account and was discharged. He reported the sale of sixty-seven town lots at various prices and to various persons. The debts of the testator were all paid.

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In 1831, John Westley Vick sold a portion of his interest, which was subdivided by sundry *mesne* conveyances, and came into the possession of several holders.

In 1838, the plaintiffs, being residents of Louisiana and Tennessee, filed their bill against all the other descendants of the testator, and claimants under them. It recited the facts above set forth, and proceeded thus:

"Your orators would further allege, that some years since the said Willis B. Vick departed this life, and that for some years all the executors of the last will and testament of said Newit Vick have been dead. Your orators allege, that only a few lots had been laid off and sold by Newit Vick, in his lifetime, and that your orator, John Lane, as administrator, with the will annexed, laid off by actual survey the said town of Vicksburg, off of the upper end of the uppermost tract, referred to in said will; which will, as your honors will perceive, directed the same to be done. Lots and parts of lots have been sold from time to time by the said administrator, and the amounts of the sales applied to the payment and liquidation of the debts of the said Newit Vick, until all the debts which he, the said Newit Vick, owed, so far as are known, have been paid off and discharged.

"They would further state, that there yet remain lots and parts of lots, and parcels of ground in said town, and on said two hundred acres, which are unsold, and more especially, that part of said town known by the name of 'Commons,' and 'Levee Street,' which have descended to the heirs of said Newit Vick, hereinafter mentioned. They would further represent, that the powers of said Lane, administrator, to sell the unsold lots, parcels of ground, as above stated aforesaid, have been doubted and brought into question, which renders it to him a matter of prudence and sound discretion 467*] to *stop the sales, since the debts of Newit Vick have been paid, and ask the advice of this honorable court, sitting in chancery, who have the burden, and whose duty it is to explain the nature of all trusts and decree the performance of the same, to say what shall be done with the residue of the unsold lots, and parts of lots, commons, Levee Street, &c., in said town, and on said two hundred acres."

It concluded thus:

"Your orators pray your honors, upon a final hearing of this cause, to decree a division and partition of the aforesaid lots, parts of lots, commons, and Levee Street, to be made between them and the other heirs of Newit Vick; and that said claimants shall be put into possession of the part allotted to her or them, and that the defendants shall account for the rents and profits which they have respectively received. Or if a partition and division of the ground aforesaid, as above asked for, is not, in the opinion of this honorable court, carrying the will of the testator, Newit Vick, into full and complete effect, according to the true intent and meaning thereof, then may your honors decree and order the said John Lane, administrator with the will annexed, to proceed to sell said grounds, upon such terms and credits as you may deem proper, and then distribute the money among the several claimants, according to their respective interests, and grant all such other relief as to justice may belong."

Some of the defendants answered the bill, admitting the truth of its statements, and concurring in the prayer for a division, "among the several claimants, according to the nature and extent of them as heirs, and also under the will of Newit Vick;" others concurred generally, and prayed that their parts might be allotted to them.

The parties made defendants as vendees, &c., to wit, Prentiss, &c., demurred to the bill; and the cause being set down for hearing on this state of preparation, the court, in June, 1842, sustained the demurrer, and dismissed the bill.

From this decree the complainants appealed.

Mr. Ben Hardin (in print) for the plaintiffs in error.

Mr. Crittenden for the defendants in error.

This is one of the cases which was argued during an unavoidable absence of the reporter; and although he is enabled to give *Mr. Hardin's* argument, he regrets that he cannot furnish that of *Mr. Crittenden*.

Mr. Hardin, after stating the case, proceeded thus:

From the face of the will, and also the statements of the bill, it appears that the testator owned a tract of land in the Open Woods, a few miles from the Mississippi River, on which he resided at his *death; and also two [*468 tracts and parcels of land, included in one survey, on the Mississippi, immediately below and adjoining the Walnut Hills. The lands on the Mississippi had only been surveyed when the testator died, and patented after his death. The second clause in the will gives to the wife of the testator, "for the term of her life on earth, the tract of land at the Open Woods, on which he then resided, or the tracts near the river, as she may choose, reserving two hundred acres, however, on the upper part of the uppermost tract, to be laid off in town lots, at the discretion of my executrix and executors." The court will perceive that the two hundred acres, on which the town was to be laid off, are expressly reserved out of the devise to the wife of the testator. In the third clause of the will there is the following devise: "And to my sons, one equal part of my said personal estate as they come of age, together with all my lands, all of which lands I wish to be appraised, valued, and divided, when my son Westley arrives at the age of twenty-one years; the said Westley having the one part, and my son William having the other part of my tracts unclaimed by my wife Elizabeth; and I bequeath to my son Newit, at the death of my said wife, the tract she may prefer to occupy." The question from this clause is, what lands were disposed of by it? I contend it is all his lands, except the two hundred acres directed to be laid off into town lots, because the objects the testator had in view in laying off the town into lots, and selling the same for the payment "of his debts and liabilities," are utterly inconsistent and incompatible with devising the same away to his sons. And the expression "all my lands" must be understood to mean, except the two hundred acres reserved for the town. Should it be contended that the expression "all my lands" will embrace the two hundred acres to be

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laid off into town lots, leaving the executors power to sell so much of it as would pay the debts of the testator, the answer to that argument is, that the lands devised to his sons "are to be appraised, valued, and divided when Westley arrives at the age of twenty-one years." The time fixed on for a division of the land would, in all probability, arrive before the debts and liabilities of the testator would be paid off, or even known; for aught the court knows or can know, on the demurrer, Westley might have been, at the death of the testator, within one or two years of twenty-one (which was the fact), and thereby leave no time, or at least not sufficient time to ascertain his debts and pay them off, and settle all his liabilities before "the lands were to be appraised, valued and divided." When Westley might arrive at twenty-one years of age the persons appointed to appraise, value and divide the lands would not know what portion of the lots would be required to be sold to pay the debts. The above reason excludes the idea that he intended to devise said lots, or any of them, to his sons. The whole amount of the debts of the testator, as settled by the court in August, 1829, was 469*] $88,704.16. *The laying off the town was a mere experiment of the testator to enable his executors to meet his debts and liabilities. It might succeed and pay his debts, and then again it might fall far short. These experiments of new towns to raise funds are as uncertain and precarious as lotteries. And hence it never entered into the design of the testator to will away the unsold lots, after the debts were paid, and to fix on a time certain, when the power of the executors to sell should cease, because it must cease, "when appraised, valued, and divided." There is another argument, growing out of the third clause of the will, which I deem conclusive in favor of the position I contend for. The testator had two tracts of land, one in the Open Woods, and one on the Mississippi. His wife had a right from the will to select which she chose for her residence; but the town part of the river tract was expressly reserved, and was not within the devise to her. Suppose she had selected the river tract, then Newit, the son of the testator, was to have that tract "which she may prefer to occupy;" and Westley and William the other tract, to wit, the Open Woods. If the wife of the testator had selected the river tract, then, at her death, what would Newit Vick take? Just what she selected to occupy, no more or less. For if more was intended, that is, the residue of the river tract, if she had selected it, why withhold that part from him until she died, when she by the will had no claim to it? It surely is not compatible with the fair exposition and interpretation of the will to say that if Mrs. Vick selected the river tract, then Westley and William would be entitled to the Open Woods, and also the two hundred acres off of the upper end of the uppermost tract, which was laid off into town lots. Besides, Westley and William were to have the other part of the tracts unclaimed by his wife Elizabeth. The construction of the will contended for on the other side, just amounts to this, that Westley and William Vick took the two hundred acres which were to be laid off in lots, without the wife of the testator or his son Newit having any claim to that part. Then why use the words "unclaimed by my wife Elizabeth," if the had no claim from the will? The word "unclaimed" clearly proves that the testator gave no lands to Westley and William, except such lands as the wife of testator had the right to claim as her future residence, if she chose.

The last clause in the will has these words interlined and underscored, "for the use and benefit of all my heirs." These words have no meaning in them, if it be only intended that by the sale of his lots to take the burden of the payment of his debts off of his personal estate, and that in that way it would be for the benefit of all his heirs, as all are to have an equal share of that, because that would have been the effect and operation of that clause without the interlineation of the above words. Their clear meaning is, the town lots are for the benefit of all my heirs. By adding the word "and" before the word "for," then it would read thus: *"and for the use and [*470 benefit of all my heirs." The word "and" added would free the will from all ambiguity and uncertainty, and then the interlineation, which was inserted with deliberation, will have some meaning, otherwise it has none; all words and parts of a will shall have some meaning if by any sensible construction of the will the same can be done. It is certain that the interlineation was inserted after the will was written, and the necessity of it was suggested upon the last reading, before signing, which shows that the testator deemed the interlineation essential to carry out his meaning. The fact is, it is well remembered by all present, who are yet alive, that on the reading of his will, one of the daughters of the testator asked him if his daughters were to have an interest in the town lots; upon the testator answering in the affirmative she replied, to clear the will of all doubt, the interlineation had better be made, which was accordingly done. I am aware that these facts are inadmissible, but at all events the interlineation goes to show that something of the kind did occur. There is yet another question; the wife of the testator died in about ten minutes after her husband, and was, from the death of the testator, until her death, incapable of making a selection of the place of her future residence, and never made any, or attempted to make any.

If the town lots passed by the will of the testator to his sons, then Newit Vick is entitled to one third. His answer is a cross-bill, and should have been retained, and, upon a final hearing, one third allotted to him. I will refer the court to the laws of Mississippi, to show that all the legitimate children inherit equal share and share alike, and also to Swinburn, 20, 21, 22, 638, 639. The meaning of the testator is all that is sought after by the judges. There is another principle of law universally admitted to be correct, that heirs are not to be disinherited by a doubtful construction.

Mr. Crittenden, for defendants in error, laid down the following propositions:

1. That (subject to an estate for life to his wife) "all" the lands of the testator are devised to his sons, in exclusion of his daughters.

2. That the last clause of the will does not affect the devise to the sons, otherwise than by creating a charge upon the town lots for the payment of debts, thereby exonerating and pre-

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serving the personal estate for the use and benefit of all the parties to whom it had been bequeathed. And those debts being paid (as appears by confession of the complainants), the incumbrance is discharged, and no ground of interest or complaint left to the complainants.

3. That if any right or title, other than above supposed, was devised to the complainants, it is expressly limited and confined to the "town lots now laid off, and hereafter to be laid off," &c. By the bill, it appears that the lots laid off by the testator were sold by him, and that no others were thereafter laid off by the executors, 471*] to whose *discretion it was confided; so that there are no lots to which any right or claim of the complainants can attach.

4. That Lane's appointment as administrator was illegal and void; and, if not, that he had no right to exercise the power and discretion confided in the executors of laying off and selling town lots; and that his laying off lots can confer no right thereto upon the complainants.

5. That the construction of the will insisted on in the 1st and 2d of the above propositions, and the points stated in all the foregoing propositions, have been, in substance, so decided and settled by the Supreme Court of the State of Mississippi, and that decision will be regarded as conclusive in this court, according to its well established principles.

On the 1st proposition, he cited 10 Wheat., 159; 8 Wheat., 535; 12 Wheat., 162, 168, 169; 5 Peters, 155; 16 Vesey, Jun., 446; 3 Mass., 381; 3 Bibb, 349; 4 Johns. Ch., 365; and in support of the 5th proposition, 1 How. Miss. Rep., 379, 442; *United States* v. *Crosby* (7 Cranch., 115); 9 Wheat., 565; 10 Wheat., 202.

Mr. Justice M'LEAN delivered the opinion of the court:

This case is brought here by an appeal from the decree of the Circuit Court for the District of Mississippi.

The complainants under the will of Newit Vick, late of the State of Mississippi, deceased, claim certain interests in a tract of two hundred acres of land, on which the town of Vicksburg is laid off. In the bill various proceedings are stated as to the proof of the will, the qualification of one of the executors named in it, the death of the executrix, and the refusal of one of the executors named to qualify; that the executor who qualified was afterwards removed, with his consent, and Lane, the complainant, appointed administrator, with the will annexed; that acting under the will, the administrator laid off the town of Vicksburg, sold lots, and paid the debts of the deceased; that there yet remains certain parts of the above tract undisposed of; and that his power as administrator to sell the unsold lots is questioned.

The defendants are represented as being interested in the above tract, as devisees and as purchasers; and the complainants pray that the court would decree a partition of the lots, commons, and Levee Street, to be made between them and the other devisees of Newit Vick; and that said claimants shall be put in possession, &c., or that said property may be sold, &c., as shall best comport with the intent of the testator.

The defendants favorable to the object of the bill answered; the others demurred to the bill, which was sustained on the hearing, and the bill was dismissed, from which decree this appeal was taken.

The decision of this case depends upon the construction of the will of Newit Vick. It was proved the 25th of October, 1819.

*Every instrument of writing should [*472 be so construed as to effectuate, if practicable, the intention of the parties to it. This principle applies with peculiar force to a will. Such an instrument is generally drawn in the last days of the testator, and very often under circumstances unfavorable to a calm consideration of the subject matter of it. The writer, too, is frequently unskillful in the use of language, and is more or less embarrassed by the importance and solemnity of the occasion. To expect much system or precision of language in a writing formed under such emergencies, would seem to be unreasonable. And it is chiefly owing to these causes that so many controversies arise under wills.

In giving a construction to a will, all the parts of it should be examined and compared; and the intention of the testator must be ascertained, not from a part, but the whole of the instrument.

By the second paragraph of the will under consideration, the testator bequeaths to his wife one equal share of his personal property, to be divided between her and her children. This would give to his wife one half of his personal estate. But the succeeding paragraph qualifies this bequest so as to give to his wife a share of the personal property equal only to the amount received by each of his children. This shows a want of precision in the language of the will, and that one part of it may be explained and qualified by another.

In the second paragraph, the testator devises to his wife, during her natural life, "the tract of land at the Open Woods, on which he then resided, or the tracts near the river, as she might choose, reserving two hundred acres on the upper part of the uppermost tract to be laid off in town lots, at the discretion of his executrix and executors.

This discretion of his executrix and executors, referred to the plan of the town, and not to the propriety of laying it off. The testator had determined that a town should be established, and reserved for this purpose the above tract of two hundred acres, "to be laid off in town lots."

The testator next disposes of his personal property to his wife and children; and he says, "to my sons one equal part of said personal estate as they come of age, together with all my lands, all of which lands I wish to be appraised, valued, and divided, when my son Westley arrives at the age of twenty-one years; the said Westley having one part, and my son William having the other part, of the tracts unclaimed by my wife Elizabeth; and I bequeath to my son Newit, at the death of my said wife, that tract which she may prefer to occupy. I wish it to be distinctly understood, that that part of my estate which my son Hartwell has received, shall be valued, considered as his, and as a part of his portion of my estate."

By these devises, Newit, on the death of his mother, was to have the tract selected by her for her residence. She died, it is admitted, in

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473*] *a few minutes after the decease of the testator, so that no selection of a residence was made by her. But this is not important as regards the intention of the testator. What lands did he devise to his sons Westley and William? The answer is, the land unclaimed by the wife of the testator. His words are, "Westley having one part, and my son William having the other part, of the tracts unclaimed by my wife Elizabeth." But what tracts may be said to come under the designation of "tracts unclaimed by my wife?" The land which, under the election given to her in the will, she might have claimed as a residence, but did not.

This claim by the widow was expected to be made shortly after the decease of the testator, as by it her future residence was to be established. If she selected the river land, then the Open Woods tract was to go, under the will, to Westley and William; but if the Open Woods tract were selected by the widow, then they were to have the river land. This devise being of land unclaimed by the widow, presupposes her right to have claimed it in the alternative under the will. It did not include the town tract, for that was expressly reserved by the testator from the choice of his wife. That this is the proper limitation of the devise to Westley and William, seems to be clear of doubt.

To Hartwell was devised the tract on which he lived, and which was to be valued.

These are the specific devises of his lands, by the testator, to his four sons. The tract of two hundred acres reserved for the town is not affected by them. Did this tract pass to his sons under the general devise of his lands to them, in the third paragraph of the will? That point will be now examined. The words of the testator are, "and to my sons one equal part of said personal estate as they come of age, together with all my lands, all of which lands I wish to be appraised, valued, and divided, when my son Westley arrives at the age of twenty-one years." The words "all of my lands," unless restricted by words with which they stand connected, or by some other part of the will, cover the entire real estate of the testator. But these words are restricted by the part of the sentence which follows them, and also in other parts of the will.

"All of which lands I wish to be appraised, valued, and divided, when my son Westley arrives at the age of twenty-one years," follow the words "all of my lands," and show that the tract of two hundred acres was not intended to be included in this general devise. Such an intention was incompatible with the reservation of this tract for a town. In the second clause of the will are the words, "reserving two hundred acres, however, on the upper part of the uppermost tract, to be laid off in town lots." Now, the testator could not have intended, in the next clause, to direct that this tract should be valued and divided among his sons. This would be repugnant to the authority given to

474*] his executors to lay off a *town, and would have been an abandonment of what appears, from the last clause in the will, to have been, with him, a favorite object. Did he intend the tract of two hundred acres should be valued and divided among his sons, which he directed in another part of his will to be laid off into town lots and sold by his executors? So great an inconsistency is not to be inferred. The general devise to his sons, "of all his lands," was limited to the lands which he directed to be valued and divided among his sons. This cannot be controverted, for it is in the very words of the will, and does not depend upon inference or construction. The special devises to each of his sons, which follow the general devise, also, in effect, limit it. These devises cover all the real property of the testator, except the town tract, and show what he meant by "all his lands." He intended all his lands which he subsequently and specially devised, and not the tract which, in the will, he had previously reserved and afterwards disposed of.

In the next clause of the will the testator expresses his wish that the aforesaid Elizabeth should keep together the whole of his property, both real and personal (reserving the provisions before made), for the raising, educating, and benefit of the before mentioned children.

These exceptions refer to the share of the personal property which each child was to receive when married, or at full age, and to the land appropriated for the town.

We have now arrived at the last clause of the will, under which clause this controversy has arisen. The testator has made provision for his wife, by giving her a life estate in one of two tracts of land as she might select, and an equal share with each child, of the personal property. To his sons, in addition to his share in the personalty, he has given to each a portion of his real estate. He has made no disposition of the tract reserved for a town, but proceeds to do so in the following and closing paragraph of the will:

"I wish my executors furthermore to remember that the town lots now laid off, and hereafter to be laid off, on the aforementioned two hundred acres of land, should be sold to pay my just debts, or other engagements, in preference to any other of my property for the use and benefit of all my heirs."

This clause is construed, by the appellees, to be a charge on the two hundred acres of land for the payment of the debts of the testator only. And that the authority to the executors to sell lots is limited to this object. That as the personal property bequeathed to his heirs was first liable for the debts of the deceased, the charge of this tract may well be said, in the language of the will, to be "for the use and benefit of all his heirs."

That there is plausibility in this construction is admitted. It may, at first, generally, strike the mind of the reader as reasonable and just. But a closer investigation of the structure of the paragraph, *and a comparison of it with [*475 other parts of the will, with the view to ascertain the intention of the testator, must, we think, lead to a different conclusion.

If the object of the testator had been, as contended, merely to charge this tract with the payment of his debts, would the words, "for the use and benefit of all my heirs" have been inserted? The sentence was complete without them. They add nothing to its clearness or force. On the contrary, if the intention of the testator was to pay his debts only, by the sale of lots to be laid off, the words are surplusage. They stand in the sentence, disconnected with

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other parts of it, and, consequently, are without an object.

The testator directed that the town lots should be sold to pay his just debts, "in preference to any other of his property." This released his personal property, which he had bequeathed to his children, from all liability on account of his debts. And on the hypothesis that he only intended to do this, why should the above words have been added? They were not carelessly thrown into the sentence when it was first written. From the will, it appears they were interlined. This shows deliberation, and the exercise of judgment. Without this interlineation, the lots were required to be sold to pay debts, in preference to other property, in language too clear to be misunderstood by anyone. It could not have been misunderstood, either by the testator or the writer of the will. But, as the paragraph was first written, it did not carry out the intention of the testator. To effectuate that intent, the interlineation was made. The words "for the use and benefit of all my heirs" were interlined. Does this mean nothing? This deliberation and judgment? Were these words added to a sentence perfectly clear, and which charged the land with the payment of the debts of the testator, without any object? Were they intended to be words of mere surplusage and without effect? Such an inference is most unreasonable. It does violence to the words themselves, and to the circumstances under which they were introduced. No court can disregard these words, or the manner of their introduction.

The testator was not satisfied with the direction of his executors to sell lots for the payment of his debts, but he adds, "for the use and benefit of all my heirs." By this he intended, that the lots should be sold for the payment of his debts, and "for the use and benefit of all his heirs." The omission of the word "and" has given rise to this controversy. Had that word been inserted with the others, no doubt could have existed on the subject. And its omission is reasonably accounted for, by the fact of the interlineation. On such occasions more attention is often paid to the matter to be introduced, than to the word which connects it with the sentence. That the lots should be sold "for the use and benefit of all his heirs," after the payment of his debts, is most reasonable; but it cannot, with the same propriety of 476*] language, be said, that the debts *of the testator were to be paid "for the use of all his heirs." The word "use" imports a more direct benefit. That the phrase was used in this sense we cannot doubt.

The clauses in the will preceding the one which is now under consideration have been examined, and no disposition is found in any of them of the town tract. And if it be not disposed of in this last paragraph, after the payment of the debts, the remaining lots or their proceeds will descend generally to the heirs of the testator as personal property. The law will not disinherit the heir, or a doubtful devise. But we think the testator intended that the tract of two hundred acres should be laid out in lots and sold, "for the use and benefit of all his heirs," and "the payment of his debts and other engagements."

This construction of the will is strengthened by its justice to all the parties interested. That the testator intended to give to his sons a much larger part of his property than to his daughters, is evident. He gave to his sons an equal share, with his daughters, of his personal property. But did he intend to cut off his daughters from all interest in his real estate? He could not have had the heart of a dying father to have done so. He did not act unjustly to his daughters. They, equally with his sons, were devisees of the proceeds of the town lots, after the payment of all just debts and other engagements.

It is insisted that the construction of this will has been conclusively settled by the Supreme Court of Mississippi, in the case of *Vick et al.* v. *The Mayor and Alderman of Vicksburg* (1 How., 379).

The parties in that case were not the same as those now before this court; and that decision does not affect the interests of the complainants here. The question before the Mississippi court was, whether certain grounds, within the town plat, had been dedicated to public use. The construction of the will was incidental to the main object of the suit, and of course was not binding on anyone claiming under the will. With the greatest respect, it may be proper to say, that this court do not follow the State courts in their construction of a will or any other instrument, as they do in the construction of statutes.

Where, as in the case of *Jackson* v. *Chew* (12 Wheat., 167), the construction of a will had been settled by the highest courts of the State, and had long been acquiesced in as a rule of property, this court would follow it, because it had become a rule of property. The construction of a statute by the Supreme Court of a State is followed, without reference to the interests it may affect, or the parties to the suit in which its construction was involved. But the mere construction of a will by a State court does not, as the construction of a statute of the State, constitute a rule of decision for the courts of the United States. In the case of *Swift* v. *Tyson* (16 Peters, 1), *the effect of the [*477 34th section of the Judiciary Act of 1789, and the construction of instruments by the State courts, are considered with greater precision than is found in some of the preceding cases on the same subject.

The decree of the Circuit Court is reversed, and the cause is remanded to that court for further proceedings.

Mr. Justice McKINLEY:

In this case I differ in opinion with the majority of the court, not only on the construction of the will, but upon a question of much greater importance, and that is, whether the construction given to this will by the Supreme Court of Mississippi is not binding on this court. I will proceed to the examination of these questions in the order in which I have stated them; and to bring into our view all the provisions of the will, which dispose of the real estate of the testator, I will state them in the order in which they stand in the will, unconnected with other provisions not necessary to aid in construing those relating to the real estate.

After the introductory part of the will, and

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providing for his funeral, the testator proceeds to dispose of his estate thus:

"Second. I will and bequeath to my beloved wife, Elizabeth Vick, one equal share of all my personal estate, as is to be divided between her and all my children, as her own right, and at her own disposal during her natural life; and also for the term of her life on earth, the tract of land at the Open Woods, on which I now reside, or the tracts near the river, as she may choose; reserving two hundred acres, however, on the upper part of the uppermost tract, to be laid off in town lots, at the discretion of my executrix and executors.

"Third. I will and dispose to each of my daughters, one equal proportion with my sons and wife, of all my personal estate, as they come of age or marry; and to my sons one equal part of said personal estate, as they come of age, together with all of my lands; all of which lands I wish to be appraised, valued, and divided, when my son Westley arrives at the age of twenty-one years; the said Westley having one part, and my son William having the other part of the tracts unclaimed by my wife, Elizabeth; and I bequeath to my son Newit, at the death of my wife, that tract which she may prefer to occupy. I wish it to be distinctly understood, that that part of my estate which my son Hartwell has received, shall be valued, considered as his, and as part of his portion of my estate.

"Fourth. It is, however, furthermore my wish that the aforesaid Elizabeth should keep together the whole of my property, both real and personal, reserving the provisions before made for the raising, educating, and benefit, of the before mentioned children. I wish my executors, furthermore, to remember that the town lots now laid off, and hereafter to be laid off, on the aforementioned two hundred acres 478*] *of land, should be sold to pay my just debts, or other engagements, in preference to any other of my property, for the use and benefit of all my heirs."

An inquiry which lies at the threshold of this investigation, is, what was the meaning and intention of the testator in reserving the two hundred acres of land, "to be laid off in town lots?"

Did he intend this tract, of two hundred acres, should not pass by his will, under the general description of "all my lands?" Or did he mean simply that it should be reserved from the use of his wife, in the event she selected the river tracts in preference to the Open Woods tract? Or did he intend, as the majority of the court have decided, that it should be reserved to be sold by his executors, for the purposes of paying his just debts and other engagements, "and" to increase the legacies of his daughters? To the last construction there is a very material objection. The power of the executors to sell the lots laid off, and to be laid off, on the two hundred acres, is not absolute, but contingent. The testator did not direct that any of his property, real or personal, should be sold for the purpose of paying his debts, or for any other purpose. But his meaning and intention, as manifested by the language employed, is, that if, in the administration of his estate, it should become necessary to sell any portion of it for the payment of his debts or other engagements, he wished his executors to remember that the town lots then laid off, and thereafter to be laid off, should be sold "in preference to any other of (his) property."

If the debts and other engagements could have been satisfied without a sale of the lots, the executors would have had no power to sell them for any purpose whatever; and the words "for the use and benefit of all my heirs" would have been inoperative for the purpose to which they have been applied; and the bounty, which it is supposed by the court a father's heart could not withhold from his daughters, would have been entirely defeated; and in that event, the interpolation of the word "and," which has been supplied by the court, could not have conferred on the daughters the lots, nor the proceeds of the sale of them. But conceding the power to sell the lots for the payment of the testator's debts, do the words "for the use and benefit of all my heirs" give any authority to the executors to sell the remainder of the lots, after paying the debts, or any right to the heirs to receive the proceeds of such sale?

The court seem to admit, by their reasoning, that these words alone give no right to the heirs to claim the proceeds, nor power to the executors to sell the remainder of the lots, and, therefore, they have supplied the word "and," to unite the power granted to sell for the payment of debts, with the words "for the use and benefit of all my heirs," which, they say, completes the right to receive the proceeds. If the court have the right to alter the will, and then give construction to it, they may make it mean what they please. *But I deny the [*479 power of the court, in such a case as this, to add the word "and." The rule is understood to be this: where there is a supposed mistake or omission, all the court has to do is to see whether it is possible to reconcile that part with the rest, and whether it is perfectly clear, upon the whole scope of the will, that the intention cannot stand with the alleged mistake or omission. (*Mellish* v. *Mellish*, 4 Ves., 49.) It appears to me these words are perfectly consistent with the other parts of the will, and are by no means repugnant to the main intention of the testator, but perfectly consistent therewith.

His intention, as manifested by all the provisions of the will, appears to be, to divide his personal estate equally among his sons and daughters and his wife, and to divide all his real estate, or lands, equally among his sons. That he intended each son to take an equal part of his lands, is proved by the direction to have each portion valued. That half of the Open Woods tract was not equal in value to the two river tracts, excluding the two hundred acres to be laid off into lots, is clearly proved by the will itself; because the testator gives his wife her choice of the Open Woods tract, or the two tracts on the river; and whichever she selects is, at her death, to go to his youngest son, Newit, and the other to be divided between his sons Westley and William; and he further directs that the part which his son Hartwell had received, should be valued, considered his, and as part of his portion of the estate. Here is a clear and unequivocal intention manifested to give to each son an equal portion of his real estate; and it is as clearly manifested that the

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specific portions given are not equal. To maintain the construction given to the will by the court, the two hundred acres are excluded from the devise of all the testator's lands to his sons. And the question arises, and ought to have been decided, how are these portions to be equalized? If the two hundred acres passed to the sons by the devise, subject to the payment of debts, then a reasonably certain contingent means was afforded for equalizing the portions, by dividing and valuing the lots not sold to pay debts, to make up deficiencies.

This view alone is sufficient to satisfy my mind that all the lands passed to the sons by the general words, "all of my lands, all of which lands I wish to be appraised, and valued, and divided, when my son Westley arrives at the age of twenty-one years." Can the words "for the use and benefit of all my heirs," which in themselves contain no positive words of grant, control the previous, positive, and unconditional grant of all his lands to his sons? It appears to me to be impossible to give such controlling influence to such words, upon any of the known and established rules of construction; and especially when they admit of a different interpretation, by which they would stand in perfect harmony with the other provisions of the will.

The accounts settled by the executor, with 480*] the Orphans' Court, *and which are part of the record exhibited in the bill of complaint, show that between twenty-five thousand and thirty thousand dollars of the debts of the estate were paid by the proceeds of the cotton crops; which proves that a large portion of the personal estate consisted of slaves. Is it not reasonable, therefore, to suppose the testator had in his mind the disadvantages that would result to all his children, if he should leave his slaves liable to be sold for the payment of his debts, when he ordered the lots, which were unproductive, to be sold for that purpose, "in preference to any other of his property" which was productive? Acting upon this view of his affairs, is it at all surprising that he should have inserted in his will, even by interlining, the words, "for the use and benefit of all my heirs," that being the reason which induced him to charge the debts upon the town lots?

But putting out of view all extraneous considerations, can the construction given by the court to this part of the will be sustained upon principle? Executors have no authority to sell real estate, unless the power to sell, and the purpose of the sale, are expressed in the will. Therefore the court cannot infer, from a power expressly granted to sell the estate for one purpose, a power to sell it for another purpose not granted. (*Hill* v. *Cook*, 1 Ves. & Beames, 175.) In the case under consideration, the only authority given by the will to sell the town lots, was for the payment of debts; and there the power of the executors to sell any portion of the estate terminated. When they had sold as many of the lots as were necessary to pay the debts, the remainder fell into the general devise of all the lands of the testator to his sons; and the purposes of the testator, in relation to his real estate, were accomplished, according to his plain intention, when all the provisions of the will are taken together.

To reserve the remainder of the lots from the general devise, and to give effect to the interlined words, different from their plain meaning, in the connection in which they stand with the other provisions of the will, the court revive the exhausted power of sale, and give capacity to all the heirs to take the proceeds of the sale of the remainder of the lots, by inserting the conjunction "and" between the power to sell the lots for the payment of debts and the interlined words; thereby changing the meaning of the whole sentence. This certainly is not construing the will; but it is making a will, and giving this portion of the testator's estate to his daughters, which he plainly intended for, and gave to his sons.

This will was brought in question before the High Court of Errors and Appeals of the State of Mississippi, in the case of *Vick et al.* v. *The Mayor and Alderman of Vicksburg* (1 How. Miss. Rep., 442). The question before that court was, whether the land in controversy had been dedicated by Newit Vick, in his lifetime, to public purposes, or passed to, and was vested in his devisees by his will; and it is a part of the same land in controversy in the case *before this court; the court of Missis [*481 sippi having concurrent jurisdiction of the subject matter with this court, decided, that the whole of the real estate was devised to the sons of Newit Vick, deceased; and that his daughters were entitled to no part of the lots, nor any part of the proceeds of the sale of them. According to the Constitution and laws of the United States and previous decisions of this court, I think this court was bound to follow the decision of that court upon the construction of the will.

The 2d section of the 3d article of the Constitution of the United States declares: "The judicial power shall extend to all cases in law and equity arising under this Constitution, the laws of the United States, and treaties made or which shall be made under their authority; to all cases affecting ambassadors, other public ministers, and consuls; to all cases of admiralty and maritime jurisdiction; to controversies to which the United States shall be a party; to controversies between two or more States, between citizens of different States, between citizens of the same State claiming lands under grants of different States, and between a State or the citizens thereof and foreign States, citizens, or subjects. In these three latter classes of cases, the jurisdiction of the courts of the United States is concurrent with the State courts. In this case it originated between citizens of different States, and is, therefore, concurrent with the courts of Mississippi. Before the jurisdiction here conferred on the courts of the United States could be exercised, it was necessary their powers and authority should be established and defined by law. And accordingly, by the 34th section of the Act of Congress of the 24th of September, 1789, it is enacted, "That the laws of the several States, except where the Constitution, treaties, or statutes of the United States shall otherwise require or provide, shall be regarded as rules of decision in trials at common law in the courts of the United States, in cases where they apply." The purposes for which jurisdiction was given to the courts of the United States between citizens of different States in ordinary matters of controversy, be-

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tween citizens of the same State claiming lands under grants from different States, and between an alien and a citizen of a State, was to give in each of these cases, at the option of the plaintiff, a tribunal, presumed to be free from any accidental State prejudice or partiality, for the trial of the cause.

And when Congress defined the powers of the courts of the United States, they directed, that the laws of the several States should be regarded as the rules of decision in suits at common law, in cases where they apply. And upon these principles, with few, if any, exceptions, has this court acted from the commencement of the government down to the present term of this court. That they should continue so to act, is of great importance to the peace and harmony of the people of the United States. **482*]** If the State judicial *tribunals establish a rule, governing titles to real estate, whether it arise under statute, deed, or will, and this court establishes another and a different rule, which of these two rules shall prevail? They do not operate like two equal powers in physics, one neutralizing the other; but they produce a contest for success, a struggle for victory; and in such a contest it may easily be foreseen which will prevail.

The State courts have unlimited jurisdiction over all the persons, and property, real and personal, within the limits of the State. And as often as the courts of the United States have it in their power, by their judgments, under their limited jurisdiction, to turn out of the possession of real estate those who have been put into it by the judgment of the highest court of appellate jurisdiction of the State, so often that possession will be restored by the same judicial State power. To avert such a contest, and in obedience to the act of Congress before referred to, this court have laid it down, in many cases, as a sound and necessary rule, that they should follow the State decisions establishing rules and regulating titles to real estate. And in the following cases they have applied the rule to the construction of wills, devising real estate. In *Jackson* v. *Chew* (12 Wheat., 162), the principle is fully maintained. In that case the court say: "The inquiry is very much narrowed by applying the rule which has uniformly governed this court, that where any principle of law, establishing a rule of real property, has been settled in the State courts, the same rule will be applied by this court that would be established by the State tribunals. This is a principle so obviously just, and so indispensably necessary under our system of government, that it cannot be lost sight of." The question in that case arose upon the construction of a will devising land in New York. In the case of *Henderson et ux.* v. *Griffin* (5 Peters, 154), the court say: "The opinion of the court in the case of *Kennedy* v. *Marsh* was an able one; it was the judicial construction of the will of Mr. Laurens, according to their view of the rules of the common law in that State, as a rule of property, and comes within the principle adopted in *Jackson* v. *Chew* (12 Wheat., 153, 167)." These cases are in strict conformity with the 34th section of the Act of the 24th September, 1789, above referred to.

There are many other decisions of this court applicable to this case; some of them have followed a single decision of a State court, where it settled a rule of real property. And at the present term of this court, in the case of *Carroll* v. *Safford, treasurer, &c.*, it was held, that it was not material whether it had been settled by frequent decisions, or a single case. From these authorities, it is plain the jurisdiction of this court is not wholly concurrent in this case with the Supreme Court of Mississippi; but in power of judgment it is subordinate to that court, and, therefore, the construction given by *that court to the will ought to have [*483 been the rule of construction for this court.

Mr. Chief Justice TANEY concurred in the opinion of *Mr. Justice* MCKINLEY.[1]

Cited—5 How., 378; 12 Otto, 53; 1 Cliff., 428.

FRANCIS C. BLACK AND JAMES CHAPMAN, *Plaintiffs in Error*,

v.

J. W. ZACHARIE & CO., *Defendants*.

Acceptance of draft on money in acceptor's hands, bar to action for same—legal and equitable title to stock—transfer of—lex loci *of owner's domicil—circuit court may quash writ of* supersedeas *for insufficient security—this court no power to review such proceeding.*

When a creditor, residing in Louisiana, drew bills of exchange upon his debtor, residing in South Carolina, which bills were negotiated to a third person and accepted by the drawee, the creditor had no right to lay an attachment upon the property of the debtor, until the bills had become due, were dishonored, and taken up by the drawer.

By the drawing of the bills a new credit was extended to the debtor for the time to which they run.

The laws of Louisiana, allowing attachments for debts not yet due, relate only to absconding debtors, and do not embrace a case like the above.

The legal title to stock held in corporations situated in Louisiana, does not pass under a general assignment of property, until the transfer is completed in the mode pointed out by the laws of Louisiana, regulating those corporations.

But the equitable title will pass, if the assignment be sufficient to transfer it by the laws of the State in which the assignor resides, and if the laws of the State where the corporations exist do not prohibit the assignment of equitable interests in stock. Such an assignment will bind all persons who have notice of it.

The laws of Louisiana do not prohibit the assignment of equitable interests in the State by residents of other States.

Personal property has no locality. The law of the owner's domicile is to determine the validity of the transfer or alienation thereof, unless there is some positive or customary law of the country where it is found to the contrary.

THIS case was brought up by writ of error from the Circuit Court of the United States for East Louisiana.

It was an attachment issued originally by the Commercial Court of New Orleans (a State court), against the goods and chattels, land

1.—On the trial of this case, *Mr. Justice* Story was absent; four of the judges, therefore, ruled the decision.

NOTE.—*As to effect of charter or by-laws of corporation as to transfer of stock*, see note to United Bank of Georgetown v. Laird, 2 Wheat., 390.

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and tenements, rights and moneys, effects and credits, of Black, at the instance of Zacharie & Co., and removed, on the petition of Black, into the Circuit Court of the United States.

Black resided in Charleston, South Carolina, and Zacharie & Co. in New Orleans.

In 1837, Black was the owner of five hundred shares of the capital stock of the New Orleans Gas Light and Banking Company, and six hundred shares of the Carrollton Bank of New Orleans. On the 31st of May, in that year, he [*484] assigned to the Bank of South Carolina, as security for a loan, his shares in the Gas Light and Banking Company, with power to sell, if necessary.

The shares in the Carrollton Bank were mortgaged to that bank.

Zacharie & Co. and Black were in commercial correspondence from 1835 to 1840, and a number of letters were inserted in the record. The point of law, however, which was based upon those letters, having been decided by the court below, and the decision not excepted to, it is unnecessary to recite their contents.

In the early part of 1841, Zacharie & Co. shipped to Black a cargo of sugar and molasses, which was sold from time to time, beginning with January 25th, and ending with April 9th, partly for cash and partly on time.

The following bills of exchange were drawn by Zacharie & Co., on Black:

February 17th,	at sixty days after sight,			$1,500.00
February 18th,	"	"	"	1,500.00
February 24th,	"	"	"	2,000.00
March 1st,	"	"	"	2,000.00
April 1st,	"	"	"	1,088.00

They were all drawn in favor of Alexander McDonald, and accepted by Black. The two first fell due on the same day, viz.: on the 30th April, 1841, and were protested.

On the 15th April, 1841, Black executed a power of attorney, appointing the cashier of the Gas Light and Banking Company his agent, to transfer the five hundred shares of stock standing in his name to the Bank of South Carolina.

On the 16th of April, 1841, this power was forwarded by the Bank of South Carolina to the cashier of the Gas Light and Banking Company, with a request that the transfer might be immediately made, and a new certificate issued.

On the 28th of April, 1841, Black made a general assignment of all his property to James Chapman, for the benefit of all his creditors, mentioning particularly the five hundred shares of stock in the Gas Light and Banking Company, subject to the mortgage before mentioned to the Bank of South Carolina, and the six hundred shares in the Carrollton Bank, subject to a mortgage to the Carrollton Bank. These mortgages the trustee was directed to pay off, and divide the surplus amongst the creditors named in a schedule annexed to the deed, including Zacharie & Co.

On the same day Black addressed a letter to Zacharie & Co., informing them of what he had done, and that he had sent the assignment to Messrs. J. H. Leverich & Co. He said, also,

Your two drafts, $1,500 each, fall due on the 30th inst.

Your one draft, $2,000, falls due on the 7th May.

Your one draft, $2,000, falls due on the 3d June.

Your one draft, $1,088, falls due on the 14th June.

On the 4th of May, 1841, Zacharie & Co. filed an affidavit for the purpose of [*485] obtaining from the Commercial Court of New Orleans, as before stated, an attachment against the goods and credits of Black. The necessary bond was given, and the attachment laid in the hands of the Carrollton Bank, and of the Gas Light and Banking Company.

On the 5th of May, 1841, Zacharie & Co. addressed to Black a letter, from which the following is an extract:

"FRANCIS C. BLACK, Esq.

"DEAR SIR: Yours of the 28th ultimo came to hand yesterday morning at the opening of the postoffice, and immediately after the shock the writer experienced, he called on our attorney, and in less than ten minutes we had an attachment levied on your stocks, both of the Carrollton and Gas Banks, and am happy to say that our attorney assures us that we have succeeded it in spite of our assignment, which is worthless in our State, particularly as no transfer had taken place on the books of the bank; this course we feel satisfied you must approve of, as it certainly will relieve you from the very unhappy and truly inevitable dilemma of throwing upon your friend, who to serve you has, without compensation, accepted for your accommodation upwards of $3,000, a loss to that amount. A neglect to provide for this sacred and confidential debt, you could not be sustained in by your best friend; and, indeed, we cannot but believe you will be happy to learn the course we have pursued, and we now hope that your assignee will urge a decision as soon as practicable, as it is useless to procrastinate the matter longer than necessary."

On the 5th of May, 1841, J. H. Leverich addressed letters to the cashier of the Carrollton Bank, and of the Gas Light and Banking Company, requesting them to transfer the stock in their respective institutions, standing in the name of Black, to Chapman, his assignee; to which the following answers were returned:

"GASS LIGHT AND BANKING CO., }
NEW ORLEANS, May 5th, 1841. }

"Messrs. JAMES H. LEVERICH & Co.

"GENTLEMEN: In answer to your note of this date, I have to say, that on the 22d ult. I received a letter from J. Chapman, cashier of the Bank of South Carolina, covering a certificate of five hundred shares of the stock of this institution, in favor of Francis C. Black, together with a power from said Black to me to transfer the stock to the Bank of South Carolina; that said power being not considered sufficiently formal (although it might be thought so by persons less rigid than myself in matters of the kind), was returned to the Bank of South Carolina, with the remark, that upon another being furnished in conformity with corrections which were stated on the face of the one returned, the desired certificate would be transmitted.

"On the 4th inst., a notice of seizure, of all effects or property of said Black in this bank, under an attachment, was served; consequently, [*486] under all these circumstances, we cannot consent to the transfer requested in your

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note, but must hold the stock, subject to the decision of the courts.

"Respectfully, your obedient servant,
(Signed) "J. W. HOUSTON, Cashier."

"CARROLLTON BANK,
"NEW ORLEANS, 7th May, 1841.

"GENTLEMEN: Your application, of date 5th inst., to transfer six hundred shares and stock, standing in the name of F. C. Black, by virtue of a power from James Chapman as his assignee, is noted. The transfer cannot be allowed, because that said stock has been attached at the suit of J. W. Zacharie & Co., served on the 4th inst., and also for the reason that said stock is pledged to this bank for a stock loan. Very respectfully,
(Signed) "JOHN NICHOLSON, Cashier.
"Messrs. J. H. LEVERICH & Co., New Orleans."

On the day when the attachment was issued, the court appointed counsel to represent the absent defendant, and on the 12th June, 1841, that counsel filed an answer on behalf of Black, but without instructions from him.

On the 19th of November, 1841, Black filed a petition praying that the cause might be removed into the Circuit Court of the United States, and it was accordingly removed.

On the 7th of December, 1841, Black prayed oyer of the bills of exchange, and Chapman filed a petition of intervention, in which he set forth the assignment to him by Black on the 28th of April, claimed the shares of stock in consequence thereof, and prayed that the attachment might be dissolved. Zacharie & Co., appeared to the intervention, and denied all the allegations in the petition except that the stock had been attached and the case removed.

The notes were filed in conformity with the prayer for oyer.

On the 28th of December, 1841, Black filed the following exceptions and answer:

"And now into the ninth Circuit Court of the United States, for the Eastern District of Louisiana, comes Francis C. Black, the defendant in said suit, by his attorneys, and excepts to the order and writ of attachment granted therein, to the petition and the demand therein made, and for cause of exception, avers that at the institution of said suit the plaintiffs therein had no cause of action whatever against this defendant, and that no debt was at the date of said suit due by defendant to said plaintiff, all of which is apparent by the petition of said plaintiff, and the account and bills of exchange annexed and referred to; wherefore defendant prays that said writ of attachment be set aside and dismissed, and that said suit be dismissed.

"But if the said exception be overruled, then 487*] this defendant answers *to said suit, and denies all and singular the allegations in plaintiff's petition contained, and denies specially being indebted to said plaintiffs as alleged in said petition; and defendant further pleads that the bank stock attached in this case was not, at the date of said attachment, the property of defendant, or liable to be attached for any debt by him owing, and that the said stock was then the property of James Chapman, of South Carolina, who became the owner thereof under a trust deed for the benefit of all the creditors of defendant without distinction, executed in Charleston, South Carolina, on the 28th April, 1841, and that said stock was delivered to said Chapman before the issuing of the attachment in this case. Defendant further shows that the said trust deed was executed in due form of law in South Carolina, where defendant resides, and that the same is effectual to pass the said stocks both in that State where it was executed and in this State; and that before the attachment in this case, the plaintiffs were notified of said assignment, and that the Gas Bank and the Carrollton Bank were also notified of said assignment immediately after the execution thereof. Wherefore defendant prays that plaintiffs' demand be dismissed."

On the 13th of January, 1842, the court overruled these exceptions.

In March, 1842, the cause came on for trial, when the jury on the 5th of March found a verdict for the plaintiffs, Zacharie & Co., against the defendant, Black, for the sum of $8,000.

A motion for a new trial was made, but overruled.

Before stating the bills of exception which were taken on the trial, it is proper to mention that the depositions of three members of the bar of South Carolina were read in evidence to show what the law was in that State. The following is an extract from that of J. L. Pettigru:

"That he, the witness, knows that the said Francis C. Black immediately advised the plaintiffs in this cause of his assignment, and that, in consequence thereof, they laid their attachment, for he, the witness, has seen the letter of the said Francis C. Black to the said J. W. Zacharie, and the answer to it, and he advised the assignee, as well as Mr. Black, to inform all the creditors immediately of what has been done. But by the law and usage of South Carolina, no act of the *cestui que trust*, or creditor in whose favor an assignment is made, is necessary either to entitle them to the benefit of its provisions, or give validity to the deed; and that the assignor and assignee were advised by the witness to give the creditor notice, because, in a business point of view, it is right and proper always to inform a correspondent or creditor of that which concerns his interest; and because by an act of Assembly of this State (statutes of South Carolina, Vol. VI., p. 365), it is made the duty of an assignee to call the creditors together within ten days after the execution of the assignment, to appoint agents on their part, equal in *number [*488 to the assignee, with equal authority in the execution of the trust; but if the assignee neglects his duty, the deed is not thereby invalidated, but the creditors may appoint their agents, and take the whole property out of the hands of the assignee, and apply the same according to the provisions of the deed.

"And the witness says that he has practiced in the courts of South Carolina for nearly twenty-nine years as a solicitor and counselor, and he deems himself qualified to express an opinion on the law of South Carolina. That by the common law, as known and administered in South Carolina, an assignment completely diverts the property from the executor

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of the deed, so that it cannot be questioned by the assignee himself, and, if free from fraud, cannot be questioned by his creditors or anybody else, and that though such assignment be made abroad, it passes the property of the debtor in South Carolina from the instant of its execution, and no subsequent attachment can disturb the right of the assignee. That this principle was denied as long ago as the year 1816, in the case of *Prime* v. *Yates* (Treadway, 770). That the distinction between an assignment of the party and one by operation of law, was taken and recognized in *Topham* v. *Chapman* (1 Constitutional Report, 283, decided in the year 1817). That this decision was followed in *Brown* v. *Minis* (1 McCord's Rep., 106), though the point there was not considered one of any difficulty, the controversy in that case turning on other questions involved. But the very question between an assignment of property in South Carolina, executed in New York, in trust for creditors, and an attachment laid on the property of the assignor in South Carolina after the date of the assignment, was raised in *West* v. *Tapper*, in the year 1829, and was decided in favor of the assignment, in which case His Honor, *Judge* Gilchrist, of the United States Court, then at the bar, was of counsel for West, the assignee. (See 1 Bailey, 193.) That the question was made again in *Green* v. *Maury*, decided in the year 1831, and again decided that a *bona fide* assignment in trust for creditors (though made out of the State, and of the property within the State) takes precedence of a subsequent attachment. That since that time the point has not, as far as witness knows, been questioned, although property to an immense amount has been passed by such assignments, and so well settled is the law on the subject, that if the situation of these parties was reversed, and the plaintiffs, by a *bona fide* assignment in Louisiana, had conveyed their property in South Carolina, whether consisting of real or personal estate, or choses in action for the payment of debts, no lawyer of reputation could be found to advise a creditor in this State to attempt to take the property by a subsequent execution or attachment. That in the case of the assignment of stocks, though they can only be transferred on the books of the bank itself, yet the assignee would be entitled to call for a transfer, and no creditor by any attachment subsequent [*489] to *the deed of assignment could prevent the assignee from taking the stocks, and disposing of them according to the trusts of the deed, and that in the decision of the question, it is perfectly immaterial whether the assignee be in actual possession of the property assigned when such property is capable of manual delivery, or whether the transfer be completed on the books of the bank when the property is of such a nature as to require such transfer, for in all cases the right of property is in the assignee from the date of the deed, and there is nothing for the attachment to act upon.

Mr. McCrady says, "that he has read the deposition of Mr. Pettigru, and concurs fully in the opinion expressed by him."

Mr. Henry Bailey also concurs, and adds, "that no assent or other act on the part of the assignee, or *cestui que trust*, is necessary to give validity to an assignment for the benefit of creditors, unless such assent or act is made a condition precedent by the express provisions of the deed of assignment, in which case the conventional law of the parties supersedes the general law of the land; that the assignment takes effect from its execution, and although executed in a foreign country, prevails over a subsequent attachment or assignment in South Carolina; that this principle applies only to voluntary assignments by the debtor, and not to assignments by operation of the foreign laws of a country, such as the bankrupt law of England; that the cases cited by Mr. Pettigru in his foregoing deposition are of unquestionable authority in South Carolina, two of which were reported by this witness when he held the office of State reported; that the same principles have been recognized in various adjudications since, and are universally regarded by the bar of this State as settled and familiar law."

The following are the bills of exceptions to the ruling of the court upon the trial:

"Be it known, that on the trial of this case the plaintiffs offered in evidence the following bills of exchange, to wit:

One of the 17th February, protested 30th April, 1841,	$1,500.00
One of 18th February, protested 30th April, 1841,	1,500.00
One of 24th February, protested 7th May, 1841,	2,000.00
One of 24th March, protested 3d June, 1841,	2,000.00
One of 1st April, protested 14th June, 1841,	1,088.25

"And before said drafts were ordered in evidence, it was proved by the testimony of a witness, that each of said drafts had been negotiated by the plaintiffs; that the two drafts of $1,500 each were returned under protest, and taken up by the plaintiffs on the 7th May, 1841; the draft of $2,000, protested on the 7th May, was returned and taken up on the 17th May, 1841; the draft for $2,000, protested on the 3d June, 1841, was returned and taken up on the 10th June, 1841; and the draft for $1,088.25 was returned and taken up by the plaintiffs on the 30th June, 1841. And before the said drafts were offered in evidence, the said plaintiff also introduced *the account sales, marked 'A'; the letter of the defendant on file, of date the 28th April, 1841; and the deed of assignment executed in Charleston on the 28th April, 1841. All of which, to wit, the said bills of exchange, the account sales marked 'A', the said letter, and the said assignment, are prayed to be taken as a part of the bill of exceptions; and the counsel for the defendant thereupon objected to the said bills of exchange as evidence in this case, and denied the plaintiffs the right to present them to the jury, on the ground that by said bills of exchange, and said testimony connected therewith, it fully appeared that the indebtedness of defendant to plaintiff, thus attempted to be proved, arose after the institution of this suit, and said bills were, consequently, no evidence in this cause; but the said objection was overruled, and the plaintiffs were permitted to present the said drafts [*490]

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and protests to the jury as evidence, and the defendant's counsel thereupon took this bill of exceptions. The plaintiff's petition and the account current annexed thereto had, before the said bills were offered, been read to the jury as pleadings, but not as evidence.

"THEO. H. MCCALEB, [SEAL.]"

A great number of letters were then given in evidence, and made a part of the exception. Some of them have been already quoted; those which have not, were intended to show an agreement between Zacharie & Co. and Black, that the former should hold the stock as security for advances which they allege themselves to have made to Black. But the court, by granting the ninth prayer asked by the intervenor, decided this point against Zacharie & Co., whose counsel did not except to the opinion of the court. The papers, therefore, need not be further noticed.

The defendant, Black, and the intervenor, Chapman, offered separate prayers to the court, viz.:

"The defendant prays the following instructions to the jury:

"1. That the drawing, negotiation, and acceptance of bills of exchange operate a complete transfer of the funds of the drawer in the hands of the acceptor, up to the amount of the bills so drawn and accepted.

"2. That after the negotiation and acceptance of such bills, the drawer ceases to be a creditor of the acceptor for the amount thereof, and has no right of action against the acceptor for said amount

"3. That the plaintiff's account annexed to this petition, in which the proceeds of sugar and certain advances are charged on one side, and certain bills of exchange are credited on the other, is an admission that said proceeds and advances constituted the final —— against which said bills were drawn.

"4. That if the jury believe, from the evidence before them, that such bills have been drawn, negotiated, and accepted, the said drawing, negotiation, and acceptance trans-
491*] ferred to the payee of said *bills so much of the said fund against which they were drawn as is represented by said bills.

"5 That if the jury believe, from the evidence before them, that at the date of the institution of this suit the plaintiffs had drawn and negotiated such bills, and were not then the holders thereof, then the jury must reject from the plaintiffs' demand the amount of said bills, although it should have been proved that subsequently to the institution of this suit, to wit, upon the return of said bills under protest, the plaintiffs took up the same, and became the owners thereof.

"6. That a suit upon an account, the items of which consist of the amounts of certain bills of exchange, and that a suit upon such bills, cannot be maintained, unless the plaintiff in the suit is the holder of the bill at the date of the institution of his suit.'

The intervenor prays the following instructions:

"1. That a *bona fide* assignment of property by a debtor for the equal benefit of all his creditors is not unlawful, but is highly favored by the law.

"2. That the law presumes an assent of creditors to such an assignment, unless their dissent is proved, and that the creditors who assent acquire, from the date of the assignment, an interest in the property which cannot be destroyed by a subsequent attachment of any single creditor.

"3. That from the date of the assignment the title of the assignor is devested, and the property assigned and delivered is not liable to attachment for his debts, and that bank stocks are incorporeal rights, the deriving of which passes by the delivery of the title or act of transfer.

"4. That if the certificates of the stocks are not in the possession of the owner, but in the possession of other persons, to whom he has pledged them, said owner may make a valid transfer, and an effectual and complete delivery of such stock, by delivering to the vendee or assignee a written title to the same, and that such title passes all the interest of the assignor.

"5. That the provisions in the charters of the Carrollton and Gas banks, to the purport that the transfer of stocks in those banks shall not be effectual or valid, until entered upon the book of the banks, are introduced solely for the protection of the interest of said corporations, and for purposes connected with the elections thereof; but that said provisions do not in any wise alter or affect the general laws touching the delivery of incorporeal rights or stocks in said banks.

"6. That a sale or assignment of stocks in said banks, and the delivering of the title to the same, makes the assignee or vendee the owner of the same, although the transfer should not have been entered upon the books of the bank, subject only to such rights or equities as said banks themselves may have or possess upon said *stocks, and that the vendee or as- [*492
signee may force the bank to enter such transfer upon their books.

"7. That if the jury believe, from the evidence before them, and especially from the act of assignment, and the depositions of witnesses taken in Charleston, South Carolina, on file and offered in evidence, that on the 28th day of April, 1841, the defendant, being domiciliated in the State of South Carolina, and being indebted to sundry persons in the amount stated in said depositions, and being the owner of the six hundred and sixty shares of the stock of the Carrollton Bank, and five hundred shares of the stock of the Gas Bank, executed and delivered to the intervenor a deed of assignment of said stocks *bona fide*, and for the benefit of all his creditors; that said stock was, after said date, attached by the plaintiffs; that no creditor is shown to have objected to said transfer, except the plaintiffs; that other creditors are proved to have excepted; that the certificates of said stock were not, on the date aforesaid, in possession of said defendant, by reason of his having pledged them respectively to the Bank of South Carolina and the Carrollton Bank; that then the delivery of said deed of assignment constituted a complete and legal delivery of said stocks to the intervenor for the benefit aforesaid; and the jury must find for the said intervenor.

"8. That if the jury believe, from the evidence, and especially from the letter of the plaintiffs of date the 5th May, 1841, on file, that the plaintiff had been notified of the assignment

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made as aforesaid, and thereupon and afterwards levied an attachment, then that such attachment was invalid, and cannot be sustained.

"9. That the letters of F. C. Black, dated at Charleston, South Carolina, on the 11th January, 1837, and at Macon, Georgia, on the 13th May, 1837, on file and in evidence, do not in law amount to a contract, agreement, or understanding that the stock of the Carrollton Bank should be held by plaintiffs as a security or pledge for the debt claimed by the plaintiffs in this suit, and that no such agreement between the defendant and plaintiff (if the jury believe that any such agreement existed) can avail in law against the intervenor in this case, representing the other creditors, unless the jury find from the evidence that such agreement was made in the form of a pledge, as prescribed in art. 3125 of the Civil Code of Louisiana.

And afterwards, to wit, on the 5th March, 1842, the following bill of exceptions was filed:

"Be it known, that on the trial of this case, and after the argument, the counsel of defendant and the intervenor prayed the instructions of the court to the jury, to the purport of the written request on file, numbered from 1 to 6 for the defendant, and from number 1 to 9 for the intervenor; and the court having granted and given to the jury all the instructions prayed for, except those designated as Nos. 3, 4, 5, 6, and 7, prayed by the intervenor; and 493*] the court refused *to give the said charges as demanded, but gave them with the qualification, as to all said instructions, that the delivery of the stock was not complete, and did not pass to the assignee, unless the transfer was entered upon the books of the bank; and that the laws of Louisiana alone, and not the laws of South Carolina, or the general commercial law of the United States, were to be regarded in the decision of this suit; to which qualification the counsel of the intervenor takes this bill of exceptions, and prays that said instructions, as prayed for, be taken as a part thereof."

On the 24th of March, 1842, Black prayed that a writ of error be allowed; and tendered a bond, with James H. Leverich & Co., as securities, in the penal sum of $500, with a condition that he should prosecute his writ of error to effect, and answer all costs. Whereupon the judge issued the following order:

"Be it so, on the petitioner's giving bond, with J. H. Leverich & Co. as security, as the law directs, in the sum of five hundred dollars."

Chapman also prayed for a writ of error, "and that the said writ operate *supersedeas* of any further proceedings of J. W. Zacharie & Co. against the bank stock attached in said cause, and claimed by your petitioner as plaintiff in said intervention, until the final decision of the said cause in the Supreme Court of the United States." Whereupon the judge issued the following order:

"A writ of error is allowed as a *supersedeas*, on petitioner's giving bond, conditioned according to law, with J. H. Leverich & Co. on the same, of five hundred dollars.

(Signed) THEO. H. MCCALEB, U. S. Judge.

"March, 28th, 1842."

On the next day, viz., the 29th of March, the following order was passed:

"On motion of George Strawbridge, Esq., for plaintiffs, ordered, that so much of the order of this court as grants a *supersedeas* to the intervenor, Chapman, on his giving bond in the sum of five hundred dollars, be annulled; the court being of opinion that the stocks attached are not sufficient security for said writ of *supersedeas*."

The court afterwards re-opened this matter, upon motion of Chapman's counsel, but, after hearing an argument, declined to change the last quoted order, and refused to restore the *supersedeas*, upon the ground that the "bond was considered as insufficient."

Mr. Wilde for plaintiffs in error.

Mr. Coxe for defendants in error.

But before the case was reached in order,

Mr. Wilde, on behalf of the plaintiffs in error, moved that this court *do issue a writ [*494 of *supersedeas* upon the judgment, upon two grounds:

1. Because, within the time allowed by law, the writ of error had been prayed for, citation issued, and bond given, with adequate security.

2. Because, before the sale of the stocks by the marshal, Black applied for the benefit of the Bankrupt Act, to the District Court of South Carolina.

In support of this motion, *Mr. Wilde* said:

That the court erred in refusing a *supersedeas*, we regard it as settled by *Stockton & Moore* v. *Bishop* (2 Howard, 74).

Nor is it a matter of indifference that the execution should be superseded. It may be that the stocks have been sold at a most unfavorable period, and bought in by the plaintiffs in attachment themselves. It may be that they would now satisfy the attaching creditor's demand, and leave a large surplus. Such considerations can weigh nothing with this court. It is quite enough that we were entitled to a *supersedeas*, and the court below refused it.

Your honors will remark the stocks were in the custody of the law.

The fund, therefore, was secure. It was competent for the court to order a sale of the property, on proof that it was perishable, or deteriorating in value.

Against the intervenor no judgment could be given, except for costs; and a bond for $500, with unquestioned and unquestionable surety, was undoubtedly sufficient.

That the intervenor is a plaintiff (see 2 Dorret, 676); the proposition asserted in argument, and not denied in this court, in *Livingston* v. *D'Orgenois* (7 Cranch, 581).

Our Supreme Court have determined that plaintiffs are bound to give security only for costs, to entitle them to a suspensive appeal. (*Heath & Co.* v. *Vaught et al.*, *Dougherty & Co.*, *intervenors* (16 L. R., 520, 1).

Even if the execution has been levied and the stocks sold, the party is still entitled to restitution. (Tidd's Prac., 1033, 1186, 1187; 2 Salk., 588; 2 Bac. Abr., 232; Cro. Jac., 246, 698.)

Upon this preliminary point, *Mr. Justice* STORY delivered the opinion of the court:

This is a case coming by writ of error to this court, from the Circuit Court of the Eastern District of Louisiana. The case has not as yet been heard upon the merits, but a motion has

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been made in behalf of the plaintiffs in error (the original defendant and the intervenor), for a writ of *supersedeas* to the execution issued upon the judgment against Black, upon two grounds; first, that the execution issued improvidently, because, within the ten days allowed by law, the writ of error had been prayed for, citation issued, and bond given, with adequate security; second, that after the execu-
495*] tion issued, *and certain stocks had been seized thereon, and before the sale thereof by the marshal, Black (who is a citizen of South Carolina) applied for the benefit of the Bankrupt Act of the District Court of South Carolina District, and was afterwards declared a bankrupt, and an assignee appointed; and that, in the intermediate period, the marshal sold the stocks.

Upon examining the record, we find that, although the writ of error had been allowed by the Circuit Court, and a citation issued, and bond given for prosecution of the writ of error and payment of costs, and a *supersedeas* had afterwards been awarded to stay execution, yet that the court upon the succeeding day revoked that order, upon the ground that the stocks attached were not a sufficient security for the said writ of *supersedeas*, and that the bond was insufficient; so that the case does not fall within the predicament provided for in the 22d and 23d sections of the Judiciary Act of 1789, chap. 20, which entitles the party to a *supersedeas* and stay of execution, since that can only be where, within the ten days allowed by law, a sufficient bond is given to prosecute the writ of error to effect, and also to answer all damages and costs. The judges of the Circuit Court were the sole and exclusive judges what security should be taken for that purpose; and they have decided that the security offered was insufficient.

In respect to the other ground, that of the bankruptcy of Black, that of itself constitutes no ground why this court should interfere to stay proceedings on the execution, or to award a *supersedeas*. It is a matter, if at all cognizable, properly cognizable in the Circuit Court, upon an application and petition, by the assignee, to that court, upon a case showing an equitable title to relief; or for an application to the proper District Court, sitting in bankruptcy for that purpose. It is in no respect a matter within the appellate jurisdiction of this court, upon the present writ of error.

The motion is therefore overruled.

This preliminary motion having been disposed of, the cause came on, soon afterwards, for argument upon its main points.

Mr. Wilde, for Black and Chapman, the plaintiffs in error, said:

Two questions are presented by this record.

1st. Had the attaching creditor a legal cause of action at the commencement of his suit?

2d. Had there been a sufficient tradition or delivery of the effects assigned, to devest the assignor of all interest therein before attachment levied?

The last, being decisive of the rights of the parties and merits of the case, will be first considered.

From the statement of the plaintiffs in error, the court will perceive that this is a controversy between an assignee under an assignment made *for the equal benefit of all the credit- [*496
ors, and an attaching creditor who seeks to obtain priority of payment by legal diligence.

The assignment was made in South Carolina. The assignor and assignee are resident citizens of that State. The subject of assignment is an interest in the stocks of certain banks incorporated by the State of Louisiana. The attaching creditor is a domiciled merchant of New Orleans, where the attachment issued. He had express notice of the assignment before issuing his attachment. Indeed, he issued it in consequence of receiving that notice. The assignment was made on the 28th of April, 1841. The attachment levied on the 4th of May.

The evidence of Pettigru, and the letters of F. C. Black, and Zacharie & Co., show the notice.

At the date of the assignment, the scrip or certificates of property in the stocks referred to were in the hands of third persons, to whom they had been pledged. Their delivery to the assignee was therefore impossible. Before the attachment, application was made by the pledgee to obtain a transfer. It was refused, on the ground of some informality in the power of attorney, though the cashier of the Gas Light and Banking Company, so refusing, admits it might have satisfied persons less rigid than himself, and before a transfer could be effected, the attachment was levied.

It is obvious, at the first glance, that in any other State than Louisiana the question thus presented would not bear a moment's argument. Personal property, having no locality, but adhering to the person of the owner, passes according to the law of his domicile; and when it is shown that the assignment by the law of South Carolina would transfer the interest of Black in the stocks assigned, simply by the execution and delivery of the deed, all doubt is at an end. See the evidence of Pettigru, McCrady, and Bailey, as to the effect of this assignment, according to the laws of Carolina.

Even assignments preferring some creditors to others have been repeatedly held good. (*Brooks* v. *Marbury*, 11 Wheat., 78, 98; *Tomkins* v. *Wheeler*, 16 Peters, 106, and the cases there cited.) Such preferences are not fraudulent unless under a bankrupt law. (*Conard* v. *Nicoll*, 4 Peters, 297.)

With respect to the general principle the authorities are superabundant. (Story's Conflict of Laws, 312, 315, 317, 330, 332; Angel on Assignments, 57; *Milne* v. *Moreton*, 6 Binney, 361; *Hunter* v. *Potts*, 4 T. R., 192; *Lewis* v. *Wallis*, 7 Jones, 223; *Sill* v. *Worswick*, 1 H. Black., 691; *West* v. *Tupper*, 1 Bailey, 193; *Greene* v. *Monsey*, 2 Bailey, 163; *Robinson* v. *Rapelye*, 2 Stewart, 86; *Holmes* v. *Remsen*, 4 Johns. Ch. R., 460; *Means* v. *Hapgood*, 19 Pick., 105; *Meeker et al.* v. *Wilson*, 1 Gall. C. C. R., 419.)

His honor, the district judge, seems, indeed, to admit the general law as we state it, by saying in his charge that "the laws of Louisiana alone, and not the law of South Carolina, or the general commercial *law of the [*497
United States, were to be regarded in the decision of this suit; and that, according to the law of Louisiana, the delivery of the stocks was not complete, unless the transfer was entered on the books of the bank."

The rule thus broadly laid down we humbly

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contend is erroneous, and we shall attempt to show

First, that the law of South Carolina, where the contract was made, is to be regarded. Next, that the delivery of the effects assigned was complete, even according to the law of Louisiana.

That the *lex loci contractus* is adopted as the rule of decision by the courts of most civilized nations is incontrovertible. (Story's Conflict of Laws; *Bank U. S.* v. *Donally*, 8 Peters, 372.) The charge of his honor, the district judge, however, evidently proceeds upon the assumption either that it is not the rule of the courts of Louisiana, or at least is so only under such restrictions and qualifications as render it inapplicable to a case like the present.

At a very early period in the history of those courts, we find them laying down the law thus: "The nature, validity, and effects of this contract must be inquired into according to the laws of the country in which it was celebrated, even when the delivery of the thing or the fact stipulated for, is to take place abroad." (*Lynch* v. *Postlethwaite*, 7 Mart., 69, citing 1 Gallison, 375.)

Ten years later, the Supreme Court, after carefully reconsidering their opinion, re-affirm it in a decision justly characterized as most learned and masterly. "Upon the whole," say they, "we must conclude, as we did in *Morris* v. *Ees*, and *Vidal* v. *Thompson*, that contracts are governed by the law of the country in which they were made in everything which relates to the mode of construing them, the meaning to be attached to the expressions by which the parties bound themselves, and the nature and validity of the engagement." (*Depau* v. *Humphreys*, 8 New Series, 1.) And accordingly they determine "that in a note executed here, on a loan of money made here, the creditor may stipulate for the legal rate of conventional interest authorized by our law, although such a rate be disallowed in the place at which payment is to be made." (*Ibid.*; *vide Morris* v. *Ees*, 11 Mart., 780; *Shiff* v. *Louisiana State Insurance Co.*, 6 N. S., 629; *Brown* v. *Richardson*, 1 N. S., 202; *Orry* v. *Winter*, 4 N. S., 277.)

In *Thatcher* v. *Walden* (5 N. S., 495; 3 Cond. R., 633), the court held that a verbal power of attorney, if given in a State where slaves pass by parol, is legal proof of the authority under which a written sale was made in this State. In delivering this decision, they employed the strongest language:

"There is no difference," say they, "between the right of a stranger to have the aid of the laws of the country where his debtor resides, to compel him to do justice in relation to a contract made under another government, and that of one citizen of a State to enforce 498*] *his claim against another. This principle, which is founded on the comity of nations, and makes a part of international law, would be a mere illusion, if other evidence was required for the validity of the agreement, than that of the laws of the country where it was made."

The same doctrine has since been repeatedly affirmed, liable only to the limitations given to it in the case of *Saul* v. *His Creditors* (5 N. S. 569), which will be considered hereafter. (*Vide Miles* v. *Oden et al.*, 8 N. S., 214; *Chartres* v. *Cairnes et al.*, 4 N. S., 1; *Bell* v. *James*, 6 N. S., 74; *King* v. *Herman's Heirs*, 6 L. R., 616; *Andrews* v. *His Creditors*, 11 L. R., 476; *Ohio Insurance Co.* v. *Edmondson et al.*, 5 L. R., 299.)

It will scarcely be denied, indeed, that the *lex loci contractus* is adopted by the courts of Louisiana as their rule of decision, although it may be contended that this adoption is subject to such restrictions and qualifications as deprive the intervenor of all benefit from it, in a case like the present.

These restrictions are supposed to have been defined and established in a number of cases, some of them turning on the question of delivery.

[*Mr. Wilde* then examined with great minuteness the Louisiana decisions.]

In considering this branch of our subject, it will be remarked by the court that we have thus far confined our citations to the decisions of Louisiana only.

We have studiously abstained from all others, because, as we alleged in the outset, except as to Louisiana, this cannot be considered an open question; and the court are so well aware of the English and American authorities on the subject that it would be a waste of time to quote them.

Nothing but the deference which this court habitually and uniformly exhibits for the adjudications of the local tribunals, in its anxiety to administer justice between citizens of different States, precisely as it is administered between citizens of the same State, could have induced us to restrain our argument within such narrow boundaries.

We think it is apparent, from the local decisions, that we are protected by the private law of nations, even as adopted in its most limited sense by the courts of Louisiana.

But if we are not, surely there never was a more fit and proper occasion, nay, never a more palpable and pressing necessity, for this court to assert its own unquestionable right of judgment, in opposition, if it must be so, to the State tribunals.

The question is one of international law; of the greatest practical consequence to us, as part of the family of nations, and of infinitely more importance, considering our country as a confederacy of States. It is one regarding the application of the *lex loci contractus*, on which *all Europe and America have spoken [*499 with one common voice; and Louisiana, if indeed her decisions are adverse, is the only recusant.

How far those decisions, supposing them to trench upon received principles, are satisfactory to the common sense and justice of mankind, may be readily ascertained by a cursory reference to the treatises of learned and accomplished jurists.

The only respectable authority opposed to the doctrines we have advocated, is the case of *Ingraham* v. *Geyer* (18 Mass. R., 146, 148), much relied on by our adversaries in the court below.

That case, however, was never generally satisfactory to the profession, has often been questioned, and was finally overruled by the recent case of *Means* v. *Hapgood* (19 Pickering, 105). In the latter case it was decided, that where a

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citizen of Maine executed an assignment in that State, to certain of his creditors, of a debt due to him from a citizen of that Commonwealth, and the creditors having claims to an amount exceeding such debt, became parties to the assignment, it was held that the assignment was valid against the attachment of the debt here, by a citizen of Massachusetts, notwithstanding the courts of Maine had decided that a similar assignment made in this Commonwealth was invalid against a subsequent attachment of the assigned property in Maine, by a citizen of that State.

It may be that we deceive ourselves as to the force of these arguments. It may be that they are unsound.

We turn then to the second point, and shall endeavor to maintain that, even according to the municipal law of Louisiana, there had been a sufficient tradition or delivery of the stocks assigned, to devest the assignor of all interest therein, before the attachment of Zacharie & Co. was levied.

It is cheerfully admitted, at the outset, that, in relation to movables, things personal and tangible, the maxim *traditionibus non pactis* has been adopted by the courts of Louisiana, and adhered to in a variety of cases in its full extent and rigor. (*Durnford* v. *Syndics of Brooks*, 3 Mart., 222; *Norris* v. *Mumford*, 4 Mart., 20; *Ramsey* v. *Stevenson*, 5 Mart., 23; Louisiana Code, art. 1917.)

If the property assigned and attached in this case had been goods and chattels, movables, capable of actual manual possession and delivery, assuredly we should not venture to argue that, according to the municipal law of Louisiana, tradition was not necessary. That point has been settled by too long a series of judicial decisions to be now contested. But the effects conveyed by this assignment are altogether of a different nature. They are mere incorporeal rights, invisible, intangible, unsubstantial, and incapable, from their very nature, of any other than a symbolical delivery.

This distinction is recognized by several articles of the Louisiana Code. Thus:

Art. 462. Incorporeal things, consisting only [*500] in a right, are not *of themselves strictly susceptible of the quality of movables or immovables: nevertheless, they are placed in one or other of these classes, according to the object to which they relate, and the rules hereinbefore established.

Art. 3395. Possession applies properly only to corporeal things, movable or immovable. The possesion of incorporeal rights, such as servitudes and other rights of that nature, is only *quasi* possession, and is exercised by the species of possession of which these rights are susceptible.

Art. 2612. In the transfer of debts, rights, or claims, to a third person, the delivery takes place between the transfer and the transferee by the giving of the title.

Art. 2613. The transferee is only possessed as it regards third persons after notice has been given to the debtor of the transfer having taken place.

Art. 2457. The tradition of incorporeal rights is to be made by the delivery of the titles, and of the act of transfer, or by the use made by the purchaser with the consent of the seller.

Art. 466 expressly classes bank shares as movables. They are, therefore, incorporeal things, movable. (*Vide*, also, art. 467.)

We contend, then, that these articles of the code allow the symbolical delivery of incorporeal rights, giving to it the same validity that attaches to the actual manual tradition of things tangible. Indeed, if this were not so, it would seem to follow, that incorporeal rights were insusceptible of any delivery at all.

In the execution of our task, it will be requisite to consider a number of judicial decisions, touching the subject of tradition, and, by a brief but critical examination of each, we hope to show that, in relation to incorporeal rights, nothing more has been required to vest them in the assignee than what the assignee in the present case has fully performed.

The earliest case decided is that of *Durnford* v. *Brooks's Syndics* (3 Mart., 222, 269; 1 Cond. R., 112.)

[*Mr. Wilde* then examined the Louisiana cases upon this point.]

The argument has hitherto been conducted according to the assumption of the district judge, that this is to be regarded as an assignment of stocks. But such assumption is surely mistaken. The stocks themselves had in both instances been already assigned as security for other debts, and the certificates at the time were actually in possession of the pledgees. The Carollton script was in pledge to that bank, as security for what is technically termed a stock note, and the Gas Light Company's script was in pledge to the Bank of South Carolina. In both instances, therefore, nothing remained to be assigned, nothing was subject to assignment, but an equitable right in an incorporeal thing—a right to redeem the thing by paying the sum due on it—an equity of redemption in the stock, not the stock itself. This view of the subject makes it clear to us *that the [*501 district judge erred, and his error consisted in applying to a mere equity, a law regulating nothing but the actual transfer of the incorporeal thing.

If we are correct in holding that the only interest assigned, or susceptible of assignment, was an equitable right in an incorporeal thing—a right to redeem the stock by paying the sum for which it was pledged—it follows as a necessary consequence, that the subject matter of this assignment no longer belongs to the category of public stocks, transferable only in a peculiar mode, but falls into the general class of debts and credits which the common law terms choses in action, or more properly, as we contend, into that of incorporeal rights, which pass by the delivery of the titles, and of the act of transfer. (*Vide* art. 2457, 2612, and 2613, *ante*.) With respect to the former, we have seen that no tradition or delivery is possible: none is required. Notice to the debtor stands in the place of delivery. The debt is liable to be attached so long as the debtor has not had notice of its assignments. After such notice, it is no longer subject to attachment. (*Gray* v. *Trafton*, 12 Mart., 702; *Armor* v. *Cockburn et al.*, 4 N. S., 667; *Bainbridge* v. *Clay*, 4 N. S., 56; *Carlin* v. *Dumatrait*, 4 N. S., 20; *Randal* v. *Moore et al.*, 9 Martin, 408; *Cox* v. *White*, 2 La. R., 425.)

But here is certainly in strictness no debt due

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from the bank. The corporation, to be sure, at the end of its charter, is to return the stock to its stockholders, or, more properly speaking, to divide its assets, whatever they may be. But until dissolution the amount of these cannot be ascertained; and if there should be no assets there is no debt.

The only class, therefore, into which the subject matter of this assignment can fall, is that of "incorporeal things, consisting only in a right," "the tradition of which is complete by the mere delivery of the titles, and of the act of transfer." (Articles 462 and 2457, *ante;* and also art. 1918, which is as follows):

"What shall be considered a delivery of possession is determined by the rules of law applicable to the situation and nature of the property."

Now, we have seen that incorporeal things, though not strictly susceptible of the quality of movables or immovables, fall into one or the other class, according to the object to which they relate. (*Vide ante*, art. 462, Louisiana Code.)

The effects here assigned belong clearly to the class of rights, claims, incorporeal things personal.

The tradition of incorporeal rights personal, is held to be complete by art. 2457, when there is a delivery of the titles and of the act of transfer. (*Vide ante*, art. 2457, Louisiana Code.)

Here the delivery of the titles was complete, if that means the complete devestiture of the original owner's title: if it means, as we suppose, the title papers, the scrip was in the hands **502*]** of third persons, *and incapable of delivery; and the right actually conveyed, not being the stock itself, but an equity of redemption in the stock, there were no other titles to be delivered but the act of transfer.

An examination of two or three cases, which are supposed to press most strongly against the plaintiffs in error, is incumbent on us.

Graves et al. v. *Roy* (13 La. Rep., 454, 457) was decided on the ground that the assignment imposing the condition of a release, and inuring to the benefit of such creditors only as should comply with this condition, was oppressive and void, even on common law principles, as well because it did not appear to be a conveyance of all the debtor's property, as because certain claims, not alleged to be fraudulent, were excluded.

Townsend v. *The Louisiana State Marine and Fire Insurance Company* (13 La. R., 551, 554) turned upon the fact that the assignment was made in Louisiana, and gave a preference to some creditors over others.

Kimball v. *Plant et al.* (14 La. Rep., 10, 18) was decided upon the express provisions of the Louisiana Code, that in the transfer of debts, the transferee is possessed as its regards third persons only, after notice has been given to the debtor of the transfer having taken place.

In the case of *Beirne & Barnside* v. *Patton et al.* (17 La. Rep., 589, 591), the court do undoubtedly lay down, broadly, that, as relates to the rights and remedies of creditors, personal property has a situs or locality, and is to be governed by the law of the country where it is situated, when there arises a conflict between the latter and the former.

The wisdom of determining only what is necessary to decide the rights of the parties and the danger of proceeding *arguendo* to settle points neither cardinal nor fully discussed, was never more apparent than in this case, and your honors in considering it will take care to separate the judgment of the court from the *dicta* that accompany it.

There were at least three points on which the judgment there rendered might be placed, without at all invoking the very doubtful canon above quoted.

1st. The assignment was one giving a preference to some creditors over others.

2d. It did not appear that it was valid, even by the laws of Tennessee, where it was made.

3d. It distinctly appeared that the debtor reserved a part of his property.

The decision, moreover, seems, to some extent at least, to be based on the authority of *Ingraham* v. *Geyer* (13 Mass. R., 146), since overruled by *Means* v. *Hapgood* (19 Pickering, 105); and is apparently in conflict with *Depon* v. *Humphreys* (8 New Series, 1), already cited —a case of the highest authority.

If, therefore, we apply to the case at bar the rule either of *McNeil* *v. *Glass* (1 N. S., **[*503** 261), before cited, or that of *Armor* v. *Cockburn* (4 N. S., 667), it will appear that Black had so completely devested himself of title as to satisfy the exigency of the first decision, and so entirely lost all power over the property as to be incapable of changing its destination, and therefore within the principle of the second. In other words, "the original owner of the property could no longer sell and deliver, so as to pass a good title." "He had lost all power over it, and could no longer change its destination;" and consequently, "the creditor could no longer seize." (*Vide ante*, the quotations from the cases of *McNeil* v. *Glass*, and *Armor* v. *Cockburn; vide*, also, *Babcock* v. *Maltbie*, 7 N. S., 137; and *Urie* v. *Stevens*, 2 Robinson's La. Rep., 253.)

Nor is there anything contrary to this in *The United States Bank* v. *Laird*, decided by this court, 2 Wheat., 393, for in that case the court recognize the possibility of acquiring an equitable title without transfer on the books of the bank—subject, of course, to any lien which the bank itself may possess.

As the distinction between equitable and legal titles does not prevail in Louisiana, where any just title is sufficient, and as no attachment can be sustained if the equitable title has passed out of the defendant in attachment before it was levied, it follows that an assignment of the equity, such as is contemplated by the court in *The United States Bank* v. *Laird*, is sufficient to defeat a subsequent attaching creditor.

Courts of common law even protect in certain cases the assignment of choses in action. (*Welch* v. *Mandeville*, 1 Wheat., 233, S. C., 5 Wheat., 283; *Corser* v. *Craig*, 1 Wash. C. C. R., 424, 427.)

The second point, viz., "Had the attaching creditor a legal cause of action at the commencement of his suit?" need not detain us long.

We contend that the drawing, negotiation, and acceptance of the bills amounted to an

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assignment of the fund against which they were drawn. (Chitty on Bills, 1, 2; 3 Kent's Com., 75; 2 Black., 466; *Mandeville* v. *Welsh*, 5 Wheat., 286.)

Zacharie & Co. ceased to be creditors of Black from the moment of the acceptance of the bills. There remained a contingent liability to pay them, if they should be regularly protested for nonpayment and due notice given; but this did not make them creditors of Black, nor even his sureties. Then, at the institution of the suit, there was no debt due by the defendant to the plaintiff. (*Taylor* v. *Drane*, 13 La. Rep., 64; Pothier on Obligations, 235, and *note*.)

An indorser who has not paid his indorsee is not a creditor. (*Planters' Bank* v. *Lanusse*, 10 Martin, 690.)

Credit given in an account current for a note extinguishes the account and produces a novation. (*Cox* v. *Williams*, 7 N. S., 301; *Barron* v. *Horr*, 2 N. S., 144; *Gordon et al.* v. *McCarty*, 9 Mart., 288.)

504*] *Here the bills were credited in the account.

The mode of ascertaining whether there was any existing debt at the time of attachment is to inquire whether, considering it a case of bankruptcy, Zacharie & Co. could have proved against the bankrupt's estate, before payment of the bills.

There cannot be two creditors for the same debt, entitled both to prove at the same time.

Now, the holder of the bills would clearly have been entitled to prove; and, consequently, Zacharie & Co. would not.

Their debt revived when they paid the amount of the bills, not before.

These principles have become proverbial: "*Qui a terme ne doit rien.*" (Loysel, Evans's Pothier on Obligations.) "*Quod in diem stipulamur, peti prius quam dies venerit non potest.*" (Justin. Inst., by Cooper, p. 249.)

If, by any interpretation, Zacharie & Co. can be considered creditors at the time of commencing their action, this debt was not due, and their suit was premature. (La. Code, art. 2047; Code of Pract., art. 158; *Groning* v. *Krumbhaur*, 18 La. Rep., 64; *Atwell* v. *Belden*, 1 La. Rep., 504; *Williamson* v. *Foucher*, 8 La. Rep., 585.)

Mr. Coxe, for the defendants in error, recapitulated the facts in the case, and then said:

The questions presented by the record are:

1. Whether, on the 4th May, 1841, any debt was in fact due by Black to plaintiffs.

2. Whether the deed of assignment, *per se*, operated a transfer of the stock.

3. Whether, if such debt actually existed on which suit could be sustained, the attachment laid on the 4th May, or the assignment of 28th April is to prevail.

1. Whether, on the 4th May, 1841, Black was indebted to plaintiffs.

By the account sales of sugar and molasses, it appears that such sales were made of a cargo, consigned by Zacharie & Co. (to Black), net proceeds subject to their order for account of whom it may concern.

This account rendered by Black on the 12th April, 1841, shows a balance due plaintiffs of $9,366.68.

The account shows that the proceeds were the property of plaintiffs; the average time of payment 27th to 30th April; and, consequently, the notes given by purchasers were the property of plaintiffs held by Black as their agent.

In this position of affairs, plaintiffs drew several bills on Black, in February, March, and April, and what became of them is shown by the record. None of these bills appear on their face to have been *accepted by [**505** Black; but, in the protests of some, three of the five, he is called the acceptor. All were returned under protest for nonpayment, and taken up by plaintiffs after the institution of the suit.

It is insisted that the drawing of these bills operated a transfer of the debt, and, as between these parties, extinguished the original liability.

The drawing of bills by a consigner and his consignee, is a matter of daily occurrence in the immense business of New Orleans; advances are thus made by the purchasers of such bills, and they are of infinite convenience. To regard them as operating an extinguishment of the debt of the consignee, before payment, is a novel doctrine, replete with the most serious consequences.

This extinguishment of the old debt by the substitution of a new one, is called, in the Louisiana law, a novation.

Wherever this doctrine of novation exists, under whatever name, the application of it depends upon the intention of the parties as exhibited in their acts. (Nap. Code Civil, lib. 3, tit. 3, sec. 2, sec. 1273.) It is never to be presumed—it is essential that the intention to operate it result clearly from the act. (*Peter* v. *Beverley*, 10 Peters, 568.)

It is a settled doctrine that the acceptance of a negotiable note for an antecedent debt will not extinguish such debt, unless it is expressly agreed that it is received as payment. The evidence must be clear and satisfactory that such was the intention of the parties.

This is a much stronger case than the acceptance of a negotable note; the drawer of the bill does not disconnect himself from the debtor. His responsibility remains to the holder. (See the three cases of novation, Nap. Code, N. S.)

The acts of the parties show that they had no such intention.

1st. Plaintiffs do not assign their claim for a valuable consideration and exonerate themselves from it.

So far from such a bill dissolving the connection between the parties, it presumes its existence and continuance. If drawee refuses to accept, drawer may sue and recover for such act. If he refuses to pay, he has a full remedy growing out of the original indebtment.

2d. Black never so regarded or treated it.

1. In his account dated 12th April, 1841, no entry is made of these bills and acceptances; no credit claimed; but the balance growing out of the sale of sugars, &c., distinctly stated and admitted.

2. In his schedule of creditors, annexed to the assignment to Chapman, Zacharie is put down as one, and McDonald, the payee and holder of bills, is not.

3. His letter of 28th April so treats plaintiff, and particularly mentions the drafts about to fall due.

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4. Black's books, as proved by Pettigru, show the same thing.

506*] *Throughout, such appears to be the understanding of the parties. Such, then, being the mercantile usage, such the particular understanding of these parties, what does the law say? (Civil Code, art. 2181.)

Novation is a contract, consisting of two stipulations, one to extinguish an existing obligation, the other to substitute a new one in its place. (Pothier on Oblig., 341. 550, 344, 559, Civil Code, art. 2183, 2185, 2190.) The mere indication by the creditor of a person who is to receive for him does not operate a novation. (Pothier, Traite de Vente, No. 600, 603; Touiller, Le Droit Civil, 5me. edit. Vol. VII., lib. 3, tit. 3, ch. 5, p. 243, 244; *Ibid.*, 66, No. 46; 19 Sircy Recueil General, 55, 56, 57.)

In Louisiana the law is well settled by adjudications. (*Cox* v. *Rabaud's Syndic*, 4 Martin, 11: *Hobson* v. *Davidson's Syndic*, 8 Martin, 428; *Gordon* v. *McCarty*, 9 Martin, 268; *Bonnmere* v. *Negretti*, 16 La., 474; *Plique* v. *Perret*, 19 La., 318.)

2. Does the assignment operate, *per se*, as transfer of the stock?

1st. The assignment, &c., does not act, *per se*, as a transfer of stock in Louisiana banks.

2d. Black executes two powers of attorney, one 15th April, 1841, to transfer to the Bank of South Carolina; the other — April, acknowledged on 30th.

3d. These powers indicate no person by name, but merely give the power to "the cashier, &c." This is invalid of itself.

The charters of the Louisiana banks are not imbodied in the record, but the substance of them is imbodied in the instructions prayed.

If such instruction was not warranted by the evidence, it was rightly refused. The modern charters of banks have copied substantially the provisions on this subject, in that of the Bank of England. An abstract of that charter may be found, 3 Petersdorff's Abr., 276, 285. 286, Amer. edit.; "Bank of the United States" (3 Story's Laws U. S. 1547, 1552); *Rex* v. *Bank of England* (Dougl., 524).

It clearly appears that the transfer on the books is necessary to pass title. (2 Bing., 393; 3 Petersdorff, 268, 410.)

It is incumbent on banks not to permit a transfer until satisfied of authority to transfer. If they err, they are bound to make good the loss. (*Sutton* v. *Bank of England*, 1 Carr. & Payne, 193; S. C., 1 Ryan & Moody, 52.)

Action will lie against the bank for unreasonable delay in permitting transfer. (*Hartga* v. *Bank of England*, 3 Ves., 55; *Bank of England* v. *Parsons*, 5 Ves., 665). See this last case particularly.

If this stock stood upon the common footing of other personal property, in the hands of third persons, it would not pass until he was notified. Here no notice was given until the 5th May; the attachment had been laid on the 4th.

507*] *The power of attorney to transfer mentions no party by name. They designate "the cashier, &c." This is a void authority.

3. The attachment issued and levied on the 4th May, 1841, takes precedence of the assignment.

The question is one of deep interest to the commercial part of Louisiana, and settled by her courts.

Whatever may be the general commercial law, Louisiana has her own law.

In this case the question is between an attaching creditor and a voluntary assignee. An attaching creditor is a purchaser for a valuable consideration. (*Langran* v. *Simmons*, 17 Mass., 110.)

It is then a case of a purchaser of such a character, with all the equity, now possessed of legal title.

The legal title does not pass without a transfer on the books of the corporation. (22 Wendell, 348.

It is said this point would not admit of argument out of Louisiana. There seems a singular misapprehension on this point.

By the common law, delivery is a general essential to the passing of title to personal property. (Statutes of Elizabeth, 1 Gallis., 428; 17 Mass., 110.)

Here the Louisiana property is to be carried to a foreign State for distribution, and Louisiana creditors to follow it there. This is against the policy of the State, and required by no comity.

In regard to intestates. (Confl. of Laws, 523.)

The law in regard to stocks is peculiar. (Confl. of Laws, 383, *note*.) Emphatically the law of Louisiana and of France. (Pothier, Traite de Vente, 186, part 5, art. 2, sec. 318, &c.; 5 Martin, 43, 75, 57; 4 Martin, 20; 2 La., 422; 14 La., 10; 12 La., 395; Story's Confl. of Laws, 386–390.)

Mr. Wilde, in reply, examined, in the first place, whether there was an existing debt due from Black at the time of laying the attachment. If the proof of such a debt did not rest upon the bills of exchange, because (as had been argued by *Mr. Coxe*) they were not accepted, then we must look elsewhere for it, because merely drawing upon a person does not make him a debtor. The proof of an existing debt can only be discovered (leaving out the bills) in—1. The account sales. 2. The letter of Black. 3. The evidence of Pettigru.

[Each head was separately examined by *Mr. Wilde*.]

If, on the other hand, the bills were accepted, then there was a novation of the debt, and not a mere delegation.

Zacharie & Co. had notice of the assignment, as appears from Black's letter to them. The Gas Light Bank had notice also of the claim of the Bank of South Carolina; and the Carrollton Bank could not be injured by the want of notice, because they held the scrip in pledge.

The whole object of notice is to prevent injury to the debtor, *holder of the prop- [*508 erty, or depositary; to prevent an innocent person from two recoveries against him for the same cause.

But here the one bank had express notice from the pledgee (Bank of South Carolina). The other held the scrip in pledge for its own debt. Neither could be prejudiced.

So far as the reason of the case goes, the maxim applies, *cessante ratione, cessat et ipsa lex.*"

It was distinctly admitted at the outset, that by the law of Louisiana absolute tradition of personal property was necessary to protect it from attachment.

It was equally admitted that, as to debts as-

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signed, they remained liable to attachment, until notice of the assignment had been given to the debtor. After such notice they cannot be attached.

But it was contended, and is still insisted, that the equity of redemption in certain stocks in pledge is neither a personal thing, tangible and susceptible of tradition or delivery, nor is it a debt which requires notice to be given to the debtor. It belongs to the category of incorporeal things movable.

The learned counsel errs, in supposing the articles of the Code, quoted in the opening, refer to what are called, by the common law, incorporeal hereditaments.

On the contrary, incorporeal things, by the Louisiana law, are classed into movable and immovable. (Art. 462, L. C.)

And article 466 expressly declares bank stocks to be movables.

The equity of redemption assigned in this case, then, is neither a thing movable, susceptible of manual tradition, nor is it a debt which, in order to perfect the assignee's title, requires notice to be given to the debtor.

There is no article of the Code, no decision of the courts of Louisiana, which requires manual tradition, which is impossible, or notice to the bank, which is unnecessary, as the bank is not a debtor.

But the court are asked to extend the principle by analogy.

There is no room for such analogy.

On the contrary, the analogy and reason of the thing are the other way.

Art. 3395, Louisiana Code, says possession applies properly only to corporeal things movable or immovable.

Art. 2612, as to debts, makes notice equivalent to tradition; but

Art. 2457 declares that the tradition of incorporeal rights is to be made by the delivery of the titles, and of the act of transfer.

No distinction is made between incorporeal rights to things movable and things immovable. All incorporeal rights may be so transferred. (*Vide Martinez* v. *Perez*, 8 Mart. N. S., 668.)

Here everything was done that could be done. The scrip was in the hands of the pledgees. That could not be delivered to the assignee, because the assignee had neither possession of it nor control over it.

509*] *Immediate notice was given to the creditor, Zacharie & Co., and in consequence of that notice he issued the attachment.

Notice was given to the banks as early as possible, and the Gas Bank had notice of the lien of the Bank of South Carolina before the attachment issued.

Neither the Louisiana Code nor the decisions of the courts sustain the attempt to declare this assignment void, for want of delivery of the effects assigned.

Nor is it supposed the judge rested his charge on the public or general law.

The argument of the learned counsel certainly reposes mainly on the clauses of the charters.

[*Mr. Wilde* here referred to the charters, and cited the following cases: *Bank of Utica* v. *Smalley & Barnard* (2 Cowen, 777, 778); *Sergeant* v. *Franklin* (8 Pick., 96, 97); *Gilbert* v. *Manchester Iron Co.* (11 Wend., 628); *Commercial Bank* v. *Kortwright* (22 Wend., 362).

The case of *The United States Bank* v. *Laird* (2 Wheat., 393) shows that the court recognize the possibility of acquiring an equitable title, without a transfer on the books of the bank.

Mr. Justice STORY delivered the opinion of the court:

This is a writ of error to the Circuit Court of the United States for the Eastern District of Louisiana. The original suit was brought in the State court, against Black alone, upon an attachment issued by Zacharie & Company against him, he being a citizen of South Carolina, and not resident in Louisiana; and upon this attachment certain shares of Black, in the Carrollton Bank, and the Gas Light and Banking Company, in Louisiana, were attached, to answer the exigency of the writ. Black appeared in the suit, and caused it to be removed into the Circuit Court. Black, upon his appearance, pleaded that prior to the attachment he had assigned the attached stock to James Chapman, of South Carolina, by a trust deed, for the benefit of all his creditors. After the removal of the suit into the Circuit Court, Chapman filed an intervention, according to the Louisiana practice, and became a party to the suit to protect his interest under the trust deed. In his petition of intervention he asserted his title, and that he had given due notice thereof to the Carrollton Bank, and the Gas Light and Banking Company; and that Zacharie & Co had due notice thereof before their attachment.

The cause was tried by a jury upon the pleadings in the case; and upon the trial it was proved that the assignment was made by the trust deed in South Carolina, by Black to Chapman, on the 28th of April, 1841. The attachment of Zacharie & Co. was made on the 4th of May, 1841, with a full knowledge of the assignment. Long before the attachment, the stock in the Carrollton Bank had been transferred and pledged to the Carrollton Bank for a stock loan, and was then held by that bank, under that transfer, the equity of redeeming *the [*510 same only remaining in Black. On the 15th of April, 1841, Black had executed a letter of attorney to the cashier of the Gas Light and Banking Company, to transfer the same to the Bank of South Carolina, of which notice was sent on the next day to the Gas Light and Banking Company, and notice was received by the latter on the 22d of April; but owing to some informality in the letter of attorney, the transfer was not then made, but the paper was sent back to be corrected, the company then agreeing to transfer it when the informality was corrected. The Bank of South Carolina was a holder of the stock, under this power, for value; and of this transaction also Zacharie & Co. had notice before their attachment.

At the trial, the jury found a verdict for the original plaintiffs, and judgment thereupon passed for them. Two bills of exceptions were taken to the ruling of the court at the trial, and upon these exceptions the cause has been brought before this court.

It does not seem necessary to recite at large the matters contained in these exceptions. They give rise to two questions, which have been fully argued at the bar, although very in-

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artificially presented in the record: First, whether at the time of the commencement of the suit of Zacharie & Co. there was any debt due to them, upon which the attachment could, under the circumstances, be maintained. Second, whether the assignment to Chapman, being made in South Carolina, and known to Zacharie & Co. at the time of their attachment, and being, by the laws of South Carolina, a good and valid assignment, is entitled to a priority over the attachment. The latter question, so far as it respected the notice to Zacharie & Co., and the equity of the assignee, is not so precisely put as it is obvious it was intended to be, in the instructions asked by the intervenor. But it is plain, from the qualifications of those instructions suggested by the court, that the court held that the delivery of the stock was not complete, and that the assignment did not pass the right to the stock to the assignee, unless the transfer was entered upon the books of the bank, notwithstanding the notice; and that the law of Louisiana upon the point was different from that of South Carolina. In this way only is the verdict at all reconcilable with the admitted state of facts.

In respect to the first question, it is plain to us that there was no debt due to Zacharie & Co. at the time when the attachment was made. The supposed debt was for the proceeds of a cargo of sugar and molasses, sold by Black on account of Zacharie & Co. Assuming those proceeds to be due and payable, Zacharie & Co. had drawn certain bills of exchange upon Black, which had been accepted by the latter, for the full amount of those proceeds; and all of these bills had been negotiated to third persons, and were then outstanding, and three of them were not yet due. It is clear, upon principles of law, that this was a suspension of all right of action in Zacharie & Co., until after those bills had become due and 511*] dishonored, and *were taken up by Zacharie & Co. It amounted to a new credit to Black for the amount of those acceptances, during the running of the bills, and gave Black a complete lien upon those proceeds, for his indemnity against those acceptances, until they were no longer outstanding after they had been dishonored.

Whether the transactions by the drawing and acceptance of these bills amounted to a novation of the debt, which might otherwise be due under the account current for the sales of the sugar and molasses, it is not necessary to decide; for, assumming that these transactions might be treated as a conditional novation only and not as an absolute novation, it would make no difference in the conclusion to which we should arrive under the circumstances of this case.

It is true that the statute law of Louisiana allows, in certain cases, an attachment to be maintained upon debts not yet due. But it is only under very special circumstances; and the present case does not fall within any predicament prescribed by that law. The statute does not apply to debts resting in mere contingency, whether they will ever become due to the attaching creditor or not; nor to any case except of absconding debtors; and this, therefore, is a case not governed by it. We think, then, that there was error in the ruling of the court in admitting, that there was a sufficient debt established by the evidence to maintain the attachment.

The other point is one of much greater importance, although in our judgment not attended with any intrinsic difficulty. We admit, that the validity of this assignment to pass the right to Black in the stock attached depends upon the law of Louisiana and not upon that of South Carolina. From the nature of the stock of a corporation, which is created by and under the authority of a State, it is necessarily, like every other attribute of the corporation, to be governed by the local law of that State, and not by the local law of any foreign state. And in the present case, if the local law of Louisiana had prohibited (as we think it had not) any assignment of an equitable interest in the stock attached, we should not have scrupled to have followed that law. The question is not here, whether the legal interest in the stock passed by the assignment before a transfer of the stock upon the books of the corporations; but whether the equitable interest therein, as contradistinguished from the legal interest, did not pass to and vest in the assignee by the law of Louisiana, so as to oust the right of any creditor with full notice of the assignment from devesting the title of the assignee by a subsequent attachment thereof as the property of the debtor. In respect to the Carrollton Bank it is clear that nothing but an equitable interest could be conveyed or was intended to be conveyed by the assignment; for the bank already held the legal title as a pledge for a stock loan. In respect to the Gas Light and Banking Company, the interest in the stock had been transferred to the Bank of South Carolina as a pledge, and the letter of attorney was given to perfect the equitable *title into a legal title by an [*512 actual transfer on the books of the corporation. But, subject to that pledge, the equity was with the consent of the Bank of South Carolina vested in the assignee under the assignment. So that each case presented the same general question as to the validity of the equitable title by the law of Louisiana against attaching creditors, having full knowledge of that equity. Out of Louisiana, we believe that no such question could possibly arise; for courts of law, as well as courts of equity, are constantly, in all States where the common law prevails, in the habit of holding a prior assignment of the equitable interest in stock as superseding the rights of attaching creditors, who attach the same with a full knowledge of the assignment.

Upon full examination of the laws of Louisiana and the decisions of its courts, we see no reason to believe that a different doctrine on this subject prevails in that State. It is true that the same distinctions between legal and equitable rights may not as to the mode of remedy exist in that State, which are recognized in States governed by the common law; but the same purposes of substantial justice are attained there under similiar circumstances as the courts in other States are accustomed to administer in a different form.

There is a marked distinction in the Louisiana law between the transfer of corporeal things movable, and things incorporeal. In the former a manual tradition of the thing is ordinarily but not universally required to per-

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fect the title. In the case of incorporeal things no such tradition can take place, and therefore such a delivery as the thing admits of—a sort of symbolical delivery—is admitted by the law as a substitute. There are several articles of the Civil Code of Louisiana bearing directly on this point; but it will be sufficient only to cite a few of those which have been relied on by counsel. Art. 2612 declares, "In the transfer of debts, rights, or claims, to a third person, the delivery takes place between the transferrer and transferee by the giving of the title." Art. 2613 declares, "The transferee is only possessed, as it regards third persons, after notice has been given to the debtor of the transfer having taken place." Art. 2456 declares, "The tradition of the incorporeal rights is to be made either by the delivery of the titles and of the act of transfer, or by the use made by the purchaser with the consent of the seller." In *Bainbridge* v. *Clay* (16 Martin R., 56) the Supreme Court of Louisiana said, "A debt due [by] the defendant on a *fieri facias* cannot as to third persons completely pass to the assignee unless there be what in sales of tangible property is called a tradition or delivery; and this is effected as to choses in action by notice of the assignment to the debtor." Again, in *Babcock* v. *Maltbie* (19 Martin R., 137), the same learned court said that the true test, in cases of assignment, is, "That where the owner of the property has lost all power over it and cannot change its destination, the creditors cannot attach." The same doctrine was directly 513*] *affirmed in the recent case of *Urie* v. *Stevens* (2 Rob. La. Rep., 251). The principles announced in these decisions seem completely to cover the present suit. In the case of the Carrollton Bank the shares had actually passed to the bank itself as a pledge, and nothing but an equity remained in Black, capable of being transferred, and that was assigned by the deed of assignment to the assignee before the attachment, and was known to Zacharie & Co. at the time when they made their attachment; and at least as early as the next day it was made known to the bank. So that the creditors had full notice and the bank had full notice; and the creditors could not make a valid attachment when to their knowlege the property no longer belonged to their debtor. The case as to the Carrollton Bank falls, then, directly within the principles just stated. The owner had parted with all his property in the stock; he had lost all power over it; and he could not change its destination. The same principles apply, *a fortiori*, to the Gas Light and Banking Company; for there, not only had the creditors notice of the assignment before their attachment; but the company also had notice thereof before that period.

It is true that the charters of the Carrollton Bank and of the Gas Light and Banking Company provide that no transfer of the stock of these corporations shall be valid or effectual until such transfers shall be entered or registered in a book or books to be kept for that purpose by the corporation. But this is manifestly a regulation designed for the security of the bank itself, and of third persons taking transfers of the stock without notice of any prior equitable transfer. It relates to the transfer of the legal title, and not of any equitable interest in the stock subordinate to that title. In the case of *The Union Bank of Georgetown* v. *Laird* (2 Wheat., 390) this court took notice of the distinction between the legal and equitable title in cases of bank stock, where the charter of the bank had provided for the mode of transfer. The general construction which has been put upon the charters of other banks containing similiar provisions as to the transfer of their stock, is, that the provisions are designed solely for the safety and security of the bank itself and of purchasers without notice; and that as between vendor and vendee, a transfer not in conformity to such provisions is good to pass the equitable title and devest the vendor of all interest in the stock. Such are the decisions in the cases of *The Bank of Utica* v. *Smalley* (2 Cowen, 777, 778), *Gilbert* v. *Manchester Iron Co.* (11 Wend., 628), *Commercial Bank of Buffalo* v. *Kortwright* (22 Wend., 362), *Quiner* v. *The Marblehead Insurance Co.* (10 Mass., R., 476), and *Sergeant* v. *Franklin Insurance Co.* (8 Pick. R., 90).

We see no reason to doubt that the jurisprudence of Louisiana adopts a similiar interpretation for the purpose of protecting equitable title against the claims of creditors of the transferrer, who have notice of such equitable titles. If it will protect an assignment of a *chose in action against attaching [*514 creditors after notice of the assignment given to the debtor, because no title remains in the transferrer (as we have seen it will), *a fortiori*, it ought to protect it where the attaching creditor himself has notice, since, in justice, he is entitled only to take under his attachment what rightfully remains in the transferrer. In the absence of any positive controlling statute or direct adjudication of the courts of Louisiana upon the very point, in contradiction to the doctrine maintained in other States, as one founded *ex æquo et bono* in general justice, we may well presume, that a State deriving its jurisprudence from the Roman law, has not failed to act upon it.

There is another ground, auxiliary to this last view, which is entitled to great consideration. It is well settled as a doctrine of international jurisprudence, that personal property has no locality, and that the law of the owner's domicile is to determine the validity of the transfer or alienation thereof, unless there is some positive or customary law of the country where it is found to the contrary. This doctrine has, in the very late case of *The United States* v. *The United States Bank* (in June, 1844), been fully and directly recognized and affirmed by the Supreme Court of Louisiana, as a part of its own international jurisprudence; and it was applied in that very case to support an assignment made in Pennsylvania, by the Bank of the United States, to certain assignees, who were intervenors of goods, debts, credits, and effects, in Louisiana. The court held that the assignment, being proved to be valid and effectual by the law of Pennsylvania, was to be deemed equally valid and effectual to pass the goods, debts, credits, and effects, of the bank, to the assignees in Louisiana, against the attaching creditors, who had notice of the assignment at the time of their attachment. The decision turned upon the very doctrine of international jurisprudence just referred to. So

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that here we have the high authority of the State court in this very matter, that there is nothing in the jurisprudence of Louisiana, which forbids giving full effect and validity to an assignment of debts, credits, and equities, situate in that State, where the assignment is valid and effectual by the law of the State where it is made, so as to oust the rights of attaching creditors who have due notice thereof. Now, in the case before us, there is plenary evidence that the assignment was valid and effectual by the laws of South Carolina, when and where it was made, to pass the right to the property in controversy; and that the attaching creditors had notice thereof before their attachment was made; so that its validity and effect are the same in Louisiana as in South Carolina. It is true that the legal title could not pass without a regular transfer of the stocks upon the books of the corporation; but it is equally true, that the title to the property, subject to the pledge thereof, was complete in the assignee, so as to bind the banks as well as the attaching creditors, after due notice to them 515*] respectively. We are, *therefore, of opinion that the district judge erred in directing the jury that the delivery of the stock was not complete unless the transfer was entered upon the books of the banks. That was true as to the absolute legal title, but it did not prevent the equitable title from passing to and becoming completely vested in the assignee under and in virtue of the assignment, so as to bind the attaching creditors, as soon as they had notice thereof, and in like manner the banks, as soon as they had notice thereof.

Upon both grounds, therefore, stated in the exceptions, the judgment of the Circuit Court is reversed, and the cause remanded to that court with directions to award a venire facias de novo.

Cited—21 Wall., 30; 3 Biss., 433; 2 Wood. & M., 454, 464–467; 3 McLean, 565; 1 Woods, 53; 8 Bank. Reg., 223; 5 Dill., 79, 88.

JOHN B. CAMDEN, *Plaintiff in Error*,

v.

THOMAS C. DOREMUS, CORNELUIS R. SUYDAM, JAMES SUYDAM, AND JOHN M. NIXON, *Defendants in Error.*

Objections to reception of evidence should state grounds of, on appeal—agreements between indorser and indorsee—custom of banks—what is due diligence to collect.

Where a general objection is made, in the court below, to the reception of testimony, without stating the grounds of the objection, this court considers it as vague and nugatory; nor ought it to have been tolerated in the court below.

Where at the time of the indorsement and transfer of negotiable note, an agreement was made that the holder should send it for collection to the bank at which it was, on its face, made payable, and in the event of its not being paid at maturity, should use reasonable and due diligence to collect it from the drawer and prior indorsers before resorting to the last indorser, the holder is bound to conditions beyond those which are implied in the ordinary transfer and receipt of commercial instruments.

Evidence of the general custom of banks to give previous notice to the payer, of the time when notes will fall due, was properly rejected, unless the witness could testify as to the practice of the particular bank at which the note was made payable.

A presentment and demand of payment of the note, at maturity, within banking hours, at the bank where the note was made payable, was a sufficient compliance with the contract to send it to the bank for collection.

The record of a suit brought by the holder against the maker and prior indorsers was proper evidence of reasonable and due diligence to collect the amount of the note from them; and it was a proper instruction, that if the jury believed that the prior indorsers had left the State and were insolvent, the holder of the note was not bound to send executions to the counties where these indorsers resided at the institution of the suit.

The diligent and honest prosecution of a suit to judgment with a return of *nulla bona*, has always been regarded as one of the extreme tests of due diligence.

And the ascertainment, upon correct and sufficient proofs, of entire and notorious insolvency, is recognized by the law as answering the demand of due diligence, and as dispensing with the more dilatory evidence of a suit.

If the holder cannot obtain a judgment against the maker for the whole amount of the note, in consequence of the allowance of a set-off as between the maker and one of the prior indorsers, this is no bar to a full recovery against the last indorser provided the holder has been guilty of no negligence.

*THIS case was brought up by writ [*516 of error from the Circuit Court of the United States for the District of Missouri.

The defendants in error were citizens of the State of New York and partners in trade under the name and style of Doremus, Suydams & Nixon. The plaintiff in error was the surviving partner of the mercantile house of John B. and Marbel Camden, which carried on business at St. Louis under the name and firm of J. B. & M. Camden. The plaintiff in error was sued in the court below as indorser of the following promissory note:

On the 8th of June, 1836, Ewing F. Calhoun executed this note, viz.:

"$4,219.90.

"Twelve months after date, I promise to pay Judah Barrett, or order, four thousand two hundred and nineteen dollars and ninety cents, negotiable and payable at the Commercial Bank of Columbus, June 8, 1836.

"EWING F. CALHOUN.

"Mississippi + 1809." Columbus, Mississippi."

Which note was indorsed by Barrett to Sterling Tarpley, or order, by him to J. B. & M. Camden, or order, and by them to Doremus, Suydams & Nixon, or order.

On the 22d of August, 1836, the plaintiffs and defendant entered into the following agreement:

"NEW YORK, August 22d, 1836.

"Memorandum of an agreement and trade made by and between Doremus, Suydams & Nixon, of the city of New York, of the one part, and J. B. & M. Camden, of the city of St. Louis, of the other part, witnesseth: Whereas, the said Camdens have this day sold and assigned unto the said Doremus, Suydams & Nixon, a note for four thousand two hundred and nineteen dollars and ninety cents, payable twelve months after date, and dated the eighth day of June, 1836, and nego-

NOTE.—*As to exceptions, what particularity in, is necessary in order to a review in appellate court. General exception, or objection, when not sufficient.* See note to Moore v. Bank of Metropolis, 13 Pet., 302.

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tiable and payable at the Commercial Bank of Columbus, Miss., Executed by Ewing F. Calhoun to Judah Barrett, and indorsed by the said Judah Barrett and Sterling Tarpley and J. B. & M. Camden. Now, it is expressly understood and agreed by the contracting parties, that the said Doremus, Suydams & Nixon are to send the said note to the said Commercial Bank of Columbus, Mississippi, for collection, and in the event of its not being paid at maturity, they are to use reasonable and due diligence to collect it of the drawer and two indorsers before they call upon the said Camdens; but in the event of its not being made out of them, then the said Camdens bind and obligate themselves, so soon as informed of the fact, to pay the said Doremus, Suydams & Nixon, the principal of the said note, together with its interest and all legal costs they may have incurred in attempting its collection. J. B. & M. CAMDEN,

"DOREMUS, SUYDAMS & NIXON."

517*] *The note not being paid at maturity, suit was brought by the indorsers against the plaintiff in error as surviving partner of the indorsers, J. B. & M. Camden.

Upon the trial of the cause, the plaintiff offered to read in evidence sundry depositions, and also a voluminous record, which are all set forth in full in the first bill of exceptions, but which it is impossible to insert here on account of their great length. They were:

1. The deposition of Thomas B. Winston, that he presented the note at the Commercial Bank of Columbus, and demanded payment thereof, which was refused; that payment was demanded on the 10th of June, 1837, because the day of payment fell on Sunday; that it was protested, and notices thereof sent to the first, second, and third indorsers.

2. The deposition of Ewing F. Calhoun, proving his own signature; the handwriting of the first and second indorsers; that he was sued at the first court after the note became due; that the suit was prosecuted as diligently as possible to a judgment and execution; that deponent continued to reside in Lowndes County, Mississippi, but that at the rendition of the judgment Barrett resided in South Carolina, and Tarpley in Texas; that Barrett and Tarpley were both insolvent, and had no property within the State of Mississippi, out of which to make the judgment, or any part thereof; that at the trial deponent was allowed a set-off against Tarpley, of about $1,500, which Tarpley owed deponent at the time of the commencement of the suit, and before he received notice of Tarpley's indorsement.

3. The deposition of Samuel F. Butterworth, that the suit was prosecuted as diligently as possible to judgment and execution; that at October Term, 1838, a verdict was rendered for the plaintiffs, which was set aside; that in April, 1839, another verdict was rendered, which was also set aside; that in December, 1839, a verdict was rendered for only $3,498.46, upon which a *fieri facias* was issued, the statutes of the State not authorizing process against the person; that no property could be found out of which the execution or any part thereof could be made.

4. A document purporting to be a transcript of the record of the suit spoken of above, showing its progress up to the final return of the sheriff, which was as follows: "The within named Ewing F. Calhoun, Judah Barrett, and Sterling O. Tarpley, have no goods or chattels, lands or tenements, within my county, whereof I can make the sums within mentioned, or any part thereof. March 28th, 1842."

Each one of these papers was severally objected to by the defendant, but the court overruled the objection, and permitted them to be read in evidence. The admission of these four papers constituted the ground of the first bill of exceptions.

Bill of Exceptions No. 2:

*"Be it remembered, that on the trial [*518 of this cause, the plaintiffs, in addition to the evidence in the former bill of exceptions in this case contained, examined Pardon D. Tiffany as a witness, who testified that shortly before this suit was brought, as well as after, he had conversations with the defendant in relation to the claim of the plaintiffs against him; and the defendant told the witness that he had transferred the note in question in the present action to the plaintiffs, for goods purchased from them, and that at the time he transferred the note to the plaintiffs he was indifferent whether they took it or not, as he considered some of the parties thereto as good as George Collier (who is known to the court and jury as a very rich man). Witness did not know whether defendant saw the note or not. The witness received a copy of the record of the suit in Lowndes County, Mississippi, brought by the plaintiffs against Ewing F. Calhoun, the maker of the note, and Judah Barrett and Sterling Tarpley, the indorsers; but witness could not say whether he received the copy from Mr. Adams, the agent of the plaintiffs, or from the defendant or from Mr. Gamber, the counsel of the defendant. The defendant in his conversation with witness was aware of the nature of the plaintiffs' claim against him, and objected to the claim, alleging that the plaintiffs had not used due diligence to collect the amount of the note; he did not say that if he were satified that diligence had been used he would pay the claim; but he did say that he was not bound to pay, and would not pay the claim; but made no other objection to the claim but want of diligence."

The plaintiffs next gave in evidence an act of the Legislature of the State of Mississippi entitled "An Act to abolish imprisonment for debt," approved February 15th, 1839, which the parties here in open court agree may be read in any court in which this cause may be pending from the printed statutes of the State of Mississippi.

The plaintiffs then proved the handwriting of the defendant to the following letter addressed to the plaintiffs, and read the same in evidence to the jury in the words following:

"SAINT LOUIS, October 24th, 1839.

"MESSRS. DOREMUS, SUYDAMS & NIXON, New York:

"GENTS: Your favor of the 11th inst. I received, and contents noted. It is quite out of our power to send you any New Orleans bills for your note on E. F. Calhoun. We trust you will before long receive a judgment for the entire debt, interest and cost, and then you will find by the virtue of an execution that 'insolvency has not passed upon them all.'

HOWARD

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Those who have gone to Texas may yet make a great rise in that fine country. We regret that the note has been so difficult of collection.

"We scarcely know which, your or we, made the worse trade; we have many of the goods on hand we got for it. Your friends,

"J. B. & M. CAMDEN.

519*] *"Your message to Mr. Homans, cashier, has been attended to, and delivered."

It was admitted by defendant's counsel that the indorsements on the note given in evidence were filled up in the handwriting of Josiah Spalding, the counsel of the plaintiffs in this action, for the purposes of this suit. It was also admitted that the laws of the State of New York placed the liability of indorsers upon promissory notes on the same footing with the liability of indorsers upon inland bills of exchange under the general law merchant.

The plaintiffs having here closed their case, the defendant produced one William C. Anderson as a witness, who, being sworn, testified that he had been employed in several banks, and had conducted one in St. Louis himself; that the practice in banks in relation to notes deposited with them for collection was to give notice to the payer of the note that it was in the bank, and when it would become due; that the effect on the credit of a payer of a failure to pay the note when it became due, was different in eastern and western banks. In banks at the east, paper deposited for collection was considered almost as sacred as paper discounted by the banks, and a failure to pay would stop the accommodation of the payer at the bank; but in the western banks the effect of permitting collection paper to lie over was not of much consequence to the credit of the payer. The defendant's counsel having asked the witness, whether a note presented at a bank for payment on the last day of grace, by a notary public, would be considered as having been sent to the bank for collection, within the meaning of the contract between plaintiffs and defendant, the question was objected to by the plaintiffs' counsel, and the court not only refused to allow the question to be answered, but rejected all testimony given by the witness, or which might be given, in relation to the practice of banks on notes deposited for collection, unless the witness could testify as to the practice or usage of the Commercial Bank of Columbus, mentioned in the note of Calhoun; to which opinion of the court the defendant, by his counsel, excepts.

Instructions asked by defendant:

"The defendant, by his counsel, moved the court to instruct the jury, that the plaintiffs were bound to send the note of Ewing F. Calhoun, indorsed by Judah Barrett and Sterling Tarpley, to the Commercial Bank of Columbus, Miss., for collection; and that, unless it is proved to the satisfaction of the jury that this was done by the plaintiffs, they must find for the defendant; which instruction was given to the jury by the court, with this explanation: That if the jury believes the note was presented at the bank, and had [?] there, by the agent of the plaintiffs, at the banking hours on the day it fell due, so as to be a valid demand on the maker, then it was duly at the bank, as required by the contract sued on. To which explanatory instruction the defendant, by his counsel, excepts.

*"The defendant, by his counsel, further moved the court to instruct the jury, that the plaintiffs were bound to use diligence by suit against Calhoun, the maker of the note, and Barrett and Tarpley, the indorsers thereof, in order to collect the money; and that if the plaintiffs neglected to prosecute their action with diligence against either of said parties, the defendant is not responsible on his indorsement of the note in question; which instruction was given by the court. [*520

"The defendant, by his counsel, then moved the court to instruct the jury, that the record from the Circuit Court of Lowndes County, given in evidence, does not show due diligence by suit against Calhoun, the maker, and Barrett and Tarpley, the indorsers, of the note in question; which instruction the court refused to give, and in lieu thereof instructed the jury, that, so far as the record goes, it does show due diligence on part of the plaintiffs; and if the jury believe from the evidence, given in addition to the record, that the two indorsers had left the State of Mississippi, and were insolvent, and had left no property in that State, at the time the judgment was rendered, that the plaintiffs were not bound to cause executions to be sent to the counties where the indorsers respectively resided at the time they were sued. To which opinions of the court, in refusing the instruction asked by the defendant as last above mentioned, and in giving the instruction in lieu thereof which was given by the court, the defendant, by his counsel, excepts.

"The defendant, by his counsel, then moved the court to instruct the jury, that the plaintiffs, under the law of Mississippi, were entitled to a judgment against Tarpley for the full amount of the note, notwithstanding any payment or set-off between Calhoun, the maker of the note, and Tarpley, the indorser; and that, if the plaintiffs have neglected to assert their right to such judgment, and have suffered a judgment by their neglect to pass for a smaller amount, the defendant is discharged by such neglect for all accountability for the sum thus lost; which instructions the court refused to give, because the record from Mississippi furnished all the evidence on the subject to which this instruction refers, and no negligence appears from said record in prosecuting the suit against Tarpley; to which opinion of the court the defendant by his counsel, excepts. And the defendant, by his counsel, prays the court to sign and seal this his bill of exceptions, and that the same may be made part of the record, which is done. J. CATRON, [L. S.]

"R. W. WELLS, [L. S.]"

Mr. John J. Hardin for plaintiff in error.

Mr. Z. Collins Lee for defendants in error.

Mr. Hardin's argument was as follows:

The points now arising for the consideration of the court, are:

1. Were the instructions asked improperly refused; and those delivered in lieu thereof improperly given?

*2. Were the depositions, or any one of them, improperly permitted to be read in evidence? [*521

3. Does the record from Mississippi show the use of reasonable and due diligence?

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The contract was not complied with, by defendants in error, in this:

They were to "send the said note to the Commercial Bank of Columbus, Mississippi, for collection. This they did not do, and there is no evidence that the bank ever had it for collection. It is true this note was protested for nonpayment on the last day of grace; but there is a wide difference between sending a note to a bank for collection, and merely presenting it for payment on the last day of grace. Banks, universally, are collecting agents; they always give notice of the time of payment, and of the amounts due to the debtors whose notes are left with them for collection. It is an injury to a man's credit, and not unfrequently destroys his business character, not to provide the means of paying a note left with a bank for collection, and of which he has been notified. These reasons must have operated with plaintiff in error in inducing him to require the note to be sent to the bank for collection. Calhoun, as appears from the record, lived in the town where the Columbus bank was situated; and if he had been notified that the note was left in the bank for collection, he might have had an opportunity of providing for its liquidation. Nor will it do to say that the presentation of the note for payment was the same thing in substance as sending it to the bank for collection. The plaintiff in error did not think so, and at any rate he has required the stipulation that the note should be sent to the bank for collection by defendants in error; and the defendants in error have no right to say that, although they did not comply, they did what amounts to nearly the same thing. The sending the note to the bank for collection was a condition precedent to the liability of plaintiff in error, and should be shown to have been strictly complied with by defendants in error.

Suppose, for instance, as is the fact, though it does not appear on the record, that the note was sent to the Columbus Bank of Georgia, and did not reach the agent of defendants in error in Mississippi until the last day of grace, when it was forthwith protested. This was not a compliance with the letter or spirit of the contract.

In this view of the case, it was proper to prove what was the usage of banks with regard to paper left with them for collection, and the testimony of W. C. Anderson (p. 519) was, therefore, pertinent. This testimony was excluded by the court, and was therefore error.

The first instruction asked by the plaintiff in error in the court below was therefore proper, and was erroneously refused.

The depositions were improperly permitted to be read.

1st Objection. They were taken before a 522*] "judge of the ninth *judicial district of Mississippi." The law of 1789 makes no mention of such an officer as authorized to take depositions. If it is said that such judges were judges of a "court of common pleas," within the meaning of that law, it is answered, that if so, that fact should appear affirmatively in the certificate of authentication. No evidence *aliunde* being introduced, the deposition itself should contain the complete evidence that it was taken by a legally authorized officer. (1 Peters, 355.)

2d Objection. The depositions were taken *de bene esse*, and the certificate does not comply either with the letter or spirit of the law. The 30th section of the Judiciary Act of 1789 provides for taking such depositions when the witness resides more than a hundred miles from the place of trial, upon giving due notice of the time and place of taking the deposition "to the adverse party, or his attorney, as either may be nearest, if either is within a hundred miles of the place of caption."

This law, being in derogation of the common law, must be strictly complied with. (1 Peters, 355; 3 Cranch, 297.)

The certificate of the judge attached to each one of the depositions states that no notification was given to plaintiff in error of the taking of the said depositions, "because neither the said John B. Camden, nor his counsel, live within one hundred miles," &c.

It was decided by the Supreme Court (3 Cranch, 297), that in taking a deposition under a *dedimus potestatem*, the term "attorney," used in the Virginia statute, meant an attorney in fact, and not an attorney at law. The words of the Virginia statute (see Tate's Digest, p. 210, secs. 18 and 15) are, on "giving notice to the adverse party, his attorney, or agent."

The inference from analogy, and from the decision in 3 Cranch, 297, is irresistible, that the term "attorney," used in the 30th section of the law of 1789, means an attorney in fact, and not an attorney at law.

It therefore would be no compliance with the law to certify that "neither the adverse party, nor his attorney at law, live within one hundred miles," &c. It seems to have been the idea of the judge who made the authentication that the law of 1789 meant an attorney at law. But even if the law was construed to mean an attorney at law, the word "counsel," used in the certificate, does not mean its requisition. A counsel and an attorney are two distinct legal officers. Their duties may be, but are not necessarily, discharged by the same person. It is the province of an attorney to prepare a case, by making up the pleadings, taking depositions, &c.; whilst the counsel in the cause manages it in court after the case is prepared by the attorney to his hand. The plaintiff in error might not have had a counsel within a hundred miles, and yet have had an attorney at law. But as a counsel is neither an attorney at law or an attorney in fact, *non constat*, but that the plaintiff in error had an *attorney living with- [*523 in one hundred miles, and the defendants in error failed to give him notice, and therefore have had the authentication so made as to prevent this fact from appearing. The law being in derogation of a man's common law rights, and the depositions being taken *ex-parte*, the authentication should exclude every conclusion which could in reason be made against the legality and formality of taking the deposition. (1 Peters, 355.) They should, therefore, have been excluded from the jury.

3d Objection. The deposition of Thos. B. Winston should have been excluded, because he was not sworn to testify "the whole truth." He was sworn "to testify the truth, and nothing else but the truth." Now, the 30th section of the Act of 1789, authorizing the taking of these depositions, expressly provides that "the

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witness is to be carefully examined, and cautioned, and sworn, or affirmed, to testify the whole truth." This was not done, and the deposition, therefore, should have been excluded. This is analogous to the case where a witness does not answer the general interrogatory, "Do you know anything further?" Such a neglect is sufficient to vitiate the deposition. (3 Wash., 109.)

4th Objection. The deposition of S. F. Butterworth should have been excluded for imperfection or diminution. It begins by stating "that the annexed note was sued," &c.; and no note is annexed, or set out in the deposition. Nor could anyone tell who were the parties to the note from anything which is contained in the deposition, for their names are not even mentioned. The court cannot tell whether it was the note here sued on that the witness had before him, and intended to have annexed to his deposition, or whether it was not an entirely different instrument.

This defect cannot be supplied by reference to the deposition of Winston, for that is a distinct deposition, and was taken at a different time—one being taken on 15th January, and the other on 17th February, 1842. Each deposition must be perfect in itself.

If the depositions are excluded, there is no evidence whatever of any diligence. If the deposition of T. B. Winston, the acting notary public, is excluded, there is no testimony to show that the note was even presented for nonpayment at the Columbus Bank. This being required by the contract, the other testimony would not be sufficient to support the judgment. But the fact of permitting one improperly taken deposition to be read to the jury is sufficient to reverse the judgment.

The court erred in refusing the third instruction asked by plaintiff in error, which was substantially, that the record from Lowndes County does not show due diligence by suit, and also in the instruction given in lieu thereof by the court. First. The suit in Lowndes County, Mississippi, was instituted by defendants in error, against maker, and two first indorsers of the note here sued on, under a provision in the statutes of Mississippi. (Howard 524*] & Hutchinson's Statutes *of Mississippi, 597, sec. 33, authorizing this mode of instituting suit.) A subsequent section of same law provides (sec. 35, Howard & Hutchinson, 596); "The court shall receive the plea of *non assumpsit* and no other, as a defense to the merits in all suits brought in pursuance of this act, and all matters of difference may be given in evidence under the said plea. And it shall be lawful for the jury to render a verdict against part of the defendants, and in favor of the others, if the evidence before them require such a verdict, and the court shall render up the proper judgments in such verdicts against the defendants, which judgments and verdicts shall not be reversed, annulled, or set aside for want of form."

Sec. 41, same act and page, provides, that defendants shall not sever in their pleas to the merits of the action.

Another act of Mississippi (Howard & Hutchinson, 374. sec. 12) provides that "the defendant shall be allowed the benefit of any payment, discount, or set-off, made, had, or possessed against the same (any assigned note or bill of exchange) previous to the notice of the assignment."

These provisions are innovations on the common law, and were evidently intended to create a new practice in pleadings, trials, and rendering up judgments. If it is not so, then the set-off of the maker of the note, Calhoun, against the second indorser, Tarpley, was all wrong, and there was a total want of diligence in defendant in error, in not taking the case to the appellate court and having it there decided, and in permitting the case to be continued for three years, for an improper defense in the Circuit Court.

Admitting, then, that it was proper for Calhoun to claim his set-off against Tarpley, it is clear that judgment should have been rendered against Calhoun for the amount of note and interest, after deducting the amount of the set-off. But it is equally clear that, as Tarpley indorsed the note without crediting thereon the amount of the set-off, and without giving notice that there existed any such set-off, that judgment should have been rendered against him for the full amount of the note and interest. The 35th section provides expressly for such cases. And without such a provision, and a strict compliance with the law under it, most flagrant injustice would be done in numerous cases, and especially in the present instance. Tarpley indorses the note to plaintiff in error, without notice of any set-off. Plaintiff in error indorses it to defendant in error, on the faith of Tarpley's solvency. Defendant in error sues Calhoun and Tarpley, and takes a judgment against both, for the amount due from Calhoun to Tarpley, and wholly neglects to take a judgment for the amount really and justly due by Tarpley, as the law authorized. If plaintiff in error now pays up the note and interest, and goes back on Tarpley, this judgment against Calhoun and Tarpley, for less than what Tarpley was legally liable for, will be a bar to a recovery for a greater sum. The defendant in error *having thus failed [*525 to obtain a judgment as he should have done for the whole amount due, and thus having prejudiced the plaintiff in error, there was not due diligence used.

The 36th section of the statute of Mississippi (Howard & Hutchinson, 596) provides that "new trials shall alone be granted to such defendants as the verdicts may have been wrongfully rendered against, and judgments shall be rendered against all the other defendants in pursuance of the verdict." It appears a verdict was rendered on the 17th October, 1838, against all three of the defendants, Calhoun, Barrett, and Tarpley, for $4,102.77, and judgment rendered thereon. On same page, it appears, that at same time "the defendant, E. F. Calhoun, moves the court to grant a new trial, &c." On page 28, the case is docketed "*Doremus, Suydam & Nixon* v. *Ewing F. Calhoun*," and it states, "thereupon came on the motion of the defendant for a new trial, &c.," which motion was sustained. This motion was made by one defendant, the reasons assigned are personal to himself, and the new trial is granted to him on his motion. According to the 36th section above, judgment should have been rendered against Barrett and Tarpley, the indors-

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ers, who did not join in the motion for a new trial, and who had no possible defense against the note. Yet defendant in error neglected to take any such judgment. And the case goes on as though they were entitled to, and had granted to them, a new trial, and no final judgment is rendered until 27th December, 1839, more than a year after, when these defendants had moved out of the State, as appears by the record. This is a clear case of a neglect of due diligence. See, also, a similar motion by Calhoun.

A similar neglect appears in another part of the record. Another statute of Mississippi (Howard & Hutchinson, 616) provides:

"Sec. 11. Every new trial at law shall be on such terms and conditions as the court shall direct; and no more than two new trials shall be granted to either party in the same cause. Now, the record shows that three new trials were granted in this case. The first verdict and new trial was granted 21st October, 1837. The second on the 17th October, 1838. The third on 19th April, 1839, and the fourth and last trial was had on 27th December, 1839. All these new trials were granted on motion of defendant Calhoun; and after two were granted, it was error in the court in Mississippi, and it was gross neglect in defendants in error that they did not have it reversed. The Supreme Court of the State of Mississippi (1 Smedes & Marshall, 421) have expressly decided that the court cannot grant more than two new trials. By the neglect of defendants in error, a gross injury is done plaintiff in error in this: On the third trial, the verdict was for $4,236.26, and on the last trial it was only for $3,498.45; thus decreasing the amount which plaintiff in error could thereafter recover against the maker and two first indorsers.

526*] *Again: There was not due diligence shown in the record in this. There was never any service of process on defendants, Barrett and Tarpley, the first and second indorsers. There never was a writ issued to the county where Tarpley resided. They never appeared in court and entered their appearance; nor do any attorneys enter their appearance for them. It is true the pleas, which are most carelessly drawn, use the words "the said defendants say," &c.; but nowhere does it appear that they authorized an appearance; and the whole defense is conducted by the attorneys for Calhoun. It is manifestly improper that this loose mode of pleading in the name of defendants, by Calhoun's attorney, should be construed into an appearance and defense for the indorsers; for the whole of Calhoun's defense consisted of a set-off against Tarpley; and their interests in this suit were directly conflicting. The whole proceedings, therefore, against Barrett and Tarpley, were informal; and there was want of diligence in not bringing them before the court by legal process, so that they might have had an opportunity of contesting Calhoun's set-off.

Besides this, there never was an execution, or "branch writ," issued to the counties, where, it appears from Winston's deposition, that Barrett and Tarpley resided; and in this there was a want of due diligence to use all the means of the law to collect the judgment.

There has also been an entire failure of the defendants in error to obtain payment from Barrett and Tarpley. One of them moved to South Carolina, and the other to Texas. One of them is certainly within the jurisdiction of our courts. As to the jurisdiction of our courts over the other, *adhuc sub judice lis est.*

Mr. Lee argued thus:

The defendants in error, by their counsel, respectfully submit with the record, that there is no error in the rulings and decision of the Circuit Court of the United States, for Missouri, in the questions of law raised and adjudged in this case, and that all the material and important facts in the cause where fully considered by the jury, which were necessary for them to render, as they have done, a proper and just verdict in the premises, and that the judgment ought therefore to be affirmed.

But it is objected, and now argued by the plaintiff in error, that the contract was not complied with, because "the note was not sent to the Bank of Columbus, Mississippi, for collection." The answer to this objection is obvious and conclusive, and to be found in the facts as sworn to by Thos. B. Winston, by which the court will perceive that the usual and proper demand of payment of said note was made on the 10th June, 1837, at the Bank of Columbus, Mississippi, and due notices of protest sent to the indorsers; in a word, that all which the law merchant or bank's usage required, as to the presentation and protest of the note, was strictly complied *with; and [*527 it is apprehended that the term "for collection," used in the contract between the parties, cannot be made to express more than a legal and proper demand at the maturity of the said note; and that this was a compliance both with the contract and stipulation in the note itself; for collection at the bank means payment thereon. The court was therefore right in limiting the action of the holders of the note to demand payment at the bank specified on the note, and during bank hours, &c. There is, besides, nothing in this record to show that any proper step was omitted, or that the plaintiff in error ever understood the contract in the sense now contended for by him.

2. As to one of the objections, that due process was not served, or suit properly instituted against Barrett and Tarpley, there can be no ground to question the regularity of the proceedings; and the court will find all necessary legal steps to have been promptly taken in strict accordance with the laws of Mississippi, to which the plaintiff in error has referred; and it is presumed that the attorney, entered upon the record as acting for Messrs. Barrett and Tarpley, acted in good faith, and by their appointment, and beyond this the court cannot now look.

The court, too, rightly rejected the testimony of W. C. Anderson, because the usage of banks, east or west, and the opinion of the witness, could not be evidence, when the contract and note in question stipulated distinctly for the collection or presentation of the said note at the Bank of Columbus, at Mississippi, whose usage alone was important to be known, and which it was presumed had been known, and governed the parties at the time the contract was made. Another objection is taken to the depositions in this case, and which it is contended were inadmissible on several grounds.

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But the defendants in error now confidently submit that upon examination of the Judiciary Act of 1789 (sec. 30th, 2 Laws U. S., 68) it will be found that the depositions objected to were legally taken in due form, and in compliance with the law referred to, however strictly it may be construed.

The deposition of Winston is certified to by the "presiding judge," and that of Calhoun also by the judge of the court before whom the suit was pending; and another deposition is certified and taken by the presiding judge of the ninth judicial district of Mississippi. This being, in the language of the law, taken before "a judge, or justice," &c., &c.

The terms or titles, attorney and counsel, between which some nice distinctions are drawn in the argument, are, by common consent and usage, now regarded as convertible terms; and, indeed, the Judiciary Act, to which reference is made, does itself so speak of them. (See sec. 30th.)

The law meant the attorney or counsel, not in fact, as is contended, but the party's legal attorney or counsel, and generally none but [*528 *such can be of record, or act in court; besides, the certificates to these depositions name the attorney in one or more instances.

So, also, as to the objection that one of the witnesses (Winston) was not sworn to tell the "whole truth." This may be a clerical or typographical omission, as the word "whole" truth is used in all the other depositions; and even were it omitted by the judge, it is submitted whether, under the true intent and meaning of the Judiciary Act (sec. 30) this would be fatal to the deposition.

Another objection as to these depositions is made with reference to an omission, as it is alleged, of the note referred to in the deposition, as the "annexed note;" but be this as it may, the court will find that the whole deposition taken together is full and distinct as to the particular note, and nothing more was required.

Finally, as to the question of due diligence: it cannot be denied that it is for the court, on the facts supposed, to determine the point of due diligence. The question only is, whether the facts contemplated by the court's direction prove "due and reasonable diligence" under the agreement of Camden & Co. with the defendants in error. Due and reasonable diligence means "reasonable diligence." But "due" and "reasonable" may, in truth, be regarded as convertible terms in this association.

Was such diligence used? The suit is shown to have been rigidly and promptly prosecuted, without the remissness of a day, and with every delay accounted for under authority superior to the party's prevention or discretion. And finally, a *fieri facias* issues instantly, and a return appears of *nulla bona*, and it is shown that the laws of Mississippi allow no *ca. sa.* It is further proved, that at the time of judgment the defendants were insolvent, and notoriously so (or at least known to "public" rumor to be so). It is in this case found that one of the defendants had gone to Texas when the judgment was obtained: but it is not shown that that change of residence was known to these claimants, or to their counsel. And if it was, need there have been a pursuit of him into Texas, and a roving *capias* to explore for him withersoever report might have sent him? Was this necessary, with proof, too, of actual insolvency? Due diligence can be required only because diligence may find and seize property to pay the claim—and where there is insolvency due diligence has no object, or rather consists, at the utmost stretch of obligation, in having a return on execution of *nulla bona*. This return is in fact only a test, or a form of proof, of insolvency. Substantiated otherwise, the duty of diligence has as truly been fulfilled by simply recovering judgment, and by issuing execution upon it. Here insolvency is proved, and judicial ascertainment was not requisite. And the office of due diligence was accomplished by suit and judgment, and (though unnecessary) by the fruitless *fieri facias*.

That the end of all "due diligeuce" is but to avail of solvency, *or to establish in- [*529 solvency, and that proof of insolvency, otherwise than judicially, supersedes all steps of further diligence, various cases settle very clearly. (See *Saunders* v. *Marshall*, 4 Hen. & Mun., 455, 458; *Thomas* v. *Wood*, 4 Cowen, 172, 188; *Boyer* v. *Turner, Admr.*, 3 Harr. & Johns., 285, 287; *Reynolds et al.* v. *Douglass et al.*, 12 Peters, 503; and 1 Law Lib., 100, 169.) The strictest exaction in such cases, however, never demanded more than a *nulla bona* to a *fieri facias* and a *ca. sa.* to succeed it. The first we have in this case; and the latter could not be had, it being abrogated by force of the law of Mississippi against imprisonment for debt. Thus, apart from the proved insolvency, we have judicially tested the means of the defendant, and exhausted all diligence.

Another suit is prescribed to us here, and to be in Texas—and that for the vain chase of a insolvent man! Not more than one suit for the exercise of diligence, wherever imposed, is required. Any other view might multiply suits through an interminable series, and all recourse to an original party, dependent on eventual and long deferred tests of insolvency, would prove but a shadow of a right, and a mere mockery.

The last objection needs scarcely a comment, that the set-off of about $1,500 should not be allowed. This set-off is explained by Calhoun's testimony, not only substantiating the set-off, but proving that it was adversely adjudged. If so, it must, as Calhoun's testimony proves it, be regarded as an inevitable abatement from the note for which the plaintiff in error should suffer, and not the defendants, who contracted with Camden for the note as valid, for what it purported to pay.

On the whole, the defendants in error insist that the record presents a case in which, after great delay, and long and expensive litigation, by which they have performed every legal duty incumbent on them by the contract entered into in 1836, as a security to them, from the present plaintiff in error, their original debtor, for value received.

That now, after the lapse of more than nine years, they are met by objections merely technical, and with merit, which, if sustained by this honorable court, would, indeed, make the forms of the law more potent than its justice, and turn out of the courts, remediless, and in some cases ruined, the honest creditor, who may require their protection and vindication

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Mr. Justice DANIEL delivered the opinion of the court:

No question has been raised on this record in reference to the original character of the instrument on which the action was founded as a negotiable and commercial paper, nor in reference to the duties and obligations of the parties arising purely from their positions as parties to such a paper. And for aught that the record discloses, every requirement of the law mer-
530*] chant, with respect to the note, or *with respect to the rights of the indorsers thereof, appears to have been fulfilled. Presentment in maturity and within due time was made at the Bank of Columbus, Mississippi, and payment there demanded; the failure to make payment was followed by regular protest, and by like notice to all the indorsers. The exceptions specifically urged by the defendant in the court below, and pressed in his behalf before this court grow out of an agreement signed by the firm of the Camdens and by the defendants in error at the time that the note of Calhoun was indorsed by the former to the latter, and which agreement, it is contended, bound the defendants in error to undertakings and acts beyond the usual duties incumbent upon indorsers and holders of negotiable paper, and without the fulfillment of which no right of recovery against the plaintiffs in error could arise. Before entering upon an examination of this agreement and of the questions which it has given rise to, it is proper to dispose of an objection by the defendants in the court below, which seems to have been aimed at the entire testimony adduced by the plaintiffs, but whether at its competency, or relevancy, or at its regularity merely, that objection nowhere discloses. After each deposition offered in evidence by the plaintiffs to the jury, it is stated that to the reading of such deposition the defendant, by his counsel, objected, and that his objection was overruled. A similar statement is made with regard to the record of the suit instituted in the court of Hinds County against Calhoun, the maker of the note, and offered in this cause as proof of due diligence. With regard to the manner and the import of this objection, we would remark, that they were of a kind that should not have been tolerated in the court below pending the trial of the issue before the jury. Upon the offer of testimony, oral or written, extended and complicated as it may often prove, it could not be expected, upon the mere suggestion of an exception which did not obviously cover the competency of the evidence, nor point to some definite or specific defect in its character, that the court should explore the entire mass for the ascertainment of defects which the objector himself either would not or could not point to their view. It would be more extraordinary still, if, under the mask of such an objection, or mere hint at objection, a party should be permitted in an appellate court to spring upon his adversary defects which it did not appear he ever relied on; and which, if they had been openly and specifically alleged, might have been easily cured. 'Tis impossible that this court can determine, or do more than conjecture, as the objection is stated on this record, whether it applied to form or substance, or how far, in the views of it presented to the court below, if any particular view was so presented, the court may have been warranted in overruling it. We must consider objections of this character as vague and nugatory, and as, if entitled to weight anywhere certainly, as without weight before an appellate court.

*Recurring to the agreement signed [*531 by the parties at the time of the transfer of the note, and to the instructions given and refused at the trial, with respect both to that agreement and the proceedings had in fulfillment thereof, we will remark, as to the agreement itself, it is clear that it bound the indorsees to conditions beyond those which are implied in the ordinary transfer and receipt of commercial instruments. Their obligations, therefore, to these indorsers could by no means be fulfilled by a compliance with such usual conditions. The language of the agreement is explicit. The said Doremus, Suydams & Nixon were to send the note passed to them to the Commercial Bank of Columbus, Mississippi, for collection, and in the event of its not being paid at maturity, they were to use reasonable and due diligence to collect it of the drawer and two previous indorsers before they were to call upon the said Camdens, &c., &c. The obligation of the plaintiffs, as indorsees and holders, would have been fulfilled by regular demand, protest, and notice; from these a right of action would immediately have accrued. But the condition stipulated in the agreement is, that before they can have any right to make demand upon their indorsers, they shall diligently endeavor to collect of the maker and previous indorsers. With the view of showing a failure in the plaintiffs in fulfilling their contract, and of deducing therefrom their own exemption from responsibility, the defendants first offered a witness to prove a difference in the practice prevailing in eastern and western banks with respect to the management of paper deposited with them for collection; and inquired of the witness whether a note presented at a bank for payment on the last day of grace by a notary public would be considered as having been sent to the bank for collection, within the meaning of the contract. This question, on motion of the plaintiff's counsel, the court refused to allow, and rejected all testimony by the witness in relation to the practice of banks as to notes deposited for collection, unless the witness could testify as to the practice or usage of the Commercial Bank of Columbus. The ruling of the court on this point we think was proper. The note was made payable at the Commercial Bank of Columbus; by the agreement between the parties it was moreover expressly stipulated that it should be sent to that bank for collection; if, then, any custom or practice other than general commercial usage were to control the management of the note, it was the usage of the Bank of Columbus, certainly not the particular usage of other banks not mentioned in the contract, and perhaps never within the contemplation of the parties to that contract. The next exception is taken upon an instruction asked of the court to the jury, that unless it was proved to their satisfaction that the note was sent to the Bank of Columbus for collection by the plaintiffs, they must find for the defendant. The court responded affirmatively to the proposition that the note should have been sent to the Bank of Columbus for collection, but declared its opin-

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532*] ion *that by presentment and demand of payment of the note at maturity by the plaintiffs at the said bank, within banking hours, so as to make a legal demand on the makers, the requirement of the contract in this particular would be complied with. A nice distinction might be made between the language of the agreement and that of the instruction given upon this point. The distinction, however, we should deem to be more apparent and verbal than substantial, and not to be applicable either to the intention of the parties, or to the real merits of the case. The note was payable at the Commercial Bank of Mississippi. The maker of the note resided in the county in which the bank was situated; the indorsers Barrett and Tarpley, who were to be looked to for payment before proceeding against the Camdens, were also residents of the State of Mississippi. Every party upon the note must be presumed to have been cognizant of its character, and to have known when and where it was payable; and was bound to prepare for his respective responsibility arising from his undertaking. Other notice than that to which the law entitled him from his peculiar position upon the note, he had no right to claim. It would be going too far, then, to imply any other right, or to admit it upon ground less strong than that of express and unequivocal contract. The language of the agreement we hold not to amount to this, and as being satisfied with the interpretation that the note should be regularly presented and payment thereof demanded at the Commercial Bank of Columbus, simply as one of the means of collection to be adopted before recourse should be had to the last indorsers.

But it has been contended that had the note been placed under the management of the bank itself, notice might have been given by the bank to the maker and prior indorsers, before the maturity of the note, and that, thereby, provision might have been made to meet it when due. In reply to this argument, it may be said, that the agreement itself expresses no such purpose or object, in requiring the note to be sent to the bank, and we do not think that such an object is necessarily implied in the requisition. In the next place, there is no proof that the bank would have given notice to the maker and indorsers, previously to the maturity of the note: nor is there anything in the record to show that this would have been in accordance with its practice in similar cases. Under the silence of the contract itself, and in the absence of proof *dehors* the agreement, we are not at liberty to set up a presumption, which neither the language of the agreement nor justice to the parties imperatively calls for.

The defendants also excepted to the opinion of the court, given upon a prayer to instruct the jury, that the record of the suit by the plaintiffs, against the maker and prior indorsers of the note, did not show due diligence as to those parties. This instruction the court refused, but, in lieu thereof, instructed the jury, that the record was proper evidence to show due diligence on the part of the plaintiff, and that 533*]*if they believed, from the evidence submitted in addition to the record, that the indorsers Barrett and Tarpley had left the State of Mississippi, were insolvent, and had left no property in the State at the time of the judgment in the said record, the plaintiffs were not bound to send executions to the counties in which those indorsers respectively resided at the time when suit was instituted against them. This court can conceive no just foundation for this exception to the ruling of the Circuit Court. The condition to which the plaintiff was pledged, was the practice of due, that is, proper, just, reasonable diligence; not to the performance of acts which were obviously useless, and from which expense and injury might arise, but from which advantage certainly could not. The diligent and honest prosecution of a suit to judgment, with a return of *nulla bona*, has always been regarded as one of the extreme tests of due diligence.

This phrase, and the obligation it imports, may be satisfied, however, by other means. The ascertainment, upon correct and sufficient proofs, of entire or notorious insolvency, is recognized by the law as answering the demand of due diligence, and as dispensing, under such circumstances, with the more dilatory evidence of a suit; evidence which, in instances that it it may be easy to imagine, might prove prejudicial alike to him who should exact, and to him who would supply it. (*Dulany* v. *Hodgkin*, 5 Cranch, 333; *Violet* v. *Patten*, *Ibid.*, 142; *Yeaton* v. *Bank of Alexandria*, *Ibid.*, 49.) We hold, therefore, that, both as to the instruction refused and as to that which was given upon this prayer, the decision of the Circuit Court was correct.

We come now to the last exception taken to the opinion of the Circuit Court upon the points presented to it. The defendant in that court insisted, that, by the law of Mississippi, the plaintiffs were entitled to a recovery of the full amount of the note, against the maker and indorsers, subject to no set-off between the maker and indorsers; and that, if the plaintiffs had, by their neglect, permitted a judgment for a smaller amount, the defendant was discharged from all accountability for the sum thus lost. The court refused so to lay down the law, because the record from the court of Mississippi furnished the only evidence to which the instruction prayed for referred, and no negligence appeared, from the record, in the prosecution of the suit against the defendants thereto. This refusal of the court was clearly right, and the reason assigned for it is quite satisfactory. The question to which the instruction asked was designed to apply, was that of due diligence. The timely and *bona fide* prosecution of a suit is, perhaps, the highest evidence of due diligence. If, in the conduct of that suit, the party should be impeded or wronged, by an erroneous decision of the tribunal having cognizance of his case, that wrong could on no just principle be imputed to him as a fault. It certainly does not tend to show him to have been the less diligent *in the pursuit of his claim; and least [*534 of all should he be prejudiced thereby, when the error insisted on has been induced by the person who seeks to avail himself of its existence.

Upon the whole, we consider the rulings of the Circuit Court, upon the several points before it, to be correct; its judgment is therefore affirmed.

Cited—18 How., 519; 20 Wall., 133, 418; 2 Otto, 161; 11 Bank. Reg., 232.

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UNITED STATES
v.
ANDREW HODGE.

Suit dismissed—citation irregular.

If the citation be signed by the clerk, and not by a judge of the Circuit Court, or a justice of the Supreme Court, the case will, on motion, be dismissed.

MR. CHIEF JUSTICE TANEY delivered the opinion of the court on a motion to dismiss this case:

This case is brought here by a writ of error to the Circuit Court for the Eastern District of Louisiana, and a motion has been made to dismiss it, because the citation was signed by the clerk, and not by a judge of the Circuit Court, or a justice of the Supreme Court, as directed by the Act of Congress of 1789, ch. 20, sec. 22.

The defendant is not bound to appear here, unless the citation is signed in the manner prescribed by law; and as that has not been done in this case, the writ must be dismissed.

Cited—6 How., 90; 13 How., 479; 3 Wall., 50.

THE STATE OF MARYLAND, for the use of Washington County, *Plaintiffs in Error*,
v.
THE BALTIMORE AND OHIO RAIL ROAD COMPANY, *Defendants.*

Maryland subscription to capital stock of railroad —provision of forfeiture in charter, penalty not contract—repeal of proviso valid.

The State of Maryland, in 1836, passed a law directing a subscription of $3,000,000 to be made to the capital stock of the Baltimore and Ohio Railroad Company, with the following proviso: "That if the said company shall not locate the said road in the manner provided for in this act, then, and in that case, they shall forfeit $1,000,000 to the State of Maryland for the use of Washington County."

In March, 1841, the State passed another act repealing so much of the prior act as made it the duty of the company to construct the road by the route therein prescribed, remitting and releasing the penalty, and directing the discontinuance of any suit brought to recover the same.

The proviso was a measure of State policy, which it had a right to change, if the policy was afterwards discovered to be erroneous, and neither the commissioners, nor the county, nor any one of its citizens acquired any separate or private interest under it, which could be maintained in a court of justice.

535*] *It was a penalty, inflicted upon the company as a punishment for disobeying the law; and the assent of the company to it, as a supplemental charter, is not sufficient to deprive it of the character of a penalty.

A clause of forfeiture in a law is to be construed differently from a similar clause in an engagement between individuals. A Legislature can impose it as a punishment, but individuals can only make it a matter of contract.

Being a penalty imposed by law, the Legislature had a right to remit it.

THIS case was brought up by writ of error, under the 25th section of the Judiciary Act, from the Court of Appeals for the Western Shore of Maryland.

The facts were these:

On the 4th of June, 1836 (Laws of Maryland, 1835, chap. 395), the Legislature of Maryland passed an act entitled "An Act for the promotion of internal improvement," by which subscriptions were directed to be made, on certain terms, to the capital stock of the Chesapeake and Ohio Canal Company, and Baltimore and Ohio Railroad Company, to the amount of $3,000,000 to each company. The conduct of the canal company having no bearing upon the question involved in the present suit, it is not necessary to notice any further the parts of the law which related to it.

A part of the 5th section of the act was as follows:

"And the said treasurer shall not make any payment aforesaid for subscription to the stock of the Baltimore and Ohio Railroad Company, until after a majority of the directors appointed therein on behalf of this State shall have certified to the treasurer in writing, supported by the oath or affirmation of a majority of said directors, that they sincerely believe in their certificate and statement, that, with the subscription by this act authorized to be made to said company's stock, and with the subscription which the city of Baltimore may have made by virtue of an act, passed at December session of the year eighteen hundred and thirty-five of this Assembly, or that independently of any subscription by any other public authority than the city of Baltimore, as aforesaid, and of the cities of Pittsburg and Wheeling, and exclusive of any loan secured to it, exclusive of all future debts and profits due by the company on interest, the said railroad company in their opinion have funds sufficient to complete the said railroad from the Ohio River by way of and through Cumberland, Hagerstown, and Boonsborough, to its present track near to Harper's Ferry; and it is hereby declared to be and made the duty of the said company to, and they shall so locate and construct the said road as to pass through each of said places: which certificate of said directors shall be accompanied by an estimate or estimates of one or more skillful and competent engineers, made out after a particular and minute survey of the route of said road by him or them, and verified by his or their affidavit, showing that the whole cost of said work will not be greater than the amount of funds the said directors shall certify to have been received by said *company [*536 and applicable to the construction of the said road: Provided, That if the said Baltimore and Ohio Railroad Company shall not locate the said road in the manner provided for in this act, then, and in that case they shall forfeit one million of dollars to the State of Maryland for the use of Washington County.

This act was accepted by the railroad company, in a general meeting of stockholders, and information thereof communicated to the governor, on the 26th of July, 1836.

On the 24th of September, 1836, the treasurer made his subscription of $3,000,000 to the capital stock of the company.

On the 1st of October, 1838, a majority of directors on behalf of the State gave the certificate and statement required by the act.

The railroad company having finally located, and being in the act of constructing their road, without the limits of Washington County, within which Hagerstown and Boonsborough

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are situated, a suit was brought in Frederick County, Maryland, in February, 1841, in the name of the State of Maryland, for the use of Washington County against the railroad company in an action of debt to recover $1,000,000.

In March, 1841, the Legislature of Maryland passed an act in which they say "that so much of the 5th section of the Act of 1835 as makes it the duty of the Baltimore and Ohio Railroad Company to construct the said road so as to pass through Hagerstown and Boonsborough, be, and the same is hereby repealed; and that the forfeiture of one million of dollars reserved to the State of Maryland as a penalty, in case the said Baltimore and Ohio Railroad Company shall not locate the said road in the manner provided for in that act, be, and the same is hereby remitted and released, and any suit instituted to recover the same sum of one million of dollars, or any part thereof, be, and the same is hereby declared to be discontinued and of no effect."

In October, 1841, the defendant pleaded the general issue, and set forth the above act.

In February, 1842, the case came on for trial, upon the following agreed statement of facts:

"It is admitted in this case, that the commissioners of Washington County, the parties at whose instance this action was instituted for the use of Washington County, were at the time of institution of this suit, and still are, a body corporate, duly elected and organized, under and by virtue of the Act of Assembly of Maryland of 1829, chap. 21, and its supplementary acts. It is also admitted that the defendants are, and were at the institution of this suit, a body corporate, duly existing under and by virtue of the Act of Assembly of Maryland of 1826, chap. 123, and its supplementary acts. It is also admitted that this suit is brought at the instance of said commissioners of Washington County to recover, for the use of said county, the $1,000,000 which they allege to be for-
537*] feited to the said *State, for the use of said county, under the provisions of the 5th section of the Act of 1835, chap. 395; and it is admitted that the said defendants have not, and had not at the institution of this suit, constructed or located their road from the Ohio River, by way of and through Hagerstown and Boonsborough, to the track of said road at Harper's Ferry, as the same existed at the time of the passage of the said Act of 1835, chap. 395; but, on the contrary, had at the institution of this suit finally located, and are, were then, and are now constructing their said road by a different route, and without the limits of Washington County, within which the said Hagerstown and Boonsborough are situated. It is admitted that the said Baltimore and Ohio Railroad Company, in general meeting of the said corporation, did accept, assent, and agree to the several provisions of the said Act of 1835, chap. 395, and did duly communicate their said approval, assent, and agreement, under their corporate seal and the signature of their president, to the Governor of this State, in the manner and within the time prescribed by the said Act, which approval, assent, and agreement, together with the report of the engineer of the said railroad company, which was required by the said act to accompany the same, were as follows, viz.:"

(The statement then set out all these documents *in extenso*. The engineer framed his estimates for a road to Pittsburg which would cost $6,681,468. That part of it passing through Washington County it thus described: "The route departs from the Baltimore and Ohio Railroad at the mouth of the Little Catoctin, ascends that stream to the eastern base of the Blue Ridge or South Mountain, and thence continues to ascend along its slope to a depression in its crest, called 'Crampton's Gap;' thence passing through the mountain by a tunnel of 1500 feet in length, it descends into 'Pleasant Valley,' lying between the South Mountain and the Elk Mountain, and proceeds along the western base of the former, to and through the town of Boonsborough; thence to a point near the village of Funkstown; and thence across the Antietam Creek, above the Turnpike Bridge, to the borough of Hagerstown; thence through the streets of that town, and over Salesbury Ridge, to and across the Conococheague Creek, about two miles north of Williamsport; thence" &c., &c.)

"It is also admitted, that after this suit was instituted for the purpose of recovering the said forfeiture of a million of dollars, the Legislature of Maryland, on the 10th day of March, 1841, passed the Act of December session, 1840, chap. 260, repealing the said 5th section of the said Act of 1835, chap. 395, as far as relates to the said forfeiture of a million of dollars, and releasing the said defendants from the said forfeiture, and every part thereof, and directing any suit instituted to recover the same to be discontinued, and to *have no effect. [*538 It is also admitted, that the said Repealing Act of 1840, chap. 260, was passed upon the following memorial of the said defendants to the Legislature, and that at the time of passing the same there was then before the Legislature a counter-memorial upon the said subject from the said commissioners of Washington County, which memorial and counter-memorial, it is agreed, were as follows, to wit:"

[These documents are too long to be inserted.]

"It is further admitted and agreed, that the several acts of Assembly herein particularly referred to, as well as any other acts or resolutions of the General Assembly of Maryland, that either party may deem applicable in the argument of this case, either in the County Court, or Court of Appeals, or Supreme Court of the United States, should the case be hereafter carried by either party to said courts, or either of them, shall be read from the printed statute books, and have the same effect and operation in the case, as if duly authenticated copies thereof were made a part of these statements.

"It is further agreed that all errors of pleading and of form in any part of the proceedings of either party in this case are waived; it being the object and understanding of the parties that the matters of right in controversy between them shall be fairly and fully presented to all or either of the said courts, in which the same may be pending, and that either of the said parties shall have his pleading and proceedings considered as being as perfect as they could be made to give him the benefit of the case here stated. It is ad-

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mitted that this suit was the only suit ever brought by the said commissioners, or at their instance, to recover the said forfeiture of a million of dollars, and was pending when the said Act of 1835, chap. 395, was passed. Upon this statement it is further agreed that, if the court shall be of opinion that this action could not be maintained if the said Repealing Act of 1840, chap. 260, had not been passed, or that the operation and effect of that repealing act is to release the said forfeiture of $1,000,000, and to discontinue and put an end to this suit, then judgment to be entered for the defendants, otherwise such judgment is to be entered for the plaintiffs as the court may think right and proper. It is further agreed that the County Court shall enter judgment *pro forma* for the defendants. The plaintiff to have the same right to take up the case, by appeal or writ of error, to the Court of Appeals, or ultimately to the Supreme Court of the United States, as if the judgment in the County Court had been rendered upon demurrer, or upon a bill of exceptions taken in due and legal form upon the facts hereinbefore agreed upon."

Upon this statement of facts, the court of Frederick County gave judgment for the defendant, and the case being carried to the Court of Appeals, the judgment below was affirmed.

The writ of error was brought to review this judgment.

539*] *Messrs. *Jervis Spencer* and *Sergeant* for the plaintiff in error.

Messrs. Nelson, Attorney-General, and *Johnson* for defendants.

Mr. Spencer, for the plaintiff in error, made the following points:

1. That the Act of 1835 is a contract.

2. That Washington County is a party to that contract.

3. That the forfeiture is in no sense a penalty.

1st. It is not for any criminal or prohibited act amounting to a public offense.

2d. It is not introduced *in terrorem*, but is a sum to be paid for using the license given by the act as a compensation to the injured party.

4. That, by the use of the license by the company, Washington County acquired a vested right in the sum stipulated to be paid.

5. That to take away this right from Washington County would be inequitable, unjust, and contrary to the first principles of the social compact; and therefore the act ought to be so construed, if possible, as to avoid that result; and it may be so construed by confining its operation to whatever right the State had, if any. The State might release her own power over the matter, leaving in force the right of the county.

6. If otherwise construed, it is repugnant to the State constitution, and void.

7. In the same view, it is repugnant to the Constitution of the United States, and void.

And then said:

This suit is brought in the name of the State of Maryland, to recover $1,000,000, which is claimed by the county, under the provisions of the 5th section of the Act of the Legislature of Maryland, at the session of 1835, chap. 395, which are substantially set forth in the declaration.

It is maintained, to support the claim of the plaintiff, that the whole act constituted a contract between the State and company; and the 5th section a part of said contract, in which the county is a party beneficially interested.

The provisions of the 1st section of the act are in the very terms of contract, and embrace the 5th section as well as the rest of the law: "If the railroad company shall approve, assent, and agree to the several provisions of this act so far as they are applicable to said corporation," &c. The approval, assent, and agreement of the company were given as provided for by the act, and that agreement gave vitality to the whole law. The State offered, and the company accepted the offer, on mutual considerations. It was the *congregatio mentium*, which is of the very essence of contract.

The case stated shows that at the time of commencing this suit, the road had been located out of the limits of Washington County, *and that, under the law, the company [*540 was liable to pay the money.

But the defense relies on the Act of 1840, chap. 260, which undertakes to repeal the provision of the Act of 1835, chap. 395, under which the claim is asserted; and the question is, whether that Act of 1840 violates the 10th section of the Constitution of the United States.

The first aspect in which the question is to be examined, is, whether the 5th section is part of a contract at all, or only criminal penalty, which it is maintained to be by the defendant. We maintain that it is not only contract, but that it could have no operation as criminal penalty.

What is a contract? (Chitty on Contracts, 1, &c.; *Canal Company* v. *Railroad Company*, 4 Gill. & Johns., 128, &c.)

The Court of Appeals say we must look to concurrent legislation to find the meaning of the 5th section; and refer to the Act of 1840, chap. 260, which uses the term "penalty." But could the Act of 1840, after the suit was brought, alter the character of the thing? If it was contract when the suit was brought, the Act of 1840 could not make it criminal penalty. The Legislature could not stretch the shoe or contract it, and make the previous law mean one thing or another, as they might choose to call it, and when they had a manifest motive in endeavoring to alter its character.

Concurrent legislation, prior to the Act of 1840, proves that the Legislature understood it as contract, and nothing else. The Act of 1826 (chap. 123, sec. 14), which was the original charter, authorized the company to enter upon any lands for a location. Afterwards, by the Act of 1827 (chap. 104, sec. 3), the Legislature thought proper to restrict the company to a location within Frederick and Washington counties, but did they do it by a criminal enactment? No. They knew they could not do that, and they entered into a distinct contract for the purpose. Stress is laid by the other side on the fact that the terms of contract are used in the same section of the Act of 1827 which makes the restriction; and the inference is deduced that if the 5th section of the Act of 1835 were intended to be contract, the terms of contract would have been used in that section

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also. But the important fact is entirely overlooked, that the words of contract, in the first section of the Act of 1835, embrace the whole act; whereas, in the Act of 1827, there were no such general words of assent and agreement to the whole act, but they applied only to the respective sections.

The Court of Appeals refer to the 9th section of the Act of 1835, and say that, inasmuch as a special contract was required to be made by that section, therefore the Legislature could not have intended to make the 5th section contract. This construction cannot be justified. It would involve the construction that many of the most essential stipulations of the company are not its [*541] contract, because *the particular sections in which they occur do not require other special contracts with reference to the same. The 9th section required a distinct contract, in order that if the State should ever have occasion to sue on it, the suit should not be embarrassed by all the various matter embraced by the law. It was an arrangement of convenience. When the company agreed to the law, and accepted the same, it was under contract to fulfill the 9th section by an additional contract. That section was a contract, to be performed by entering into another contract; and it was as much a contract as the subsequent contract would be such, after it should be entered into.

There are thousands of instances of this, where contracts are in part, or the whole, to be performed by entering into other contracts.

The right to choose a location was a vested franchise of the company, its property, which the Legislature of Maryland had no right to interfere with by a criminal enactment. (*Canal Company* v. *Railroad Company*, 4 Gill & Johns. R., 144.) The obligation to go through Frederick and Washington counties, under the Act of 1827, was released by the Act of 1831, chap. 251; and the company stood untrammelled, without any power of control by the Legislature. Their contract or agreement was absolutely essential to bind them down to any particular location. The 5th section, in any other sense but contract, is a dead letter.

It has been asked, suppose the act had said that the company should be liable to Washington County in damages, would that be contract? And again, that if the road should leave the prescribed points it should be a misdemeanor, would that be contract? It is submitted, that it would be, in both cases. The courts have said, in the authorities I have read, that the right to choose a location is the property of the company, and it could be liable neither for damages nor a misdemeanor, for using properly its own property. It might contract to use its property in a certain way, and if nothing be said about damages for the breach, a liability for such damages is implied in every contract. To declare, in express terms, what is implied in every contract, certainly would not vitiate it. Private individuals could not contract that the act of one should be a misdemeanor, but a misdemeanor is an offence against the State, and surely a party who has an absolute right to do a thing, independent of legislative control, may contract with the State that he will not do it, and if he do it shall be a misdemeanor. A State may do many things, in the way of contract, that an individual cannot do, for there is no public policy to restrain her, nothing but the written constitution.

There is another kind of penalty which is the penalty of a contract. This is not such a case, but it is the actual contract of the party to pay the million, in the event which has happened. (2 Pothier on Obligations, 86, &c., 93, 94, 95, 96; 7 Wheat., 18.)

Washington County had a good subsisting interest in the contract. *If any con- [*542 sideration were necessary to sustain the use, it amply exists in the moral obligation which the State owes to the people to protect their interest and nourish their prosperity. The Court of Appeals say that, "as a county, she stands to the State in the relation of a child to a parent;" and this would furnish consideration enough. (*Green* v. *Biddle*, 8 Wheat., 151; *Lloyd* v. *Spillet*, 2 Atk., 149.)

But no question of consideration can arise here, as the acceptance and contract of the company is under the solemnities of a seal, which implies a consideration.

No consideration is necessary. (*Dartmouth College* case, 4 Wheat., 698; 3 Story on the Const., 257, 258; *Carnigan* v. *Morrison*, 2 Metcalf, 396; Willis on Trustees, 216; *Cooker* v. *Child*, 2 Levinz, 74; 4 Kent's Com., 307, and cases there referred to.)

The sovereignty of a State is above the restrictions of the common law and the statutory law. They must all yield to the sovereign will; and what would be necessary to the contract or grant of an individual would by no means be necessary to the same things of a State.

Even though Washington County had been ignorant of the provision in the law, made for her benefit at the time of its passage, she could have availed herself of it; and she did affirm it when she instituted the suit, if not before. (4 Kent's Com., 307, &c.)

The use declared in the Act of 1835 ought to be as sacred as any other right of property. It is property to the county. It is vested under the law of the State. It vests under the same sanction which secures to a citizen his estate. It is an interest in a contract, vested under the sacred sanction of the law, and is inviolate under the Constitution.

The county enjoyed great advantages before the construction of this road. One of the greatest thoroughfares in the country (the great national road) passed for fifty miles through her territory. Twenty four-horse stage coaches, filled with passengers, daily passed over the road, and it was constantly lined with immense wagon-teams, traveling to and from the great west. All these people and horses had to be fed. It made a most profitable market for our farmers. Houses were built all along the road, to accommodate the custom. It is now all gone. The farmers lose the profits of their provender and marketing; the whole country feels the depression; and the houses which were a few years ago comfortable inns, and profitable to their proprietors, are going to decay, a dead loss. The million we seek to recover can never indemnify the county for the injury she has sustained.

Maryland was about to apply large sums to the construction of this great work (the Balti-

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more and Ohio Railroad); the means were to be obtained in part from Washington County; and could any more cruel injustice be conceived than for the State to appropriate the 543*] *money of the people, and pledge the property of Washington County, for the construction of a work which would take from the county all the benefits it enjoyed? Surely every principle of justice and moral duty required that the State should protect the county; and the stipulations of the 5th section were no doubt intended for that.

The State was a mere trustee after the contract was made, and could not deny to the county the right to use her name in bringing the suit. (*Payne* v. *Rogers*, 1 Doug., 407; *Carter & Moore* v. *Insurance Company*, 1 Johns. Ch. R., 463; *Green* v. *Biddle*, 8 Wheat., 89; *Kierstead* v. *The State*, 1 Gill & Johns., 246.)

It has been argued, by the other side, that the State has entire control over the corporation of Washington County, and can destroy it at her pleasure. We admit that the Legislature has absolute control of the political powers of a political corporation, to amend, or modify, or repeal them. But as long as the corporate organization continues, the county is as capable of taking as a natural person, and its contracts are equally pretected. The Act of 1829 (chap. 21, sec. 3) incorporates the commissioners of Washington County, and enables them to hold all kinds of estate. The constitution made no distinction in the classes of contracts whose obligation was forbidden to be impaired, but protects those made by corporations equally with those made by individuals. (*Green* v. *Biddle*, 5 Pet. Cond. Rep., 390.)

The right of a Legislature over charters does not imply a right to the property held under those charters. (9 Cranch, 335; 16 Mass. Rep., 84, 85, 86; 2 Kent's Com., 275, 3d ed.)

Mr. Nelson, Attorney-General, for defendants in error, referred to and commented on the various laws of Maryland respecting the railroad company, and said, that the only question in the case was, whether the Act of 1840 was valid and legitimate. Upon this point three propositions could be stated:

1. The proviso in the preceding act, which declares a forfeiture, imposes it as a penalty.

2. If it be a penalty, the Legislature had a right to remit it, and did remit it.

3. If the stipulation in the 5th section of the Act of 1835 be a contract in its nature, the Legislature was competent to release it, and did so.

1. Is the proviso a contract or mere penalty? This must be answered by a reference to the terms of the act, to the circumstances under which it was passed, and to acts *in pari materia*. Let us examine each. The 5th section prescribes a duty to be performed by the railroad company. It says "It shall be the duty of the company," and the performance of it is sanctioned by a forfeiture. The language is not that they shall pay if they fail to comply, 544*] but that *they shall forfeit $1,000,000. What is a forfeiture? It is a penalty imposed by a superior power for an omission to perform a duty. The terms of the act, therefore, mean a penalty by denouncing forfeiture as a punishment. The Act of 1837, 4th section, contained an offer to the company, which was not accepted; but its language is, that it shal "not be construed to repeal the forfeiture t Washington County." The Act of 1840 con tains the same idea; it remits a forfeiture. I the Act of 1835, different expressions are use in the 7th and 9th sections, where it is declare that "the company shall bind itself by an in strument to pay," &c.; and in the 14th section where the duty of providing transportation i imposed upon the company, they are mad liable to an action by any party aggrieved. I the 5th section, it is not the less a penalt because the amount is ascertained. If th Legislature meant the obligation in the 5t section to rest on contract, can it be accounte for that they did not use the appropriate terms when they did so in the 7th and 9th sections It has been said, that the railroad company as sented to the act, and that it thus became contract. But the assent was given to the ac as it stood, with the penalty in it. Assent t it did not change a penalty into a contract. The Act of Virginia contained penalties fo wronging persons, but by accepting this th company left it optional with the proper au thorities of Virginia whether to enforce th penalities or not.

2. If it be a penalty, has the Legislature th power to release it? Whether injustice was o was not done to Washington County, was question for the Legislature to decide, but no for this court, which must *jus dicere*, and no *jusa dare*. In England, the king cannot re mit a penalty, where private rights are involved, but Parliamant can. (2 Black. Com., 437, 446; 1 Wm. Black. Rep., 451.)

Where a forfeiture is imposed by act of Congress, and the law expires, the forfeiture cannot be enforced, although there was a judgment below. (1 Cranch, 104; 5 Cranch, 281; 6 Cranch, 203, 329.)

Decisions in the different States are uniform on this point. (2 McCord, 1; 2 Bailey, 584; 1 Missouri, 169; Breeze, 115; 1 Murphy, 465; 1 Stew. Ala. Rep., 346; Allen, N. H., 61; 4 Yeates, 392.)

It is clear, therefore, that if this provision is in the nature of a penalty, the law of 1840 is valid.

3. Suppose, however, that the stipulation is in the nature of a contract, had the Legislature power to release it? The Act of 1840 professes to release it, whether it be contract or penalty. It is not denied that a State may make a contract, and if she does, that she cannot break it. The Constitution intended to protect private property, whether of corporations or individuals. Is Washington County such a person? We say that she can have no interest separate from the State. She is a competent part of Maryland, and is separate only for the purpose of executing the sovereign will of *the [*545 State. The distinction between public and private corporations must exist in such a case, if it exists at all. In 1804 the Levy Court was incorporated; the justices of which were appointed by the State, but they had no power to levy taxes, nor any other power, except that which was conferred upon them by law. In 1839, commissioners were authorized by law to supersede the Levy Court, with the same powers. They cannot be the *cestui que use* of the State, for they had no authority to accept such a use,

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and could not appropriate the money, if it were given to them. The State could pass a law, directing the purpose for which it should be expended, and even order it to be paid over to the railroad company. Maryland can abolish Washington County. Suppose that on the day after the forfeiture the county were to be annihilated or broken up, and partitioned amongst the adjacent counties, what would be done with the funds on hand? It would be for the State to prescribe their direction. (9 Cranch, 43, 52, 292.)

If the distinction between public and private corporations be that interests are protected, all are protected, because there can be no litigation without interest. (4 Wheat., 629, 630, 659, 660, 693, 694; 13 Wend., 325, 334, 337.)

Was a right of action such a property as is protected? The penalty was never reduced into possession, and the State had a right to defeat the remedy when it was sought by a suit in its own name. All the points in this case are covered by 1 Missouri Rep., 169. Counties are public corporations, and can be changed or modified at the pleasure of the State. (Breese, Illinois Rep., 115.)

In the case of the town of Pawlet private interests were involved; it was not intended to throw the shield of protection over public property. The public may do what they please with their own. A Legislature cannot repeal a charter, and take the property of individuals; but if you refuse to it the power to control public funds, you strip it of a useful and legal authority.

Mr. R. Johnson argued upon the same side, but of his argument the reporter has no notes.

Mr. Sergeant, for plaintiff in error, in conclusion, stated the facts in the case, referred to the acts of Assembly, and then argued that the proviso in the Act of 1835 was not a penalty. There was an alternative, an option given to the railroad company, either to make the road as directed, or to pay the money. The nature of the proviso was perfectly understood by the Legislature. The previous part of the law enacted that the company should pass through three towns. Had the law stopped there, the obligation would have been complete, under the penalty, as it is said by the other side, of forfeiting their charter. But the proviso makes a difference. If the company choose to pay the money, they may decline to obey the enacting clause. The difference between a law and an 546*] agreement is, that *the one is binding absolutely, and the other not without an assent. But here the company were required to signify their assent to the law, which shows that the Legislature thought they were making a contract. When a State becomes a contracting party, she acts with no higher power than an individual, except that sometimes persons are made able to contract who would be unable, without the assistance of legislation. A confusion arises in some cases from the same power making laws and contracts; and the different mode of action must be steadily kept in view. A treaty is binding, and yet there is no exercise of a legislative power. In the case before us, the company were not bound to adopt any certain route. All that the Legislature said was, that if they did not agree to pass through the three towns, they should not have the subscription of $3,000,000. It makes no difference, in a legal point of view, whether it was or was not difficult to construct the road along that route. This circumstance did not alter the contract. If they had agreed to pay the $1,000,000, the Legislature could not have compelled them to pass through the towns.

The Act of 1840 does not declare what that of 1835 was, but professes to annihilate it. But the Legislature cannot do this. They cannot even construe the law, which is the peculiar province of a court. There is nothing in this disability derogatory to the dignity of Maryland, because it is common to all the States. Courts may look at acts which are *in pari materia*, but the examination is only to guide their judgment, and not because the Legislature has a right to construe a contract already made. When the Constitution of the United States protects contracts, it means that they shall be defined and construed according to received and settled principles: there is no exception of implied contracts or those made by States or corporations, public or private. Public corporations have a right to make contracts and to sue, and there is no exception of a penalty by contract, such, for example, as a bond. This court has always acted up to the letter and spirit of the Constitution, and it is a subject of rejoicing that its opinions have found their way into the hearts of the people, and become guides of action. In a convention of the people of Pennsylvania, which met not long since, an argument addressed to that body, founded on the decisions of this court, settled a question which had been much debated. It is a principle that contracts must be interpreted by the judiciary, and this is equally true of contracts made by individuals or States. All the incidents of contracts are protected also, and no equivocation or subterfuge will be allowed. The only distinction which can be made amongst penalties, is regarding crimes and contracts. No one can contract to commit a crime: it would be void. If the Act of 1840 impairs the obligation of a contract, it is nugatory. Between individuals, this would be considered a case of contract, and there is in the law no exercise of the legislative power, which would *have been the case if [*547 Washington County, by it, had been empowered to make a contract. But this was not necessary. The State could contract, undoubtedly, and so could the railroad company, and a third party is introduced with the consent of both. A charter is a contract; but provisions are sometimes introduced into it which are not matters of contract. (4 Wheaton, 235.) In the present case, the acceptance completed the contract. If you strike out of the law the words "for the use of Washington County," there is nothing to show what was to be done with the money. But when these were inserted, it prevented the State from claiming it for herself; if she had done so, the railroad company would have been justified in refusing to pay. Here, then, were two parties, each capable of contracting; and as to the capacity of Washington County so to do, it was held, in the case of *Terrett & Taylor*, that the recognition of a power to contract is equivalent to a fresh grant of power. A bond between A and B for the use of C, admits C's interest, and suit must be brought in the name of the obligee. When a

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bond is assigned, there is an implied engagement that the assignor will do nothing to impair the interest of the other party. A *cestui que trust* has, in equity, a control of the fund. *Black* v. *Zacharie*, decided at this term.

The Act of 1835 is, in fact, a stipulation for a license to depart from a prescribed route. It has been said, by the other side, that it is a penalty, that the Legislature can release it, and that if it is a contract, the Legislature can annul it. If it is a penalty, and the State has released it, the question cannot come up here. We have no desire to say anything as to the power of a State over criminal penalties, such as that in 10 Wheaton. It is said that Washington County was not a party to the contract. But it seems to be conceded that if it were not for the Act of 1840, there would be no opposition to the claim. There was a time, then, when Washington County had an interest, and this remained at the institution of the suit. If the State of Maryland were to receive the money as the plaintiff in the cause, perhaps we could not legally coerce her to pay it to Washington County. But she would be morally bound to do so. The moment that the railroad company determined not to pass through the three towns, Washington County acquired a right. The trustee and the party bound have concurred to destroy the contract, and it is only in consequence of this, that Washington County does not stand as it did at first. It has been said that the Legislature could take away the remedy by which the contract was to be enforced. But the decisions of this court are uniform, that a Legislature cannot take away a right, under pretense of affecting the remedy. The last case upon this point in *Bronson* v. *Kenzie* (1 Howard, 311).

If the law impairs a remedy, or varies a contract a hair's breadth, it is void; and it makes no difference whether it is a general or a **548*]** *special law. In the case before us, the plaintiffs are put in a worse situation than they were before, and the same thing is intended to be accomplished as if a law had been passed forbidding them to bring a suit.

It is said that Washington County is a public municipal corporation, and therefore within the control of the Legislature. But in the Act of 1835, there was no reservation of power upon this ground. It may be that the votes of some few persons were required to pass the law, who would not have voted for it if any such reservation had been made. Men cannot be such general philanthropists as to give up the interests of their own immediate neighborhood. Suppose Washington County to have said, if you take away the road from us, you must make compensation. In such case, the law would not have been passed with a reservation in it like the one just spoken of. And if it be a contract, it is violated for the benefit of the railroad company. The argument on the other side goes to the extent that every contract, made by a public municipal corporation, is beyond the pale of the Constitution. There is no decision of this court that such a charter and property can be taken away. One of the complaints in the Declaration of Independence is, that charters were taken away; and this practice, in part, produced a revolution in England. By this argument, they may all be swept off; and such corporations may, moreover, be asked what they are going to do with their property. It has been said, that supposing it to be a contract, it cannot inure to the benefit of Washington County. But an implication cannot be made contrary to what is expressed, or what is just and right. What Washington County is going to do with the money is of no concern to the railroad company, the true defendant in this case. It may educate the poor with it; it may pay debts, or it may erect a monument to that glorious clause in the Constitution which enables it to assert its rights in this court.

Mr. Chief Justice TANEY delivered the opinion of the court:

The question brought before the court by this writ of error depends upon the construction and effect of an act of the General Assembly of Maryland, passed at December session, 1835, entitled "An Act for the Promotion of Internal Improvement."

The original charter of the Baltimore and Ohio Railroad Company authorized it to construct a railroad from Baltimore to some suitable point on the Ohio River, without prescribing any particular route over which the road was to pass; leaving the whole line to the judgment and discretion of the company. But by the act above mentioned the State proposed to subscribe $3,000,000 to its capital stock, provided the company assented to the provisions of that law; and among other provisions, this act of Assembly required the road to pass through Cumberland, Hagerstown, and Boonsborough; and provided also that, if the road was not located in the manner therein *pointed out, the company "should [*549 forfeit $1,000,000 to the State for the use of Washington County."

The towns of Cumberland, Hagerstown, and Boonsborough, are all situated in Maryland; the first in Alleghany County, and the two latter in Washington.

This law was assented to by the company, and became obligatory upon it, and the sum proposed was subscribed by the State; but for reasons which it is not necessary here to mention, the company did not locate the road through Hagerstown or Boonsborough, nor pass through any part of Washington, on its way from Harper's Ferry to Cumberland, to which point the road has been made; and this suit was thereupon brought, at the instance of the commissioners of Washington County, in the name of the State, for the use of the county, to recover the $1,000,000 above mentioned. After the suit had been instituted, the State, at December session, 1840, passed a law repealing so much of the Act of 1835 as required the company to locate the road through Hagerstown and Boonsborough, and remitting the forfeiture of the $1,000,000, and directing any suit instituted to recover it to be discontinued.

The commissioners of Washington County, however, at whose instance the action was brought, insisted that the money was due to the county by contract, and that it was not in the power of the State to release it; and upon that ground continued to prosecute the suit; and the Court of Appeals of the State, having decided against the claim, the case is brought here by writ of error.

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Undoubtedly, if the money was due to Washington County by contract, the Act of 1840, which altogether takes away the remedy, would be inoperative and void. But even if the provisions upon this subject in the Act of 1835 could be regarded as a contract with the railroad company, it would be difficult to maintain that the county was a party to the agreement or that it acquired any private or separate interest under it, distinct from that of the State. It was certainly at that time the policy of the State to require the road to pass through the places mentioned in the law, and if it failed to do so, to appropriate the forfeiture to the use of the county. But it cannot be presumed that in making this appropriation the Legislature was governed merely by a desire to advance the interest of a single county, without any reference to the interests of the rest of the State. On the contrary, the whole scope of the law shows that it was legislating for State purposes, making large appropriations for improvements in different places; and if the policy which at that time induced it to prescribe a particular course for the road, and in case it was not followed to exact from the company $1,000,000 and devote it to the use of Washington County, was afterwards discovered to be a mistaken one, and likely to prove highly injurious to the rest of the State, it had unquestionably the power to change its policy, and allow the company to pursue a 550*] different course, and to *release it from its obligations both as to the direction of the road and the payment of the money. For, in doing this, it was dealing altogether with matters of public concern, and interfered with no private right; for neither the commissioners, nor the county, nor any one of its citizens, had acquired any separate or private interest which could be maintained in a court of justice.

As relates to the commissioners, they are not named in the law, nor were they in any shape parties to the contract supposed to have been made, nor is the money declared to be for their use. They are a corporate body, it is true, and the members who compose it are chosen by the people of the county. But like similar corporations in every other county in the State, it is created for the purposes of government, and clothed with certain defined and limited powers to enable it to perform those public duties which, according to the laws and usages of the State, are always entrusted to local county tribunals. Formerly they were appointed in all of the counties annually, by the executive department of the government, and were then denominated the Levy Court of the county; and in some of the counties they are still constituted in that manner, the Legislature commonly retaining the old mode of appointment, or directing an election by the people, as the citizens of any particular county may prefer. But, however chosen, their powers and duties depend upon the will of the Legislature, and are modified and changed, and the manner of their appointment regulated at the pleasure of the State. And if this money had been received from the railroad company, the commissioners, in their corporate capacity, would not have been entitled to it, and could neither have received nor disbursed it, nor have directed the uses to which it should be applied, unless the State had seen fit to enlarge their powers and commit the money to their care. If it was applied to the use of the county, it did not by any means follow that it was to pass through their hands, and the mode of application would have depended altogether upon the will of the State.

This corporation, therefore, certainly had no private corporate interest in the money, and indeed the suit is not entered for their use, but for the use of the county. The claim for the county is equally untenable with that of the commissioners. The several counties are nothing more than certain portions of territory into which the State is divided for the more convenient exercise of the powers of government. They form together one political body in which the sovereignty resides. And in passing the law of 1835, the people of Washington County did not and could not act as a community having separate and distinct interests of their own, but as a portion of the sovereignty; their delegates to the General Assembly acting in conjunction with the delegates from every other part of the State, and legislating for public and State purposes, and the validity of the law did not depend upon their assent to its provisions, as it would have been equally obligatory upon them, if *every one of [*551 their delegates had voted against it, provided it was passed by a constitutional majority of the General Assembly. And whether the money was due by contract or otherwise, it must, if received and applied to the use of the county, have yet been received and applied by the State to public purposes in the county. For the county has no separate and corporate organization by which it could receive the money or designate agents to receive it or give an acquittance to the railroad company, or determine upon the uses to which it should be appropriated. We have already seen that the corporation of commissioners of the county had no such power; and certainly no citizen of the county had any private and individual property in it. It must have rested with the State so to dispose of it as to promote the general interest of the whole community, by the advantages it bestowed upon this particular portion of it.

Indeed, if this money is to be considered as due, either to the commissioners or to the county, by contract with the railroad company, so that it may be recovered in this suit, in opposition to the will and policy of the State, it would follow necessarily that it might have been released by the party entitled, even if the State had desired to enforce it. And if the State had adhered to the policy of the act in question, and supposed it to be for the public interest to insist that the road should pass along the line prescribed in that law, or the company be compelled to pay the million of dollars, according to the construction now contended for, the commissioners of the county might have counteracted the wishes of the State, and, by releasing the company from the obligation to pay this money, allowed them to locate the road upon any other line. And if the construction of the plaintiff in error be right, the Legislature of Maryland, in a case where the whole people of the State had become so deeply concerned by the large amount subscribed to the capital stock of the road, that its success or failure must seriously affect the interests of every part of the State; and where the improvement was regard-

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ed as of the highest importance to its general commercial prosperity; it deliberately deprived itself of the power of exercising any future control over it, and left it to a single county or county corporation to decide upon the course of the road, and either to insist on the line prescribed by the Legislature, or to release the company from the obligation to pursue it, without regard to the wishes or interest of the rest of the State. Whether the million of dollars was reserved by contract, or inflicted as a penalty, such a construction of the law cannot be maintained.

But we think it very clear that this was a penalty, to be inflicted if the railroad company did not follow the line pointed out in the law. It is true, that the Act of 1835, which changed in some important particulars the obligations imposed by the original charter, would not have been binding on the company without its consent; and the 1st section, therefore, contains a provision requiring the con-
552*] sent *of the company in order to give it validity. And when the company assented to the proposed alterations in their charter, and agreed to accept the law, it undoubtedly became a contract between it and the State; but it was a contract in no other sense than every charter, whether original or supplementary, is a contract, where rights of private property are acquired under it. Yet, although this supplementary charter was a contract in this sense of the term, it does not by any means follow that the Legislature might not, in the charter, impose duties and obligations upon the company, and inflict penalties and forfeitures as a punishment for its disobedience, which might be enforced against it in the form of criminal proceedings, and as the punishment of an offense against the law. Such penal provisions are to be found in many charters, and we are not aware of any case in which they have been held to be mere matters of contract. And in the case before the court, the language of the law requiring the company to locate the road so as to pass through the places therein mentioned, is certainly not the language of contract, but it is evidently mandatory, and in the exercise of legislative power, and it is made the duty of the company, in case they assent to the provisions of that law, to pass through Cumberland, Hagerstown, and Boonsborough; and if they fail to do so, the fine of $1,000,000 is imposed as a punishment for the offense. And a provision, as in this case, that the party shall forfeit a particular sum, in case he does not perform an act required by law, has always, in the construction of statutes, been regarded not as a contract with the delinquent party, but as the punishment for an offense. Undoubtedly, in the case of individuals, the word forfeit is construed to be the language of contract, because contract is the only mode in which one person can become liable to pay a penalty to another for a breach of duty, or the failure to perform an obligation. In legislative proceedings, however, the construction is otherwise, and a forfeiture is always to be regarded as a punishment inflicted for a violation of some duty enjoined upon the party by law; and such, very clearly, is the meaning of the word in the act in question.

In this aspect of the case, and upon this construction of the act of Assembly, we do not understand that the right of the State to release it is disputed. Certainly the power to do so is too well settled to admit of controversy. The repeal of the law imposing the penalty, is of itself a remission. (1 Cranch, 104; 5 Cranch, 281; 6 Cranch, 203, 329.) And in the case of *The United States* v. *Morris* (10 Wheat., 287) this court held, that Congress had clearly the power to authorize the Secretary of the Treasury to remit any penalty or forfeiture incurred by the breach of the revenue laws, either before or after judgment; and if remitted before the money was actually paid, it embraced the shares given by law in such cases to the officers of the customs, as well as the share of the United States. The right to remit a penalty like this stands upon the same principles.

** We are, therefore, of opinion, that the* [*553 *law of 1840, hereinbefore mentioned, did not impair the obligation of a contract, and that the judgment of the Court of Appeals of Maryland must be affirmed.*

Cited—10 How., 417, 535; 16 How., 408; 9 Wall., 573; 11 Wall., 95.

JAMES STIMPSON, *Plaintiff in Error*,

v.

WESTCHESTER RAILROAD COMPANY

Certiorari, *motion for—exceptions to charge of court should be specific—exceptions certified under seal not amended on* certiorari—*error in framing exceptions not corrected here.*

The 38th rule of court forbids the insertion of the whole of the charge of the court to the jury in a general bill of exceptions, but requires that the part excepted to shall be specifically set out.

This court has not the power to correct any errors or omissions which may have been made in the Circuit Court in framing the exception; nor can it regard any part of the charge as the subject matter of revision, unless the judges, or one of them, certify under his seal, that it was excepted to at the trial.

If the omission of a part of the charge, which was in fact embraced in the exception, is a mere clerical error, the party will be entitled to a *certiorari*, upon producing a copy of the exception properly certified.

But in no case can the exception certified under the seals of the judges of the Circuit Court be altered or amended.

A SUGGESTION was made, in this case, of diminution in the record, and a motion for a *certiorari* to bring up the charge which the court delivered to the jury on the trial of the cause in the Circuit Court of the United States for the Eastern District of Pennsylvania.

Mr. Chief Justice TANEY delivered the following opinion of the court:

The plaintiff in error in this case suggests that there is diminution in the record, in omitting the charge to the jury which was delivered at the trial by the Circuit Court, and moves for a *certiorari*, that it may be set out at length and appended to the record.

So much of the charge of the court as was excepted to at the trial, is inserted in the record as it now stands; and by the 38th rule of the court, adopted at January Term, 1832, it was

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ordered, that thereafter "the judges of the circuit and district courts do not allow any bill of exceptions, which shall contain the charge of the court at large to the jury, in trials at common law, upon any general exception to the whole of such charge. But that the party excepting be required to state distinctly the several matters in law, in such charge, to which he excepts; and that such matters of law, and those only, be inserted in the bill of exceptions, and allowed by the court."

The record now before us contains as much of the charge as is authorized, by this rule, to be inserted in the exception, and the motion for a *certiorari* must therefore be overruled.

554*] *Mr. *J. R. Ingersoll* afterwards filed and read in open court, the following suggestion in writing, to wit:

In the printed record, a mere omission is made of a portion of the manuscript charge. 1. After the reference to *Evans* v. *Jordan* (9 Cranch, 201, printed record, p. 30, near the bottom of the page), there are four and a half pages of manuscript (pages 26, 27, 28, 29, 30). 2. On page 27 of the manuscript are these words: "It thus appears that the Act of 1839 goes only one step beyond those of 1832 and 1836, and is a dead letter, if it protects the person who has purchased, constructed, or used the machine invented," &c.

A memorandum indorsed by *Judge* Baldwin, "*Stimpson* v. *Westchester Railroad Company*. Exceptions to the charge." In this memorandum are found the following words: "7 sec. Act of 1839 goes only one step beyond those of 1832 and 1836, and is dead letter so far as protection against such subsequent use."

3. On page 30 of the manuscript charge are these words: "In the case before us, it clearly appears that the defendants constructed their railroad with the plaintiff's curves, in 1834, one year or more before the plaintiff's application for his renewed patent, consequently they may continue its use without liability to the plaintiff."

The same memorandum, indorsed by *Judge* Baldwin, contains these words; "As defendants made railroad in 1834, they may continue use."

Thus it will be perceived, the very points objected to in writing, and the writing received and admitted to be such by *Judge* Baldwin, are omitted in copying the charge at the clerk's office at Philadelphia. The language of the charge, as written out, is somewhat more extended than that of a memorandum hastily made, while it was delivered, but it is, throughout, substantially, and in part, literally the same.

The "important question" in the case was, the defendants' right to use, after the date of the second patent, the specific machine constructed and used by them before the date of that patent. This question, according to the printed record, is not decided at all, nor left to the jury, nor any result arrived at in regard to it.

The whole charge is not wanted, but only those parts distinctly excepted to at the moment, and inadvertently omitted by a copyist.

It is obvious, besides, that the charge, or the fragment of a charge printed, is not only elliptical, but insensible. The judge says (page 30): "Another important question," &c., yet no question appears. The manuscript must be consulted in order to give meaning or object to the phrase.

The counsel for the defendant in error would probably learn with some surprise, that this application has been refused. In the paper book which that counsel has caused to be printed (page 3), third paragraph, the 7th section of the Act of 1839 is quoted, and supported *by points and references. All this is [*555 without object or origin in the printed record. The source of it is dried up by the omission of the copyist. So page 4 of that paper book, No. 6, "under the Act of 1839, &c." These remarks are applicable only to the omitted parts of the charge.

The counsel for plaintiff in error, who now moves for a *certiorari*, was not present at the trial, but his colleague, who tried the cause, informs him that the judge undertook to put the whole charge on the record, and the concluding words along with it. Thus,

1. The whole charge, under the promise of the judge, ought to be a part of the record.

2. The omitted parts in the printed record are the essence and substance of the case, admitted by the judge to be such, and specifically excepted to at the moment.

3. The whole difficulty arises from a mere inadvertence of a clerk.

4. Extreme injustice will be done if the clerical omission be not corrected.

5. Were the judge living, verbal explanations might be given by him, but not more precise, perhaps, than the written indorsement or the memorandum of counsel.

Finally, the printed record shows that the judge put the case on two points:

First, was the second patent void?

The judge decided that it is.

Second, if the second patent were not void, then, can the plaintiff recover, when the specific machine used by the defendants was first made and used by them before the second patent was taken out?

This second point, according to the printed record, the judge states, but does not decide, or put in such shape as to let the jury decide. His conclusion is omitted, while his premises are stated. And a correction of this is the subject of the *certiorari*. *Mr. Ingersoll* then moved the court for a writ of *certiorari* to be directed to the judges of the Circuit Court of the United States for the Eastern District of Pennsylvania, commanding them to certify forthwith whatever errors and omissions shall be found.

Upon which motion, *Mr. Chief Justice* TANEY delivered the opinion of the court:

A motion was made at a former day of the present term for a *certiorari* to bring up the charge delivered by the Circuit Court at the trial, to be set out at length, and appended to the record. This motion was overruled for the reason then stated by the court.

The motion has since been revived, and a copy of what purports to have been the charge of the court at length has been produced, in order to show that a material point in it has not been inserted in the *exception, as [*556 brought up in the record; and some memorandums in the handwriting of the late presid-

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ing judge of the Circuit Court have also been laid before this court for the purpose of showing that an exception was reserved to the part of the charge above referred to.

In relation to the exception stated in the record, the court think it proper to say, that it contains a great deal of argument which is altogether out of place in an exception, and contrary to the directions of this court as given in the 38th rule. And it would appear, from the copy of the charge produced in support of this motion, that while much of the argument of the Circuit Court has been improperly inserted, the matter of law which the argument was intended to prove, and upon which the jury were instructed, is omitted. But this court has not the power to correct any errors or omissions that may have been made in the Circuit Court in framing the exception; nor can we regard any part of the charge as the subject matter of revision here, unless the judges, or one of them, certify, under his seal, that it was excepted to at the trial. If the portion of the charge, in relation to which the diminution is suggested, was in fact embraced in the exception, and the omission of it is a clerical error, then, upon producing here a copy of the exception properly certified, the plaintiff in error will be entitled to a *certiorari*, in order to supply the defect. But we can in no respect alter or amend the exception certified under the seals of the judges of the Circuit Court, either by referring to the charge at length, or the notes of the presiding judge; and as the case is now presented, the motion must be refused.

Cited—11 How., 158; 3 Wood. & M., 537; 11 Bank. Reg., 157.

THE UNITED STATES, *Plaintiffs*,

v.

WILLIAM H. FREEMAN.

Construction of statutes—brevet officers of marine corps, pay and emoluments—double rations.

Statutes *in pari materia* should be taken into consideration in construing a law. If a thing contained in a subsequent statute be within the reason of a former statute, it shall be taken to be within the meaning of that statute.

And if it can be gathered from a subsequent statute *in pari materia* what meaning the Legislature attached to the words of a former statute, this will amount to a legislative declaration of its meaning, and will govern the construction of the first statute.

The meaning of the Legislature may be extended beyond the precise words used in the law, from the reason or motive upon which the Legislature proceeded, from the end in view, or the purpose which was designed; the limitation of the rule being, that to extend the meaning to any case, not included within the words, the case must be shown to come within the same reason upon which the law-maker proceeded, and not a like reason.

A brevet field officer of the marine corps is not entitled by law to brevet pay and rations, by reason of his commanding a separate post or station, if the force under his command would not entitle a brevet field officer of infantry of a similar grade to brevet pay and rations.

557*] *The Act of 1834, chap. 132, does not repeal the 1st section of the Act of 1818, regulating the pay and emoluments of brevet officers.

The 5th section of the Act of 30th June, 1834, is a repeal of the joint resolution of the two houses of Congress of the 26th May, 1832, respecting the pay and emoluments of the marine corps.

By force of the Army Regulation No. 1125, authorizing the issues of double rations to officers commanding departments, posts, and arsenals, a brevet field officer of marines is entitled to double rations. But the fact must be shown that he had such a command of a post or arsenal at which double rations had been allowed according to the army regulations.

The fact of appropriations having been made by Congress for double rations does not determine what officers are entitled to them.

A brevet field officer of the marine corps, commanding a separate post, without a command equal to his brevet rank, is not entitled to brevet pay and emoluments. But if such brevet officer is a captain in the line of his corps, and in the actual command of a company, whether he is in the command of a post or not, he is entitled to the compensation given by the 2d section of the Act of the 2d March, 1827.

THIS case came up on a certificate of division from the Circuit Court of the United States for the District of Massachusetts. It was to test the right of the defendant in error, who has also the defendant below, to certain pay, allowances, and emoluments, which he claimed as being an officer of the marine corps. The questions which were certified to this court were the following:

"1. Whether a brevet field officer of the marine corps is by law entitled to receive the pay and rations of his brevet rank by reason of his commanding a separate post or station, although the force under his command should not be such as would by law, or by such regulations as have in this respect and for the time the force of law, entitle a brevet field officer of infantry of a similar grade to brevet pay and rations.

"2. Whether the provision respecting brevet pay and rations in the 3d section of the Act of 1818, chap. 117, is repealed by the Act of 1834, chap. 132.

"3. Whether by force of the Act of 1834, chap. 132, the point resolution of the two houses of Congress of the 25th of May, 1832, respecting the pay and amoluments of the marine corps, is repealed.

"4. Whether by force of the army regulation, numbered 1125, authorizing the issues of double rations to officers commanding departments, posts, and arsenals, a brevet field officer of marines, commanding a separate post or station, is entitled to double rations.

"5. Whether the additional fact of appropriations having been made by Congress for such double rations, entitles such marine officer to receive the same for the years for which such appropriations are made.

"6. Whether a brevet field officer of the marine corps, commanding a separate post, and receiving his brevet pay and emoluments, but being a captain in the line, is entitled to the ten dollars a month additional compensation for responsibility of clothing, &c., under the Act of 1834, chap. , applying to the marine corps the Act of 1827, chap., 199."

There was a statement of facts agreed upon in the court below, the only parts of which that bear upon the certified questions are the following:

"It is further agreed that Colonel Freeman was commissioned a captain in the line of the marine corps on the 17th of July, 1821, and on that lineal rank he was commissioned a lieutenant-colonel by brevet on the 17th of July, 1831, and on the 30th of June, 1834, he was

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commissioned a major in the line of the marine corps.

"Colonel Freeman files an account, in set-off against the United States, of $1,013.93, for brevet pay and rations while in command on the Boston station, the same being a separate station or detachment, under the provision of the 3d section of an act of Congress of 16th April, 1814, for the augmentation of the marine corps. Said amount extends from the 30th of June, 1834, to the 1st of April, 1842, and has been presented to and disallowed by the fourth auditor.

"Said Freeman files an account also of $1,-669 for double rations while in command on the Boston station, between the 30th of June, 1834, and the 1st of April, 1842, under a joint resolution of Congress of 25th May, 1832; which account has also been presented to and disallowed by the fourth auditor.

"Said Freeman files also an account of $854.-69 for the responsibilities of clothing, &c., while a captain in the line of the marine corps, and in command of the marines on the Boston station, from the 17th of July, 1831, to the 30th of June, 1834, under an act of Congress of 30th June, 1834, making certain allowances, &c., to the captains and subalterns of the marine corps, as to officers of similar grades in the army, under an act of 2d March, 1827; which account has likewise been presented to and disallowed by the fourth auditor of the treasury, on the ground that the defendant received the pay of a grade higher than that of captain.

"It is further agreed that double rations have been paid heretofore and up to the 30th of June, 1834, to the officers of the marine corps, in the manner and as stated in the letter of the fourth auditor of date 27th of April, 1842, and marked B, and annexed; also, that estimates and appropriations were made, as stated in said letter, since 1834.

"Upon the foregoing facts, the case is submitted to the court; the accounts of the said several claims of the said Freeman to be adjusted hereafter by the officers of the treasury, if the same, or any portion of them, are found by the court to be legally due.

"FRANKLIN DEXTER, U. S. Dist. Att'y.
"W. H. FREEMAN."

559*] *The laws will be stated which bear upon each of the three items into which the account is divided, viz.: 1. Pay. 2. Rations. 3. Clothing.

1. As to pay.

On the 6th of July, 1812 (2 Story, 1278) Congress passed an act entitled "An Act making further provision for the Army of the United States, and for other purposes," the 4th section of which was as follows:

"That the President is hereby authorized to confer brevet rank on such officers of the army as shall distinguish themselves by gallant actions, or meritorious conduct, or who shall have served ten years in any one grade: Provided, That nothing herein contained shall be so construed as to entitle officers so breveted to any additional pay or emoluments, except when commanding separate posts, districts, or detachments, when they shall be entitled to and receive the same pay and emoluments to which officers of the same grade are now, or hereafter may be, allowed by law."

On the 16th of April, 1814, Congress passed an act (2 Story, 1414) "authorizing an augmentation of the marine corps, and for other purposes," the 3d section of which was exactly similar to the above, except that "officers of the marine corps" were substituted for "officers of the army," and that in the proviso the words "commanding separate stations or detachments" were substituted for "commanding separate posts, districts, or detachments."

On the 16th of April, 1818, an act was passed (3 Story, 1672) "regulating the pay and emoluments of brevet officers," the 1st section of which was as follows:

"Be it enacted, &c., That the officers of the army who have brevet commissions shall be entitled to, and receive, the pay and emoluments of their brevet rank when on duty and having a command according to their brevet rank, and at no other time."

In 1825, regulations for the army were issued; the 1124th section was as follows:

"Brevet officers shall receive the pay and emoluments of their brevet commissions, when they exercise command equal to their brevet rank; for example—a brevet captain must command a company; a brevet major and a brevet lieutenant-colonel, a battalion; a brevet colonel, a regiment; a brevet brigadier-general, a brigade; a brevet major-general, a division."

On the 30th of June, 1834, Congress passed an act "for the better organization of the United States marine corps". (4 Story, 2383.) After increasing the number of officers and privates, the 5th section enacted:

"That the officers of the marine corps shall be entitled to, and receive, the same pay, emoluments, and allowances, as are now, or hereafter may be, allowed to officers of similar grades in the infantry of the army, except the adjutant and inspector, who shall," &c., &c.

*The 7th section provided that "the [*560 commissions of the officers now in the marine corps shall not be vacated by this act," &c.

The 9th section repealed so much of the 4th section of the Act of the 6th of July as authorized the President to confer brevet rank on such officers of the army or of the marine corps as shall have served ten years in any one grade.

The 10th section repealed all acts or parts of acts inconsistent therewith.

In 1836, another set of army regulations was issued, the forty-eighth article of which contained the following:

"Officers who have brevet commissions shall be entitled to receive their brevet pay and emoluments, when on duty, under the following circumstances:

"A brevet captain, when commanding a company.

"A brevet major, when commanding two companies, or when acting as major of the regiment.

"A brevet lieutenant-colonel, when commanding at least four companies, or when acting as lieutenant-colonel of the regiment.

"A brevet colonel, when commanding nine companies of artillery, or ten of infantry or dragoons, or a mixed corps of ten companies, or when commanding a regiment.

"A brevet brigadier-general, when commanding a brigade of not less than two regiments or twenty companies.

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"A brevet major-general, when commanding a division of four regiments or at least forty companies.

"A brevet officer, when assigned by the special order of the Secretary of War to a particular duty and command, according to his brevet rank, although such command be not in the line, provided his brevet allowances are recognized in the order of assignment.

"To entitle officers to brevet allowances while acting as field officers of regiments according to their brevets, they must be recognized at general headquarters as being on such duty, and the fact announced accordingly in general orders."

The laws relating to rations are the following:

2. Rations.

On the 3d of March, 1797 (1 Story, 460), Congress passed an act to amend and repeal, in part, the Act entitled "An Act to ascertain and fix the military establishment of the United States," the 4th section of which declared that "to each officer, while commanding a separate post, there shall be allowed twice the number of rations to which they would otherwise be entitled."

On the 16th of March, 1802 (2 Story, 831), an act was passed "fixing the military peace establishment of the United States," the 5th section of which designated the number of rations to which each officer should be entitled, and then added as follows, viz.: "to the commanding officers of each separate post, such additional number of rations as the President of **561*]** the United States shall, from time *to time, direct, having respect to the special circumstances of each post."

On the 25th of May, 1832 (4 Story, 2333), Congress passed a joint resolution as follows: "Resolved, &c., That the pay, subsistence, emoluments, and allowances of officers, non-commissioned officers, musicians, and privates of the United States marine corps, shall be the same as they were previously to the 1st of April, 1829, and shall so continue until they shall be altered by law."

In 1834, the act was passed which has already been mentioned under the head of "Pay."

3. Clothing.

On the 2d of March, 1827, Congress passed an act (3 Story, 2057), the 2d section of which was as follows: That every officer in the actual command of a company in the army of the United States shall be entitled to receive $10 per month, additional pay, as "compensation for his duties and responsibilities, with respect to the clothing, arms, and accoutrements of the company, whilst he shall be in the actual command thereof."

Mr. Nelson, Attorney-General, for the United States.

Colonel Freeman, in a printed argument, the defendant in the court below, for himself.

Mr. Nelson made the following points:

1st. That a brevet field officer of the marine corps is not by law entitled to receive the pay and rations of his brevet rank, under the circumstances stated in this case.

2d. That the provision respecting brevet pay and rations, in the 3d section of the Act of 1818, chap. 117, is repealed by the Act of 1834, chap. 132.

3d. That the joint resolution of the two houses of Congress, of the 25th of May, 1832, is repealed by the Act of 1834, chap. 132.

4th. That a brevet field officer of marines, commanding a separate post or station, is not entitled to double rations by force of Army Regulation, numbered 1125.

5th. That the additional fact of appropriations having been made by Congress for double rations, does not entitle such marine officer to receive the same, if otherwise not entitled thereto by law.

6th. That a brevet field officer of marines is not entitled to the $10 a month, under the Act of 1834, chap. 132, under the circumstances stated in the sixth question, certified in the record.

He examined the subjects in the order mentioned above, of Pay, Rations, and Clothing.

1. Pay.

He admitted that if the Act of 1814 is still in force, the defendant is entitled to brevet pay; but it is not in force. The Act of 1834 has changed the law; the 5th section puts the marine corps on the same footing with the infantry. What, then, were the infantry entitled to? To *answer this question, we must look at [*562 the laws of 1812 and 1814 (the same in substance upon this point) and also the law of the 16th April, 1818, which expressly declares that officers of the army shall receive brevet pay when they have a command according to their brevet rank, and at no other time. Before they can claim the pay, the condition must be shown to be complied with; but here it is admitted that Colonel Freeman had not such a command.

The Army Regulations of 1825, reg. 1124, say that brevet officers are to receive pay only when the command is equal to the rank; and those of 1836 say the same. Freeman was a lieutenant-colonel by brevet, and had not the command appropriate to that rank.

Does the Act of 1834 repeal that of 1814? We say it does. It purports to re-organize the marine corps; it makes great changes as to the officers and their rate of pay; and the 7th section provides that the commissions of the officers shall not be vacated. Why put in such a clause, unless there was a design to put the corps upon a new footing altogether? The 5th section changes the pay, emoluments, and allowances, and puts them on the footing of infantry; and the 10th section repeals all laws inconsistent with the act. The acts of 1818 and 1834 repealed all former laws, both as to infantry and marines.

2. Rations.

By the Act of 1797, double rations were given to a commander of a separate post; but the Act of 1802 changed this rule, and substituted another. Instead of giving them to every commander, the President was to designate the number of rations for each post, according to circumstances. This was a repeal of the Act of 1797. They cannot both stand.

But it is said that the joint resolution of 1832 changed the rule, as to officers of marines, and rendered lawful the same pay, rations, &c., which they had, in fact, received before 1829. Suppose we admit this. That resolution looked to a future change, which was made by the Act of 1834, which referred not only to pay, but allowances and emoluments. Infantry are not

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entitled to these allowances, and therefore the marines cannot be.

These considerations furnish answers to the three first certified questions.

With regard to the fourth, it may be said that the army regulations give double rations to such posts as the War Department shall authorize; but the Act of 1802 says that the President is the person who is to give the authority; and supposing that the War Department represents the special authority of the President, then we say, that the department never gave such authority for this post. The defendant must show that it did.

Besides, the regulation was not intended to apply to the marines. They were under the Navy Department.

563*] *The 5th question is easily answered. If the defendant was not entitled to the allowances by law, he cannot claim them because Congress placed money in the hands of the executive, in case it should be wanted. The service might have been performed or it might not, and the money was ready in case it should be performed. But here it was not.

3. Clothing.

Ten dollars per month were to be given to commanders of companies. But Freeman was a major by commission, and lieutenant-colonel by brevet. The law only includes captains; and, moreover, the record does not show that there was a company of marines at Boston, and the fact, I believe, was not so.

Mr. Justice WAYNE delivered the opinion of the court:

Several questions occurred upon the trial of this cause in the court below, upon which the opinions of the judges were opposed, and they were certified to this court for decision.

From a careful examination of all the acts of Congress relating to the pay and emoluments of brevet officers, and those acts establishing and organizing the marine corps, we are of the opinion, whatever may have been a different practice, that the brevet officers of the marine corps have always been by law upon the same footing with other officers of the military establishment of the United States, in respect to the circumstances which entitle them to pay and emoluments, and that they continue to be so. Brevet pay and emoluments were orginally given by the Act of 1812 (2 Story's Laws, 1278), and by the Act of 1814 (2 Story's Laws, 1414), when breveted officers commanded separate posts, districts, stations, or detachments. But an act was passed in 1818 (3 Story's Laws, 1672), regulating the pay and emoluments of brevet officers, the 1st section of which is, that "the officers of the army who have brevet commissions, shall be entitled to and shall receive the pay and emoluments of their brevet rank, when on duty and having a command according to their brevet rank, and at no other time." The 2d section is, "that no brevet commission shall hereafter be conferred, but by and with the advice of the Senate." By the Acts of 1812 and 1814, they were conferred by the President alone. By the 1st section of the Act of 1818, it will be perceived that pay and emoluments were attached to command, and not, as they had been, to the command of separate posts, stations, districts, or detachments. That the Act of 1818 repealed the 4th section of the Act of 1812, no one doubts. But it is said, it is not a repeal of the 3d section of the Act of 1814, because the act, in terms, speaks of the officers of the army who have brevet commissions, and not of such officers of the marine corps. It may be well to state that the 3d section of the Act of 1814 is a transcript of the 4th section of the Act of 1812, except that it has in it the words "officers of the marine corps," instead of "officers of the army;" and that the *words "stations [*564 or detachments" were substituted for "posts, districts, or detachments." The first point for consideration is, was the Act of 1818 a repeal of the 4th section of the Act of 1812, and of the 3d section of the Act of 1814, as to the condition upon which brevet officers were to have additional pay and emoluments? It is conceded that it repealed the 4th section in the Act of 1812. We are of opinion that it repealed also the 3d section of the Act of 1814. It cannot be denied that the marine corps is an addition to the "military establishment of the United States." It is declared to be so in the act by which it was organized. Now, though neither that fact, nor the words "military establishment," as they are used in the acts of Congress, will of themselves authorize the inclusion of officers of the marine corps, within the words "officers of the army," yet considering the subject matter of the Act of 1818; the application of the 2d section of the act to all breveted officers; and the assimilation of the marine corps, by the Act of 1814, to the army, to give to its officers brevet commissions, and pay, exactly, too, in the same way as they were given to the officers of the army, by the Act of 1812; we do not see how, consistently with a correct judicial interpretation, the conclusion can be resisted, that Congress did intend, in passing the Act of 1818, to place the officers of the marine corps and the officers of the army upon the same footing, in respect to brevet pay and emoluments. Though what has been differently done is binding upon the government, and cannot be recalled, to the pecuniary disadvantage of any officer, who may have received brevet pay and emoluments, not according to the Act of 1818, no erroneous practice under it, of however long standing, can justify the allowance of a claim, contested by the government, in a suit, contrary to what is the true meaning and intent of that act. The error of the accounting officers of the treasury, and of the officers of the marine corps, in the construction of the Act of 1818, arose from that act having been considered by itself, without any reference to other statutes relating to brevet commissions and pay, and without any examination whether the words "officers of the army," as used in the 1st section of the Act of 1818, though they are descriptive of a particular class, were not intended, from their connection with the subject matter of the act, to comprehend all officers of the military establishment of the United States, who, when the act was passed, were only under like circumstances entitled to brevet pay and emoluments.

The correct rule of interpretation is, that if divers statutes relate to the same thing, they ought all to be taken into consideration in construing any one of them, and it is an established rule of law, that all acts *in pari materia* are to be taken together, as if they were one law.

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(Doug., 80; 2 Term Rep., 387, 586; 4 Maule & Selw., 210.) If a thing contained in a subsequent statute, be within the reason of a former statute, it shall be taken to be within the meaning of that statute (Lord Raym., 1028); and if [*565] it can be gathered from a subsequent statute *in pari materia*, what meaning the Legislature attached to the words of a former statute, they will amount to a legislative declaration of its meaning, and will govern the construction of the first statute. (*Morris* v. *Mellin*, 6 Barn. & Cress., 454; 7 Barn. & Cress., 99.) Wherever any words of a statute are doubtful or obscure, the intention of the Legislature is to be resorted to, in order to find the meaning of the words. (*Wimbish* v. *Tailbois*, Plowd., 57.) A thing which is within the intention of the makers of the statute, is as much within the statute, as if it were within the letter. (*Zouch* v. *Stowell*, Plowd., 366.) These citations are but different illustrations of the rule, that the meaning of the Legislature may be extended beyond the precise words used in the law, from the reason or motive upon which the Legislature proceeded, from the end in view, or the purpose which was designed—the limitation of the rule being, that to extend the meaning to any case not included in the words, the case must be shown to come within the same reason upon which the law-maker proceeded, and not only within a like reason. This court has repeatedly, in effect, acted upon the rule, and there may be found, in the reports of its decisions, cases under it, like the cases which have been cited from the reports of the English courts. In 4 Dall., 14, "The intention of the Legislature, when discovered, must prevail, any rule of construction declared by previous acts to the contrary notwithstanding." In 2 Cranch, 33, "A law is the best expositor of itself—that every part of an act is to be taken into view for the purpose of discovering the mind of the Legislature," &c., &c. In the case of *The United States* v. *Fisher et al., Assignees of Blight*, in the same book, the court said, "It is undoubtedly a well established principle in the exposition of statutes, that every part is to be considered, and the intention of the Legislature to be extracted from the whole," &c. In 2 Peters, 662, "A legislative act is to be interpreted according to the intention of the Legislature, apparent upon its face. Every technical rule, as to the construction or force of particular terms, must yield to the clear expression of the paramount will of the Legislature." In Paine's C. C. Rep., 11, "In doubtful cases, a court should compare all the parts of a statute, and different statutes *in pari materia*, to ascertain the intention of the Legislature." So in 1 Brockenb. C. C. Rep., 162. In the construction of statutes, one part must be construed by another. In order to test the legislative intention, the whole statute must be inspected. No one of the cases cited will justify; nor have they been cited to sanction an equitable construction of statutes beyond the just application of adjudicated cases. They have been brought together upon this occasion, for the purpose of showing how many authorities there are to sustain the conclusion, that the Act of 1818, regulating the pay and emoluments of brevet officers, repealed the Act of 1814, upon which the defendant relies to support his claim to brevet pay. Our answer to the first question then is, that a brevet field officer of the marine [*566] corps is not entitled, by law, to brevet pay and rations, by reason of his commanding a separate post or station, if the force under his command would not entitle a brevet field officer of infantry, of a similar grade, to brevet pay and rations. We will add to our exposition of the law upon this point, that brevet officers of the marine corps, in respect to pay and emoluments, were included under the Army Regulation 1124 sanctioned on the 1st March, 1825; were included also in the regulation upon the subject of brevet pay, sanctioned by the President December 1, 1836, and that they may claim brevet pay and emoluments under the regulations of 1841, when they exercise a command, according to the provisions regulating brevet pay, in page 344, Army Regulations of 1841. This right to brevet pay results from the marine corps having been subjected, by the Act of 1798 (1 Story's Laws, 542), and by other acts of Congress, to the same rules and articles of war "as are prescribed for the military establishment of the United States," and from the exception in the 2d section of the Act of 30th June, 1834, taking them out of the regulations which might be established for the navy, when detached for service with the army, by order of the President of the United States.

To the second question we reply, that the Act of 1834, ch. 132, does not repeal the first section of the Act of 1818, regulating the pay and emoluments of brevet officers. That section of the act is still in force, and upon it rests the army regulations, in relation to brevet pay and emoluments. The Act of 1834 only repeals those sections in the acts of 1812 and 1814, and in the Act of 1818, by which the President was authorized to confer, and the Senate was permitted to confirm, brevet commissions conferred upon officers of the army, or officers of the marine corps, for ten years' service in any one grade, excepting such officers as had, before the passage of the act, acquired the right to have brevet rank conferred by ten years' service in any one grade, if the President should think fit to nominate them to the Senate for brevet commissions.

To the third question we reply, that the 5th section of the Act of the 30th June, 1834, is a repeal of the joint resolution of the two houses of Congress of the 25th May, 1832, respecting the pay and emoluments of the marine corps.

The fourth question involves the charge made by the defendant for double rations. Additional rations are provided for by the 5th section of the Act of 1802. (2 Story's Laws, 881.) "To the commanding officer of each separate post, such additional number of rations as the President of the United States shall, from time to time, direct, having respect to the special circumstances of each post," is the language of a part of the section. It is the authority for the 1125th paragraph in the Army Regulations of 1825. The President sanctioned those regulations, and by doing so, delegated his authority, as he had a right to do, to the Sec- [*567] retary at War. The Army Regulations, when sanctioned by the President, have the force of law, because it is done by him by the authority of law. The Regulations of 1825, then, were

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as conclusive upon the accounting officer of the treasury, whilst they continued in force, as those of 1836 afterwards were, and as those of 1841 now are. When, then, an officer presents, with his account, an authentic document or certificate of his having commanded a post or arsenal, for which an order has been issued from the War Department, in conformity with the provisions of the Army Regulations, allowing double rations, his right to them is established, nor can they be withheld, without doing him a wrong, for which the law gives him a remedy. But as the question in this case must be decided upon the agreed statements of facts in the record, between Colonel Freeman and the District Attorney of the United States, we have no hesitation in answering it adversely from the claim of the defendant, for double rations, as the fact does not appear in the record that he had such a command of a post or arsenal, at which double rations had been allowed, according to the Army Regulations which were in force, from the time his account begins, or according to those subsequently sanctioned by the President. To the fifth question, we reply, that the fact of appropriations having been made by Congress for double rations, does not determine what officers in command are entitled to them. The sixth question relates to the charge of the defendant for compensation for his duties and responsibilities, with respect to clothing, arms, and accoutrements," while he was a captain in the line of the marine corps, and in command of the marines on the Boston station. The question, as it is put, makes it necessary for us to repeat what has been already said in a previous part of this opinion, that a brevet field officer of the marine corps, commanding a separate post, without a command equal to his brevet rank, is not entitled to brevet pay and emoluments. But if such brevet officer is a captain in the line of his corps, and in the actual command of a company, whether he is in command of a post or not, he is entitled to the compensation given by the 2d section of the Act of the 2d March, 1827. (3 Story's Laws, 2057.) We cannot give any other answer to this question, because the first part of it attaches brevet pay and emoluments to the command of a separate post, for which it is not allowed by law, and cannot therefore influence any right to compensation which may have accrued to a captain in the line under the 2d section of the Act of the 2d March, 1827. That act is in full force, unrepealed in any way by the Act of 1834, for the better organization of the marine corps. (4 Story, 2383.) And captains and subalterns of that corps are as much entitled to its provisions, as any other captains or subalterns in the military establishment of the United States. If there was any doubt of this, before the Act of 1834 was passed, the 5th section of that act

568*] must be considered *as having put an end to it. It is, "that the officers of the marine corps shall be entitled to, and receive the same pay, emoluments, and allowances, as are now, or may hereafter be allowed to similar grades in the infantry of the army," subject to the exception in the section following the words just cited.

We shall direct the foregoing answers to the questions, upon which the judges in the court below were opposed in opinion, to be certified to that court.

Cited—1 Black, 61; 11 Wall., 504; 18 Wall., 301; 19 Wall., 427; 1 Wood. & M., 48-51; 3 Wood. & M., 292; 2 Sawy., 203; 7 Bank. Reg., 207; 3 Biss., 234; 3 Blatchf., 335.

JAMES B. ANDREWS, *Appellant*,

v.

WILLIAM H. WALL AND JOHN H. GEIGER, *Defendants*.

Agreements of consortship between masters of vessels engaged in salvage business extends to owners and crew—dissolution of—jurisdiction of admiralty.

An agreement of consortship between the masters of two vessels engaged in the business known by the name of wrecking, is a contract capable of being enforced in an admiralty court, against property or proceeds in the custody of the court.

The case of Ramsay v. Allegre (12 Wheaton, 611) commented on, and explained.

Such an agreement extends to the owners and crews, and is not merely personal between the masters.

If made for an indefinite period, it does not expire with the mere removal of one of the masters from his vessel, but continues until dissolved upon due notice to the adverse party.

Where there is no other evidence than the answer of its having been a part of the original agreement, that such removal should dissolve the contract, the evidence is not sufficient.

Whenever proceeds are rightfully in the possession and custody of the admiralty, it is an inherent incident to the jurisdiction of that court to entertain supplemental suits by the parties in interest to ascertain to whom those proceeds rightfully belong, and to deliver them over to the parties who establish the lawful ownership thereof.

THIS was an appeal from the Court of Appeals in Florida, and grew out of the following circumstances:

There were two vessels, one called the Globe, and the other the George Washington, engaged in the business of assisting vessels which were wrecked, or in danger of becoming so, on the coast of Florida. Between these two there existed the agreement of consortship, which will be spoken of presently.

For assistance rendered by the Globe to the ship Mississippi and cargo, an amount of $5,522.49 was decreed as salvage. Andrews, the appellant, was part owner of the Globe, and Wall and Geiger, the defendants in error, were part owners of the George Washington.

Wall and Geiger filed a petition in the Superior Court for the Southern District of Florida (being the same court which decreed the salvage), as follows:

*"To the honorable WM. MARVIN, [*569 Judge of the United States Superior Court, Southern Judicial District of Florida, in admiralty:

"Your petitioners respectfully represent, on oath, to your honor, that they, with J. A. Thouron, are the only owners of the schooner George Washington; that said schooner has for some time past been consorted with the sloop Globe, in the business of wrecking upon this reef, and was so consorted with said sloop

NOTE.—*As to salvage*, see note to Stratton v. Jarvis, 8 Pet., 4.

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when that vessel performed the services to the ship Mississippi which have resulted in the payment of salvage to said sloop by your honor, in admiralty, on the 31st day of May, 1841; that a portion of said salvage is justly due and owing unto your petitioners from said consortship, and that the master and agent of said sloop Globe, J. B. Andrews, positively refuses to pay to them any portion of the same. They, therefore, respectfully represent this matter, and pray the interference of your honor, that you may order the clerk of your honor's court to retain such portion of said salvage, now about to be paid to said sloop, as to your honor may appear equitable under said consortship, due to said petitioners as owners of schooner the George Washington. And they are ready to show to your honor the exact sum due to them under said consortship. And will ever pray.

" W. H. WALL,
" JOHN H. GEIGER,
" S. R. MALLORY, Proctor."

In conformity with this petition the judge directed the sum of $2,455.64 to be retained, which Wall and Geiger claimed by a subsequent petition.

Andrews answered it as follows:

"The answer of James B. Andrews, part owner of the sloop Globe, would respectfully represent, that a notice of a petition filed by Wm. H. Wall and John H. Geiger, who claim as part owners of the schooner George Washington, claiming a part of the salvage decreed to Thos. Greene, master of the sloop Globe, in the case of *Thomas Greene et al.* v. *Ship Mississippi and cargo*, and has been served upon him. To which he comes into court, and says, that—

"1. The petitioners have no right to come into your honorable court in this summary way, and obtain a decree against the earnings of the master and crew of the sloop Globe, who were libelants in the above case.

"2. That if there is anything due by the Globe, her crew and owners, it must be by some contract existing at the time the services for which salvage has been decreed were rendered, and that if such contract exists, it was not made with petitioners by your respondent.

"3. Your respondent admits that there was a consortship or agreement entered into previously to the services rendered to the ship Mississippi, by him, as master of the sloop Globe, and —— Russel, master of the schooner George Washington, by which they agreed 570*] *to divide their respective earnings or gain between each other, their crews, and the owners of the respective vessels, in a certain proportion, viz.: the Globe was to be rated at sixty-three tons, and the George Washington at fifty-three tons, and the number of men each vessel might have on board at the time any money might be earned. But he alleges that such contract was made between him and Captain Russel for an indefinite time, and considered that it only remained in force so long as they both remained on board of their respective vessels and earned salvage; and that at the time the money in dispute was earned, that Thomas Greene, the mate of the Globe, was master, and in that capacity rendered services to the ship Mississippi, and filed a libel in his own name, as such, and being recognized as master by this court, salvage on the said ship was decreed to him in his own name.

"Whereupon your respondent prays that your honor will dismiss the said petition, and that the amount of the money retained from the salvage decreed to Thomas Greene be paid over to him, together with his costs in this behalf expended. And your respondent, &c.

" JAMES B. ANDREWS,
" W. R. HACKLEY, Proct. for Resp."

After the cause had been argued, the court gave the following order:

"Ordered, That the clerk ascertain the number of men on board the sloop Globe and George Washington respectively at the time of the earning of the salvage by the Globe for services rendered the Mississippi and cargo, and that he divide the salvage in that case decreed the Globe, between the Globe and the George Washington, man for man, and ton for ton, taking the Globe at sixty-three tons, and the George Washington at fifty-three tons, and that he pay to Wm. H. Wall and John H. Geiger the George Washington's portion for and on behalf of all persons interested therein.

"Ordered, That each party pay his own costs in this suit."

The result of the order was an apportionment of the fund between the two vessels as follows:

To the Globe - - - - -	$3,066.85
To the George Washington -	2,455.64
Total salvage - - - - -	$5,522.49

From this decree Andrews appealed to the Court of Appeals of Florida, which affirmed the sentence, and from this affirmance he appealed to this court.

Mr. Clement Cox for the appellant.

Mr. C. J. Ingersoll for the defendants.

Mr. Cox made the two following points:

1. That the record shows no subsisting contract of consortship at the time of the salvage service.

*2. That a court of admiralty has no [*571 jurisdiction of the case.

In support of the first point, he said that he had not been able find any judicial exposition of the contract of consortship. The court below decided on two grounds: 1st. That the Globe was a wrecker, and, 2d. That contracts of consortship were usual. But the record shows no evidence of these facts, and the court was not warranted in assuming them. (8 Gill & Johns., 449, 456.)

Upon the second point, he said that he had not found a case where a court of admiralty had taken such jurisdiction, and it ought not to have been assumed. (12 Wheat., 611, 613; 3 Peters, 433; Baldw., 544; Bee, 199; 1 Pet. Adm. Rep., 228; Gilp., 514, 184; Dunlap's Adm. Pr., 29; 1 Hagg., 306; 13 Peters, 175.)

Mr. C. J. Ingersoll, for defendants, said that he could scarcely add anything to the reasoning upon which the court below founded its opinion, which was inserted in the record. The contract was one of an admiralty character, and the case was like that of joint captors, the rules relating to which were familiar to the court. It was a daily practice in a court of admiralty to distribute funds which were brought into court. The answer itself admitted the contract.

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Mr. Justice STORY delivered the opinion of the court:

This is the case of an appeal in admiralty, from a decree of the Court of Appeals of the territory of Florida, affirming the decree of the judge of the Superior Court of the Southern Judicial District of Florida. It appears from the proceedings, that upon a libel filed in the Superior Court of the territory, in behalf of the owners and crew of the sloop Globe, salvage had been awarded in their favor, against the ship Mississippi; that a part of the salvage so decreed remained in the registry of the court; and that the present petition was filed by Wall and Geiger, on behalf of the owners of the schooner George Washington, for the share of the salvage due to them, as consorting with the Globe in the business of salvage. It seems to be a not uncommon course among the owners of a certain class of vessels, commonly called wreckers, on the Florida coast, with a view to prevent mischievous competitions and collisions in the performance of salvage services on that coast, to enter into stipulations with each other, that the vessels owned by them respectively shall act as consorts with each other in salvage services, and share mutually with each other in the moneys awarded as salvage, whether earned by one vessel or by both. It is admitted in the answer of the appellant, who was the master and part owner of the Globe, and the original respondent in the court below, that such an agreement or stipulation was entered into, for an indefinite time, between himself, as the master of the Globe, and the master of the George Washington, before the salvage service in question; but he insists that it was to remain in force only so long as both remained masters of their respective 572*] *vessels, and earned salvage; and that at the time of the salvage services in question, one Thomas Greene, mate of the Globe, acted as master thereof. He also insists, that the libellants have no right to come into the court, in a summary way, to obtain a share of the salvage; and lastly, he insists that the agreement or stipulation was not made between him and the libelants.

The courts below overruled all these matters of defense; and upon the present appeal the same are brought before us for consideration and decision. In the first place, then, as to the original agreement or stipulation for consortship, it must, although made by the masters of the vessels, be deemed to be made on behalf of the owners and crews, and to be obligatory on both sides, until formally dissolved by the owners. The mere change of the masters would not dissolve it, since in its nature it is not a contract for the personal benefit of themselves, or for any peculiar personal services. It falls precisely within the same rule, as to its obligatory force, as the contract of the master of a ship for seamen's wages, or for a charter-party for the voyage, which, if within the scope of his authority, binds the owner, and is not dissolved by the death or removal of the master. Besides, in the present case, the agreement or stipulation for consortship was for an indefinite period, and, consequently, could be broken up or dissolved only upon due notice to the adverse party; and the mere removal of the master of one of the vessels, by the owner thereof, for his own benefit or at his own option, could in no manner operate, without such notice, to the injury of the other. In the next place, there is not a particle of evidence in the case, that at the time of the agreement or stipulation for consortship, it was agreed between the parties, that a change of the masters should be treated as a dissolution thereof. The answer is not of itself evidence to establish such a fact, but it must be made out by due and suitable proofs; for in the admiralty the same rule does not prevail as in equity, that the answer to matters directly responsive to the allegations of the bill, is to be treated as sufficient proof of the facts, in favor of the respondent, unless overcome by the testimony of two witnesses, or of one witness and other circumstances of equivalent force. The answer may be evidence, but it is not conclusive; and in the present case, the dissolution of the agreement or stipulation for consortship, by the change of the master of the Globe, seems to be relied on as a mere matter of law, and not as a positive ingredient in the original contract.

The material and important question, therefore, is, whether the agreement or stipulation of consortship is a contract capable of being enforced in the admiralty against property or proceeds in the custody of the court. We are of opinion that it is a case within the jurisdiction of the court. It is a maritime contract for services to be rendered on the sea, and an apportionment of the salvage earned therein. Over maritime contracts the admiralty possesses a clear and established *jurisdiction, [*573 capable of being enforced *in personam*, as well as *in rem;* as is familiarly seen in cases of mariners' wages, bottomry bonds, pilotage services, supplies by material men for foreign ships, and other cases of a kindred nature, which it is not necessary here to enumerate. The case of *Ramsay* v. *Allegre* (12 Wheat., 611) contains no doctrine, sanctioned by the court to the contrary. It is within my own personal knowledge, having been present at the decision thereof, that all the judges of the court, except one, at that time concurred in the opinion that the case was one of a maritime nature, within the jurisdiction of the admiralty, but that the claim was extinguished by a promissory note having been given for the amount, which note was still outstanding and unsurrendered. It became, therefore, unnecessary to decide the other point. The general doctrine had been previously asserted in the case of *The General Smith* (4 Wheat., 438), and it was subsequently fully recognized and acted upon by this court in *Peroux* v. *Howard* (7 Peters, 324). Upon general principles, therefore, there would be no difficulty in maintaining the present suit, as well founded in the jurisdiction of the admiralty.

There is another view of the matter, which does not displace but adds great weight to the preceding considerations. This is a case of proceeds rightfully in the possession and custody of the admiralty; and it would seem to be, and we are of opinion that it is, an inherent incident to the jurisdiction of that court, to entertain supplemental suits by the parties in interest, to ascertain to whom those proceeds rightfully belong, and to deliver them over to the parties who establish the lawfull ownership thereof. This is familiarly known and exercised in cases

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of the sales of ships to satisfy claims for seamen's wages, for bottomry bonds, for salvage services, and for supplies of material men, where, after satisfaction thereof, there remain what are technically called "remnants and surplusses," in the registry of the admiralty. But a more striking example is that of supplemental libels and petitions, by persons asserting themselves to be joint captors, and entitled to share in prize proceeds, and of custom-house officers, for their distributive shares of the proceeds of property seized and condemned for breaches of the revenue laws, where the jurisdiction is habitually acted upon in all cases of difficulty or controversy.

Upon the whole, without going more at large into the subject, we are of opinion that the decree of the Court of Appeals of Florida ought to be affirmed, with costs.

Cited—5 How., 475; 19 How., 38; 1 Black, 524; 20 Wall., 223; 1 Brown, 208; 1 Ben., 467; 5 Ben., 442; Olcott, 288, 358, 356, 363; 2 Biss., 123; 3 Biss., 102; McAll., 14, 15; 2 Wood. & M., 114; 6 Bank. Reg., 459; Newb., 278; 2 Dill., 308; 2 Curt., 83; 1 Sprague, 442; Taney, 495; Abb. Adm., 342.

574*] *AUGUSTUS AND EDWARD BONNAFEE, Partners under the name and style of BONNAFEE & Co., *Plaintiffs in Error*,

v.

IRA E. WILLIAMS, CHARLES S. SPANN, AND B. H. COOK, *Defendants in Error.*

Citizen trustee of one State may sue citizen of another State in U. S. Circuit Court without reference to residence of cestui que trust—*note payable to bearer for use of maker's company.*

The Circuit Court of the United States has jurisdiction where a promissory note is made by a citizen of one State payable to another citizen of the same State or bearer, and the party bringing the suit is a citizen of a different State, although upon the face of the note it was expressed to be for the use of persons residing in the State in which the maker and payee lived.

Where the citizenship of the parties gives jurisdiction, and the legal right to sue is in the plaintiff, the court will not inquire into the residence of those who may have an equitable interest in the claim.

THIS case was brought up by writ of error from the Circuit Court of the United States for the Southern District of Mississippi.

The plaintiffs in error were citizens of the State of New York; the defendants in error, of Mississippi.

The defendants in error executed four joint and several promissory notes, promising to pay to Cowles Meade, or bearer, for the use of the Real Estate Banking Company of Hinds County, the sums of money therein mentioned.

In 1841, the plaintiffs brought suit upon these notes, alleging themselves to be the lawful bearers thereof.

The defendants demurred upon the two following grounds:

"1. The plaintiffs cannot maintain the action, because, by their own showing, the defendants who are sued are also a part of the persons for whose use the suit is commenced.

"2. The court can have no jurisdiction of this case, because, although it is true, the nominal plaintiffs are the bearers of the paper sued on, and citizens of a State other than Mississippi, yet the usees, or those for whose benefit the suit is brought, for anything which appears in the declaration, are citizens of the State of Mississippi; and there are all other causes," &c.

The Circuit Court sustained the demurrer; from which decision a writ of error brought the case to this court.

The cause was argued for the plaintiffs in error by *Mr. Walker*, as follows:

The first cause of demurrer was as follows: "The defendants who are sued are also a part of the persons for whose use the suit is brought."

Now, the suit is brought in the name of Bonnafee & Co. alone, and not for the use of any one, and therefore the demurrer cannot be sustained on this ground. The note was payable to "Cowles Meade, or bearer, for the use of the Real Estate Banking Company of Hinds County," and it was assigned by delivery, by Cowles Meade, to the plaintiffs, who, throughout every count of the declaration, are described as the lawful bearers of the note, and in whose name *alone the suit is brought. It is true, [*575 the note was payable to Cowles Meade, for the use of the Real Estate Banking Company, and that Cowles Meade was one of that company; but this could constitute no objection to the jurisdiction, because, before a court of common law, this company had no rights whatever. They were unincorporated, and, therefore, could not sue at law in the name assumed by them; and even if they could, no right of action would accrue to them, where the note, as in this case, was not payable to them, but to Cowles Meade, or bearer, in whom alone, or the bearer, the sole legal title was vested. The question, therefore, intended to be raised by the demurrer, does not apply to this case. The legal title is vested in any bearer, and the fact that the bearer derived title by delivery, from Cowles Meade, can have no injurious effect upon the title of the plaintiffs.

But it is said that Cowles Meade, to whom, or bearer, the note is payable, appears to be one of the same unincorporated banking company for whose use the note is given. But if Cowles Meade delivered the note to the plaintiffs, and they, as is the fact, are not members of the same banking company, still the question does not arise, that one partner cannot sue another partner at law; for the plaintiffs and defendants were not partners, and the use for which the note was given does not affect the legal rights of the parties. The legal intendment is, and such is the fact, that the plaintiffs, with the consent of the banking company, were the purchasers of the note in question, and brought the suit for their own use alone. But were it otherwise, could not Cowles Meade maintain a suit at law on such a note as this of the defendants, even if Meade and the defendants were members of the same banking company? Now, the law is clearly settled that a partner-

NOTE.—*As to jurisdiction of United States courts depending upon parties, citizenship and residence*, see note to Emory v. Greenough, 3 Dall., 369; and note to Strawbridge v. Curtis, 3 Cranch, 267.

As to colorable conveyance to enable suit to be brought, and residence of assignor, see note to McDonald v. Smalley, 1 Pet., 620.

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ship can sue upon a note given by one of the partners to another, even although it be for the use of the firm. (*Van Ness* v. *Forrest*, 8 Cranch, 30.)

In that case, the person to whom the note was given was a mere trustee for the firm; yet the court maintained the action against one of the partners. The cases in which partners cannot sue each other, on account of transactions growing out of the partnership, or where the firm cannot sue a partner, are cases of unascertained balances, or where the partnership transaction has not been separated by a note or express promise. In such cases a court of law cannot sever the joint contract or liabilities, but this may be done by the parties themselves. (*Neale* v. *Turton*, 4 Bing., 149; *Coffee* v. *Brian*, 3 Bing., 54; *Gibson* v. *Moore*, 3 New Hamp., 527; *Nevins* v. *Townsend*, 6 Conn., 5; Story on Partnership, 241, 527, 320; Collyer on Partnership, 392, 504, 91, 148, 152, 147, 165; *Wright* v. *Hunter*, 1 East, 30; *Brierly* v. *Cripps*, 7 Carr. & Payne, 709; *Smith* v. *Barrow*, 2 T. R., 476; *Simpson* v. *Rochman*, 7 Bing., 617; *Venning* v. *Leckie*, 13 East, 7; *Gale* v. *Leckie*, 2 Starkie., 96.)

Where a note is payable to A. for the use of 576*] B, the legal title is *in A, and he is the party to transfer it, to receive payment, and to sue upon it. (3 Kent's Com., 89; 1 Selwyn's *N. P.*, 292; Chitty on Bills, 180, 226, 428, 566; Bailey on Bills, 76, 115; *Chaplin* v. *Canada*, 8 Conn., 286; *Binney* v. *Phumpley*, 5 Vermont, 500.)

At law, the trustee has the whole title and interest. (*Bank of the United States* v. *Deveaux*, 5 Cranch, 91; *Irving* v. *Lowry*, 14 Peters, 300; *Bowerman* v. *Rodenus*, 7 T. R., 668; *Wake* v. *Tinkler*, 16 East, 36; *Tucker* v. *Tucker*, 4 B. & Adol., 745; Willis' Trustees, 72, and N. E., 78, 83, 86, 87; Lewin on Trustees, 267, 247, 481.)

The express purpose of the trust was, to give Meade the legal title, and enable him to sue at law.

But even if Meade could not sue, the bearer could; and Meade could receive payment, or transfer by delivery. And having done so, he is presumed to have received full value from the plaintiffs. (1 Selw. *N. P.*, 292, citing Carth., 5; 2 Vent., 307; Skinner, 264.)

The banking company are not parties plaintiffs or defendants, on the record, nor is the suit brought for their use, nor have they in fact any interest in the case. And, in the language of the Supreme Court of the United States:

"It may be laid down as a rule, we think, which admits of no exception, that in all cases where jurisdiction depends on the party, it is the party named on the record." *Governor of Georgia* v. *Madrazo*, 1 Peters, 122.)

"Jurisdiction is neither given nor ousted by the relative situation of the parties concerned in interest, but by the relative situation of the parties named on the record." (*Osborn* v. *Bank United States*, 9 Wheat., 738.)

A trustee may sue in the federal courts without reference to the domicile of his *cestui que trust*. (*Irvine* v. *Lowry*, 14 Peters, 298; *Bank United States* v. *Devaux*, 4 Cranch, 308; *Corporation of Washington* v. *Young*, 10 Wheat., 4; Story, Constitution, 566; Sergeant, C. L., 113, 114; 1 Kent's Com., 348, 349.)

These authorities are equally conclusive against the second cause assigned in the demurrer, that "those for whose benefit the suit is brought" are citizens of Mississippi.

No other cause of demurrer is assigned.

It is clear that jurisdiction is not devested, on the ground that Meade was a citizen of Mississippi, because the note was payable to him "or bearer," and, therefore, not within the provisions of the 11th section of the Judiciary Act of 1789. (*Bullard* v. *Bell*, 1 Mason, 251.) And in *Bank of Kentucky* v. *Wistar et al.* (2 Peters, 326), the court say: "The other point has relation to the form of the bills which are made payable to individuals or bearer, concerning which individuals there is no averment of citizenship, and which, therefore, may have been payable in the first instance to parties not competent to sue in the courts of the United States. But this is also a question which has been considered and disposed of in our previous *decisions. This court has uniformly [*577 held that a note payable to bearer is payable to anybody, and not affected by the disabilities of the nominal payee."

Mr. Justice McLEAN delivered the opinion of the court:

This is a writ of error from the Southern District of Mississippi.

The plaintiffs brought their action on four promissory notes, payable at different times, for different sums, and bearing different dates, except two, which were dated the 23d January, 1839. In each of the notes the defendants promised, or either of them, to pay to Cowles Meade, or bearer, for the use of the Real Estate Banking Company of Hinds County, at their banking house in Clinton, the sum named, without defalcation, for value received.

The defendants demurred to the declaration, and assigned the following causes of demurrer:

1. "The plaintiffs cannot maintain the action, because, by their own showing, the defendants who are sued are also a part of the persons for whose use the suit is commenced."

2. "The court can have no jurisdiction of this case, because although it is true, the nominal plaintiffs are the bearers of the paper sued on, and citizens of a State other than Mississippi, yet, those for whose benefit suit is brought, for anything which appears in the declaration, are citizens of the State of Mississippi."

The notes in question passed by delivery, and the plaintiffs, as bearers, have a right to sue in their own names, as the promise to pay is made to bearer. The plaintiffs allege that they are citizens of New York, and, consequently, the Circuit Court had jurisdiction of the case. Where the citizenship of the parties give jurisdiction, and the legal right to sue is in the plaintiff, the court will not inquire into the residence of those who may have an equitable interest in the claim. They are not necessary parties on the record. A person having the legal right may sue, at law, in the federal courts, without reference to the citizenship of those who may have the equitable interest. (*Irvine* v. *Lowry*, 14 Peters, 298.)

The judgment of the Circuit Court, which sustained the demurrer, is reversed, and the cause is remanded for further proceedings.

Cited—5 How., 291; 21 How., 576; 20 Wall., 124; 1 Wood. & M., 119, 135; 2 Wood. & M., 82; 1 Biss., 102, 277; 3 Dill., 266.

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578*] *THE UNITED STATES, *Plaintiff*,
v.
ELI S. PRESCOTT ET AL., *Defendants*.

Receiver of public moneys, and his sureties liable for loss by theft.

The felonious taking and carrying away the public moneys in the custody of a receiver of public moneys, without any fault or negligence on his part, does not discharge him and his sureties, and cannot be set up as a defense to an action on his official bond.

THIS case came up on a certificate of division in opinion between the judges of the Circuit Court of the United States for the District of Illinois.

On the 4th of March, 1839, Prescott was appointed receiver of public moneys at Chicago, in Illinois.

On the 1st of October, 1840, he executed a bond, together with twenty-seven other persons, who were all defendants in the present suit, in the penal sum of $150,000, the condition of which was as follows: "If the said Eli S. Prescott had truly and faithfully executed and discharged, and should truly and faithfully continue to execute and discharge, all the duties of said office, according to the laws of the United States, and moreover had well, truly and faithfully kept, and should well, truly and faithfully keep, safely, without loaning or using, all the public money collected by him, or otherwise, at any time placed in his possession and custody, till the same had been, or should be ordered by the proper department or officer of the government, to be transferred or paid out, and when such orders for transfer or payment had been or should be received, had faithfully and promptly made, and should faithfully and promptly make, the same as directed, and had done, and should do and perform, all other duties as fiscal agent of the government, which have been or may be imposed by any act of Congress, or by any regulation of the Treasury Department made in conformity to law, and also had done and performed, and should do and perform, all acts and duties required by law, or by direction of any of the executive departments of the government, as agent for paying pensions, or for making any other disbursements which either of the heads of those departments might be required by law to make, and which were of a character to be made by a depositary constituted by an act of Congress, entitled 'An Act to provide for the collection, safe keeping, transfer and disbursements of the public revenue,' approved July 4, 1840, consistently with the other official duties imposed upon him, then the said obligation to be void and of none effect; otherwise it should abide and remain in full force and virtue."

In June, 1843, the United States brought an action of debt upon this bond against Prescott and all his securities, setting forth, amongst other breaches, that on the 15th of June, 1842, Prescott was ordered by the Secretary of the 579*] Treasury to tranfer the public *moneys to Edward H. Hadduck, and that he neglected and refused so to do.

The defendants filed several pleas. The 3d, 4th, and 5th were of the same character, and it is only necessary to insert one of them.

"3. And for a further plea in this behalf, the said defendants say *actio non*, because they say that the said Eli S. Prescott, before the commencement of this suit, did pay to the said plaintiffs all moneys which came into his hands as receiver of public moneys, excepting the sum of $12,815: and the said defendants aver that the said Eli S. Prescott tendered to the said plaintiff the sum of $127 before the commencement of this suit; and the said defendants aver that whilst the said Eli S. Prescott had said money in his possession, and before the commencement of this suit, some person or persons, to said defendants unknown, feloniously did steal, take, and carry away from the possession of the said Eli S. Prescott, the sum of $11,688; part and parcel of said money received by the said Eli S. Prescott, as receiver of public moneys, although the said Eli S. Prescott used ordinary care and diligence in the safe keeping of the same, and this they are ready to verify, wherefore they pray judgment," &c.

To these pleas the plaintiff demurred generally, and the defendants joined in the demurrer.

And the cause being argued upon the said demurrer before the court, the opinions of the judges were opposed on this question, namely: Does the felonious stealing, taking, and carrying away the public moneys in the custody of a receiver of public moneys, without any fault or negligence on his part, discharge him and his sureties, and is that a good and valid defense to an action on his official bond?

Upon this question the cause came up.

Mr. Nelson, Attorney-General, for the plaintiffs.

Messrs. Dickey and *Burke* for the defendants.

Mr. Nelson said, that if it were not for the printed argument, filed on behalf of the defendants, he would have thought it enough to say, with respect to the money being stolen, that there was no such condition in the bond. It was contended by the other side, that the case was to be governed by the principles of bailment. If the bond were to be laid aside, and the case examined as if it were one of parol contract, it would still be found that the defendant was responsible. In *Southcote's* case (4 Co. Rep., 83) it was held no defense to say that goods were stolen, and in Willes, 118, it was again affirmed that a defendant was responsible for robbery. But this is not a case of general bailment; it rests on special contract. All the principles which govern it are summed up in Story on Bailments, 21. Bailments may be enlarged or restricted by special contract. The condition of the bond here is to keep safely, and it is of course a special bailment. It would be mischievous to apply the doctrine of *general bailments to such cases. If [*580 carriers are held responsible from motives of public policy, much more strongly is the necessity felt in the cases of officers of government, where the door could so easily be opened to collusion and fraud. In *Coggs* v. *Bernard* (2 Lord Raym., 918) this doctrine is indicated.

NOTE.—*As to official bonds, and their construction, and actions upon them, and liability of sureties thereon*, see note to United States v. Giles, 9 Cranch, 212; and note to Postmaster-General v. Early, 12 Wheat., 136.

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when speaking of the fifth species of bailment, and the same principle is sustained by Raymond, 220; 1 Ventris, 190; Holt, 131; 1 Wilson, 281; 1 Term Rep., 27; Strange, 128.

The case relied upon by the other side is 17 Mass. Rep., 479, where gold was deposited with the Essex Bank for safe keeping, and stolen by the officers of the bank. But that was a bailment without consideration. The bank received nothing for keeping it, whereas, in this case, the party undertook to keep the money, and was paid for it.

The argument of *Messrs. Dickey* and *Burke* was as follows:

1. The defendant, Prescott, is a depositary for hire, and unless his liability was enlarged by the special contract to keep safely, he is only subject to the liabilities imposed by law upon such a depositary.

2. The special contract to keep safely does not enlarge the liability in the case of a depositary for hire.

1st. It does not enlarge it by the ordinary meaning and acceptation of the terms "keep safely," nor,

2d. Has the judicial construction put on those words enlarged the liability.

1. The defendant is a depositary for hire, and comes under the liability imposed on such depositary. He is within the class laid down by Lord Holt (*Coggs* v. *Bernard*, 2 Lord Ryam., 917) as the 5th class of bailments, and called by *Judge* Story in his Commentary on Bailments, and Jones on Bailments, *locatio custodiæ*, or "deposits for hire," or "the hiring of care and services to be performed or bestowed on the thing delivered," or "hire of custody." (Story on Bail., sec. 8, 442, 2d ed.; Jones on Bail., 90, 91, 96, original ed.)

Such a depositary is bound to ordinary diligence, and only responsible for losses by ordinary negligence. (Story on Bail., sec. 442; Jones on Bail., 97, 98, 99; *Platt* v. *Hibbard*, 7 Cow. R., 497.)

If he uses due care, and the property deposited is nevertheless stolen, he is excused; *Coggs* v. *Bernard* (2 Lord Ryam., 918), where Lord Holt says "he is only to do the best he can; and if he be robbed, it is a good account;" and again (p. 918), "and yet if he receives his master's money, and keeps it locked up, with a reasonable care, he shall not be answerable for it though it be stolen." (See, also, Story on Bail., sec. 444, 455, 2d ed.; *Roberts* v. *Turner*, 12 T. R., 232; *Brown* v. *Anderson*, 2 Wend., 593.)

If, then, the defendant, Prescott, was such a depositary, the pleas averring that the money was stolen without and default on his part, 581*] *and that he used ordinary care in keeping the same, are good pleas, and excuse his liability.

2. The words "keep safely," in sec. 6 of the Act of July, 1840, and in the condition of the bond declared on, following the words of the act, do not alter or extend the liability, otherwise imposed by law,

1st. They do not by the ordinary meaning and acceptation of the terms.

In the construction to be given to words, they are to be received according to their ordinary meaning and import, or such meaning as is given to them by the common sense and understanding of mankind. In this sense no other construction can be given to the words "keep safely" than to keep with that degree of safety which prudent men ordinarily exercise, where safety is required; the common sense of mankind would construe it to mean reasonable safety. When A accepts to keep safely, the meaning he would be apt to give to the contract (supposing no judicial meaning had been given to the words), would be, such reasonable safety as in the exercise of prudence, he and other men ought, under the circumstances of the case, to use; and this is exactly the degree of diligence or care required in the contract of bailment called *locatio custodiæ*.

The words "keep safely," therefore, considered in their ordinary and common acceptation, do not vary the usual liability of a depositary for hire.

2d. Judicial construction has not given a higher meaning to these words.

In *Southcote's* case (4 Co., 83, 84) the plaintiff had delivered goods to the defendant to be by him safely kept. The plea was that they were stolen out of the possession of the defendant, and judgment was given because the goods were to be safely kept. The plea, however, was defective in not averring that they were stolen without his default, or that he used ordinary care and diligence, and theft being evidence of ordinary neglect according to Sir Wm. Jones (although this is now doubted), it would be presumed that the defendant had been guilty of ordinary neglect, and this is in accordance with the opinion of Sir Wm. Jones in commenting upon this case (Jones on Bail., p. 43, original edition), where he says: "If the plaintiff, instead of replying, had demurred to the plea in bar, he might have insisted in argument, with reason and law on his side, that, although a general bailee to keep be responsible for gross neglect only, yet Bennet had, by a special acceptance, made himself answerable for ordinary neglect at least; that it was ordinary neglect to let the goods be stolen out of his possession; and he had not averred that they were stolen without his default;" thereby intimating, that if such averment had been made in *Southcote's* case, the plea would have been good. In the present case the pleas contain such averments.

*The words "keep safely," then, by [*582 *Southcote's* case, and in the opinion of Jones, meant to bind the depositary to ordinary diligence only.

The case of *Coggs* v. *Bernard* (2 Ld. Raym., 909), by the opinion of Ld. Holt and the majority of the court, is to the same effect.

The question in point, decided, was, "that if a man undertake to carry goods safely and securely, he is responsible for any damage through his neglect, although he was not a common carrier, and was to have nothing for the carriage." (See 1st marginal note.)

The inference to be drawn is, if there was no neglect, he was not liable.

In commenting on the effect of the undertaking "to keep and carry safely," the judges who delivered opinions in this case differed. Lord Holt, who delivered the celebrated opinion which has been the foundation of the modern law of bailment, and which is entitled to the most consideration, together with all the other judges (except Powell, *J.*), held, as

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is remarked by *Judge* Story (Com. on Bail., sec. 35, 2d edition), "that upon a promise by a bailee, without reward to keep or carry safely, he is not responsible for injuries or losses occasioned by the acts of wrong-doers, and *a fortiori*, that he is not responsible for a theft not caused by his own neglect." In the same section, *Judge* Story remarks: "*Mr. Justice* Powys and *Mr. Justice* Gould seem to have agreed in opinion with Lord Holt." By referring to the opinion of the judges in this case, the same doctrine will be found. Lord Holt says (2 Ld. Raym., 915): "Nay, suppose the bailee undertakes safely and securely to keep the goods, in express words, yet even that won't charge him with all sorts of neglect. For if such a promise were put into writing, it would not charge so far even then. ...And if a promise will not charge a man against wrong-doers, when put in writing, it is hard it should do it more so when spoken. Doct. & Stud., 180, is in point, that though a bailee do promise to re-deliver goods safely, yet if he have nothing for the keeping of them, he will not be answerable for the acts of a wrong doer. So that there is neither sufficient reason or authority to support the opinion in *Southcote's* case; if the bailee be guilty of gross negligence he will be chargeable, but not for any ordinary neglect." (See 2 Ld. Raym., 914 and 915; Lord Holt's comment on *Southcote's* case.) In the same case, Gould, *J.*, agreeing with Lord Holt, says (2 Ld. Raym., p. 909): "So if goods are deposited with a friend, and are stolen from him, no action will lie.....But if a man undertakes expressly to do such a fact, safely and securely, if the thing comes to any damage by his miscarriage, an action will lie against him." And again (p. 910): "But when a man undertakes especially to do such a thing, it is not hard to charge him for his neglect, because he had the goods committed to his custody upon those terms." It is apparent by the reasoning of these judges, that they intended to place the liability in the case of a **583*]** special *contract to keep safely, upon the neglect or miscarriage of the depositary, and that he would not be liable for the acts of wrong-doers, without his default: and this was the opinion of Lord Holt and all the other judges, except Powell, *J.* (See Story on Bail., sec. 35.)

It is true that Powell, *J.*, in the same case, says (p. 910), "The party's special *assumpsit* and undertaking obliges him so to do the thing, that the bailor come to no damage by his neglect, and the bailee in this case shall answer accidents, as if the goods are stolen, but not such as happen by the act of God;" but from the reference made to the case of the ferryman, immediately after, he was probably alluding to the case of the common carrier. But, at any rate, the reason assigned by him for the liability of the bailee in case of accidents, as in case the goods are stolen, viz., that the bailee has a remedy against the wrong-doers, as an appeal of robbery, or accident against the hundred, is unsatisfactory. It might furnish a reason in England, where a speedy and certain remedy is given for the man robbed, by a special action on the case against the hundred for damages equivalent to his loss unless they make hue and cry after the felon, and take him, which excuses them. (3 Black. Com., 160.) But no such remedy exists here. And it is to be observed, that the reason given by Powell, *J.*, was probably altogether wrong. Sir Wm. Jones expresses his disapprobation as follows (Jones on Bail., 44, orig. ed.): "*Mr. Justice* Powell, speaking of *Southcote's* case, which he denies to be law, admits that 'if a man does undertake specially to keep goods safely, that is a warranty, and will oblige the bailee to keep them safely against perils, where he has a remedy over, but not against those where he has no remedy over.' One is unwilling to suppose that this learned judge had not read Lord Coke's report with attention; yet the case which he puts is precisely that which he opposes, for Bennet did undertake to keep the goods safely; and with submission, the degree of care demanded, not the remedy over, is the true measure of the obligation, for the bailee might have his appeal of robbery. Yet he is not bound to keep the goods against robbers without a most express agreement." (Jones on Bail., 44.)

In 2 Black. Com., 452, the same construction is given to the words "keep safely and securely," viz., "he is bound to take the same care of them as a prudent man would of his own," *i. e.*, reasonable care. And the case of *Coggs* v. *Bernard* (2 Ld. Raym., 909) is cited, and the law is spoken of as settled.

Finnucane v. *Small* (1 Espinasse R., 315) was a case in which the depositary received pay, and he was held, by the opinion of Lord Kenyon, to be liable only for ordinary neglect. In this case the property had been stolen from the depositary.

The American authorities are to the same effect.

Foster v. *The Essex Bank* (17 Mass. Rep., 479) was a case of deposit *of gold in a bank, [***584** under a memorandum signed by the cashier, that it was "left for safe keeping;" the court (Parker, *J.*) delivered an elaborate opinion, and reasons on the nature of the undertaking to keep safely in a very full and satisfactory manner (see pages 499, 500, 501 and 502), showing that the contract to keep safely, in the case of a simple depositary, extends his liability to ordinary neglect, and in the case of a depositary for hire, the principle goes no further than liability for ordinary neglect; "so that if he shows that he used due care, and nevertheless the goods were stolen, he would be excused." (17 Mass. Rep., 502.)

1 Dane's Abr. chap. 17, art. 11, sec. 3, lays down the same doctrine.

Judge Story (Story on Bail., secs. 70, 71, 2d edition) evidently leans to the same doctrine, where he says that "there is much to warrant the suggestion that in a case where the bailment is to keep safely, the depositary would not be liable for a loss by theft, unless it should arise from his own negligence, and want of due diligence and care."

Chancellor Kent (2 Kent's Com., 563, *note d*, 3d edition) alludes to the decision in 17 Mass. Rep., 479, with approbation.

The great weight of authority, then, both in England and in this country, supports the doctrine, that under the contract to keep safely, the depositary would not be liable for a theft committed without his default, and that

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in such case he is only liable for ordinary diligence.

The case relied on, chiefly, on the other side, is a *dictum* of *Lord Chief Justice* Willes (*Kettle* v. *Bromsall*, Willes R., 118), where he speaks of the liability of the depositary to keep safely, in case he is robbed of the goods. But it is to be observed that this is said as being according to *Southcote's* case, the case of *Coggs* v. *Bernard*. (Willes R., 121.) It is hardly conceivable how the judge who delivered the opinion in *Kettle* v. *Bromsall* could have fallen into such error, for the first authority cited by him (*Southcote's* case), had been expressly overruled in the last authority cited (*Coggs* v. *Bernard*); and in the last case, Lord Holt and the majority of the court, dissenting from *Southcote's* case, lay down a contrary rule (as we have shown above), viz.: that the depositary would not be liable for the acts of wrong-doers, without his default.

Chancellor Kent says, in the note above referred to, that the doctrine in *Kettle* v. *Bromsall* (Willes R., 118) and in *Southcote's* case, "is held to be exploded in the case of *Foster* v. *Essex Bank*."

A distinction has sometimes been taken between a loss by theft, and a loss by robbery, from the last being considered irresistible, and the former not so. But see, as to this, Story on Bail., sec. 39, 2d edition, where the distinction is refuted; and it is held that "no degree of vigilance will always secure a party from losses by theft," &c., &c.

585*] *When the contract is a special acceptance, the taking a reward can make no difference in the construction of it.

It is to be observed that where there is a special contract to "keep safely," the contract is expounded according to the meaning of the terms themselves, without inquiring whether a reward was paid or not. The acceptance is a sufficient consideration for the promise to keep safely, as was determined by the case in point in *Coggs* v. *Bernard* (see first marg. note); and in that case the court decided that the bailee, to keep or carry safely, is liable for ordinary negligence, without inquiring whether he received a reward or not. None was averred in the declaration, and there might or might not have been one.

In Hargrave & Butler's note to 2 Co. Litt. *n.*, 78, it is said, in reference to the decision in the case of *Coggs* v. *Bernard*, that "it was wholly grounded on a special undertaking to carry safely, without stating either that the defendant was to have hire or was a common carrier." In giving an exposition, therefore, to the contract "to keep safely," it makes no difference whether a reward was paid or not. It is the special acceptance that makes the party bound to ordinary diligence and liable for ordinary neglect.

Again: In the contract "to keep safely" it is the special acceptance (without inquiring into a reward or not) that makes the party bound to ordinary diligence; and in the ordinary contract of a depositary for a reward, it is the reward that puts the party to ordinary diligence. (Story on Bail., sec. 442; Jones on Bail., 49, 91, 98, 99, original ed.) The liability, therefore, of the special depositary to keep safely, and of the depositary for a reward, is the same; and if the depositary for a reward accepts specially, the receiving the reward cannot put him to greater diligence than what the law determines that fact shall put a depositary to, which is ordinary diligence (Story on Bail., sec. 442), and nothing more.

The cases and authorities that expound the meaning of the words "keep safely," speak of them generally in reference to the contract of *depositum*, or naked bailment without reward (Story on Bail., sec. 33, the opinion of the judges in *Coggs* v. *Bernard*, in relation to these words altering the responsibility in case of naked bailment; *Southcote's* case, 2 Black. Com., 452; 17 Mass. Rep., 479); and as enlarging the responsibility from slight diligence, in such case, to ordinary diligence. If the cases and authorities are silent as to the effect of these words in the cases of other bailees, such as the depositary for hire, common carrier, &c., it is because, in these cases, their ordinary legal liability is the same, or more extensive, than the words "keep safely" import, requiring ordinary diligence in some, and extraordinary diligence in others. No one would contend that these words enlarge the responsibility of a common carrier, who is liable for more than what they would import, viz., for all losses except "by the act of God, or the king's enemies;" *neither should it be contended [*586 that they enlarge the responsibility of the bailee for hire, whose usual legal responsibility is the same as what the special acceptance in the case of simple deposit has been decided to be, viz., ordinary diligence. These words only make a difference in the case of *depositum*, or naked bailment, because the usual liability in that case, for gross neglect only, is inconsistent with safe keeping. And this agrees with Sir William Jones (p. 61, original ed.) where he says, in remarking upon the opinion of Powell, *J.*, in *Coggs* v. *Bernard*, "Now, the reason assigned by the learned judge for the cases in the register and year books, which were the same with *Coggs* v. *Bernard*, viz., the party's special *assumpsit*, obliged him so to do the thing that the bailor come to no damage by his neglect, seems to intimate that the omission of the words *salvo et secure* would have made a difference in this case, as in that of a deposit, but I humbly contend that those words are implied by the nature of a contract which lies in feasance," &c. In the present case the duty of the receiver, for which he is paid, lies in feasance, for he is to receive, keep, transfer, and pay out, and do all other acts, as fiscal agent, which may be imposed on him by law, or the directions of the Treasury Department. (Sec. 6, Act of 1840.)

By section 12 of the Act of 4th July, 1840, government agents are required to examine "the money on hand and the manner of its being kept;" and by section 13, the register is required to examine and report, from time to time, the condition of the money on hand with the receiver; and by section 14, the officers may be allowed for fire-proof chests, vaults, &c., for safe keeping, to be expressly authorized by the Secretary of the Treasury, whose directions, &c., "are to be strictly followed."

The law, then, vests the discretion of the safe keeping, in a measure, in government agents,

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and in the Secretary of the Treasury, "whose directions are to be strictly followed." If, then, the Secretary of the Treasury has directed the money, deposited with the receiver, to be placed in a particular place, vault, &c., and it is stolen there: or, if the government agent, having examined "the manner of its being kept," is satisfied, and so reports, and still the money is stolen; the receiver, in either case, would not be liable, without his default (Story on Bail., sec. 74, 2d ed.); "if the depositor agree that the goods may be kept in a particular place, &c., he cannot object afterwards that the place is not a safe one." And *non constat* but that, in the present case, the money had been directed to be kept in the particular place where it was stolen, nor but that the government agent had examined "the manner of its being kept," and reported it to be safe; in either of which cases the defendant, without his own default, would not be liable.

Finally, it may be said that government requires nothing unreasonable from its officers. If, as in the case of *The Essex Bank*, where $53,000 of gold was deposited, under a memo., **587*]** *for safe keeping, and who might be considered in the light of a public depositary, and where considerations of public policy, in return for the extraordinary privileges conferred on the bank, were entitled to all their weight, the bank was held to ordinary neglect only, why should greater responsibility be thrown on a receiver of public money? *Chief Justice* Parker in that case (17 Mass. Rep., 501) says, "and this certainly is the more reasonable doctrine, for the common understanding of a promise to keep safely, would be, that the party would use due diligence and care to prevent the loss or accident; and there is no breach of faith or trust, if, notwithstanding such care, the goods should be spoiled or purloined." A contrary doctrine to this would be unreasonable. It would also be against public policy; for, if the receiver is to be held liable, when money is stolen from him without his default, having used due diligence and care in the safe keeping, men of common prudence and responsibility would cease to become his sureties, since they would make themselves responsible, not merely for his prudence, good faith, and honesty, in keeping money, but sureties against the cunning, dishonesty, and villainy of all mankind.

Mr. Justice McLEAN delivered the opinion of the court:

This action was brought in the Circuit Court for the District of Illinois, on a bond given by Prescott, with the other defendants as his sureties, for his faithful performance of the duties of receiver of public moneys, at Chicago, in the State of Illinois. The defense pleaded was, that the sum not paid over by the defendant, Prescott, and for which the action was brought, had been feloniously stolen, taken, and carried away, from his posession, by some person or persons unknown to him, and without any fault or negligence on his part; and he avers that he used ordinary care and diligence in keeping said money, and preventing it from being stolen.

To this plea the plaintiffs filed a general demurrer; and on the argument of the demurrer, the opinions of the judges were opposed on the question, whether "the felonious taking and carrying away the public moneys in the custody of a receiver of public moneys, without any fault or negligence on his part, discharged him and his sureties, and may be set up as a defense to an action on his official bond." And this point is now before this court, it having been certified to us under the act of Congress.

On the part of the defendant it is contended that the defendant, Prescott, was a depositary for hire; and that unless his liability was enlarged by the special contract to keep safely, he is only subject to the liabilities imposed by law upon such a depositary; that the special contract does not enlarge his liability.

This is not a case of bailment, and, consequently, the law of bailment does not apply to it. The liability of the defendant, Prescott, arises out of his official bond, and principles which are founded upon *public policy. [**588** The conditions of the bond are, that the said Prescott has "truly and faithfully executed and discharged, and shall truly and faithfully continue to execute and discharge, all the duties of said office" (of receiver of public moneys at Chicago), "according to the laws of the United States; and moreover has well, truly, and faithfully, and shall well, truly, and faithfully, keep safely, without loaning or using, all the public moneys collected by him, or otherwise at any time placed in his possession and custody, till the same had been or should be ordered, by the proper department or officer of the government, to be transferred or paid out; and when such orders for transfer or payment had been or should be received, had faithfully and promptly made, and would faithfully and promptly make, the same, as directed," &c.

The condition of the bond has been broken, as the defendant, Prescott, failed to pay over the money received by him, when required to do so; and the question is, whether he shall be exonerated from the condition of his bond, on the ground that the money had been stolen from him.

The objection of this defense is, that it is not within the condition of the bond; and this would seem to be conclusive. The contract was entered into on his part, and there is no allegation of failure on the part of the government; how, then, can Prescott be discharged from his bond? He knew the extent of his obligation, when he entered into it, and he has realized the fruits of this obligation by the enjoyment of the office. Shall he be discharged from liability, contrary to his own express undertaking? There is no principle on which such a defense can be sustained. The obligation to keep safely the public money is absolute, without any condition, express or implied; and nothing but the payment of it, when required, can discharge the bond.

The case of *Foster et al.* v. *The Essex Bank* (17 Mass. Rep., 479) was a mere naked bailment, and of course does not apply in principle to this case. The deposit in that case was for the accommodation of the depositor, and without any advantage to the bank, as the court say, "which can tend to increase its liability." No control whatever of the chest, or of the gold contained in it, was left with the bank or

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its officers. It would have been a breach of trust to have opened the chest, or to inspect its contents."

Public policy requires that every depositary of the public money should be held to a strict accountability. Not only that he should exercise the highest degree of vigilance, but that "he should keep safely" the moneys which come to his hands. Any relaxation of this condition would open a door to frauds, which might be practiced with impunity. A depositary would have nothing more to do than to lay his plans and arrange his proofs, so as to establish his loss, without laches on his part. Let such a principle be applied to our postmasters, collectors of the customs, receivers of public 589*] *moneys, and others who receive more or less of the public funds, and what losses might not be anticipated by the public? No such principle has been recognized or admitted as a legal defense. And it is believed the instances are few, if indeed any can be found, where any relief has been given in such cases by the interposition of Congress.

As every depositary receives the office with a full knowledge of its responsibilities, he cannot, in case of loss, complain of hardship. He must stand by his bond, and meet the hazards which he voluntarily incurs.

The question certified to us is answered, that the defendant, Prescott, and his sureties, are not discharged from the bond, by a felonious stealing of the money, without any fault or negligence on the part of the depositary; and, consequently, that no such defense to the bond can be made.

Cited—11 How., 160; 4 Wall., 185; 9 Wall., 88; 13 Wall., 24, 62; 15 Wall., 347, 349, 352; 6 Otto, 49; 1 Wood. & M., 48.

BERNARD PERMOLI, *Plaintiff in Error,*

v.

MUNICIPALITY No. 1 OF THE CITY OF NEW ORLEANS, *Defendant in Error.*

Religious liberties, right to protect citizens in, given by U. S. Constitution to respective States —Act admitting Louisiana into the Union Superseded former protective acts.

This court has not jurisdiction, under the 25th section of the Judiciary Act, of a question whether an ordinance of the corporate authorities of New Orleans does or does not impair religious liberty.

The Constitution of the United States makes no provision for protecting the citizens of the respective States in their religious liberties; this is left to the State constitutions and laws.

The Act of February 20th, 1811, authorizing the people of the territory of Orleans to form a constitution and State government, contained, in the third section thereof, two provisos; one in the nature of instructions how the constitution was to be formed, and the other, reserving to the United States the property in the public lands, their exemption from State taxation, and the common right to navigate the Mississippi.

The first of these provisos was fully satisfied by the Act of 1812, admitting Louisiana into the Union, "on an equal footing with the original States." The conditions and terms referred to in the act of admission referred solely to the second proviso, involving rights of property and navigation.

The Act of 1805 (chap. 83), extending to the inhabitants of the Orleans territory the rights, privileges and advantages secured to the Northwestern territory by the ordinance of 1787, had no further force after the adoption of the State constitution of Louisiana, than other acts of Congress, organizing the territorial government, and standing in connection with the ordinance. They are none of them in force unless they were adopted by the State constitution.

THIS case was brought up by writ of error, under the 25th section of the Judiciary Act, from the City Court of New Orleans, the highest appellate court in the State to which the question could be carried.

In 1842, the defendants in error passed the following ordinance:

*"Municipality No. 1 of the City [*590 of New Orleans.

"Sitting of Monday, October 31st, 1842. Resolved, that from and after the promulgation of the present ordinance, it shall be unlawful to carry to, and expose in, any of the Catholic churches of this municipality, any corpse, under the penalty of a fine of fifty dollars, to be recovered for the use of this municipality, against any person who may have carried into or exposed in any of the aforesaid churches any corpse, and under penalty of a similar fine of fifty dollars against any priest who may celebrate any funeral at any of the aforesaid churches; and that all the corpses shall be brought to the obituary chapel, situated in Rampart Street, wherein all funeral rites shall be performed as heretofore.

(Signed) "PAUL BERTUS, Recorder.

"Approved, November 3d.

(Signed) "D. PRIEUR, Mayor."

And a few days afterwards, the following:

"Sitting of November 7th, 1842. Resolved, that the resolution passed on the 31st October last, concerning the exposition of corpses in the Catholic churches, be so amended as to annul in said resolution the fine imposed against all persons who should transport and expose, or cause to be transported or exposed, any corpses in said churches.

"Be it further Resolved, That the said fine shall be imposed on any priest who shall officiate at any funerals made in any other church than the obituary chapel.

(Signed) "PAUL BERTUS, Recorder.

"Approved, November, 9th.

(Signed) "D. PRIEUR, Mayor."

On the 11th of November, 1842, the municipality issued the following warrant against Permoli, a Catholic priest.

"MUNICIPANITY No. 1 }
v. }
BERNARD PERMOLI. }

"Plaintiff demands of defendant fifty dollars fine, for having, on the 9th November, 1842, officiated on the body of Mr. Louis Le Roy, in the church St. Augustin, in contravention of an ordinance passed on the 31st of October last."

To which the following answer was filed:

"The answer of the Reverend B. Permoli, residing at New Orleans, to the complaint of Municipality No. 1.

"This respondent, for answer, says: true it is that the corpse of Mr. Louis Le Roy, deceased, was brought (inclosed in a coffin) in the Roman Catholic church of St. Augustin, and there exposed; and that when there thus exposed, this

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respondent, as stated in the complaint, officiated on it, by blessing it, by reciting on it all the other funeral prayers and solemnity, all the 591*] usual funeral ceremonies *prescribed by the Rites of the Roman Catholic religion, of which this respondent is a priest. That in this act he was assisted by two other priests, and by the chanters or singers of the said church.

"This respondent avers, that in so doing he was warranted by the Constitution and laws of the United States, which prevent the enactment of any law prohibiting the free exercise of any religion. He contends that the ordinance on which the complainants rely is null and void, being contrary to the provisions of the act of incorporation of the city of New Orleans, and to those of the Constitution and laws of the United States, as above recited.

"This respondent therefore prays to be hence dismissed with costs.

(Signed) "D. SEGHERS, of counsel."

The judge before whom the case was tried, decided that the ordinance was illegal, and not supported by any of the acts of the Legislature incorporating the city of New Orleans. But the case being carried up by appeal to the City Court, the decision was reversed, and judgment entered in favor of Municipality No. 1 against Permoli, for fifty dollars and costs.

The judge of the City Court, before deciding the case, made the following remarks, which it may not be inappropriate to transcribe.

"Before entering into a statement of the case, as it appeared on trial before this court, I consider it necessary to give a mere outline of the circumstances which induced the Council of the First Municipality to pass the ordinances of the 31st of October and 7th of November, 1842.

"By an ordinance of the corporation of the city of New Orleans, approved 26th September, 1827, and entitled 'An ordinance supplementary to an ordinance concerning public health.' it was 'Resolved, that from and after the first of November next, 1827, it shall not be lawful to convey and expose into the parochial church of St. Louis any dead person, under penalty of a fine of fifty dollars, to be recovered for the use of the corporation, against any person who should have conveyed or exposed any dead person into the aforesaid church; and also under penalty of a similar fine of fifty dollars, against all priests who should minister to the celebration of any funeral in said church; and that from the first of November of the present year (1827), all dead persons shall be conveyed into the obituary chapel in Rampart Street, where the funeral rites may be performed in the usual manner.'

"This ordinance continued in force during a period of fifteen years, without any opposition on the part of the Catholic clergy or population; but in the year 1842, the late lamented and venerable revered Abbé Moni, curate of the parish of St. Louis, having departed this life, some misunderstanding took place between his successor and the church-wardens. The new curate and assistant clergy abandoned the cathedral, and commenced to celebrate funeral ceremonies in other churches than the obituary 592*] chapel, this chapel being *under the administration of the said wardens. The council thereupon passed the ordinances, for the violation of which the defendant is sued.

"The case was presented here on the same pleadings as in the court below, but the plaintiff's counsel introduced evidence to prove several facts; this evidence was in substance as follows:

"The Right Reverend A. Blanc, Bishop of New Orleans, testified that the dogmas of the Roman Catholic religion did not require that the dead should be brought to a church, in order that the funeral ceremonies should be performed over them; that this was a matter of discipline only; that the witness, as bishop of this diocese, had authorized the clergy to leave the cathedral, and not to officiate at funeral rites at the obituary chapel, and that these ceremonies might be celebrated at the house where the dead person expired, or at any other place designated by the bishop.

"The Reverend C. Maenhant, curate of the parish of St. Louis, testified, that he was the curate of said parish, and in that capacity he had given orders for no funeral service to be said at the obituary chapel; that, from the situation of the clergy with regard to the wardens, these funeral services could not, with propriety, be performed at said chapel; that he had been several times applied to, by persons who wished these ceremonies celebrated over the dead bodies of their friends or relatives at the obituary chapel, but he had replied that, under present circumstances, these ceremonies would not be performed at that place, but at the chapel of St. Augustin, or in the house were the deceased person was lying, at the choice of the relatives.

"Cross-examined. This witness testified, that the St. Augustin chapel was, in his opinion, as conveniently situated for these purposes as the obituary chapel; that, in the funeral office, there is nothing calculated to disturb the public peace, nothing contrary to morals, and that the greatest decency is always observed in these mortuary rites.

"The Reverend Jacques Lœne testified, that he is the priest employed as chaplain at the obituary chapel; that he is entitled to no remuneration, besides what he receives from the church-wardens, for attending at the chapel, to bless the bodies of the dead which are brought there; that he does not celebrate funeral obsequies with that pomp which is given to them in special cases, but he continues, with the permission of the bishop, to read the office of the dead, whenever required, at the obituary chapel, as he did previous to the departure of the clergy from the cathedral; that he is not permitted to leave the chapel to accompany funerals to the cemetery.

"Cross-examined. He said, there is nothing immoral or contrary to the public tranquility in the prayers which are said at funerals.

"Messrs. José Fernandez, Bernard Turpin, Anthony Fernandez, and Joseph Génois, proved that, for fifteen years passed, the funeral service *has been performed at the obituary [*593 chapel, only that this chapel is the best situated for this purpose, and that nothing disorderly ever occurred there.

"Mr. A. Fernandez, cross-examined, added that he had never known of the occurrence of any disturbance of the public peace, during the ceremonies at the St. Augustin chapel, but he

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had heard a great deal of complaint about it; and that, being a native of New Orleans, and having almost constantly resided here, he has never seen or heard of the performance of funeral rites at any of the Protestant churches.

"The Honorable Paul Bertus, recorder of Municipality No. 1, proved, that having the misfortune to lose his sister-in-law, he desired that the funeral solemnities should have been celebrated at the obituary chapel; but that the clergy had left him no choice but between the St. Augustin chapel and the mortuary house, and that he determined upon the latter place.

"The following resolutions, passed by the church-wardens of the parish of St. Louis, were next introduced:

"'Sitting of Friday, 11th November, 1842. Resolved, That the obituary chapel shall be open for the reception of the remains of all deceased Catholics. Resolved, That all persons who desire to have dead bodies exposed in funeral state, at the said chapel, are requested to give notice to the secretary of the wardens, in order that he may cause the necessary preparations to be made.

"'Resolved, That the public be informed that the Reverend Abbé Lesne shall continue to bless all bodies of persons brought to the obituary chapel, and that he will continue to say the usual funeral prayers at said chapel.'

"A correspondence between the mayor and the curate was also introduced, by consent of parties; but the court, considering this evidence as having no legal effect upon the case, contents itself merely with the mention of its introduction.

"Henry St. Paul, Esq. (one of the defendant's counsel), testified that at Lexington, Kentucky, he saw the body of a deceased person taken into the Methodist Episcopal church, where a funeral oration was pronounced for the occasion by the Reverend Maffit, a minister of that persuasion, and that said oration was followed by prayers.

"Finally, the testimony of Mr. P. E. Crozat proved that one of his friends having departed this life, and having been warned by Mr. Rufino Fernandez of the existence of the ordinance, he had nevertheless insisted that the body should be taken to the St. Augustin chapel for the funeral rites, holding himself responsible for the fine imposed, for his opinion was on the side of the clergy."

The judge of the City Court then gave his opinion at large and decided, as has already been stated, in favor of Municipality No. 1, from which decision a writ of error brought the case up to this court.

594*] *Messrs. *William G. Read* and *Coxe* for the plaintiff in error.

*Mr. *Barton* for the defendant in error.

*Mr. *Read's* argument was as follows:

Three questions arise on this record:

1. Is the cause before the court in accordance with the requirements of the Act of September 24th, 1789, sec. 25?

2. Have the court jurisdiction over cases of infringement of the religious liberty, of citizens of Louisiana by the municipal authorities of that State?

3. Do the ordinances of November 3d and November 9th, recited in the record, infringe the religious liberty of citizens of Louisiana?

1. The first question is settled affirmatively by a bare inspection of the record. It falls within the very terms of the act.

2. For an answer to the second question, we must go back, in the first place, to the "ordinance for the government of the territory of the United States northwest of the river Ohio," passed by Congress on the 13th of July, A. D. 1787; part of preamble and article 1st: "And for extending the fundamental principles of civil and religious liberty, which form the basis whereon these republics, their laws, and constitutions are erected; to fix and establish those principles as the basis of all laws, constitutions, and governments, which forever hereafter shall be formed in the said territory.....It is hereby ordained and declared.....That the following articles shall be considered as articles of compact between the original States and the people and States in the said territory, and forever remain unalterable unless by common consent, to wit:

"Art. 1st. No person demeaning himself in a peaceable and orderly manner shall ever be molested on account of his mode of worship or religious sentiments in the said territory."

This ordinance, so comprehensive, so far-reaching, so simple, and sublime, established a new era for the millions who were destined to swarm within the sphere of its benevolent operation. For them, we may say in the words of the Roman poet, "*magnus ab integro sæclorum nascitur ordo!*" Till then, the right of the civil power to control the religion of the State had always been practically asserted and recognized; if not by moralists and theologians, at least by statesmen and jurists. Such has been the theory and practice of European governments, from the times when the emperors lighted the streets of Rome with blazing Christians, to the last liturgy forced on his Protestant subjects by the despot of Prussia. Even these American States, planted as they were by refugees from religious persecution, presented for generations anything but a land of religious liberty. The government of the Puritans was the very opposite of tolerant; and if they spilled not the lives of their dissentient brethren as freely as others had done, it was because they fled from before their face into the wilderness. The government of Virginia *was [*595 equally exclusive; and the land of the Calverts was peopled by exiles from both. Even old Maryland, the primal seat of Christian freedom, has enfranchised the Israelite within our own brief memories. It was but yesterday that the Catholic was made eligible to office in North Carolina; and his continued exclusion from it disgraces New Hampshire to-day. But the ordinance of 1787 drew a broad line of distinction between the thirteen original States, which, in conquering their independence, acceded to all the known attributes of sovereignty, and the new ones to be carved out of the immense regions northwest of the Ohio; which come into the national community shorn of this flower, or rather thorn, of prerogative. It has left not the trace of a foundation, within their vast extent, whereon bigotry can erect her citadels. The United States have guarantied, to their inhabitants, religious liberty as absolutely as they have republican government to us all.

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This ordinance gave the key-note to our territorial legislation; and every subsequent passage has, on this paramount interest of humanity, harmonized therewith. By the Act of April 7th, 1798 (chap. 45, sec. 6), the inhabitants of the Mississippi territory were admitted to "all the rights of the people of the northwest territory, as guarantied by the ordinance;" and by the Act of March 2d, 1805 (chap. 437, sec. 1), the inhabitants of the territory of Orleans (now Louisiana) became entitled to "all the rights, privileges, and advantages secured by said ordinance, and enjoyed by the people of the Mississippi territory."

But we do not rely on the ordinance of 1787 and the aforesaid extending acts alone. The Act of February 20th, 1811 (chap. 298), by which the people of the territory of Orleans were empowered to form a constitution and State government, provided expressly, in the 3d section, that the constitution to be formed "should contain the fundamental principles of civil and religious liberty;" and the Act of April 8th, 1812 (chap. 383, sec. 1), by which the State of Louisiana was admitted into the Union, provided "that all the conditions and terms contained in the said third section should be considered, deemed, and taken as fundamental conditions and terms, upon which the said State is incorporated into the Union.

The argument, then, is strictly consecutive; that, both under the ordinance of 1787, and the acts for admitting Louisiana into the Union, there is a solid compact between the people of that State and the United States (which this high conservative tribunal will protect from violation by State authority), that they shall not be molested on account of their religious belief, or mode of worship; but that they shall forever enjoy religious liberty in the fullest and most comprehensive acceptation of the term.

To obviate the force of this conclusion, the judge "*a quo*" (Preaux) has, in his opinion, which is part of the record (16 Peters, 285), been compelled to advance doctrines of the wildest nullification, subversive of the very **596*]** first principles of political morality. *He argues (pages 19 and 20 of the record) "that the ordinance of 1787 was superseded by the constitution of the State of Louisiana;..... that constitution became the Supreme law of the State, and all acts of Congress regulating the government of the territories of the United States ceased to exist within the limits of Louisiana—a sovereign State;.....the erection of Louisiana into an independent State, under a constitution adopted by her own citizens, and sanctioned by Congress, must necessarily set aside the charter established for its territorial government by Congress. To accede to a contrary doctrine, would be to admit that the power of Congress might be perpetuated, notwithstanding this solemn act, contrary to the rights of the States as defined and reserved by the federal compact," and this notwithstanding the most carefully expressed and guarded stipulations between the federal empire and its newly admitted member! To what a solemn farce does this argument reduce the earnest debates, the stern remonstrances, the enthusiastic appeals, which shake our legislative halls, and agitate this vast Union from one extremity to the other! What avail our anxious compromises, our reluctant concessions, our cautious provisos, if, the instant a new partner is admitted to the national firm, she is at liberty to cast her most solemn obligations behind her? To what a ridiculous condition is one at least of the high contracting parties degraded by these fancies! Is she sovereign? Oh, no! not "sovereign" till she becomes "a State!" Is she subject? How can subject stipulate with sovereign? She is then a nondescript, *tertium quid*—a sort of political redemptioner; with just enough of the slave to submit to humilating conditions, and just enough of the freeman to count the days the indentures have yet to run, and rejoice in anticipated repudiation of the most formal and explicit engagements.

Such, however, is not the doctrine of this court. In *Menard* v. *Aspasia* (5 Peters, 515), *Judge* McLean, delivering the opinion of this court, distinctly intimated that the ordinance of 1787 might be insisted on, as yet in force, within the sovereign State of Missouri. His words are too clear for misconception: "If the decision of the Supreme Court of Missouri had been against Aspasia, it might have been contended that the revising power of this court, under the 25th section of the Judiciary Act, could be exercised;" and although the same learned judge, in *Spooner* v. *McConnell et al.* (1 McLean's C. C. R., 341), subsequently admitted that such provisions of the ordinance as were intended to produce a moral or political effect (among which he classes those which secure the rights of conscience), were annulled in Ohio, by the adoption of the federal and State constitutions, as implying the "common consent" required for their abrogation; his language must necessarily be understood as harmonizing with that of this court in *Menard* v. *Aspasia*, and inapplicable to the case of Louisiana; unless it can be shown either that the federal constitution abolished those provisions explicitly, which *it did not; or vested the States with [*597 powers repugnant thereto, which it did not; or superseded them by higher federal guaranties, which it did not; or that the constitution of Louisiana proceeded on either of those grounds, which it certainly did not, in terms; and, if at all, only by inference from the conditions imposed by the act for admitting that State to the Union; which supposition leaves the case as strong as under the ordinance.

Equally unfortunate is the gloss by which the judge below has endeavored (pages 14 and 15 of the record) to evade the constitutional guaranties of Louisiana, on the subject of religious liberty. The Supreme Court of his own State, in the recent case of *The Wardens of the Church of St. Louis, New Orleans*, v. *Blanc, Bishop, &c.* (which is reported, as it would seem, by authority, in the New Orleans Weekly Bulletin, of July 6th, 1844), holds this most emphatic language in reference to the constitution of Louisiana: "If the State constitution, framed a few years afterwards, contained no such restriction upon the legislative power, it was because it was thought unnecessary. It had already been settled, by solemn and inviolable compact, that religious freedom, in its broadest sense, should form the essential basis of all laws, constitutions and governments, which should forever after be formed in the

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territory; and that compact was declared to be unalterable unless by common consent."..... "In the opinion of the court, no man can be molested, so long as he demeans himself in a peaceable and orderly manner, on account of his mode of worship, his religious opinions and profession, and the religious functions he may choose to perform, according to the rites, doctrine and discipline of the church or sect to which he may belong. And this absolute immunity extends to all religions, and to every sect." So that, had the judiciary system of Louisiana permitted an appeal from the City Court of New Orleans to the supreme law tribunal of the plaintiff's own State, this court would not probably have been troubled with this argument.

3d. To read the ordinances under which the plaintiff in error has been fined, is to dispose of the third question presented by this cause. Their bearing upon only one denomination of worshippers establishes their tyrannical character. Equality before the law is of the very essence of liberty, whether civil or religious. The performance of funeral obsequies, in buildings consecrated to public adoration of the Deity, is not confined to Catholics, but is practiced by many other religious societies.

Again; the ordinances, as they now stand, contain but a single penal prohibition. They punish the performance of a religious function by individuals acting in their religious capacity or character, "according to the rites, doctrine, and discipline of the church to which they belong." They legislate for the priest as priest, and only as priest; not as a person transporting and exposing, or causing to be transported or exposed, any corpse, in the interdicted churches; 598*] *but as the ordained celebrant of the office for the dead. What is this function he is forbidden to exercise? His church—the holy Catholic church—teaches that the mercy of God, while it mitigates, does not merge his justice; that, though many, through the atoning blood of the Saviour, escape eternal woe, they do not all pass directly from this probationary state to celestial bliss. Souls may depart this life unpolluted with mortal sin, which would consign them to everlasting misery, and yet bearing some stains of earth, which may not be admitted to His presence, before whose awful purity archangels veil their faces; and such, according to the fearful parable, are cast into that prison whence there is no egress till "payment of the uttermost farthing;" till expiation of "every idle word," of which we are to "give account." This expiatory state is termed by theologians "purgatory;" and the Catholic doctrine is, that those who suffer there are aided by the prayers, almsdeeds, and other good works of their brethren still in the flesh, and the suffrages of the blessed spirits; exhibiting thus, blended in one tender "communion of saints," the church triumphant in heaven, the church militant on earth, and her suffering members in the middle state. Thus Catholic charity ceases not with the last sad offices rendered to these fainting frames. When eyes that beamed on us with kindness are closed forever, when the intellectual light that blazed about and guided us is darkened, when the hearts that loved and trusted us are cold and still, then are we stimulated to new demonstrations of affection, by the very agony of our bereavement. And the church, whose every precept is founded on the deepest philosophy of human nature, knowing that the efficacy of prayer is proportioned to its urgency (as her divine master "in his agony prayed the more"), directs that they shall be offered under every circumstance that can animate hope, strengthen faith or kindle charity. And, therefore, to her temples, where she receives the little child at "the laver of regeneration," and where she delights to bless the nuptial ring, she commands that we bring the bier; that, kneeling besides the dear remains of friend or relative, before the awful memorials of our redemption, surrounded by the relics of those who have gone before, and whom we believe to be confirmed in glory, in the very presence of the mercy seat, where, less terrible but dearer than in the *shekinah* that filled the tabernacle of the early dispensation, the Almighty shrouds his glory beneath the sacramental veil, we may pour out our souls in fervent supplication, that those we mourn may be admitted to the mansions of eternal rest, and have their longing hopes crowned with everlasting fruition. And tell us not this is a fond superstition. It is an office in which "the church of the New Testament is in communion with the church of the Old;" with the Hebrew of three thousand years ago and the Hebrew of to-day. In it the Catholic unites with the Nestorian and the Copt, and the separated Greek, and every liturgist before the *sixteenth century; [*599 nay, with many of the wise and good, who, half doubting or rejecting it as of revealed authority, still practice it at the instinctive teaching of their own hearts; and with the great Dr. Johnson, bow down for them they loved in prayer that God "may have had mercy." But were it, on the contrary, the last novelty of the day; were it confined to the little chapel where the plaintiff in error ministers to his flock, still he could lay his hand on the ordinance of 1787, and exclaim with the sage of Tusculum, *Si erro, libenter erro; nec hunc errorem a me extorqueri volo.*

But the judge *a quo* has argued, that the praying for the dead in churches, with the body there present, is merely a disciplinary observance, as stated in the evidence of Bishop Blanc, and may, therefore, be regulated or controlled by the Legislature, without violating religious liberty.

Now, if there be aught essentially characteristic of religious liberty, it is the exemption of ecclesiastical discipline (defined by the learned Hooker "church order") from secular control; and this, because the external forms and practices of religion are all that temporal power can directly invade. Faith, doctrine, are beyond its reach; objects of the understanding and the heart. Discipline is the sensible law which regulates the manifestation of our belief or opinion, in our public and social devotional intercourse with our Creator. Faith is the soul of religion; discipline the visible beauty in which she commends herself to our veneration and love. And it may be safely asserted that there never was an arbitrary change introduced by governments into the religious opinions of a community which was not masked by a pretended reform of exterior observances. What distinguishes the most numerous sect of Chris-

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tians in our country, from the many who agree with them on doctrinal points but their method; the practical methods established by the founders of their peculiar system of church polity? In fact, they have taken their name from it. Yet what is "method" but another word for "discipline"? And would a member of that society consider himself in the enjoyment of religious liberty if told "believe what you please of the divinity, the incarnation, the atonement, the influences of the Holy Spirit, baptism; but hold no class-meeting—hold no camp-meeting. These, though perhaps edifying and consolatory to you, are only matters of discipline, and amenable, therefore, to the municipal police?"

But the judge below contends that the Catholic office for the dead is not prohibited; inasmuch as it is permitted in the "obituary chapel." That is to say, religion is free, though its observances may be limited to a building in the possession of notorious schismatics, who might tax them to virtual prohibition, or apply the proceeds, at their own discretion, to the subversion of religion itself. The point is stated *arguendo*, but borrowed from the facts which gave rise to this appeal to the court.

600*] *But it was further insisted below, that as a measure of quarantine precaution, the exposition of corpses may be prohibited. Not if such prohibitory legislation infringes rights more precious than mere animal health, which are guarantied by the Constitution or supreme law of the land. *Judge* Marshall's language on this point is clear. In *Wilson et al.* v. *The Black Bird Creek Marsh Co.* (2 Peters, 251), he says: "The value of the property on the banks (of this creek) must be enhanced by excluding the water from the marsh, and the health of the inhabitants probably improved. Measures calculated to promote these objects, provided they do not come into collision with the powers of the general government, are undoubtedly within those which are reserved to the States." And if it be true, as inferred from this language, that a sovereign State, in her high legislative capacity, cannot, for the preservation of the health of her citizens, encroach on the constitutional guaranties for unrestricted commerce between man and man, can we suppose she could delegate the more dangerous power of interfering with the intercourse of man with God, specially guarded as it has been by the organic law of Louisiana, to a petty coporation? This case, however, passes clear of that suggestion. The judge below endeavored to implicate the priest, as the ultimate cause of exposing the sad relics of mortality which "lie festering in the shroud;" but the words of the ordinances, which, being penal, must be construed strictly, have expressly waived the penalty against all concerned in exposing, or causing them to be exposed, and directed their vengeance exclusively against the priestly function.

Mr. Barton's argument was this:

The First Municipality of New Orleans embraces the whole of what is called "the city proper," or "square of the city," and is bounded by a wide front levee, and the three streets of Esplanade, Rampart, and Canal (which are as wide as Pennsylvania Avenue), and covering also the whole suburbs, and low grounds in the rear of Rampart, extending to Lake Ponchartrain. The obituary chapel, referred to in the record, is situate upon Rampart, but on the rearward side, and is thus separated from the city proper by an area of the width of three of its principal streets. The parochial church of St. Louis is the principal Catholic cathedral in the city, and, like the church of St. Augustin, is situate within the square of the city, where all the streets are very narrow.

New Orleans is visited annually with the yellow fever, in either the sporadic or epidemic form, and strong sanitary measures are deemed indispensable there to check the range and prevalence of the pestilence whence it comes.

The great body of the Catholic citizens of New Orleans (other than those of Irish descent) reside in the First Municipality. The American Protestant population reside chiefly in the Second Municipality; they *have but one [*601 church in the First Municipality, and that fronts the second, on Canal Street.

The usages of the Catholics there are to perform the mortuary services with the corpse exposed in open church, and before the congregation. Protestant churches there are never used for such purposes, but services for the dead are performed at the cemeteries where the bodies are deposited.

The statement of facts contained in the opinion of the judge of the City Court having been used in the opening argument at this forum, gives warrant for the statement now made, which it is thought may be useful besides as a clue to the *quo animo* of the council of the First Municipality in enacting the ordinance complained of. If that measure had its origin in the mere purpose of infringing upon, and discriminating, to the prejudice of the religious rights of one denomination of Christians, it is not to be defended; but if designed merely as a regulation of sanitary police, for the preservation of the public health, then the law of necessity pleads in its behalf; and all obituary rites and ceremonials which tend to frustrate its object, or impair its efficacy, must yield to the supremacy of the common good.

The learned counsel also cited and quoted, from the New Orleans Bulletin, an opinion of the Supreme Court of Louisiana, in the case of *The Wardens of the Church of St. Louis* v. *The Right Rev. Bishop Blanc*, instituted for the legal adjustment of certain differences between them in relation to church affairs, and which that court's judgment happily put an end to. It may be proper to remark, however, that this controversy was between Catholics; the one administering the temporalities of the church, and maintaining the rights of the corporation—the other administering the ecclesiastical functions, and maintaining the rights of the clergy. None but those professing the Roman Catholic religion can vote for church-wardens, as that opinion makes known; and none, therefore, are chosen such, who are not of that religious persuasion. Nothing could have been further from the designs of either party to that controversy, than to have trenched upon or abridged the civil or religious privileges of Catholicism itself, and still less to have favored, to its prejudice, any other denomination of Christians.

The controversy referred to having arisen, too, in the same year (1842) in which the ordinance

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was passed under which the fine was imposed on the plaintiff in error, leaves the inference fair that there was a necessary connection between them. But this is not so; and the circumstances strongly repel all inferences that the First Municipality council could have designed any infringement upon, or impairment of, the privileges of Catholics. The great body of the constituency of that council is Catholic; and it is believed, *ad urbe condita*, to the present day, a majority, and very frequently the whole, of that council, are such as have been reared up in the Catholic faith, and have continued in that religious persuasion. 602*] Hence, if the *ordinance complained of abridges the privileges of Catholics, it abridges to a like extent the privileges of those who enacted it. If Catholics are wronged, Catholics have wronged them. This circumstance, indeed, may not lessen the injury, though it weakens the wrong. It may not test the lawfulness, but it defends the motive.

Though the particular ordinance under which the fine was imposed, bears date the 31st October, 1842 (modified as it was by the ordinance of the 7th of November, 1842), yet the purpose and the occasion originated at a far earlier period, at a season when dissensions in the parochial church were unknown, and when the venerable and reverenced Abbé Moni—a priest of all worth and all appreciation—presided as curate of the parish of St. Louis. As far back as the 26th of September, 1827 (fifteen years before), the city council adopted an ordinance upon this subject of precisely similar import with that of the 31st October, 1842; and the motive of its enactment is conspicuous in the very title of the ordinance. It is entitled "An ordinance supplementary to an ordinance concerning public health." It is as follows:

"Resolved, That from and after the 1st of November next (1827) it shall not be lawful to convey and expose, into the parochial church of St. Louis, any dead person, under penalty of a fine of $50, to be recovered for the use of the corporation, against any person who should have conveyed or exposed any dead into the aforesaid church; and also under penalty of a similar fine of $50, against all priests who should minister to the celebration of any funeral in said church; and that from the 1st of November of the present year (1827) all dead persons shall be conveyed into the obituary chapel in Rampart Street, where the funeral rites may be performed in the usual manner."

This act has remained in force ever since the 1st November, 1827. Its sole purpose was manifested in its title and provisions. All persons concerned gave it their obedience, and none ever complained that it impaired or abridged the civil or religious rights and privileges of the Catholics. No motive was attributed to its authors, other than the fears they may have entertained, in seasons of disease, of the perils of contagions, or the spread of epidemics. The ordinance of the 31st October, 1842, made no change whatever in the ordinance of 1827, except in its penalties, for conveying to, and exposing in, other Catholic churches, in the First Municipality, of dead bodies; the obligations not to do so, and to use the obituary chapel in Rampart Street for that purpose, remained as before. Neither has the ordinance of the 7th November, 1842, wrought any modification in that of 1827, for its amendments are confined by special references to the ordinance of the 31st October, 1842. That the ordinance of 1827, in principle, affected the rights and privileges referred to, equally with the subsequent ordinances, is too plain to be questioned; and that grievance seems altogether too slight and impalpable to *claim the [*603 protection of this august tribunal, when in fifteen years, for ought that is known, it has passed without complaint, and for the reason, it may be, that it was so subtle and ethereal as to elude detection.

2. The ordinances of the 31st of October, and the 7th November, 1842, do not invade the rights or privileges of the Catholic citizens of New Orleans.

The testimony of the Right Rev. Bishop Blanc would seem to establish this proposition incontrovertibly, for he says that "the dogmas of the Roman Catholic religion did not require that the dead should be brought to a church, in order that the funeral ceremonies should be performed over them; that this was a matter of discipline only." A dogma is a matter of church faith, and affects conscience; discipline affects conduct only, where conduct does not affect faith. Under these ordinances, then, and the bishop's testimony, faith and conscience are left free; nothing molests the enjoyment or constrains the exercise of either. How is it made to appear, then, that they conflict with that "free enjoyment of religion," secured to the "inhabitants of the ceded territory," by the Louisiana Treaty of 1803, which has been cited? Or, with the 1st article of the ordinance of 1787, which says, that "no person demeaning himself in a peaceable and orderly manner, shall ever be molested on account of his mode of worship or religious sentiments," which has been also cited? Or, with the 4th section of the Act of Congress of March 26, 1804, which prohibits the Legislative Council of the Orleans territory from passing any law "which shall lay any person under restraint, burden, or disability, on account of his religious opinions, profession, or worship; in all which he shall be free to maintain his own, and not burdened for those of another," which has been also cited? Or, with the Act of Congress of the 20th February, 1811 (also cited), which provides that the constitution to be formed by the people of the Orleans territory "shall contain the fundamental principles of civil and religious liberty?" Or, with the Act of Congress of the 8th April, 1812, admitting Louisiana as a State, and providing that the terms of admission contained in the 3d section of the Act of 20th February, 1811, "shall be considered, deemed, and taken, as fundamental conditions and terms upon which the said State is incorporated in the Union?"

Supposing these various provisions, relied on by the plaintiff in error, to have not spent their force by the operations of time, nor the change of government, it is submitted that there is nothing in these ordinances repugnant to either or any of them; for, if they be enforced evermore, they do not, and cannot, affect the religious sentiments or opinions, the worship or the liberty of any. But the bishop says, further, that "these ceremonies might be cele-

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brated at the house where the dead person expired, or at any other place designated by the bishop." The place, then, for the mortuary **604*]** ceremonials *not being sacramental, how is the faith or conscience of Catholics assailed by designating a few places in which they could not be performed? The essence of the right consists in the thing that is to be done, and not in the place or performance. If the thing itself were forbidden, then might have been drawn in question the power to forbid, coupled with the further inquiry, how far religious, as well as civil rights and privileges, may be constrained to give way to the public necessities and the common good?

3. The ordinances complained of were within the competency of the council of the First Municipality.

No express authority is needed to invest in a corporation a power of preservation of the public health. The law of necessity would constitute it an incident essential to its existence. (*Vide* Bacon's Abridgment, tit. Corp., D.) It is there laid down that "there are some things incident to a corporation—which it may do without any express provision in the act of incorporating—such are powers to make laws, for a body politic cannot be governed without laws." And *Chief Justice* Holt says (Carth., 482) "That every by-law by which the benefit of the corporation is advanced, is a good by-law for that very reason, that being the true touchstone of all by-laws."

So in matters of corporate police. In Com. Dig., 8, tit. By-law C, it is laid down "That a by-law to restrain butchers, chandlers, *et al.*, from setting up in Cheapside, or such other eminent parts in the city of London, was good," not because a special power was conferred to enact it, but "because such trades were offensive, and apt to create diseases; and that, therefore, for fear of infection, and for the sake of public decorum and conveniency, such kind of offensive trades might be removed to places of more restraint." The validity of a similar by-law, made by the corporation of Exeter, was afterwards affirmed by Lord Mansfield. (See Cowp. R., 269, 270.)

"Where a restraint appears to be of manifest benefit to the public, such is to be considered rather as a regulation than as a restraint." (Willes, 388; 1 Strange, 675; 2 Strange, 1085; 3 Burr., 1328; 1 H. Black., 370; 1 Roll. Abr., 365; 3 Salk., 76; Sid., 284; 2 Kyd on Corp., 149.)

In *The Village of Buffalo* v. *Webster* (10 Wend., 101) *Chief Justice* Savage puts this case *ex gratia:* "A by-law that no meat should be sold in the village would be bad, being a general restraint; but that meat shall not be sold except in a particular place, is good, not being a restraint of the right to sell meat, but a regulation of that right."

In the case of *The Commonwealth* v. *Abram Wolf* (3 Serg. & Rawle, 48) *Chief Justice* Tilghman affirmed the validity of an ordinance of Philadelphia, imposing a fine for working on a Sunday, against a Jew: though under the teachings of the Jewish Talmud and the Rabbinical Constitutions, the Jews deemed Satur- **605*]** day as the *Jewish Sabbath, and felt it both as a privilege and a duty to labor for six days, and to rest on the seventh, or Saturday.

In the case of *The Mayor of New York* v. *Stack* (3 Wheeler, 248, *et seq.*), the court affirmed the validity of an ordinance imposing penalties for burying the dead within three miles of the city limits, on the ground that the preservation of the public health was an incident of the corporate power. The opinion of the court is particularly referred to for the minuteness and learning with which it reviews the whole power of city corporations over matters of general police and sanitary regulation.

To the same end reference is also made to the ordinances of Boston (pp. 53, 55, 76; of Nashville, p. 60); the revised ordinances of Baltimore (1838), p. 285, for the act of assembly, conferring the power; and from p. 37 to 51, for the ordinances made under that authority; quarantine laws, &c.

So far as the legislative power of Louisiana, both territorial and State, could confer the power to make the ordinances in question, that power has been amply conferred. The 6th section of the Act of the 17th February, 1806, provides that "the said council shall have the power to make and pass all by-laws and ordinances for the better government of the affairs of the said corporation, for regulating the police, and preserving the peace and good order of the said city;" so the Act of the 14th March, 1816, provides "that the city council shall have power and authority to make and pass such by-laws and ordinances as they shall deem necessary to maintain the cleanness and salubrity of the said city, &c. And to make any other regulations which may contribute to the better administration of the affairs of the said corporation, as well as for the maintenance of the police, tranquillity, and safety of the said city.

These acts were all in force at the time these ordinances were passed, and still are; and also the 4th section of an Act of the 8th of March, 1836, which provides that "each of the municipalities, &c., shall possess generally all such rights, powers, and capacities as are usually incident to municipal corporations, &c., &c.

The power conferred on the council, then, is ample enough to sanction these ordinances; but it is material to know, whether the delegating power could rightfully do what it has thus done; and if it could not, whether it is the province, or within the competency of this court to say so. This brings us to the question:

4. Has this court jurisdiction in this case?

If it has, it does not derive it from the character of the parties, for they are all citizens of the same State; and not deriving it thence, the function of this court to administer State laws between certain classes of parties does not attach. The questions raised here, therefore, of the repugnancy of these ordinances to the laws of the State, or of the repugnancy of those laws to the State constitution, be such repugnancy what it may, it is most respectfully submitted, are mere *municipal questions, upon [*606 which the judgment of the court, *a quo*, in the present conjuncture, is final and conclusive. If, indeed, there be a repugnancy between these ordinances and "the Constitution, treaties, or laws of the United States," and their validity is "drawn in question" by the court's judgment, the jurisdiction is conceded.

1st. There is no repugnancy to the Constitution, because no provision thereof forbids the

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enactment of law or ordinance, under State authority, in reference to religion. The limitation of power in the first amendment of the Constitution is upon Congress, and not the States.

2d. The provisions of the Treaty of 1803 are *functa officiorum*, with regard to that portion of "the ceded territory" which has been formed into States which have been admitted into the Union. To that end the guaranties in behalf of the "inhabitants" were directed and confined, for no higher or other privileges were claimed or provided for them; and it is hence submitted, that when a State, formed out of that territory, enters the Union, the treaty, *quoad hoc*, has been executed, and has spent its force. The "inhabitants" of Louisiana have provided their own securities for their own rights in their own constitution, which they themselves have established; and the federal government has admitted her into the Union upon their own terms. They have absolved the government from its treaty dues to them, and the government has absolved itself from its treaty dues to France on their account.

3d. So much of the ordinance of 1787 as may have been extended to the people of the Orleans territory expired within the jurisdiction of Louisiana when she was admitted as a State into the Union. That ordinance is older than the Constitution, but it cannot, to any extent, supersede it. The federal government possesses no powers but such as it has derived from the States; and no one State has conferred upon it, or can confer upon it, more or less power than any other State has conferred, or can confer. This results from the incapacity of the government to take, rather than from the incapacity of the States to give. Hence there is, and must be, from a constitutional necessity, a perfect and unchangeable equality among the States, not, indeed, in reference to the powers which they may separately exercise (for that depends upon their own municipal constitutions), but in reference to those which they separately retain. What Massachusetts may do, Louisiana may do. What Congress may not forbid Massachusetts to do, it may not forbid Louisiana to do. If Congress may not extend over Massachusetts the provisions of the ordinance of 1787, or any portions thereof, neither can it over Louisiana, or retain them there after Louisiana became Massachusetts' equal, and had the power to decide for herself. If they are retained there they derive their exclusive obligation and force from Louisiana's adoption, and not from the authority of Congress. They have thus become laws of Louisiana, and have ceased to be laws 607*] of *the United States. If they have so ceased to be laws of the United States, how could the imputed repugnancy between them and the city ordinances confer any jurisdiction upon this court? As laws of Louisiana, the judicial functionaries thither are the constitutional and final expounders in cases between her own citizens, like the one at bar.

The Act of Congress of the 8th April, 1812, which admitted Louisiana into the Union, acknowledged that very equality with her sovereign sisters, which is here asserted. The 1st section provides "That the said State shall be one, and is hereby declared to be one, of the United States of America, and admitted into the Union on an equal footing with the original States, in all respects whatever." It is not the mere assertion of her equality, in this clause, which establishes her equality—it only pronounces that equality which the Constitution establishes. If she be equal, however, she must be equally exempt from the legislation of Congress, past or future, as her elder sisters. If the 1st article of the compact created by the ordinance of 1787, in these words, "No person demeaning himself in a peaceable and orderly manner shall ever be molested on account of his mode of worship or religious sentiments," has been extended over Massachusetts by any act of Congress, and through its own proper vigor has the force of law, it binds Louisiana to the same extent, but no further, and not otherwise.

The learned counsel for the plaintiff in error have cited two decisions of this court (the one 5 Peters, 515, the other 9 Peters, 235) to sustain their position upon this branch of the issues raised by the record; but it is presumed that there is some error in the references; for there is naught to be found at those pages applicable to the matter for which they are cited.

A case has also been cited from 1 McLean's C. C. Rep., 341, to maintain that the ordinance of 1787 survives the organization of a State government over territory to which it applies. That may be, in those new States which have been erected in the identical territory to which the compact contained in the ordinance relates. Nor is the authority understood as extending beyond that. The case arose in Ohio. It had reference especially to the free navigation of her waters, as secured to the other States by the compact, and it may be doubted if Ohio could have deprived them of that, though there had been no compact. The learned judge, in delivering his opinion, and in speaking of the ordinance, says:

"Many of the provisions were temporary in their nature, having for their object the organization and operation of a territorial government. Others assume the solemn form of a compact between the original States and the people and States in the territory which were to remain forever unalterable, unless by common consent."

The portion of the ordinance thus deemed "unalterable" could never have been made applicable to the "inhabitants" of the Orleans *territory, because there could have [*608 been no such "compact" made in reference to them; nor was it made. Indeed, other parts of the opinion seem to assail the position it was cited to support. At p. 348, the learned judge says:

"The change from a territorial government to that of a State necessarily abolished all those parts of the ordinance which gave a temporary organization of the government, and also such parts as were designed to produce a certain moral and political effect. Of the latter description were those provisions which secured the rights of conscience—which declared that education should be encouraged, and excessive bail should not be required," &c.

What "provisions" of the ordinance "secured the rights of conscience," other than those forbidding a person to "be molested on account of his mode of worship, or religious sentiments,"

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already quoted from the 1st article of the compact? The counsel of the plaintiff in error has made reference to no other "provisions," and it is believed there are none. Then we are furnished by the learned counsel with the high authority of *Mr. Justice* McLean, that these "provisions" are "necessarily abolished," by the erection of a territory, in which they apply, into a State government. And, as this is true of a territory embraced within the very limits to which the compact originally referred, *a fortiori* must it be applicable to States formed out of territory *aliunde*.

It is believed that the opinion also sustains other views presented in the argument in behalf of the defendants in error, in the following passage:

"It may be admitted that any provision in the constitution of the State must annul any repugnant provision contained in the ordinance. This is within the terms of the compact. The people of the State formed the constitution, and it was sanctioned by Congress; so that there was the 'common consent' required by the compact to alter or annul it."

So, too, the constitution of Louisiana "was sanctioned by Congress." If there be a repugnancy between its provisions and those "provisions" of the ordinance referred to, those provisions are annulled. If not, then the State of Louisiana has retained them, and made them her own proper laws, and they are in no just sense, since then, laws of the United States; for Congress is without capacity to make for her, or to extend over her sovereign domain, any laws of Congress upon that subject.

The defendants in error further rely on, and make reference to, the well reasoned opinion of the judge, *a quo*, and the authorities cited therein.

Mr. Coxe, in reply, directed his attention chiefly to the other questions in the case than that of jurisdiction, and referred to the opening **609*]** *argument of his colleague, *Mr. Read*, as a full exposition of the merits of the case.

Mr. Justice CATRON delivered the opinion of the court:

As this case comes here on a writ of error to bring up the proceedings of a State court, before proceeding to examine the merits of the controversy, it is our duty to determine whether this court has jurisdiction of the matter.

The ordinances complained of must violate the Constitution or laws of the United States, or some authority exercised under them; if they do not, we have no power by the 25th section of the Judiciary Act to interfere. The Constitution makes no provision for protecting the citizens of the respective States in their religious liberties; this is left to the State constitutions and laws: nor is there any inhibition imposed by the Constitution of the United States in this respect on the States. We must therefore look beyond the Constitution for the laws that are supposed to be violated, and on which our jurisdiction can be founded; these are the following acts of Congress. That of February 20, 1811, authorized the people of the territory of Orleans to form a constitution and State government; by sec. 3 certain restrictions were imposed in the form of instructions to the convention that might frame the constitution; such as that it should be republican; consistent with the Constitution of the United States; that it should contain the fundamental principles of civil and religious liberty; that it should secure the right of trial by jury in criminal cases, and the writ of *habeas corpus;* that the laws of the State should be published, and legislative and judicial proceedings be written and recorded in the language of the Constitution of the United States. Then follows by a second proviso, a stipulation reserving to the United States the property in the public lands, and their exemption from State taxation—with a declaration that the navigation of the Mississippi and its waters shall be common highways, &c.

By the Act of April 8, 1812, Louisiana was admitted according to the mode prescribed by the Act of 1811; Congress declared it should be on the conditions and terms contained in the 3d section of that act; which should be considered, deemed and taken, as fundamental conditions and terms upon which the State was incorporated in the Union.

All Congress intended, was to declare in advance, to the people of the territory, the fundamental principles their constitution should contain; this was every way proper under the circumstances: the instrument having been duly formed, and presented, it was for the national Legislature to judge whether it contained the proper principles, and to accept it if it did; or reject it if it did not. Having accepted the constitution and admitted the State, "on an equal footing with the original States in all respects whatever," in express terms, by the Act of 1812, Congress was concluded from assuming that the *instructions contained in the Act of [**610** 1811 had not been complied with. No fundamental principles could be added by way of amendment, as this would have been making part of the State constitution; if Congress could make it in part, it might, in the form of amendment, make it entire. The conditions and terms referred to in the Act of 1812, could only relate to the stipulations contained in the second proviso of the Act of 1811, involving rights of property and navigation; and in our opinion were not otherwise intended.

The principal stress of the argument for the plaintiff in error proceeded on the ordinance of 1787. The Act of 1805 (chap. 83) having provided, that from and after the establishment of the government of the Orleans territory, the inhabitants of the same should be entitled to enjoy all the rights, privileges, and advantages secured by said ordinance, and then enjoyed by the people of the Mississippi territory. It was also made the frame of government, with modifications.

In the ordinance, there are terms of compact declared to be thereby established between the original States, and the people of the States afterwards to be formed northwest of the Ohio, unalterable, unless by common consent—one of which stipulations is, that "no person demeaning himself in a peaceable manner, shall ever be molested on account of his mode of worship, or religious sentiments, in the said territory." For this provision is claimed the sanction of an unalterable law of Congress; and it is insisted the city ordinances above have violated it; and what the force of the ordinance is north of the Ohio, we do not pretend to say, as it is un-

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necessary for the purposes of this case. But as regards the State of Louisiana, it had no further force, after the adoption of the State constitution, than other acts of Congress organizing, in part, the territorial government of Orleans, and standing in connection with the ordinance of 1787. So far as they conferred political rights, and secured civil and religious liberties (which are political rights), the laws of Congress were all superseded by the State constitution; nor is any part of them in force, unless they were adopted by the constitution of Louisiana as laws of the State. It is not possible to maintain that the United States hold in trust, by force of the ordinance, for the people of Louisiana, all the great elemental principles, or any one of them, contained in the ordinance, and secured to the people of the Orleans territory, during its existence. It follows, no repugnance could arise between the ordinance of 1787 and an act of the Legislature of Louisiana, or a city regulation founded on such act; and therefore this court has no jurisdiction on the last ground assumed, more than on the preceding ones.

In our judgment, the question presented by the record is exclusively of State cognizance, and equally so in the old States and the new ones; and that the writ of error must be dismissed.

Cited—10 How., 94; 19 How., 490, 491, 632; 4 Wall., 38; 5 McLean, 212; 1 Abb. U. S., 162; 1 Biss., 550.

611*] *JOSEPH CHAIRES, Executor of BENJAMIN CHAIRES, Deceased, AND PETER MIRANDA AND GAD HUMPHREYS, *Appellants*,

v.

THE UNITED STATES.

Decree of this court affirming on appeal—court below cannot correct alleged mistake in decree affirmed.

Where this court has affirmed the title to lands in Florida, and referred, in its decree, to a particular survey, it would not be proper for the court below to open the case for a rehearing, for the purpose of adopting another survey.

The court below can only execute the mandate of this court. It has no authority to disturb the decree, and can only settle what remains to be done.

THIS was an appeal from the Superior Court of East Florida, and a sequel to the case reported in 10 Peters, 308.

The appellants filed in the court below the following petition:

"To the Honorable Isaac H. Bronson, Judge of the Superior Court in and for the Eastern District of Florida.

"The petition of Joseph Chaires, of the said territory, executor of the last will and testament of Benjamin Chaires, late of the same territory, but now deceased, Peter Miranda, and Gad Humphreys, respectfully showeth:

"That the said Benjamin Chaires, Peter Miranda, and Gad Humphreys, heretofore, to wit, on the 11th day of May, which was in the year of our Lord one thousand eight hundred and thirty-nine, filed their petition in the office of the clerk of this honorable court in terms of an act of Congress of the United States, entitled "An Act supplementary to the several acts providing for the settlement and confirmation of private land claims in Florida,' approved on the 23d of May, in the year one thousand eight hundred and twenty-eight, praying for the confirmation of certain claims to lands therein specified, and founded on a title made and granted by his excellency Don Jose Coppinger, Lieutenant-Colonel of the royal armies of Spain, civil and military governor of the territory of Florida, then subject and belonging to His Catholic Majesty, the King of Spain, and chief of the royal exchequer of the city of St. Augustine, Florida, to José de la Maza Arredondo.

"That the Attorney of the United States in and for said district, duly appeared, and answered the said petition; and thereupon such proceedings were had in the said court, that afterwards, on the 24th day of November, in the year of our Lord one thousand eight hundred and thirty-four, a decree was rendered therein in favor of the petitioners; and the said court did thereupon order, adjudge and decree, that the claim of the said petitioner was valid, and that, in accordance with the laws and customs of Spain, and under and by virtue of the treaty of amity, settlement, and limits, between the United States and Spain, ratified by the President of the United States on the 22d day of February, one thousand eight hundred and twenty-one, and under and by virtue of the laws of nations and of the United States, the said claim was thereby confirmed, adjudged *and decreed, unto the said claimant, [*612 to the extent, for the number of acres, and at the place specified in the grant for the said land, to José de la Maza Arredondo; and as in the certificate and plat of the same, made by Andres Burgevin, dated the 14th of September, in the year of our Lord one thousand eight hundred and nineteen, and fully in the said cause is set forth, that is to say,

"A piece of land, which contains twenty thousand acres, situated on both margins of a creek, known as Alligator Creek, said land commencing a little above the head of said creek, and embracing an Indian town, distant about eighty miles from the port of Buena Vista, and about forty miles to the northwest of Payne's Town—its first line running north twenty degrees west, three hundred and fifty-seven chains, begins at a pine marked X, and ends at another marked ☰; the second line running south seventy degrees west, five hundred and sixty chains, and ending at a stake; the third line running south twenty degrees east, three hundred and fifty-seven chains, and ending at a pine marked II; and the fourth line running north seventy degrees east, five hundred and sixty chains.

"That an appeal was taken from the decree, so rendered in this honorable court, to the Supreme Court of the United States, by the attorney of the said United States, in and for the said territory, and such proceedings were thereupon had in the said Supreme Court, that afterwards, on the —— day of, in the ——— year of our Lord one thousand eight hundred and thirty-six, the decree of this honorable court was affirmed; and thereupon the mandate of the said Supreme Court was awarded, directing the same to be carried into effect.

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"And your petitioner further shows to your honor, that upon application to the proper officer of the United States, to carry the said decree into effect, by admeasuring to your petitioner the lands specified in the grant, it appears that there is error in rendering the said decree, and that the same requires to be reformed, in this:

"That in and by the decree of this honorable court, hereinbefore alleged and affirmed, in manner hereinbefore set forth by the Supreme Court, your petitioner's claim was confirmed, adjudged and decreed to be valid 'to the extent, for the number of acres, and at the place as in the grant to the said land to José de la Maza Arredondo, but it is added in the said decree, 'and as in the certificate and plat of survey of the same, made by Don Andres Burgevin, and dated the 14th September, one thousand eight hundred and nineteen, and filed herein, is set forth, to wit,' &c., &c.; and the said decree thereafter proceeds to recite the metes and bounds as specified and set forth in the survey made by the said Don Andres Burgevin.

"That the land granted to José de la Maza Arredondo, and, in the decree before referred to, confirmed and adjudged to your petitioner, is described in the royal grant or title to prop-
613*] erty, also before *herein referred to, to consist of 'twenty thousand acres of land, with title of absolute property, of those known as Alachua, about eighty miles distant from this city (of St. Augustine) at a place known as "Big Hammock," about twenty miles from the river Lawanee westward, about sixty miles from St. John's.' While the land specified in the survey of Don Andres Burgevin is described as follows: 'twenty thousand acres of land, situated on both margins of a creek known as Alligator Creek. Said land commences a little above the head of said creek, and embraces an Indian town, distant about eighty miles from the post at Buena Vista, and about forty to the northwest of Payne's town, &c., &c.

"That the land specified in the said survey does not conform to, or correspond with the land described in the said grant, and that the Surveyor-General of the United States has therefore been unable to execute the decree of this honorable court, affirmed as aforesaid by the Supreme Court of the United States, and to admeasure to your petitioner the land adjudged to him by the said decree.

"That forasmuch as the land specified in the said grant to José de la Maza Arrredondo is, by the decree aforesaid, adjudged to your petitioner, 'to the extent, for the number of acres, and at the place, as in the grant for said land,' your petitioner is entitled to have the same admeasured to him according to the terms of the said grant, and the description therein contained; and that if the said survey of Don Andres Burgevin conflicts with the said grant, the said survey must yield to, and be controlled by the terms of the grant.

"Your petitioner further shows to your honor, that the said land was duly surveyed and admeasured, and a plat thereof made and returned to this honorable court, and given in evidence in said cause, by Joshua A. Coffee, a competent and qualified surveyor, but that the same was omitted in the transcript of the record sent to the Supreme Court of the United States, although the fact of its having been given in evidence appears in the said transcript, a copy of which said survey is hereunto annexed.

"Your petitioner further shows to your honor, that the Surveyor-General of the United States hath refused to execute the said decree by admeasuring for your petitioner the land thereby confirmed and adjudged to him, and that, upon application to the commissioner of the general land office, he hath in like manner refused so to do, until the said decree shall have been reformed by the competent authority.

"Wherefore, your petitioner prays this honorable court, the premises aforesaid being considered, and due proof thereof being made, that the said decree may be reformed, and to that end that a rehearing of the said cause in this behalf may be granted; that the title of your petitioner to the twenty thousand acres of land, specified in the grant to José de la Maza Arredondo may be adjudged to your petitioner according to the terms and specifications of the said grant, *and the survey of the said [*614 Joshua A. Coffee, a copy whereof is hereunto filed; or according to a survey to be made under the order of this court, by the Surveyor-General of the territory of Florida, in conformity to the description of the said land in the said grant specified and set forth, to be returned into the registry of this honorable court; and that he may have such other and further relief, as in the wisdom of this honorable court shall seem meet and right in the premises; and your petitioner, &c., &c., &c."

In June, 1844, the court, after hearing an argument, decided that the petition for rehearing could not be entertained, and ordered it to be dismissed.

From this decree the petitioners appealed to this court.

Mr. Berrien for the appellants.

Mr. Nelson, Attorney-General, for the United States.

Mr. Berrien, after stating the case, said: This petition was dismissed by the District Court on the ground that it had not been filed in time.

The relief sought by the petitioner is therefore resisted solely on the ground that too much time has elapsed since the decree was rendered to entitle them to it.

They have the decree of this court affirming their title to twenty thousand acres of land, specified in their grant, and at the place therein specified.

The ministerial officer of the government refuses to admeasure the land so awarded to them, according to the terms of the grant, because the decree also refers to an inconsistent description contained in the survey of Burgevin.

And an application to have the decree reformed, according to the clear and manifest intent of the court, is resisted on the ground of time.

This objection is sustained by a reference to the rules established in the English courts of chancery, and recognized here in cases to which they apply, in relation to applications for a rehearing, and bills of revivor.

And to the argument from analogy, drawn from the limitation of time in our statute, with-

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in which appeals may be entered, and writs of error sued out.

As to the first objection: it is submitted that the rules which regulate the proceedings of courts of chancery, in the exercise of their general jurisdiction over cases, between individual parties, are not applicable to this proceeding.

This case was brought before the court below, and subsequently transferred to this court, not by an appeal to the general chancery jurisdiction of either, but under the special authority given to these courts by the Act of 1828, providing for the settlement and confirmation of private land claims in Florida, and those other acts to which it refers.

The proceeding was by petition; which was [*615 required to be conducted *according to the rules of a court of equity; and certain limitatations of time were prescribed, within which petitions were to be filed, and appeals to be entered.

But the court was required to settle and determine the validity of the title, by a final decree, and the successful claimant was entitled to a copy of the decree, and the admeasurement by the surveyor-general of the land awarded, with a certificate of such admeasurement, for the purpose of obtaining a patent from the commissioner of the general land office.

No time is specified within which the duties of these officers are to be respectively performed.

But in the case of a successful claimant, their acts constitute part of the *res gesta*. They are part of the proceeding; and the District Court must, in such case, retain possession of the cause until the mandate of this court is carried into execution.

Its intervention may, in various ways, be necessary to direct, or speed the action of the ministerial officers of the United States.

Neither the enrollment of the decree in this court, nor of the mandate in the court below, can conclude the cause, and fix a period from which the time for filing a petition for a rehearing, or bill of revivor, is to run.

The case remains open, always liable to be acted on by the court below, until the mandate is executed.

No time is prescribed by the act, within which the duties of the surveyor-general are to be performed. The nature of these duties forbade it. It was to survey wild lands in trackless forests.

In point of fact, the decision of the surveyor-general, and of the commissioner of the general land office, that this decree, in its present form, could not be executed, was only obtained immediately before the application to the court below.

If they erred in that decision, had not the District Court power, in the exercise of its authority, to carry the mandate of this court into execution to correct that error, and to require the survey to be made according to its interpretation of the decree? That was one of the purposes of the petitioners.

No application could be made here. The case had passed from this court with its man-

[illegible] remained with the court below to superin-

[illegible] 8.

That which is here contended is, that neither the time at which the decree is pronounced, in this court, nor that when the mandate is filed in the court below, can be considered as the starting point, from which the limitation applicable to petitions for rehearing, and bills of revivor, is to be computed.

This seems to result inevitably from the mode of proceeding.

The decree of this court is spoken of. But the proceeding here is but an affirmance of the decree of the court below.

*The mandate is the certificate of [*616 that affirmance, and the case is remanded to the District Court for "such further proceedings," as according to right and justice, and the laws of the United States, ought to be had. It is then necessarily open in that court.

It may do whatever "right and justice," and "the laws of the United States," require to be done.

Here it is obvious that this application is founded on such matter.

The impossibility of reconciling the different parts of this decree, so as to give it effect, could only be ascertained (from the vagueness of this, as of all other Spanish grants) by the experimental surveys of the United States officer.

This suggestion withdraws the case at bar from the authority of that of *Thomas* and *Brockenborough*, and of the rules of the English chancery.

Repeated experimental surveys were necessary, for the purpose of ascertaining whether the lines of surveys lying in the supposed vicinity of those specified in this grant would correspond with those of the survey referred to in the decree. It was only when this had been done, that the impossibility of carrying this decree into effect, without abandoning the lines of the survey of Burgevin, and resorting to those in the grant, and the survey of Coffee, could be ascertained.

No laches can be imputed to the petitioners, because the time which has since elapsed is not within any legal or equitable limitation.

The ground upon which, however, it is apprehended that this case ought to be put, is, that this case was still open in the court below for the purpose of this petition.

The petitioners had a final decree in their favor, as ascertaining their title to twenty thousand acres.

As they were required to do, they applied to the surveyor to admeasure their land to them.

This, after repeated efforts, in a wild country, he failed to do, alleging certain errors in the decree.

When this was ascertained, application was made to the court below, so to reform the decree as to give the petitioners the benefit of it in some form.

This was refused, solely on the ground that such petition could not now be received.

If, therefore, this cause is open for any purpose, in the District Court, as we apprehend all such cases must be, while the surveyor is engaged in making the survey, in obedience to the mandate; if the court could have granted

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relief in any form, upon petition, to the appellants, then we suppose that its judgment must be reversed, as the petition contains a prayer for general relief.

Mr. Nelson's argument was this:

This is an an appeal from the decision of the **617*]** Superior Court of the *District of East Florida, rendered on a petition exhibited in said court by the appellants, praying for certain relief, and which was dismissed by said court. The error alleged is, that the decree of dismissal was improvidently passed.

The petition is spread upon the record, and need not be repeated here.

It is sufficient to state, that it seeks to reform a decree of the court to which it was presented, passed on the 24th day of November, 1834, and which was, at the January Term, 1836, of this court, upon an appeal prosecuted by the United States, affirmed. (10 Peters, 308.)

The object sought to be effectuated is to make the decree available for other lands than those covered by it, under an allegation that the recitals in said decree are erroneous, and this it is proposed to do by the instrumentality of the petition set out in the record.

The appellee maintains that the court below, in dismissing the petition, committed no error, and that the same ought not to have been entertained by it, because of the lapse of time from the rendition of the decree proposed to be reformed, to the exhibition of the petition in this case.

The proceedings in the court of Florida were had in pursuance of the provisions of the Act of Congress on the 23d of May, 1828, entitled "An Act supplementary to the several acts providing for the settlement and confirmation of private land claims in Florida," the 6th section of which provides, that "all claims, &c., shall be received and adjudicated by the judge of the Superior Court in which the land lies, upon the petition of the claimant, according to the forms, rules, regulations, conditions, restrictions, and limitations, prescribed to the district judge, and claimants in the State of Missouri, by Act of Congress, approved May 26th, 1824, entitled 'An Act enabling the claimants to lands, within the limits of the State of Missouri and territory of Arkansas, to institute proceedings to try the validity of their claims.'"

The 2d section of the act last referred to declares "that every petition which shall be presented, under the provisions of this act, shall be conducted according to the rules of a court of equity."

The question then to be decided is, in the view entertained by the appellees, whether, according to those rules, the petition for a rehearing, filed in this case, was in time to justify the court below in opening the original decree.

This was passed on the 24th day of November, 1834, and was affirmed in this court in January, 1836, and the present petition was filed on the 21st day of May, 1844.

A rehearing will not be granted, if once the decree has been enrolled, even if only one of several defendants has caused the enrollment. (1 Schoales & Lefroy, 234.)

Whatever may be the capacity of a bill of **618*]** revivor or review, to *open a decree thus enrolled, a petition for a rehearing is incompetent to such an end. (*Bennett* v. *Werter*, 2 Johns. Ch. Rep., 305; 3 Ch. Rep., 94.)

But in this case, the lapse of time, in analogy to the principles of law applicable to limitations, is a bar to any relief under this petition, if not, indeed, under any form of proceeding. (10 Wheat., 146; 8 Peters, 123.)

The 22d section of the Judiciary Act of September 24, 1789, limits writs of error and appeal to five years. (1 Story's Laws, 60; 2 *Ibid.*, 905, 906, sec. 5; *McCluny* v. *Silliman*, 6 Wheat., 598.)

Appeals in cases arising under the Act of 1828 are governed by the 7th and 9th sections thereof.

And the 12th section provides, that claims not brought or prosecuted to final decision within two years shall be barred.

Besides, in this case, a mandate had been sent down from the Supreme Court to the Superior Court of Florida; and after a mandate, no rehearing will be granted. (*Sibbald* v. *The United States*, 12 Peters, 492, and authorities there cited.)

It is a mistake to suppose that the object of this petition was to operate upon a ministerial officer, the surveyor-general, in the execution of the decree of the court; its purpose was to reform the decree itself, and to assert, substantially, a new claim. This, it is respectfully insisted, it is not competent for the appellants to do in the form they have adopted.

Mr. Justice CATRON delivered the opinion of the court:

On the facts presented, one consideration is whether the petition was dismissed for a proper reason. The petition was moved on by the claimant's counsel, and resisted on the ground that it had not been filed within the time allowed by law, and the rules of the court: and it is insisted it was dismissed for this reason, which is insufficient; as the bar of five years cannot be interposed under the circumstances. If this had been the reason given, it would be immaterial, if the order was proper for other reasons. The 32d section of the Judiciary Act prescribes the duty of this court in such cases, and directs it to proceed and give judgment according to the right of the cause, and matter in law, without regard to any imperfections in the judgment.

But we do not apprehend any imperfection to exist; the court says: "It is considered that a petition for a rehearing cannot now be entertained by this court in this cause." And why not? In 1829 a proceeding was instituted in the Superior Court of East Florida by the claimants for the confirmation of a claim for twenty thousand acres of land granted to Arredondo. In 1830 that court declared the title valid, on the face of the title papers; this fact existing, the next presented for ascertainment was the sufficiency of the description as to the general locality of the land granted. But the duties of the *court did not [*619 end here; by the 2d section of the Act of 1824 it was not only given full power and authority to hear and determine all questions arising in the cause relative to the validity of the title, and the descriptive identity of location on the face of the title; but third, to settle the precise boundaries of the land on the ground;

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founding its decree on an existing survey, if a proper one was produced, and if not, to let the party proceed according to the 6th section of the act. On the face of the title no material difficulty seems to have arisen; but to identify the land called for was most difficult, and probably impossible. If the grant had been unaided by a survey, it cannot well be perceived how it could have escaped from the principles on which were rejected the claims of Forbes, Buyck, and Joseph Delespine (found in 15 Peters), and of Miranda (in 16 Peters). To avoid doing so, the land was decreed by metes and land marks, founded on a survey (purporting to have been made for the land granted) by Don Andres Burgevin on the 14th of September, 1819.

This survey, it is contended, is for land lying in a different locality from that referred to in the grant, and being so, it is urged, that according to the rulings of this court, no survey could be made for any other land than that granted after the 24th of January, 1818; as this would in effect be a new grant, which the treaty prohibited after that date, according to the cases of *Clarke* and *Huertas*, in 8 and 9 Peters, and that of *Forbes* (15 Peters, 182); and there being no equivalent provided in the grant to except the case from these principles, the survey could not legally be the basis of a decree.

This may have been true, and the decree for the land contained in Burgevin's survey erroneous; but the question is, whether the court below had any power to correct it. If it had not, then no petition for such purpose could be heard, either on the part of the United States, or the claimants in that court.

From the decree made in 1830, an appeal was prosecuted by the United States to this court; the claimants rested content, and prosecuted no cross appeal. (10 Peters, 308.) On a hearing, the decree below was affirmed for the specific land, and the cause remanded for further proceedings, to the end that a patent might issue, pursuant to the 6th section of the Act of 1824, which declares it shall be for the land "specified in the decree;" and prohibits a survey for any other land, unless that decreed has been disposed of, when a change is authorized by the 11th section; but as no other appropriation of the land set forth in the decree is alleged to exist, this circumstance is out of the present case.

The claimants not being willing to take the land in Burgevin's survey, assumed the right to have a resurvey made, or to have adopted that made by Joshua A. Coffee, on their behalf, in 1834, which they allege is at the place called for in the grant; and this on the ground that the decree of 1830 is inconsistent, it being in confirmation of the land granted, and also
620*] of Burgevin's survey—*the places not being the same. This change was refused at the land office here, for the reason that the decree excluded such a change until it was altered by the proper judicial authority. For this purpose the petition for a rehearing was filed, seeking to have the decree of 1830 reformed, and that part of it establishing locality and boundaries set aside or disregarded, and the land located elsewhere. This the Superior Court of East Florida had no power to do, on the facts set forth by the petition, because the decree of this court, made in affirmance of that made below, is conclusive on the inferior court; and it has no authority to disturb it by the mode proposed, but can only execute our mandate, and settle so much as remains to be done. For the principles governing in like cases, we refer to the *ex-parte* application of Sibbald, and the rules there laid down (12 Peters, 489, 490), to which nothing need be added; as they are altogether adverse to the present proceeding, and show that the petition was properly dismissed.

Cited—17 Wall., 283.

THE UNITED STATES, *Appellants*,
v.
WILLIAM MARVIN.

Courts of Florida no right to receive petition for confirmation of private land claim after May 26, 1831.

The Act of the 26th of May, 1830, providing for the final settlement of land claims in Florida, must be construed to contain the same limitation of time within which claims were to be presented as that provided by the Act of 23d of May, 1828.

That limitation was one year. The courts of Florida, therefore, had no right to receive a petition for the confirmation of an incomplete concession after the 26th of May, 1831.

The case in 15 Peters, 329, examined and distinguished from the present.

THIS was an appeal from the Superior Court for the District of East Florida.

It was a land claim, and as the opinion of the court turned entirely upon the question, whether or not the claim was filed in time in the court below, it is only necessary to state the circumstances which bear upon that point.

On the 23d of May, 1828 (1 Land Laws, 439), Congress passed an act, the 12th section of which was as follows:

"That any claims to lands, tenements, and hereditaments, within the purview of this act, which shall not be brought by petition before said court within one year from the passage of this act, or which, being brought before said court, shall, on account of the neglect or delay of the claimant, not be prosecuted to a final decision within two years, shall be forever barred, both at law and in equity; and no other action at common law, or proceeding in equity, shall ever thereafter be sustained in any court whatever."

On the 26th of May, 1830, another act was passed (1 Land *Laws, 466), providing [*621 for the final settlement of land claims in Florida. It confirmed certain claims under a league square, which had been recommended for confirmation by the register and receiver of the land office, acting as commissioners in the District of East Florida, and then proceeded to enact by the 4th section, as follows:

"That all the remaining claims which have been presented according to law, and not finally acted upon, shall be adjudicated and finally settled upon the same conditions, restrictions, and limitations, in every respect, as are prescribed by the Act of Congress, approved 23d May, 1828, entitled "An Act supplementary to

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the several acts providing for the settlement and confirmation of private land claims in Florida."

On the 17th of June, 1843, Marvin filed in the clerk's office of the Superior Court for the District of East Florida, a petition, claiming title to seven thousand acres of land which had been granted to Bernardo Segui, in the year 1815, by Estrada, then the Governor of East Florida. He further stated that the claim had been presented to the commissioners, recommended by them to Congress for confirmation, and confirmed by Congress to the extent of one league square, by the Act of May 23, 1828.

An answer being filed on behalf of the United States, and sundry matters being given in evidence by the petitioner, the cause came on for trial, when the court decided that by the Act of Congress of May 26, 1830, the claimant was not bound to file his petition within one year from the passage of said act, and then proceeded to decree in favor of the claim.

From this decree the United States appealed to this court.

The cause was argued by *Mr. Nelson*, Attorney-General, on behalf of the United States, and by *Mr. Marvin* for the defendant in error.

Mr. Nelson referred to the acts of Congress above cited, and said that the question under this head was, whether the limitation of time prescribed by the Act of 1828 was continued by the Act of 1830. The case in 15 Peters, 319, was relied upon by the other side, and was the foundation of the opinion given by the court below. But the point did not arise in that case, because there a petition had been filed in time. In all other land laws there was a limitation, because the policy of the government was to have all land claims settled within a given time.

Mr. Marvin argued in the following manner:

The petition in this case was filed June 17, 1843, and the only point of any difficulty in the case, and the only one argued in the court below, is, whether the petition was filed in proper time.

The correct decision of this question depends upon the construction to be given to the 4th section of the Act of Congress of May 26, 1830, **622*]** *entitled "An Act to provide for the final settlement of land claims in Florida," and to the 12th section of the Act of May 23d, 1828, entitled "An Act supplementary to the several acts providing for the settlement and confirmation of private land claims in Florida."

By the 4th section of the Act of May 26, 1830, it is provided, that "all the remaining claims which have been presented according to law, and not finally acted upon, shall be adjudicated and finally settled, upon the same conditions, restrictions, and limitations as are prescribed in the Act of 1828." This claim had been presented, according to law, to the land commissioners, and by them presented to Congress, and recommended for confirmation. It remained to be finally settled, Congress confirming only to the extent of one league square.

The point of difficulty, if any, is in the true meaning of the words "conditions, restrictions, and limitations." These words do not necessarily mean a limitation as to time. By the 12th section of the Act of May, 1828, claims were to be brought by petition before the court, within one year thereafter, *i. e.*, by May 23d, 1829, and prosecuted to final decision in two years, *i. e.* by May 23d, 1830. Yet the Congress says May 26, 1830, more than two years afterward that the remaining claims shall be adjudicated upon the same limitations, &c., as in the Act of 1828, which would be impossible if these words included the idea of time; for the time to file the petition, and even for final decision had already expired, and no proceedings could be had. But the Congress intended, by the 4th section of the Act of 1830, that the proceedings should be had for a final settlement. The title of the act is, "to provide for a final settlement," &c. These words, then, cannot intend a limitation as to the time of commencing proceedings, but mean those various conditions restrictions, and limitations, in regard to the practice, course of proceedings, &c., &c., required by the Act of 1828, and the Missouri act upon the same subject.

This point was argued in the case of *The United States* v. *Delespine* (15 Peters, 319), and the court says there "is no direct limitation in the Act of 1830." Will the court imply a limitation as to time in this highly remedial statute and by such implication defeat a final settlement of these land claims, to effect which was the object of passing the act, and in which both parties are interested; and that, too, in a case where the minority of heirs repels any imputation of laches on the part of the claimants? Justice and public policy are both against any such implication.

Mr. Justice CATRON delivered the opinion of the court:

This is an appeal from a decree rendered by the Superior Court of the District of East Florida, by which it was adjudged that no limitation existed to the filing for adjudication a claim for land under the acts of 23d May 1828, and of 26th May, 1830.

*The petition to the Superior Court [*623 of Florida was filed in 1843 by Marvin, to have confirmed to him seven thousand acres of land on the river St. John's, by a concession in the first form made in favor of Don Bernardo Segui, on the 20th December, 1815, by Governor Estrado: and the first question presented below was, and is here, had the Superior Court jurisdiction to entertain the cause? The court having adjudged that the Act of 1828 had no limitation in it, and our conclusion being to the contrary, we will briefly state our reasons for reversing the decree and for ordering the petition to be dismissed.

The first act conferring jurisdiction on certain courts of the United States, to adjudge title to land of the foregoing description, was that of May 26, 1824, and applicable to lands lying within the State of Missouri and territory of Arkansas. By the 5th section of that act it was declared that all claims within its purview should be brought by petition before the District Court within two years from the passage of the act; and when so brought before the court, if the claimant, by his own neglect or delay, failed to prosecute the cause to final decision within three years, he should be forever barred, both at law and in equity; and that no other action at common law, or proceeding in equity should ever thereafter

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sustained, in any court whatever in relation to said claims.

By the Act of 1828, sec. 6, the provisions of the Act of 1824 were extended to the Superior Court of Florida, with some modifications; and among others by sec. 12, that any claims to lands within the purview of that act which should not be brought by petition before the proper court within one year from the passing of the act; or which, being brought before the court, should not on account of the neglect or delay of the claimant, be prosecuted to a final decision within two years, should be forever barred; and that no action at common law or in equity should ever thereafter be sustained in any court whatever. And by sec. 18, the decree was to be conclusive between the United States and the claimant.

The Act of 1830, in its 1st, 2d, and 3d sections, confirms various claims; and in the 4th section declares that all the remaining claims which had been presented according to law to certain boards of commissioners referred to in the previous sections, and not finally acted on by Congress, should be adjudicated and finally settled upon the same conditions, restrictions and limitations, in every respect, "as are prescribed by the Act of Congress approved May 23, 1828, entitled 'An Act supplementary to the several acts providing for the settlement and confirmation of private land claims in Florida.'" The last law of 1830 is also entitled an act to provide for the same purpose: It is supplementary to, and in effect re-enacts the law of 1828; carrying with it the entire provisions of the previous statutes, save in so far as previous parts of them were modified by subsequent conflicting provisions. The policy of Congress 624*] *was to settle the claims in as short a time as practicable, so as to enable the government to sell the public lands; which could not be done with propriety until the private claims were ascertained. As these were many in number, and for large quantities, no choice was left to the government but their speedy settlement, and severance from the public domain; such has been its anxious policy throughout, as appears from almost every law passed on the subject. In 1828 the time for filing petitions before the courts was even reduced from two years to one, and a positive bar interposed in case of failure. This policy we think Congress intended to maintain, and that the courts of Florida had no jurisdiction to receive a petition for the confirmation of an incomplete concession like the one before us, after the 26th of May, 1831.

Some stress has been placed on the language employed by this court in *Delespine's* case (15 Peters, 329); and on which it is supposed the court below founded its decree on the head of jurisdiction. There an amended petition had been filed after the expiration of a year from the 26th of May, 1831, and the question was whether the defective petition, filed in time, had saved the bar, and it was held that it had. But so far from holding that no bar existed, the contrary is rather to be inferred; the direct question was neither decided or intended to be.

For the reasons stated, we order the decree of the Superior Court of East Florida to be reversed, and direct that the appellees' petition be dismissed.

LLEWELLYN PRICE, JUN., for the use of DANIEL W. GAULLEY, *Plaintiff in Error*,

v.

MARTHA A. SESSIONS.

Bequest to infant daughter—age—marriage—death—husband's rights.

Where a testator devised certain property to his infant daughter, to be delivered over to her when she should arrive at the age of eighteen years, and the daughter at the age of sixteen, married the executor who had the principal management of the estate, and possession of the property devised, he must be considered as holding it as executor, and not as husband.

The executors had no power to deliver the property to the daughter, or to her guardian, or to her husband, before the happening of the contingency mentioned in the will.

The law of the State of Mississippi, providing that a wife should retain such property in her own right, notwithstanding her coverture, having gone into operation before the daughter arrived at the age of eighteen years, the distribution to her must be considered to have been made under that law.

The property, therefore, cannot be responsible for the husband's debts.

THIS case was brought up by writ of error from the Circuit Court of the United States for the Southern District of Mississippi.

The facts were these:

In June, 1836, Russell Smith died, leaving a will, the second section *of which [*625 directed that his just debts and funeral expenses be paid, and that, for this purpose, the force be kept together on his plantation, Sylvan Vale, and prudently managed until that crop, or the subsequent one, should yield a fund to pay said debts.

The third section bequeathed to his step-son, William D. Griffin, four quarter-sections of land, and seventeen slaves; and continued as follows: "which property is to be delivered to the said William D. Griffin, by my executors, when he shall arrive at the age of twenty-one years; and should he, the said William D. Griffin, die before he arrives at the age of twenty-one years, then, and in that event, the aforesaid property, real and personal, is to be equally divided between my dear beloved brothers-in-law, E. J. Sessions, P. W. Defrance, W. Le Defrance, and Charles A. Defrance, provided they be living; if not, then it is to revert to my estate again, to be disposed of as hereinafter provided.

"4th. I give and bequeath unto my dear beloved daughter, Martha Ann Smith, all the remaining balance of my estate, real and personal, not mentioned in my bequest to William D. Griffin, and should he and the others before mentioned, to whom the said legacy was to descend, all be dead, she is also to inherit it, the said legacy to W. D. Griffin; but, at all events, the property is to be kept together, and the force worked on the plantation, until my said daughter, Martha Ann, arrives at the age of eighteen years, at which time my executors are to deliver over to her all of the property first set apart for her, and still retain the possession of the legacy to W. D. Griffin, and not deliver it to her if he lives until he is twenty-one years of age; and if he dies, the mode is pointed out for them to pursue. But should my said daughter, Martha Ann, die before she arrives at the age of eighteen, or has an heir of

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her own body, then the legacy left her, as also that may descend to her from the first legacy (to W. D. Griffin), is to be disposed of as follows, to wit:" &c., &c.

He further appointed E. J. Sessions, P. W. Defrance, John Lane, and George Selser, executors; and John Lane guardian to his daughter, Martha, the defendant in error in the present suit, who was, at that time, about fourteen years of age.

On the 25th of July, 1836, the will was admitted to probate, and letters testamentary were granted to three of the executors, viz., Sessions, Lane, and Selser; and Lane was also appointed guardian to the child.

On the 8th of May, 1838, Sessions, together with Samuel Fernandis, and H. Fernandis, executed to Price, the plaintiff in error, two promissory notes; one payable eight months after the 1st of May, 1838, for $2,345.11, and the other payable twelve months after the 1st of May, 1838, for $2,401.16; both being negotiable and payable at the office of the Planters' Bank, Vicksburg, Mississippi.

In September, 1838, Sessions, one of the 626*] executors, married Martha, *the daughter of the testator, she being, at that time, about sixteen years of age.

In August, 1839, Price, a citizen of the Republic of Texas, and suing for the use of Gaulley, a citizen of the State of New York, brought suit against the three makers of the notes aforesaid, in the Circuit Court of the United States.

At November Term, 1839, he obtained a judgment against the whole three, and in December following issued a *fieri facias* upon the judgment.

The property levied upon was suffered to remain in the hands of the possessors, upon their executing a forthcoming bond.

In 1839, the Legislature of Mississippi passed an act (Acts, 72), the 22d and 23d sections of which were as follows:

"Sec. 22. Any married woman may become seized or possessed of any property, real or personal, by direct bequest, demise, gift, purchase, or distribution, in her own name, and as of her own property; provided, the same does not come from her husband after coverture.

"Sec. 23. Hereafter, when any woman, possessed of a property in slaves, shall marry, her property in such slaves, and their natural increase, shall continue to her, notwithstanding her coverture; and she shall have, hold, and possess the same, as her separate property, exempt from any liability for the debts or contracts of the husband."

The 24th section gave to a woman who became entitled to slaves during coverture, the same right which the preceding section gave to those women who possessed slaves at the time of marriage.

In January, 1840, Sessions and wife executed two mortgages; one to the Commercial and Railroad Bank of Vicksburg, of land and negroes, to secure $21,661.79, and the other to the Planters' Bank, of other land and negroes, to secure $7,121.20.

In May, 1840, the forthcoming bond, already spoken of, was forfeited, the effect of which was equivalent to a judgment against principal and sureties, for debt, interest and costs.

On the 23d of November, 1840, the executors of Russell Smith presented their account to the Probate Court, by which it was received, examined, allowed, and ordered to be recorded and the executors were discharged from further accounting with the court, unless thereafter cited by parties interested.

The estate was made Dr.,	$39,345.7
And allowed a credit of	13,636.1
By which it appeared the executors had overpaid	$25,709.4

In January, 1842, an *alias fieri facias* was issued against Sessions, together with the securities on the forthcoming bond, and levied upon the land and negroes which were devised to Martha by her father.

In February, 1842, Martha claimed the property as her own, and *the question was [*627 brought before the court below on the validity of said claim.

Upon the trial, the claimant then introduced John Lane, one of the executors, whose competency was objected to by the plaintiff, but was permitted to testify by the court. Said witness testified that Egbert J. Sessions, one of the defendants in the above named *fieri facias*, has acted as executor from the time he qualified as such, in conjunction with the two other executors; that Egbert J. Sessions had taken charge of the plantation and slaves, as executors, and had since had the actual control and management thereof, that the possession of Sessions was joint with the other executors, and the control of the slaves was given to him by the other executors as a matter of convenience, as he, Sessions, lived on the adjoining plantation. The witness further testified that the estate of Russell Smith was unsettled, and that there are now outstanding debts against the estate of Russell Smith, unpaid, amounting to upwards of twenty thousand dollars. Witness further testified that the accounts of the affairs of the estate had been kept and rendered mostly by Egbert J. Sessions, the witness (Lane) having made but two annual settlements. Witness stated that he had rendered accounts, as guardian of claimant, Martha A. Sessions. Witness further stated that he considered Egbert J. Sessions in the possession of the property, in the capacity of executor of Russell Smith; that the claimant and Egbert J. Sessions had intermarried in 1838; that said Sessions was now in the possession of the property since the marriage; that no formal act of delivery of the property to E. J. Sessions, by the executors, had taken place since the marriage of the claimant with said Sessions.

The plaintiff proved that claimant was now about twenty years of age, and was sixteen years of age at the time of her marriage with said Egbert J. Sessions, which was in September, 1838.

The plaintiff proved by John Lane that he assented to the execution of the two mortgages above named, by Sessions and wife, the present claimant.

The claimant then proved that the debts enumerated in said mortgage before referred to was, as she believed, in renewal of debts contracted with the bank by Russell Smith in his lifetime, the claimant's father.

Said John Lane further proved that he was a director in one of the banks to which

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mortgages are made; that he had assisted Sessions in making the arrangement with the bank, and also assented that he (Sessions) and claimant should mortgage the property to the banks.

This was all the proof in the cause; and, thereupon, the court instructed the jury, "that the property devised and bequeathed by the will of Russell Smith to the claimant, Martha A., did not vest in her, nor was she entitled to 628*] the possession of it until she, the *claimant, arrived at the age of eighteen years; and although she married the defendant in the execution before that time, the title of the property could not be vested in him until the claimant attained eighteen years of age, at which time, under the will, she became entitled to the possession of it; that the property in controversy is a chose in action, and could not vest in her husband until she or he had reduced it to possession, which could not be done, by the terms of the will, before she was eighteen years of age. If, therefore, when the Act of the Mississippi Legislature, securing to married women their property, free from the debts of their husbands (which went into effect in April, 1839), the claimant had not attained the age of eighteen years, the husband had no legal estate in it, and it could not be subject to this execution; and if they believe from the evidence that the possession held by Egbert J. Sessions, one of the defendants in the execution, was held as executor up to that time jointly with the other executors, such possession vested in him no legal interest by his marriage with the claimant, either to the land or slaves, or other personal property.

"To which instructions of the court the plaintiff excepted, and rendered this his bill of exceptions at the time, before the jury retired from the bar, which he prayed might be signed, sealed, enrolled, and made a part of the record, which is done accordingly.

"J. MCKINLEY, [SEAL.]"

Under these instructions the jury found a verdict for the claimant, and to review their correctness the writ of error was brought.

Mr. Henderson for the plaintiff in error.

Mr. Crittenden for the defendant in error.

Mr. Henderson referred to the following assignment of errors which had been filed in the court below:

1. The court erred in instructing the jury "That the property devised and bequeathed by the will of Russell Smith to the claimant Martha Ann did not vest in her until she arrived at the age of eighteen years.

2. The court erred in instructing the jury "That the title to the property did not vest in Egbert J. Sessions until the claimant arrived at eighteen years of age."

3. The court erred in instructing the jury "That the property in controversy is a chose in action, and could not vest in the husband of the claimant until she or he had reduced it to possession.

4 The court erred in instructing the jury "If, when the Act of the Mississippi Legislature, securing to married women their property, free from the debts of their husbands (which went into effect in April, 1839), the claimant had not attained the age of eighteen years, the husband had no legal estate in it, and it could not be subject to this execution."

*5. The court erred in instructing the [*629 jury—

"If they believed from the evidence that the possession held by Egbert J. Sessions, one of the defendants in the execution, was held as executor up to that time (when the act of the Legislature of Mississippi, above referred to, was passed), jointly with the other executors, such possession vested in him no legal interest by his marriage with the claimant, either to the land or slaves, or other personal property."

6. The court instructed the jury contrary to the law of the case.

His argument then proceeded as follows:

Notwithstanding that Russell Smith died in June, 1836, and his daughter Martha married the said Egbert in September, 1838, and the Married Women's Act took effect on the 15th April, 1839, yet, as from the proof it is to be inferred Martha was not eighteen years old till about June, 1840, it is assumed the legacy could not vest till the latter date, and, therefore, was property acquired to her after the said statute took effect, and was, therefore, secured to her by the 3d section of that act, which is as follows:

"That when any women during coverture shall become entitled to, or possessed of slaves by conveyance, gift, inheritance, distribution, or otherwise, such slaves, together with their natural increase, shall inure and belong to the wife, in like manner as is above provided as to slaves which she may possess at the time of marriage."

As to all such slaves, she is entitled, as per sec. 2, to hold them as her property; the control and usufruct, however, to belong to the husband, agreeable to laws heretofore in force.

The Superior Court of Mississippi has decided that this statutory estate of a married woman is not the sole and separate estate known to the common and chancery law: that the latter may still be created, though the statute has not created such estate, but has only secured personal property to a married woman, in the same way lands, in her own right, were secured to her at common law. (2 Smede & Marshall's Rep., 165, 570.)

We maintain:

1st. That by the will of Russell Smith the legacy to his daughter Martha vested on the instant of his death, and possession only was deferred; and her marriage with Egbert J. Sessions invested him with a right of property in said legacy, subject only to like postponement of possession. (4 Hen. & Mun., 411; 4 Call's Rep., 321; 1 How. Miss. Rep., 563, 564; 3 How. Miss. Rep., 312, 395, 396; 1 Wash. Va. Rep., 30.)

That to fix a husband's right of property to a legacy accruing to his wife, either before or during coverture, it is not necessary he should reduce it to possession. (3 How. Miss, Rep., 395, 396; 4 How. Miss. Rep., 214.)

Especially is this true of a legacy, the possession of which is *postponed by the will [*630 by which the husband's right to reduce to possession is delayed. (4 Hen. & Mun., 411.)

2d. The court below erred in charging the jury that "the property in controversy is a chose in action, and could not vest in her husband until he or she had reduced it to possession,

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which could not be done by the terms of the will until she was eighteen years," and, therefore, that the title could not vest in husband, &c., till after wife was eighteen.

Whatever question may be made of what constitutes a chose in action, whether it may be property out of possession or only a right to recover money due by contract, or by tort, it is manifest, from the state of facts in this case, these slaves were not (in relation to Egbert J. Sessions), in any sense, a chose in action. He had the actual and controlling possession of the slaves from the time of marriage. And the right to them, which vested in him by virtue of the marriage, concurring with his actual possession, precludes the possibility that these slaves were, to him, choses in action. Himself was the executor—whom could he sue? Both title and possession were his own—for what could he sue? True, he had a right to account with the Probate Court for his administration, but he neither could sue, or be sued, for these slaves. (See 1 How. Miss., Rep., 563, 564.)

3d. The court erred, also, in instructing the jury that if Egbert J. Sessions had possession of the slaves levied before his wife was eighteen years old, such possession could only be as executor, and could not invest him with the necessary possession to fix his marital right in the property.

If possession of a wife's legacy be postponed by the will, the husband, it is true, cannot be entitled to recover its possession; but for that same cause his marital right to the legacy shall not be prejudiced. (4 Hen. & Mun., 411; 3 How. Miss. Rep., 318; 1 Wash. Va. Rep., 30.)

Now, by the laws of Mississippi, where a will does not otherwise appoint, executors and administrators are bound to pay over legacies, or make distribution, twelve months after letters granted. (Rev. Co., How. & Hutch., p. 406, secs. 70, 71.)

The executors had this estate in administration from testator's death, in June, 1836, till Martha Ann married E. J. Sessions (one of the executors) in September, 1838, two years and three months in all.

But for the provision of the will, that the slaves should be kept together till the legatee, Martha, should arrive at eighteen years of age, the law would have terminated the executor's right of possession more than a year before the marriage.

It was not, therefore, in right of their legal office of executors that the possession was then held, but by the appointment of the will only. The husband, therefore, had all the possession **631***] of this * vested legacy at the time of his marriage of which the legacy was capable; and the law required nothing more of him to perfect his title *jure mariti*. (3 How. Miss. Rep., 313.)

Two months after Egbert J. Sessions' marriage this judgment was obtained against him, which, by the statute of Mississippi, binds property, personal as well as real, from its date. (Rev. Co., How. & Hutch., p. 621; 6 How. Rep., 562, 567.)

But if we are mistaken in all the preceding, still the charge of the court and the verdict of the jury would be wrong; because, if the title to the property was in the wife, the usufruct for life is, by the statute of 1839, reserved to the husband, and that his life estate would be subject to execution for his debts. (6 How. Miss. Rep., 562; 2 Munf. Rep., 501; 4 How. Miss. Rep., 230; 2 How. Miss. Rep., 39.)

Mr. Crittenden, for the defendant in error, insisted—

1. That the property devised was not fully vested in her till she arrived at the age of eighteen years.

2. That whatever right or interest might have been previously vested in her by the will, she had not, nor was she entitled to, seisin or possession of the land or slaves before she attained that age.

And, therefore, as she did not attain it until after her marriage, and after the passage of said act, the provisions of that act apply to and protect the land and slaves devised to her from the debts of her husband and from the execution in question; and, consequently, that said verdict and judgment are correct, and ought to be affirmed.

Mr. Crittenden said that this case strikingly illustrated the wisdom of the law of Mississippi, which was emphatically called "a woman's law." The executor married the daughter at the age of sixteen, and the honeymoon was scarcely over when an execution came to sweep away all that had been provided for her future comfort. The only inquiry is, whether the legacy was vested or not. Suppose she had died, would the husband have had it? Not so, because it was to be applied to charitable purposes. If payment was only postponed, the law would consider it as a vested legacy, but the consequences of a vested legacy do not follow here; therefore it cannot be so. The devise over shows that it was not the intention of the testator that the legacy should vest immediately, and his intention must be the guide to the construction of his will. It is true that chancery inclines to consider legacies as vested, when it is doubtful, but all agree that everything must give way to the intention of the testator, to ascertain which is the object of all rules. In this case the intention is clear. There is a present gift, but the legatee is not to come into possession till the age of eighteen, and in the mean time the executor is to have it, who is directed how to apply it. Again, if the legacy vested and she had died before reaching the age of eighteen, it would have gone to her personal *representatives, but the will gives it [*632 another direction. (1 Roper on Legacies, 378, *et seq.*; 3 Vesey, 236, 536; 1 Merivale, 422, 428; 8 Vesey, 547; 2 Merivale, 368, 384.)

The rule is, that where interest on a legacy is given to a legatee, courts are inclined to consider it as a vested legacy, although the payment may be postponed to a future time; but here the profits were to go to the executor, and, in case of the death of the legatee, the property was to go in another direction than to her natural heirs. Was it within the protection of the law of Mississippi? The law may be inartificially drawn, but its object is apparent. When it allows a woman to acquire and hold separate property, it is equivalent to saying that it shall not be responsible for the debts of the husband. But it is said by the other side that the husband had at least an estate for life in the slaves, and that this estate was properly liable to execution for his debts. But the act says that he is to have the direction and control of them

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during coverture, and how can this be complied with if they are removed out of it by being sold? If this were so, the intentions of the Legislature could always be defeated. There are no restrictions as to time or place, and they might be sold for twenty or thirty years if the husband continued to live so long and be removed to some distant place from which the woman, when a widow, would find it impossible to reclaim them. Was this what the Legislature meant? All that they intended to provide for was that the husband should have a control over them for safe keeping. They intended to carry out their idea plainly, without reference to technical rules or contingent legacies. It has been said that the husband became vested with the property before the passage of the act; but the counsel confounds his possession as executor with that as husband. A case has been cited from Virginia, saying that where a remainder in slaves belongs to a wife the husband has a vested right. But this is peculiar to that State and arises from her local laws. In Kentucky slaves are real property for some purposes, and personal for others. The common law has not been the woman's friend. Society has placed her in a higher position than the law. Under a flattering pretense of unity between husband and wife, the woman has been considered as annihilated, stripped of her property, and in widowhood allowed only a scanty pittance of the very property which she may have brought. This law of Mississippi is a wise and just law, and we hope it will receive such a construction as will carry out the benign intentions of the Legislature. Sessions was not married when the debts were contracted, and no injustice is done to his creditors by refusing to apply his wife's property to the payment of these debts.

Mr. Henderson, in reply and conclusion, referred to Roper on Legacies, 403, to show that a devise over upon a contingency does not prevent a legacy from vesting. The husband here 633*] claims to *hold as executor after his functions as executor have ceased. The distinction between the choses in action and property of a wife, is clearly pointed out in 3 Howard's Miss. Rep., 395. The courts in Mississippi say that the right of the husband is perfect without reducing them into possession. How can property in possession be a chose in action? Sessions had these slaves in possession, and has them now. He undoubtedly had a life estate in them. The case is badly brought up, because the verdict of the jury includes both land and slaves. In Mississippi property taken in execution may be replevied, but this will not apply to land. The statute only meant to put a wife's personal property in the same condition where the common law places her real estate. But the life estate of a husband in lands may be sold. The statute gives to the husband the use and control of the wife's slaves as long as he lives, and consequently she can have no benefit from them under any construction of it.

Mr. Justice CATRON delivered the opinion of the court:

The question arising on the charge of the Circuit Court is: What interest had the husband (Sessions) in the property in controversy at the time it was levied on for his debts? If he had any subject to execution, it was acquired by the marriage with his wife as owner. Her right depended on the will of her father.

Russell Smith died in 1836, in the State of Mississippi, leaving a last will and testament, duly proved in Warren County (27th July, 1836), leaving E. J. Sessions, P. W. Defrance, John Lane, and George Selser his executors; and also leaving John Lane testamentary guardian to the testator's only child, Martha Ann Smith. Sessions, Lane, and Selser qualified as executors.

The testator first provided that his debts should be paid by the proceeds of crops from his plantation, and that the force should be kept together, until the crops paid the same, not exceeding two, however.

He next gave to his step-son, William D. Griffin, a section of land, and various slaves, to be delivered to this devisee, when he arrived at the age of twenty-one years: But should he die before, then, and in that event, the property, real and personal, was to be divided between E. J. Sessions, P. W. Defrance, W. Le Defrance and Charles A. Defrance, provided they should be living—if not, the property to revert to the estate to be disposed of as thereinafter provided.

2. All the remaining balance of the estate, real and personal, is devised to the daughter, Martha Ann Smith—and should all of the devisees mentioned in the first clause be dead before William D. Griffin attained twenty-one years of age, then the whole estate was to be inherited by said Martha Ann. "But at all events (says the will) the property is to be kept together and the force worked on *the planta- [*634 tion until my said daughter Martha Ann arrives at the age of eighteen years; at which time my executors are to deliver over to her all of the property first set apart for her, and still retain the possession of the legacy to W. D. Griffin, and not deliver it to her if he lives until he is twenty-one years of age." The proceeds of the crops were to be invested in young slaves, in the meantime.

If the daughter should die before she arrive at the age of eighteen, or had an heir of her body, then the legacy left her (and that left to Griffin also, if vested in her), are directed to be disposed of otherwise—in charities, &c.

At about sixteen years of age Martha Ann married Egbert J. Sessions, one of the executors, who had the principal management of the estate, and possession of the property. For the additional facts we refer to the statement of the reporter. On this proof the court instructed the jury, "that the property devised and bequeathed by the will of Russell Smith to the claimant, Martha A., did not vest in her, nor was she entitled to the possession of it until she, the claimant, arrived at the age of eighteen years; and although she married the defendant in the execution before that time, the title of the property could not be vested in him, until the claimant attained eighteen years of age, at which time, under the will, she became entitled to the possession of it; that the property in controversy is a chose in action, and could not vest in her husband until she or he had reduced it to possession, which could not be done, by the terms of the will, before she was eighteen years of age. If, therefore, when the Act of the Mississippi Legislature, securing to married women their property, free from the debts of their hus-

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bands (which went into effect in April, 1839), the claimant had not attained the age of eighteen years, the husband had no legal estate in it, and it could not be subject to this execution; and if they believe from the evidence, that the possession held by Egbert J. Sessions, one of the defendants in the execution, was held as executor up to that time jointly with the other executors, such possession vested in him no legal interest by his marriage with the claimant, either to the land or slaves, or other personal property."

As the legacy was outstanding at the time of the marriage, the title was in the executors, subject, first, to the payment of debts; and then the claim of the devisee: but on the contingency, that until the daughter arrive at eighteen, or had an heir of her body, she should in the mean time take nothing more than a support; and this whether she married or not, for a marriage was contemplated as possible before the age of eighteen, as the becoming a mother before was provided for, so that the child might take through the mother.

We think it is free from doubt that the executors had no power to deliver possession of the property devised to the daughter before either of the contingencies above occurred; and that an attempt to do so, either to the guardian, or 635*]to the husband, would have been *void, because in violation of the manifest intention of the testator. It follows, that until the wife arrived at the age of eighteen, or had an heir of her body, the husband could only hold possession as executor. Had he died before, then we think it clear, the wife would have taken, and not the personal representative of the husband, as the executors could not assent in his behalf to the vestiture of the legacy in possession. Provisions in wills, that the executors shall retain the property devised until the devisee is of lawful age; and postponements to later periods, are of common occurrence; the executors having assumed the trust, are held to its execution —on their responsibility and prudence the testator relied, and not on future husbands that young and orphan daughters might marry; nor on guardians selected by indiscreet and incompetent minors. These evils are too prominent, and have too long employed the anxious cares of prudent testators, for this court to lend its sanction in any degree to impair the guards interposed by wills, whereby the rights of possession and enjoyment are withheld from devisees. As the testator could have cut them off altogether if he would, there is no ground for complaint recognized in courts of justice: And yet less ground for complaint is there in a case like the present, where an individual creditor of the husband seeks to defeat the plain provisions of the will, by an assumption that the marital rights superseded the executorial duties, and conferred a power to deliver possession, which the will expressly prohibited.

Mrs. Sessions attained the age of eighteen in June, 1840. In April, 1839, the Act of Mississippi took effect, by which it is provided, that when any woman possessed of property in slaves shall marry, her property in such slaves, and their natural increase, shall continue to her, notwithstanding her coverture; and she shall have, hold, and possess the same, as her separate property, exempt from any liability for the debts or contracts of the husband: And when any woman during coverture shall become entitled to, or possessed of, slaves by conveyance, gift, inheritance, distribution, or otherwise, such slaves shall inure and belong to the wife in like manner, as is above provided, as to slaves which she may possess at the time of marriage.

As the right of distribution in this case was postponed until after the Act of 1839 took effect, the wife could only take the slaves exempt from the husband's debts; we say could, because it does not appear that the executors of Russell Smith have assented to the legacy and delivered possession to the legatee, Martha Ann.

Without saying more, we are of opinion the charge of the Circuit Court to the jury was proper, and that the judgment must be affirmed.

Cited—4 How., 122.

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*W. AND D. H. DAVIESS ET AL., [*636
Plaintiffs in Error,

v.

JOHN H. FAIRBAIRN ET AL., Heirs of MARY E. FAIRBAIRN, Deceased, *Defendants in Error.*

Incorporation of prior into subsequent statutes—Virginia law of acknowledgment of deeds.

In affirmative statutes, such parts of the prior as may be incorporated into the subsequent statute, as consistent with it, must be considered in force.

If a subsequent statute be not repugnant in all its provisions to a prior one, yet if the later statute clearly intended to prescribe the only rules which should govern, it repeals the prior one.

Under the application of these rules, the law of Virginia passed in 1776, authorizing the mayor of a city to take the acknowledgment of a *feme covert* to a deed, is not repealed by the Act of 1785, or that of 1796.

THIS case was brought up by writ of error from the Circuit Court of the United States for the District of Kentucky.

It was an ejectment brought by the heirs of Mary E. Fairbairn, to recover a half acre lot in the city of Louisville, designated on the old plan as number 22, and on the new plan as number 31.

There were many questions in the case, but as the opinion of the court turned upon a single point, it is not necessary to state any except that one.

On the 12th of March, 1811, Mary E. Fairbairn, being the wife of Thomas H. Fairbairn, and the owner of the lot in controversy, subject to the dower interest of her mother, united with her husband and mother in executing a deed for the premises. She then resided in the city of Baltimore. It was alleged by her children and heirs that this deed was incompetent to pass her interest, being improperly executed.

They therefore brought an ejectment to recover it.

The deed was as follows:

"This indenture, made this 12th day of March, in the year of our Lord 1811, between Elizabeth Henry, Thomas H. Fairbairn, and Maria, his wife (daughter and heiress of Daniel Henry, deceased), of the city of Baltimore, in the State

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of Maryland, of the one part, and Dr. Richard Ferguson, of the town of Louisville, in the County of Jefferson and State of Kentucky, of the other part, witnesseth: that the said Elizabeth Henry and Thomas H. Fairbairn, and Maria, his wife, for and in consideration of the sum of eight hundred dollars, current money of the United States of America, to the said Thomas H. Fairbairn in hand paid, at and before the execution of these presents, the receipt whereof is hereby acknowledged, the said Elizabeth Henry, as tenant in dower, hath aliened, released and confirmed, and by these presents doth alien, release and confirm; and the said Thomas H. Fairbairn as tenant by the curtesy, and the said Maria, his wife, as tenant in fee-simple, have granted, bargained, sold, conveyed, released, and confirmed, and by these presents doth grant, bargain, sell, release, convey, and confirm, unto the said Richard Ferguson, his 637*] heirs and assigns, forever, a *certain lot of land, with all the appurtenances, situate, lying, and being in the town of Louisville aforesaid, and known on the plan or map thereof by the number ninety-one (91), containing half an acre, be the same more or less, on Main Street, adjoining the northwardly side of the half acre lot whereon the said Ferguson now lives, and between the same and Main Street: to have and to hold the said half acre lot number ninety-one, with all the appurtenances, unto the said Richard Ferguson, his heirs and assigns, to his and their only proper use and behoof forever. And the said Thomas H. Fairbairn, and Maria, his wife, do covenant and agree, to and with the said Richard Ferguson, and his heirs and assigns, that they, the said Thomas and Maria, will, and their heirs, executors, and administrators, shall, warrant and forever defend the said lot of land numbered ninety-one, with all the appurtenances, unto the said Richard Ferguson, his heirs and assigns, against all and every person or persons whatsoever lawfully claiming or to claim the same.

"In witness thereof, the said Elizabeth Henry, Thomas H. Fairbairn, and Maria, his wife, have hereto set their hands and seals, on the day and year first written.

ELIZABETH HENRY, [L. S.]
THOMAS H. FAIRBAIRN, [L. S.]
MARIA ELIZA FAIRBAIRN. [L. S.]

"Signed, sealed, and delivered, in presence of—
"EDW'D JOHNSTON,
"JNO. HARGROVE.
"HENRY PAYSON,
"CUTH. BULLITT,
"THOMAS LESTER."

"Baltimore County, State of Maryland, sct.:

"Be it known and remembered, that on this 12th day of March, 1811, Elizabeth Henry and Thomas H. Fairbairn, and Maria, his wife, parties to the within and foregoing deed of conveyance to Dr. Richard Ferguson, come in their proper person before me, Edward Johnston, mayor of the city of Baltimore, in the State aforesaid, and signed, sealed and delivered said deed of conveyance, as and for their voluntary act and deed; and the said Maria, being privately examined by me out of the presence and hearing of her said husband, did, of her own free will and consent, again consent to and acknowledge the said deed of conveyance as and for her act and deed, the same being shown and explained to her; and also relinquished and released all her right, title, interest, and estate, and fee, of, in, and to the lot of land number 91, with all the appurtenances by the said deed conveyed, or intended to be conveyed.

"In testimony whereof, I have hereto set my hand, and caused the corporate [L. S.] seal of the city of Baltimore to be hereunto affixed, the date and year above written. "EDW'D JOHNSTON,
"Mayor of the City of Baltimore."

*Upon the trial in the court below, [*638 the following instructions were given with reference to this deed:

"And in substitution of a number of instructions moved by the plaintiff, the court gave to the jury these instructions:

"Instead of the plaintiff's instruction No. 1, the court instructed the jury, that the deed of conveyance by Thomas H. Fairbairn, &c., of 12th March, 1811, to the defendant Dr. Richard Ferguson, whereof a copy was read in evidence by the plaintiff, was not in law the deed of the *feme covert* Maria E. Fairbairn, is not her deed of conveyance for any purpose whatever, and passed from her to Dr. Ferguson no estate whatever in the lot of land in controversy.

The bill of exceptions brought up this instruction, amongst others.

The question was, whether the mayor of the city of Baltimore had a right to take the acknowledgment.

The Act of Virginia, passed in 1776, which had been adopted by Kentucky (4 Littell's Laws of Kentucky, 432), allowed the mayor of a city to take an acknowledgment, where the grantor resided out of Virginia.

Two acts were afterwards passed by Virginia, one in 1785 and the other in 1796, prescribing other modes of taking acknowledgments in such cases, and the question was, whether these acts repealed that of 1776. The provisions of these acts are quoted in the opinion of the court, and need not be repeated.

Mr. Crittenden for the plaintiffs in error.

Mr. Loughborough for the defendants in error.

Mr. Crittenden, for the plaintiffs in error, referred first to the Act of Virginia passed in 1748 (4 Littell, 423; 1 Statute Laws of Kentucky, 429), and then to the succeeding acts. The Act of 1785 was thought to repeal that of 1776, but there was no repealing clause in it, and the courts of Kentucky construe them to be *in pari materia*. The laws of Virginia successively enlarged the means of conveyance. The title of the Act of 1796 was "to enable," &c. The rule is, that repugnancy in statutes must be clear and undeniable, before courts will assume it to exist. (Dwarris on Stat., 638, 699, 717, 718, 726, 734.)

And again, where a statute is remedial and enlarging, it will not be held to control the operation of a previous one. The general character of these statutes is enabling. The Act of 1776 allows *femes covert* to go before a mayor; that of 1785 to appear in court and acknowledge a deed. Where is the inconsistency between the two? If the latter is a repeal of the former, we have never found it out in Kentucky. There are more conveyances of land there than in any other State, and much land

GEORGE W. YOUNG

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is owned by non-residents. Up to 1827 the doctrine now contended for was never heard of. The first time that the question was raised was in the case of *Hynes* v. *Campbell* (6 Monroe, 286), much relied on by the other side. But there **639*]** *was no question in that case about a *feme covert*. A deed was set aside because justices did not certify that it was subscribed before them. The court say that the Act of 1785 repeals that of 1776 as to justices. But then the provisions of the two laws are inconsistent with each other in this respect. In *Miller* v. *Henshaw* (4 Dana, 327), the point is not decided. There are some loose *dicta*, but although the decisions of State courts upon State laws are binding upon this court, *dicta* of judges are not. In *Taylor* v. *Shields* (5 Littell, 295), the court held that a subsequent statute requiring deeds to be recorded in eight months, did not repeal a prior one allowing eighteen months. 6 Monroe, 186, refers to the preceding case. The Act of 1796 contains a general repealing clause (1 Littell, 508, 509), repealing all that is inconsistent with the acts therein recited and continued. But affirmative subsequent statutes are not held to be inconsistent with prior ones. (6 Co. Rep., part 11, p. 54.)

The Digest sanctioned by the judges of the Court of Appeals contains this Act of 1776.

Mr. Loughborough, for defendants in error:

The first opinion of the court pronounced on the trial was, that the deed of March 12, 1811, was ineffectual as to the wife of T. H. Fairbairn, and that her title to the lot did not pass thereby.

The Act of Virginia of 1748 respecting conveyances provided for cases of conveyances by persons residing in the State. It will be found in 4 Littell, 423 (1 Statute Laws of Kentucky, 429).

By the Act of 1785 (1 Statute Laws, 432), husband and wife residing in another State were enabled to convey the dower or inheritance of the wife within the Commonwealth by the acknowledgment of the deed, and the privy examination of the wife before two justices of peace of the county of the wife's residence, to be empowered by a commission for that purpose from the court in which the deed should be recorded.

By an act of 1792 (1 Littell, 152; 1 Statute Laws, 434), the acknowledgment and subscription of the deed before two justices of the peace, though not empowered by commission, and their certificate of the privy examination of the wife, upon being recorded in due time, shall be effectual to pass the wife's right of dower.

In 1795, shortly after Kentucky became a State, its Legislature considering the complexity and uncertainty of the statute laws in force, provided by Act of December 17 (1 Littell, 293), for a revision thereof, for a selection of such as ought to be continued in force, and for a reduction of all those relating to the same subject into one act.

Revisors were accordingly appointed, and discharged their duty. The results of their labors may be seen in various important acts passed in 1796, in the first volume of Littell's Laws. Having enacted them, the Legislature, by an act of the 19th December, 1796, **640*]** *provided that they should take effect on the 1st day of January, 1797, and that so much of any act or acts as came within the purview of the said acts should be repealed from and after that day. (1 Littell's Laws, 508, 509.)

One of these revised statutes was the act to reduce into one the several acts for regulating conveyances. (1 Littell, 567; 1 Statute Law, 437). It provides specially (section 4) for the conveyance by husband and wife, living in another State, of the wife's land in Kentucky. The mode prescribed is the acknowledgment of the deed, and the privy examination of the wife before two justices of the peace of the county of her residence, to be commissioned for that purpose. This act also embraces the provisions of the Act of 1792, respecting the transfer of the wife's dower, in its 6th, 7th, and 8th sections.

It was the law in force at the date of the deed to Ferguson.

In *Elliott* v. *Piersol* (1 Peters, 338), this court held that in Kentucky the capacity of a *feme covert* to convey her land, is the creature of the statute law, and that to make her deed effectual, the forms and solemnities provided by that law must be observed. This is the received doctrine in the courts of Kentucky. It is held there that the deed of a *feme covert* to convey her inheritance, or even her dower, must not only be executed in the mode, and with the solemnities required by the statute laws (*Phillips et ux.* v. *Green*, 3 Marshall, 12; *Steele* v. *Lewis*, 1 Monroe, 49; *Roberts' Heirs* v. *Elliott's Heirs*, 3 Monroe, 397; *Smith* v. *White*, 1 B. Monroe, 19); but it must be actually recorded, together with the certificate of her privy examination, not merely lodged in the proper office for record (*Whitaker* v. *Blair*, 3 J. J. Marshall, 241; *Tomlin* v. *McChord's Reps.*, 5 J. J. Marshall, 336); and that, too, within the time fixed by the statute, otherwise it is void. (*Prewitt* v. *Graves*, 5 J. J. Marshall, 124; *Applegate* v. *Gracey*, 9 Dana, 215.) And to authorize its recordation it must be authenticated in the mode prescribed, and by the officers appointed for that purpose. (*Hunt* v. *Owings*, &c., 4 Monroe, 21; *McConnell* v. *Brown*, Litt. Sel. Cases, 464; *Womack* v. *Hughes*, *Ibid.*, 292.) And if, in fact, placed on the record without being so authenticated, it is still regarded as an unrecorded instrument—cases last cited.

These cases show the strictness with which the statutes of Kentucky, authorizing married women to part with their titles, have been construed by its courts; and the care they have exhibited in the protection of the rights of such persons and their heirs.

In this case, though the deed to Ferguson was in fact recorded, it was not upon its authentication, as regarded the *feme covert*, properly admitted upon the records. As to her it is an unrecorded deed.

The mayor of Baltimore was not authorized to take her acknowledgment, and to make and certify a privy examination.

It was contended in the Circuit Court, that he derived authority *to perform these [*641 acts from a statute of Virginia of 1776 (4 Littell, 432).

The answer to this is, 1st. That this act was impliedly repealed by the Act of 1785.

This Act of 1784 occupied the same ground, and so far as regards conveyances of real estate, contemplates and provides for the same

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case. It was decided by the Court of Appeals of Kentucky, in the case of *Hynes* v. *Campbell*, (6 Monroe, 289), that this act virtually, yet effectually, repealed that of 1776.

2d. When the Legislature passed the Act of 1796, it was obviously intended that all the provisions of existing statutes on the subject of conveyances should be thereby superseded. Its history and title make this manifest. It was a codification of all the laws which it was intended should remain in force. Its first sections are the same as those of the Act of 1785. Those succeeding are the provisions of the Act of 1792. The old Act of 1776 was wholly dropped. Other modes than those of that act being adopted for the conveyance of land by non-residents.

Without a clause of repeal, it would seem that after the Act of 1796, that of 1776 was not in force. To hold otherwise would imply the folly on the part of the Legislature in the effort to render simple and condense into one law all acts on the subject, to have retained two acts on the same subject by which the same thing could be done in different modes—or would be to deny to the Legislature the power to simplify and reduce into one the laws of conveyances, since there can be no doubt that was its intention.

But having adopted the codes, so to call them, of the revisors, the Legislature, by a separate act, passed on the same day (1 Littell, 508), as if to leave no doubt upon this subject, expressly repealed all former acts coming within the purview of these statutes.

Can it be said that the Act of 1776, so far as it regarded conveyances of real estates, by non-resident husbands and wives, is not within the purview of the Act of 1796?

As to what subsequent statutes annul prior ones, see 1 Pickering, 45; 12 Mass. Rep., 563; 5 Pickering, 169. The case of *Taylor* v. *Shields* ought to have no weight upon this point. There must have been an error in copying the word "eight" instead of "eighteen." The last syllable must have been left out by mistake, for no good reason can be given for allowing the people of the State eighteen months to record their deeds, and restricting non-residents to eight.

It is admitted by the other side that the Act of 1796 repeals the prior statute as to justices of the peace, because it makes provision for them; but it is argued that the authority of a mayor was permitted to remain, because no notice is taken of him in the act. But both laws are equally applicable to justices. What good reason, then, can be given for the distinction?

This case does not rest on an implied repeal
642*] only; we say that *there was an express repeal. The revisors were to collect what was proper to be retained, and omit what ought to be left out. The title of the Act of 1796 was "to reduce into one," &c. One branch of the laws reported on by the revisors related to county courts, and upon this subject they made an entirely new code. We say that the same purpose was intended with regard to the deeds of *femes covert*. Additional guards were thrown around them for protection. They were required to go into a court or before commissioners. If the Legislature had repealed the whole Act of 1776, by name, they would have gone further than they wished, because they intended all such parts of it as related to personal property to remain in force. We must find out the intention of the Legislature by looking at the evils which existed before the passage of the law, the circumstances of the case, &c. (6 Dane's Abr., 595: 9 Peters, 317; 3 Wheaton, 610.)

It is said, in 6 Dane, 595, that where the Legislature intends a revision, it amounts to a repeal of prior laws.

In the Act of 1796, clerks are directed to record papers "acknowledged as before prescribed," which shows that the Legislature intended to make a new rule.

Mr. Crittenden, in reply and conclusion:

The deed is admitted by the other side to be good, if the statute of 1776 is not repealed. The burden of proof is on him, therefore, to show that it has been so; and it has been attempted to be shown.

1. From its being inconsistent with the Act of 1785.

2. From its inconsistency with 1796.

3. From an express repeal by 1796.

The fact that the Act of 1796 is the work of revisors, cannot affect the construction of it. There is no rule like this laid down by the elementary writers. It is only, after all, a revised statute. Every act of a Legislature implies a revision of all former laws; and is the construction of it to be varied, because A. B. prepared it? A part of the duty of revisors is to say what statutes shall be repealed. If they thought that the Act of 1776 ought to have been repealed, why did they not say so? A revised act is cumulative. (11 Leigh, first case in the volume.) What part of the Act of 1785 repeals that of 1776? By 1748 deeds must be acknowledged before the general court, or a County Court, in Virginia. By 1776 a *feme covert* may go before a mayor, and by 1785 she may go before any court of record, or two justices appointed by a commission. But these might all be put into one statute, and not be inconsistent with each other. How can the circumstance that they are in different statutes vary the result? Statutes *in pari materia* must be construed together.

In 5 Pickering, a higher penalty was imposed than had been imposed by a preceding law. Here there was a direct conflict. But in the *case in Foster, where £20 per month, [*643 and 12*d.* per Sunday, were inflicted for not going to church, both penalties could be levied. The multiplication of the means of acknowledging deeds was only a facility afforded to women.

If the Act of 1785 did not repeal that of 1776, the Act of 1796 did not, because it is almost an exact transcript of former laws. The designation of one person to do any given thing, does not exclude the right of another to do the same thing. It is said that the Legislature intended to protect women, but Mrs. Fairbairn never denied or questioned the validity of her deed, as long as she lived.

Mr. Justice McLEAN delivered the opinion of the court:

This case is brought here by a writ of error to the Circuit Court for the District of Kentucky.

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The lessors of the plaintiff brought an action of ejectment, to recover a half acre lot in the city of Louisville, numbered on the new plan of the city ninety-one. Richard Ferguson, Daviess, and others, were made defendants. The jury found the defendants guilty, and a judgment was entered against them. On the trial, exceptions were taken to various rulings of the court, only one of which it is material to consider.

The court instructed the jury, "that the deed of conveyance, by Thomas H. Fairbairn and wife, of the 12th of March, 1811, to the defendant, Dr. Richard Ferguson, whereof a copy was read in evidence by the plaintiffs, was not, in law, the deed of the *feme covert*, Maria E. Fairbairn; is not her deed of conveyance for any purpose whatever; and passed from her to Dr. Ferguson no estate whatever in the lot of land in controversy."

The plaintiffs below claimed as heirs-at-law of Maria E. Fairbairn. The fairness of the purchase of the lot by Ferguson was not controverted, nor that he paid for it an adequate consideration. The lot having descended to Maria E. Fairbairn, and her husband being dead, her heirs claim the property, on the ground that the acknowledgment of the deed by their mother, she being a *feme covert*, was defective. And so the court ruled in the above instruction.

The deed was acknowledged on the 12th of March, 1811, the day it bears date, by Elizabeth Henry, who signed it, and who had a dower interest in the lot, and by Fairbairn and wife: the latter being examined separate and apart from her husband, in due form, before the mayor of Baltimore, who affixed his certificate and the seal of the corporation to the acknowledgment.

On the 20th of May, 1811, Warden Pope, clerk of the County Court of Jefferson, in which Louisville is situated, certified that the deed was received in his office; and it being duly certified and authenticated, he recorded the same.

By the Virginia Act of 1776, adopted by Kentucky (4 Litt. Laws of Kentucky, 432), entitled "An Act to enable persons living in **644*]** other *countries to dispose of their estates in this Commonwealth, with more ease and convenience," it was provided "that a person residing in any other county, for passing any lands and tenements in this Commonwealth, by deed, shall acknowledge or prove the same before" the mayor or other chief magistrate of the city, town, or corporation, wherein or near to which he resides. But where there was no mayor or other chief magistrate within the county, then a certificate, under the hands and seals of two justices or magistrates of the county, that such proof or acknowledgment has been made before them, is sufficient. Without an acknowledgment, the fee did not pass under this statute. And "where any person making such conveyance shall be a *feme covert*, her interest in any lands or tenements shall not pass thereby, unless she shall personally acknowledge the same before such mayor or other chief magistrate, or before two justices or magistrates, as aforesaid." A privy examination is required, and the same being certified, the deed may be recorded in the county where the land lies. And such deed shall be effectual to pass all the interest of the *feme covert*.

The acknowledgment of the deed under consideration, in all respects, conforms to the requirements of the above act; and the important question is, whether, at the time of the acknowledgment, the act was in force. If the act had not been repealed, the deed is unquestionably valid.

The plaintiffs in error contend that the above statute was repealed by the Act of 1785, and also of 1796. The Act of 1785 is entitled "An Act for regulating conveyances," in the 1st section of which it is provided, "that no estate of inheritance, or freehold, or for a term of more than five years, in lands or tenements, shall be conveyed from one to another, unless the conveyance be declared by writing, sealed and delivered; nor shall such conveyance be good against a purchaser for valuable consideration, not having notice thereof, unless acknowledged or proved before the general court, or before the court of the county, city, or corporation, in which the land is conveyed, or in the manner hereinafter directed," &c.

"When husband and wife shall have sealed and delivered a writing, purporting to be a conveyance of any estate or interest, if she appear in court, and being examined privily and apart from her husband, by one of the judges thereof, &c.; or if before two justices of the peace, of that country in which she dwells, who may be empowered by commission, to be issued by the clerk of the court wherein the writing ought to be recorded," &c., shall be sufficient to convey her estate.

In this act there is no express repeal of the Act of 1776, consequently that act can only be repealed in so far as it may be repugnant to the subsequent act. They are both affirmative statutes, and such parts of the prior statute as may be incorporated into the subsequent one, as consistent with it, must be considered in force. This *is a settled rule of con- [*645 struction, and applies, with peculiar force, to these statutes. Their object was to prescribe certain modes by which real property within the Commonwealth should be conveyed, by residents and non-residents, and also by *femes covert*, and it must be admitted, that no other modes of conveyance than those which are prescribed will be valid. These forms have been adopted for the security of real property, and the convenience of individuals; hence we find in the statute books of all the States, numerous acts regulating the signing, acknowledging, and recording of deeds.

If the Act of 1785 be not repugnant in all its provisions to the Act of 1776, yet if the former clearly intended to prescribe the only modes by which real estate should be conveyed, it repeals the prior act. And this intention, it is said, is found in the Act of 1785. To some extent this may be correct. In the first section of that act it is provided, that "no estate of inheritance in lands or tenements shall be conveyed from one to another, unless the conveyance be declared by writing, sealed and delivered." Now, a deed, to be valid as a conveyance, under this statute, must be in writing, sealed and delivered. This is the common law definition of a deed. But there are other requisites to make this conveyance

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valid against a purchaser for a valuable consideration, without notice. The deed must be acknowledged as the statute requires, and lodged with the clerk for record. The conveyance as between the parties would be valid, under this statute, without acknowledgment, but unless acknowledged and recorded, or lodged for record, would not be notice to subsequent and innocent purchasers.

The acts under consideration provide specially the mode by which the estate of a *feme covert* shall be conveyed. In the Act of 1785, her privy examination may be made in court or by one of the judges thereof, or she may be examined by two justices of the peace of the county where she resides, "who may be empowered to do so by commission," &c.

By the Act of 1776, the acknowledgment and privy examination of a *feme covert* were required to be made before the mayor or other chief magistrate, or before two justices or magistrates of the town or place wherein she shall reside. The acknowledgment before two justices is retained in the Act of 1785, with this additional requisite, that the justices shall be commissioned, as provided, to perform this duty. This necessarily repeals that part of the prior act which authorized the acknowledgment to be taken before two justices, without being commissioned. The latter act is, in this regard, repugnant to the former. The provisions cannot stand together, as the latter act superadds an essential qualification of the justices not required by the former. But the important question is, whether, as the Act of 1785 made no provision authorizing a mayor of a city to take the acknowledgment of a *feme covert*, that provision in the Act of 1776 is repealed by it. **646*]** In this respect it is clear there is no *repugnancy between the two acts. The two provisions may well stand together, the latter as cumulative to the former.

Does a fair interpretation of the Act of 1785 authorize the inference that the Legislature intended no conveyance by a *feme covert* should be valid, unless acknowledged in the form prescribed by that act? We think no such inference can be drawn. In the first section of that act, in reference to ordinary acknowledgments of conveyances, in order, when recorded, that they might operate as notice to subsequent purchasers, it is required that the acknowledg ment should be made as provided, "or in the manner hereinafter directed." The words here cited can have no bearing on the execution of a conveyance by a *feme covert*. In a subsequent part of the same section, provision is made for the execution of such an instrument, which is complete, without reference to any other part of the statute. The above words, therefore, could only refer to the conveyances spoken of in the first part of the section, and in order that they might operate, when recorded, as notice.

Upon a careful comparison o these statutes, as regards the point in controversy, we think there is no repeal of the Act of 1776 by the Act of 1785. There is no express repeal; no repugnancy, as regards the power of the mayor of a city to take the acknowledgment of a *feme covert;* nor on this point are there any words of the latter act which show an intention to make its provisions exclusive. We are, therefore, brought to the conclusion, looking only at these statutes, that the latter act, in this regard, may be considered as cumulative.

As having a strong and decided bearing on this view, we refer to *Wood* v. *The United States* (16 Peters, 362). In that case the court say, "the question then arises whether the 66th section of the Act of 1799, ch. 128, has been repealed, or whether it remains in full force. That it has not been expressly, or by direct terms, repealed, is admitted; and the question resolves itself into the more narrow inquiry, whether it has been repealed by necessary implication. We say by necessary implication, for it is not sufficient to establish that subsequent laws cover some or even all the cases provided for by it, for they may be merely affirmative, or cumulative, or auxiliary. But there must be a positive repugnancy between the provisions of the new laws and those of the old; and even then the old law is repealed by implication only *pro tanto*, to the extent of the repugnancy."

We come now to consider the Act of 1796. The Act of the 20th of December, 1792, concerning the relinquishment of dower, in the 2d section, provides that dower may be relinquished before two justices of the peace, where the parties reside out of the Commonwealth, and the clerk of the county is required to certify that the persons taking the acknowledgment were justices, &c. This provision is repugnant to that of the Act of 1785, which requires a commission to be issued to such justices.

*By the Act of the 17th of December, **[*647** 1795, two persons were authorized to be appointed by joint ballot of the Legislature, to revise the laws in force, &c. These persons, having been so appointed, reported the Act of 1796, which is entitled "An Act to reduce into one the several acts, or parts of acts, for regulating conveyances." In this act are included parts of the Act of 1776, and nearly the whole of the Act of 1785. It was passed the 19th of December, 1796, and with all other acts reported at the same time, was adopted by a general act, referring to the various acts, and providing "that so much of every act or acts before recited, as comes within the purview of this act shall be, and the same is hereby repealed from and after the first day of January, 1797," on which day the above act took effect.

That part of the Act of 1776, authorizing the mayor of a city to take the acknowledgment of a *feme covert*, is not included in the Act of 1796; nor were certain provisions of the Act of 1748, "for settling the titles and bounds of lands," &c., included, some parts of which have since been recognized by the Court of Appeals of Kentucky as in force.

Great reliance is placed by the counsel for the defendants in error in the case of *Hynes's Representatives* v. *Campbell* (6 Monr., 286). In that case the complainants prayed a rescission of the contract for the conveyance of a certain tract of land, on the ground of a defect of title; and the court held that they were not bound to accept the deed for the land, tendered by the defendant, as some of the conveyances under which he claimed were not acknowledged and recorded, as the law required. The deeds thus objected to "were acknowledged

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before two justices of the peace of Dunwiddie County, Virginia, who certified simply that the grantor acknowledged the same before them, as the law required," without adding that the grantor "also subscribed the same in their presence." This proceeding was under the Act of 1792, which had been construed to require a certificate of the justices that the deed had been subscribed in their presence, in regard to deeds executed within the State. And the court say they turn their attention to the Act of 1776, "and they find that it regulates only conveyances made out of the State, and that it provides for acknowledgment alone, before two justices of the peace, and says not a word about subscribing, and if that act is in force in this respect, it will exactly embrace the case in question. And they held that the above act was virtually repealed by the Act of 1785, which requires that the two justices taking the acknowledgment should be commissioned to do so. This view of the court, as regards the acknowledgments of the deeds then before them, was undoubtedly correct. It is the construction which we have before given to this part of the Act of 1785. The attention of the court was not drawn to any other point than the one before them. They did not say that that part of the Act of 1776 which regulates the ac-
648*] knowledgment *by a *feme covert*, which is wholly different from the above, was repealed. It is true their language is general, but their meaning must be limited to the point under consideration. This decision, therefore, cannot be considered as having a bearing on the point now before us.

In the case of *Prewet* v. *Graves et al.* (5 J. J. Marshall, 120), the court say that the 5th section of the Act of 1748 had been repealed by subsequent and repugnant enactments. In *Miller et al.* v. *Henshaw & Co.* (4 Dana, 323), they say, in reference to the Act of 1776, and to the decision of *Hynes's Representatives* v. *Campbell*, above cited, that the Act of 1776 "is nowhere repealed by express words, but only by construction, in consequence of the inconsistency of its provisions with those of subsequent statutes; and as none of the subsequent statutes relate to the authentication of deeds of personalty, out of the State, except those which reduce the number of witnesses from three to two, there can be no inconsistency, and therefore no constructive repeal of so much of this statute as relates to deeds of personalty, except as to the number of witnesses."

In *McGowan* v. *Hay* (5 Litt., 244), the court held the Act of 1748 was in force in Kentucky, in regard to the acknowledgment and recording of mortgages and deeds of trust. By the Act of 1796, a deed, executed out of the Commonwealth for lands within it, was required to be recorded in eight months. The Act of 1785, which preceded it, required such deed to be recorded in eighteen months; and in *Taylor* v. *Shields* (5 Litt., 297), the question was, whether the latter of these acts, in this respect, had repealed the former; and the court say, "we should hesitate much to give such effect to the latter statute." "Virtual repeals are not favored by courts. A body of acts ought to be held as one act, so far as they do not conflict with each other. Here the same restriction to the 'manner prescribed by law,' existed before the passage of our act, as well as afterwards; and if, in transcribing the Virginia Code into ours, any part shall be adjudged to be repealed, barely by putting in the date of transcribing, as the date of the law, and because the provision, so transcribed, shall apparently conflict with any former part not so transcribed, it may be of serious consequence to the community." "We incline," the court say, to the opinion "that the clause in our statute (of 1796), 'in the manner prescribed by law,' meant to retain, and was intended to retain former provisions, with regard to deeds entire;" and they held that recording of the deed within eighteen months, under the Act of 1785, was sufficient.

That part of the Act of 1785, which regulated the time of recording deeds, executed without the Commonwealth, was not copied into the Act of 1796, and yet the court held that the latter act, in this respect, did not repeal the former.

In *Elliott et al.* v. *Piersol et al.* (1 Peters, 339), this court say the Virginia statute of 1748 "was adopted in Kentucky, at her separation *from Virginia, and is understood never [*649 to have been repealed."

It does not appear that the question, as to the validity of the acknowledgment of a deed before the mayor of a city, by a *feme covert*, under the Act of 1776, since that of 1785 has been enacted, has ever been decided. Some general expressions, as above stated, have been used by the Court of Appeals, in regard to the repeal of the former act by the latter, but those expressions did not relate to the above question. And it may be again observed, that those remarks by the Court of Appeals can only be held to apply to the matter then before them; and that a more extended application of them would be inconsistent with the views taken by the same court, in the other cases cited. If the provision in the Act of 1785, requiring a deed executed out of the State to be recorded in eighteen months, is not repealed by the Act of 1796, requiring such deed to be recorded in eight months, is the Act of 1776, authorizing the acknowledgment of a deed before a mayor, by a *feme covert*, repealed by subsequent acts? None of those acts repeal, in terms, the above provision in the Act of 1776, and they contain no repugnant provision. Consequently, the first act stands unrepealed. The different acts on the same subject, in the language of the Court of Appeals, must be "considered as one act." In this view, the provision in question stands consistently with all the subsequent statutes; and on this ground we feel authorized to say, that the acknowledgment of the deed before us is valid, under the Act of 1776, and that it conveyed to Ferguson, the grantee, a good title in fee-simple. The clause of the Act of 1796, "repealing so much of the acts referred to as come within the purview of that act," extends no further than the repugnancy of the Act of 1796 to the provisions of the acts named.

Upon the whole, the judgment of the Circuit Court is reversed, at the costs of the defendants, and the cause be remanded, &c.

Cited—11 Wall, 92; 17 Wall, 431; 6 Otto, 158; 1 Brown, 95; 12 Blatchf., 349; 10 Bank. Reg., 176; 3 Cliff., 193, 256, 257.

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650*] *LESSEE OF WILLIAM L. BROWN AND WIFE, *Plaintiff in Error*,

v.

JOSEPH CLEMENTS AND JONATHAN HUNT, *Defendants in Error*.

Division of public lands—duties of surveyor-general.

Under the acts of Congress, providing for the subdivision of the public lands, and the instructions of the Secretary of the Treasury, made under the Act of 24th April, 1820, entitled "An Act making further provision for the sale of the public lands," it is the duty of the surveyor-general to lay out a fractional section in such a manner that an entire quarter-section may be had if the fraction will admit of it.

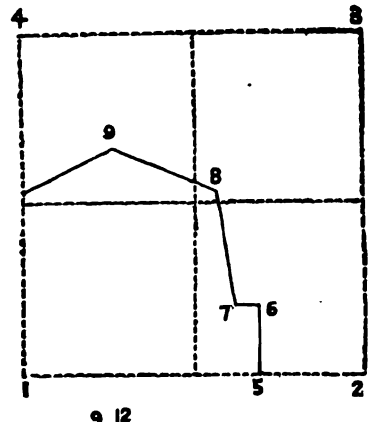
The surveyor-general has no right to divide a fractional section by arbitrary lines, so as to prevent a regular quarter-section from being taken up.

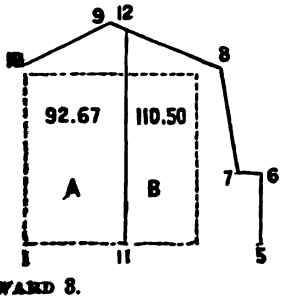
THIS case was brought up by writ of error, under the twenty-fifth section of the Judiciary Act, from the Supreme Court of the State of Alabama.

It was an ejectment, brought by the plaintiffs in error to recover two and forty one-hundredths acres of land, in the possession of Clements as the tenant of Hunt. The plaintiff claimed title through a patent to James Etheridge, and the defendants through a patent to W. D. Stone. Both Etheridge and Stone claimed as pre-emptioners under the Act of Congress passed on the 29th of May, 1830.

The question depended upon the manner in which the fractional section twenty-two, in township four south, of range one west, in the district of lands subject to sale at St. Stephens, Alabama, should be laid out.

A reference to the annexed diagrams will make it more intelligible.





Nos. 1, 2, 3, 4 represent the whole section; but in consequence of prior claims or grants, only that part of it included within 1, 5, 6, 7, 8, 9, 10, was subject to entry, containing the entire southwest quarter-section, and some additional land upon the east and north. The surveyor divided the whole of this into two parts by a line running from 11 to 12, one of which parts (marked A) contained 92.67 acres, and the other (marked B) contained 110.50 acres. The *plaintiff claimed to extend [*651 the part A over the whole square which constituted the quarter-section, as represented by dotted lines.

On the 28th January, 1831, Etheridge presented the following application and affidavit:

"To the Register and Receiver of the Land Office at St. Stephens:

"You will please to take notice that I, James Etheridge, of Mobile County, Alabama, claim the right of pre-emption, under the Act of Congress of the 29th May, 1830, to the southwest quarter-section 22, t. 4, r. 1 west."

Affidavit. "James Etheridge, being sworn, maketh oath that the above described tract of land was planted and cultivated by him in the year 1829, and remained in his possession from the year 1829 until after the 29th May, 1830. That the said land was occupied and cultivated by him in his own right, and not as the tenant of any other person. That the said land was inclosed with his own fence, and that there was no person concerned with him in the occupation, and cultivation of the said land; and that the present claim does not interfere with the right of any other person, and that he believes he is entitled to the same under the Act of Congress of the 29th May, 1830, and that the said tract is within the corporate limits of the city of Mobile.

"J. ETHERIDGE."

The affidavit was sustained by the oaths of Daniel Robertson and John Carr.

On the 25th of March, 1831, Stone presented the following application and affidavit:

"To the Register and Receiver of the Land Office at St. Stephens, Alabama:

"You will please to take notice that I, William D. Stone, of Mobile County, Alabama, claim the right of pre-emption, under the Act of Congress of the 29th of May, 1830, to the fraction situated in the west part of the southeast quarter of section 22, in township 4, range 1, west of 13.

"WILLIAM D. STONE."

Affidavit. "William D. Stone, being sworn, maketh oath that the above described tract of land was planted and cultivated by him in the year 1829, and remained in his possession from the year 1829 until the 29th May, 1830, and that the said land was occupied and cultivated by him in his own right, and not as the tenant of any other person. That the said tract of land was inclosed with his own fence, and that there was no person concerned or connected with him in the cultivation of the said land, and

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that this present claim does not interfere with the rights of any other person; and further, that the tract described is within the present corporate limits of the city of Mobile.

WILLIAM D. STONE."

The affidavit was supported by the oaths of Samuel H. Garrow and James Dowell.

652*] *On the 20th of June, 1831, the register and receiver issued the following certificate:

E.—Extract from abstract of claims to pre-emption, under the Act of 29th May, 1830.

A abstract of claims to pre-emptions to lands that are reported to have been surveyed, but the township plats not furnished to this office.

"Land Office, St. Stephens, Alabama.

No.	By whom claimed.	Residence.	Tract.				Quantity.		Rate.		Amount.	
				Sec.	T.	R.	D.	C.	D.	C.	D.	C.
2	Jas. Etheridge	Mobile	S. W. qr. Fraction 22 and	22	4	1 W.						
15	Wm. D. Stone	Do.	All lying south of 31°	27	4	1 W.						

except claim No. 40.

"LAND OFFICE, ST. STEPHENS, ALA., June 20, 1831.

"It is the opinion of the undersigned, that the foregoing claimants are each entitled to the right of pre-emption, under the Act of Congress of the 29th May, 1830, to the tract or tracts by them claimed, and annexed to their names respectively, in the foregoing abstract.

"JOHN B. HAZARD, Register.

"J. H. OWEN, Receiver."

The account of sales was entered in the book at some period which the record does not show, and was as follows:

Extract from account of land sold by register and receiver.

"Account of lands sold, and moneys entered in payment therefor, in April, 1832.

When sold.	By whom purchased.		No. of receipt	Tract.			Acres.	Price.	Amount.	
	Purchaser.	Residence.		Section.	T.	R.				
1832 April 30	James Etheridge	Mobile	4,539	S. W. qr. 22	4. So.	1 W.	9,267	1 25	115 83	
"	Wm. D. Stone	Do.	4,547	S. E. subdiv. qr. sec. 22	4. So.	1 W.	11,060	1 25	138 18	Pre-emption So. 31st.

On the 30th of April, 1832, the register gave to Etheridge the following certificate:

G.—Certificate.

"Pre-emption No 4,539, act 29th May, 1830.

"LAND OFFICE, ST. STEPHENS, ALA., April 30, 1832.

"It is hereby certified, that in pursuance of law, James Etheridge, of Mobile County, Alabama, on this day purchased of the register of this office, the lot or southwest quarter of section number twenty-two, of township No. 4 south, in range number one west, containing nine-two acres and sixty-seven hundredths of an acre, at the rate of one dollar and twenty-five cents per acre, amounting to one hundred and fifteen dollars and eighty-three cents, for which *the said James Etheridge has made [*653 payment in full, as required by law.

"Now, therefore, be it known, that on presentation of this certificate to the commissioner of the general land office, the said James

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Etheridge shall be entitled to receive a patent for the lot above described.

"JOHN B. HAZARD, Register."

On the same day a certificate was issued to Stone, as appears from the following extract from the record of certificates issued for lands sold.

"Record of certificates issued for lands sold, &c.

Date of certificate.	No. of certificate.	Name.	Residence.	Tract. Sec. or part of Sec.	T.	R.	Quantity. Acres.	Hdth.	Price. D.	C.	Amount. D.	C.
1832. April 30	4,539	James Etheridge	Mobile co.	Southwest 23 S. E. sub. frac. 23	4	1 W.	92	97	$1	25	$115	88
"	4,547	Wm. D. Stone	do.		4	1 W.	110	08	$1	25	$138	13

On the 17th of December, 1832, a patent was issued to Stone. It granted the land described in the following preamble:

"Pre-emption certificate, No. 4549. The United States of America, to all to whom these present shall come, greeting:

"Whereas, William D. Stone, of Mobile, has deposited in the general land office of the United States a certificate of the register of the land office at St. Stephens, whereby it appears that full payment has been made by the said William D. Stone, according to the Act of Congress of the 24th of April, 1820, entitled "An Act making further provision for the sale of the public lands," for the southeast subdivision of fractional section twenty-two, in township four, south of range one west, in the district of lands subject to sale at St. Stephens, Alabama, containing one hundred and ten acres and fifty-one hundredths of an acre, according to the official plat of the survey of said land returned to the general land office by the surveyor-general, which said tract has been purchased by the said William D. Stone.

"Now know ye," &c., &c.

On the 30th of May, 1833, a patent was issued to Etheridge for the land described in the preamble.

"Pre-emption certificate, number 4539.

"The United States of America, to all to whom these presents shall come, greeting:

"Whereas, James Etheridge, of Mobile County, Alabama, has deposited in the general land office of the United States a certificate of the register of the land office at St. Stephens, whereby it appears that payment has been made by the said James Etheridge, *accord- [*654 ing to the provisions of the Act of Congress of the 24th April, 1820, entitled "An Act making further provisions for the sale of the public lands," for the southwest quarter of section twenty-two, in township four, south of range one west, in the district of lands subject to sale at St. Stephens, Alabama, containing ninety-two acres and sixty-seven hundredths of an acre, according to the official plat of the survey of the said lands returned to the general land office by the surveyor-general, which said tract has been purchased by the said James Etheridge.

"Now know ye," &c., &c.

In April, 1838, Brown and wife, claiming under the title of Etheridge, brought an ejectment against Clements for the east half of the southwest quarter of fractional section twenty-two. The case came on for trial at the April Term, 1841, in the Circuit Court of the State of Alabama for the County of Mobile, in the course of which the following bill of exceptions and agreement were filed.

Bill of Exceptions.

"Be it remembered, that upon the trial of this cause, the plaintiffs gave in evidence the paper hereto annexed, marked A, being a duly certified copy of a patent from the United States government to James Etheridge; and thereupon, it was admitted by the defendants that the plaintiffs had, at the date of the demise, and time of trial, all the rights of said patentee Etheridge in the land described in the declaration. Plaintiffs also gave in evidence paper marked B, hereto annexed, being a plat of a survey made and returned, under an order of this court, by the surveyor for the County of Mobile, and proved by said surveyor that said survey was truly made, according to said order, and that the plat returned shows correctly the external lines and corners of said fractional section twenty-two. That he found the southwest corner of said fractional section, as shown by the plat returned; and also found, on the section lines of said fractional section, the half mile posts, each post being a half mile from the southwest corner of said fractional section. That these

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posts bore evidence of being those put down by the United States surveyor, on running the section lines. That an entire southwest quarter exists in said fractional section, without interference with any private land claim, and leaving a *residuum* both on the north and on the east of said quarter-section, as shown by the plat returned by him; and also, that said fractional section contains two hundred and ten acres. The defendants admitted that they were in possession, at the time of service of the declaration, of sixteen acres of the land described in the declaration. The defendants gave in evidence, by consent of plaintiffs, a certified copy of a patent from the United States government to William D. Stone, hereto annexed, marked No. 1; and thereupon, it was admitted by the plaintiffs that the defendants have all the rights of the said patentee, Stone, 655*] in *the land admitted to have been in their possession at the time of the service of the declaration.

"The defendants offered in evidence duly certified copies of the official township plats of 1832 and 1835, of the township in which the land sued for is situated (extracts from which are hereunto annexed, marked No. 2), to show the boundaries and contents of the land described in said patents to said Etheridge and to said Stone, without having offered, or professing to have any other evidence than the plats themselves afford, to prove that the subdivision, corners, and lines dividing said fractional section, as exhibited in the said plats, had been run and marked on the ground. To the admission of which evidence the plaintiffs objected; and their objection was overruled, and said plats allowed to go to the jury. The plaintiffs admitted, that if the line, as marked on said extract from plats (No. 2) dividing lots A and B, is a legal line, lot B, as exhibited, will cover the land sued for.

"The plaintiffs further gave in evidence, that the said line and corners, as exhibited on the extract (No. 2), had never been run or marked on the ground; and also gave in evidence papers marked C, D, E, F, G, H, being duly certified transcripts of records from the land office at St. Stephens, Alabama.

"The defendants gave in evidence paper marked No. 3, being a duly certified copy of the instructions of the Secretary of the Treasury, bearing date the 10th day of June, 1820, also 20th January, 1826.

"The plaintiffs gave in evidence paper marked I, being a duly certified copy of the circular of the Secretary of the Treasury, of date the 8th day of May, 1832.

"Upon the foregoing evidence, the court instructed the jury, that if they believed the same, they must find for the defendants. The court further instructed the jury, that if said fractional section (No. 22) was capable of being subdivided into an entire southwest quarter-section and two half quarter-sections, leaving a *residuum* as shown by the said map and evidence of the county surveyor, still the surveyor-general was not required, under the acts of Congress providing for the subdivision of the public land, and the instructions of the Secretary of the Treasury, made under the Act of the 24th of April, 1820, entitled 'An Act making further provision for the sale of the public lands,' to make, in his subdivision of the same, either such quarter-section or half quarter-sections, but might lawfully subdivide the same into two lots (A and B), as indicated by said plat of 1832; and that under said evidence, Etheridge's title would not hold the whole southwest quarter of said fractional section, but only lot A, and that Stone's title would hold lot B, being the balance of said fractional section.

"To which instructions, and each and every of them, the plaintiffs, *by their coun- [*656 sel, except, and pray the court to sign and seal this their bill of exceptions.

"E. L. DARGAN. [SEAL.]"

Agreement of the parties:

"The parties to this cause, not wishing to incumber the record by copying from the book entitled 'General Public Acts of Congress respecting the sale and disposition of the public lands, with instructions issued from time to time by the Secretary of the Treasury and commissioner of the general land office, and official opinions of the Attorney-General on questions arising under the land laws,' and which instructions are contained in the 2d volume, part 2d, prepared and printed by order of the Senate, agree that said book may be used by either party, and anything therein contained read as illustration of the practice of the land office, and construction that the acts of Congress had received in that branch of the government. The same work can be referred to by either party in the Supreme Court, for the purpose aforesaid. The parties further agree, that for exhibit No. 2, being the official map of the survey of the township described in the patents of both plaintiffs and defendants, the map contained in the same book above described, between pages 134 and 135, shall be referred to as if the same was incorporated with, and formed a part of the record in this cause.

"SHERMAN & CHAMBERS,
"Attorneys for plaintiffs.
"GORDON, CAMPBELL & CHANDLER
"Attorneys for defendants."

The jury having found for the defendants under the above instructions, the case was carried to the Supreme Court of the State of Alabama, where the opinion of the court below was affirmed.

A writ of error brought it to this court.

Messrs. Willis Hall and *Sherman* for the plaintiff in error.

Mr. Jones for the defendants in error.

Mr. Hall stated the case, and claimed the entire quarter-section. It was not within the exceptions of the Act of 1830, being neither reserved nor appropriated. The agent of the United States cannot prescribe any other conditions than those which are found in the law. The southwest quarter of section 22 is a specific thing. A patent was issued to Etheridge for it. It is true that the patent says that it contains only ninety-two acres and sixty-seven hundredths, but this is mere surplusage, and does not detract from the legal efficacy of the grant. (6 Cowen, 706.)

The defendant in error settled upon the southeast quarter, but there were previous claims to a part of it, which had a preference, and he only claimed what remained. Stone

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claim to the southeast quarter was put in three months after ours. In order to effect a valid title under the pre-emption law, three things are required.

657*] *1. The land must belong to the United States, and be unappropriated.

2. It must conform to the regular and legal subdivisions.

3. The settlement must be upon the quarter-section which is claimed.

The patents of the parties in this case do not clash with each other. One is for the southwest quarter-section, and the other for the southeast subdivision. A subdivision is not a legal term, and is synonymous, in this case, with quarter. The part claimed by the defendant in error is called by different names, for example, "a fraction of 22," "southeast subdivision," "fraction and southeast subdivision," and "southeast sub-fraction." They all mean the same thing, which is, a fractional part of the southeast quarter-section. The dispute has arisen because the surveyor has drawn a line not authorized by law, dividing the section into two parts. The authority which is supposed to exist for such a line is the law of 1820 (1 Land Laws, 323); but we say that this law does not apply to the case, or if it does, that it is controlled by the Act of 1830, which says that we are entitled to a quarter-section. But these laws are not inconsistent with each other. (13 Peters, 498.)

All the laws, beginning with the ordinance of 1785, which directs the public lands to be laid off into townships, and coming down to the law of 1832 (1 Land Laws, 493), have the same system in view, viz.: running the lines geographically, and laying the land off into squares. The Acts of 1804 and 1805 (1 Land Laws, 104, 108), requiring lands to be laid out and offered for sale in quarter-sections, are unrepealed, for the Act of 1820 refers to them, and recognizes the same mode of running out the lines. Laws must be construed together. (Dwarris on Stat., 674.) The Act of 1820 supposes that the land is already laid off in quarter-sections, and not that new lines are to be run. The reference to the rules which the Secretary of the Treasury is authorized to prescribe, is to the manner of executing the established provisions of existing laws, and not that the system itself should be changed. The word "fraction" in the law must be construed to mean the piece which is left after a quarter-section is carved out. The object of all the land laws (which *Mr. Hall* examined in detail) is twofold. 1st. To avoid a conflict as to boundaries, because each man's possession is a regular geometrical figure; and, 2d. To guard against favoritism and partiality, by requiring the whole figure to be purchased. After the surveyor-general had run these lines, he was *functus officio*, and had no right to obliterate them, unless by a fresh act of Congress. We contend:

1. That this quarter-section is given to us by the Act of 1830.

2. That there have been no laches on our part.

3. That we have the higher equity, our claim being two or three months earlier than that of the other side.

[658 *Mr. Sherman* here gave taht notice that in his reply he should refer to the following authorities: 6 Cranch, 237; 1 Paine's C. C. Rep., 494; 4 Wash. C. C. Rep., 45; 2 Porter's Ala. Rep., 42, 43; 7 Porter's Ala. Rep., 351, 360, 432; 3 Stew. Ala. Rep., 76; 1 Peters, 655; Stat. Alabama, 283; 13 Peters, 436, 498; 4 La. Rep., 547; 13 La. Rep., 547; 1 La. Rep., 56.

Mr. Jones, for defendant in error:

Both patents can stand. The parties are both pre-emptioners, and entered and paid for their land on the same day, and received certificates for it. Our patent is the elder. What does it grant? The description of the property is, the "southeast subdivision," &c., "according to the official plat of the surveyor." We must, therefore, look at the official survey, returned before the patent issued. It is the same thing as if it had actually been inserted in the body of the patent. There are two subdivisions marked upon it, and no one can doubt which is the southeastern. It corresponds, also, with the original entry, which we find to be one hundred and ten and a half acres. The patent contains the exact technical description of the land, as claimed by us.

The argument upon the other side is, that the surveyor general had no right to lay off the land in these two subdivisions, and that his act, being illegal, is void. But if he has done an illegal act, does that destroy our title? This section is a fractional one, containing only two hundred and three acres, forty-three more than a quarter-section. Were we bound to divide this into half or quarter-sections? Had not the Secretary of the Treasury power to adapt the mode of laying it out to the state of the country? The act of Congress was prospective, and designed to provide for just such a case as this. What is left of the section, after satisfying elder claims, is singularly shaped, and could not have been laid out into squares.

It is made an objection to the subdivision by the surveyor, that the dividing line was never run and marked upon the ground. But if this be sound, it will impeach every title made under that survey. The irregularity of the figure is no objection to the subdivision, for the Act of 1820 provides for the case. It directs whole sections to be laid off by north and south lines, but fractional sections are left to the judgment of the Secretary of the Treasury. The Act of 1830 introduces no new system for the benefit of pre-emptioners, but refers to the system which was then in existence. Under it, if an entire quarter-section had been laid out, there would have been only forty acres left, and if several claimants had been living on it, it would have been impossible to divide the land amongst them all.

Mr. Sherman, in reply, laid down the following propositions:

1. That Etheridge's patent, legally construed, will hold the whole *"southwest [*659 quarter" of fractional section number 22, according to his claim, allowance, and right, under the pre-emption law.

2. That Stone's patent for the "southeast subdivision" of said section, legally construed, will hold only the southeast legal subdivision of the same; and that the southeast fractional quarter is such southeast "legal subdivision," according to his claim and right under the pre-emption law.

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3. That if the patents cannot be legally so construed as to avoid conflict, yet that Etheridge's preliminary title, and rights under the pre-emption law, are sufficient to authorize the plaintiffs to recover; and that, under the statutes of Alabama, the certificate issued to Etheridge, which is older than the certificate or patent to Stone, is sufficient to authorize the plaintiffs to recover.

These lands were surveyed in 1820, and the corners marked. It is stated in the record that they found the southwest corner and the half-mile posts all marked. Etheridge's patent includes the whole of the southwest quarter, and the granting clause is not restrained by a reference to the number of acres, which is merely descriptive. (See the authorities already cited, and also 5 Mason C. C. R., 410; 1 Peters C. C. R., 496; 6 Cowen, 706.)

The Pre-emption Act of 1830 says that persons must take some legal subdivision. The direction is positive on this subject. The southwest quarter was such a subdivision, and created in 1820, when the lines were run. There were three corners established then, and anyone could run the fourth line; and the fact of the case is, that these section lines are the only ones which were ever run. The system was adopted in 1805. Under it, quarter-sections could be found without being run out, because half-mile posts were put down. The law, then, created this quarter-section, which was established as soon as the posts were planted. Etheridge lived in sight of a post. The lines which the surveyor makes upon paper are not boundaries, but are merely indicative of subdivisions which the law has created. (5 How. Miss. Rep., 751.)

A quarter-section is a definite, precise, legal thing. (2 Laws and Instructions, 180, 181, 183, 184, 187; 4 Stewart & Porter, 396; 7 Porter, 432.)

Etheridge's patent is not for the lot A, which runs into the northwest quarter-section.

The Act of 1805 speaks of corners and lines not run out; and the 2d section of the Act of 1796 (Land Laws, 51), shows what the surveyor-general must return, by directing that his plat must be made up from field books. (2 Porter's Alabama Rep., 40; 3 Stew., 76; 7 Porter, 432, 434, 435; 3 Stew., 396.)

These two certificates being issued by the same officer, on the same day, must be interpreted so as to avoid a conflict between them. Lot A cannot be held under Etheridge's patent, because it runs out of the southwest quarter. Stone's is described to be the southeast sub-
660*] *division; but what is that, and how can it be found, as no lines were ever upon the ground? (2 Land Laws, 303, 820, 787, 999, 826, 827.)

In instructions from the commissioner, dated January 20, 1826, a fractional section is defined to be "a tract of land not bounded by sectional lines on all sides, in consequence of the intervention of a navigable stream, or some other boundary recognized by law, and containing a less quantity than six hundred and forty acres;" and the surveyor is directed, in "subdividing fractional sections, containing one hundred and sixty acres and upwards," to "designate as many full half quarter-sections as practicable, and the residuary lot will then be a fraction of the fractional quarter-section of which it forms a part. (2 Land Laws, 853, 854, 921, 933, 934, 136.)

Mr. Justice McKINLEY delivered the opinion of the court:

This case comes before this court on a writ of error to the Supreme Court of the State of Alabama.

The plaintiffs brought an action of ejectment against the defendants, in the Circuit Court for the County of Mobile, in said State; and upon the trial they read in evidence the following claim and entry: "To the register and receiver of the land office at St. Stephens: You will please to take notice, that I, James Etheridge, of Mobile County, Alabama, claim the right of pre-emption, under the Act of Congress of the 29th of May, 1830, to the southwest quarter-section 22, township 4, range 1 west;" and that, on the 28th day of January, 1831, the said James Etheridge made the necessary proof that he had planted and cultivated said quarter-section in the year 1829, and remained in possession until after the 29th day of May, 1830. The plaintiff also read in evidence a patent from the United States, bearing date the 30th day of May, 1833, reciting that, "Whereas James Etheridge, of Mobile County, Alabama, has deposited in the general land office of the United States, a certificate of the register of the land office at St. Stephens, whereby it appears that payment has been made by the said James Etheridge, according to the provisions of the Act of Congress of the 24th April, 1820, entitled 'An Act making further provision for the sale of the public lands,' for the southwest quarter of section 22, in township 4, south of range 1 west, in the district of lands subject to sale at St. Stephens, Alabama, containing ninety-two acres and sixty-seven hundredths of an acre, according to the official plat of the survey of the said lands, returned to the general land office, by the surveyor-general, which said tract has been purchased by the said James Etheridge:

"Now know ye, that the United States of America, in consideration of the premises, and in conformity with the several acts of Congress in such case made and provided, have given and granted, and by these presents do give and grant, unto the said James Etheridge, and to his heirs, the said tract, above described," &c.

*In obedience to an order of the Cir- [*661
cuit Court, the surveyor of Mobile County went upon the land in controversy, and made an actual survey, and returned a plat thereof into court, showing that the section 22 was covered by private land claims, except the whole of the southwest quarter, on which James Etheridge had made his entry; and a small fraction in the southeast quarter, entered under the pre-emption law, by Wm D. Stone; and a fraction in the northeast and northwest quarters of said section; which plat was given in evidence to the jury. And the plaintiffs proved, by the surveyor, that he found the southwest corner of said fractional section as shown by the plat returned; and also found, on the section lines of said fractional section, the half-mile posts, each post being half a mile from the southwest corner of said fractional

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section; that these posts bore evidence of being those put down by the surveyor of the United States, on running the section lines; that an entire southwest quarter-section exists in said fractional section, without interfering with any private land claim, leaving a *residuum* on the north and the east of said quarter-section.

The defendants gave in evidence to the jury the following claim and entry, made by the said William D. Stone: "To the register and receiver of the land office at St. Stephens, Alabama: "You will please to take notice, that I, William D. Stone, of Mobile County, Alabama, claim the right of pre-emption, under the Act of Congress of the 29th of May, 1830, to the fraction situated in the west part of southeast quarter of section 22, in township 4, range 1 west of 13." And on the 25th of March, 1831, he made the necessary affidavit and proof to show that he had planted and cultivated the above described tract of land, according to said Act of the 29th of May, 1830. And they also gave in evidence the following patent: "The United States of America, to all to whom these presents shall come, greeting: Whereas William D. Stone, of Mobile, has deposited in the general land office of the United States, a certificate of the register of the land office at St. Stephens, whereby it appears that full payment has been made by the said William D. Stone, according to the Act of Congress of the 24th of April, 1820, entitled 'An Act making further provision for the sale of the public lands,' for the southeast subdivision of fractional section 22, in township 4, south of range 1 west, in the district of lands subject to sale at St. Stephens, Alabama, containing one hundred and ten acres, and fifty-one hundredths of an acre, according to the official plat of the surveyor of said land, returned to the general land office by the surveyor-general; which said tract has been purchased by the said William D. Stone: Now know ye, that the United States of America, in consideration of the premises, and in conformity with the several acts of Congress in such case made and provided, have given and granted, and by these presents do give and grant, unto the said William D. Stone, and his heirs, the said tract above described." &c. **662*]** *And it was admitted by the plaintiffs that the defendants had all the rights of said Stone in the land admitted to have been in their possession, at the time of the service of the declaration: and the defendants admitted that the plaintiffs had, at the date of the demise and time of trial, all the rights of said patentee, Etheridge, in the land described in the declaration.

And the parties "not wishing to incumber the record, by copying from the book entitled 'General Acts of Congress respecting the sale and disposition of the public lands, with instructions issued, from time to time, by the Secretary of the Treasury, and commissioner of the general land office, and official opinions of the Attorney-General, on questions arising under the land laws;' and which instructions in the 2d vol., part the 2d, prepared and printed by the Senate, agree that said book may be used by either party, and anything therein contained read as illustration of the practice of the land office, and construction that the acts of Congress had received in that branch of the government. The same work can be referred to, by either party, in the Supreme Court, for the purpose aforesaid. The parties further agree that the exhibit, No. 2, being the official plat of the survey of the township described in the patents of both plaintiffs and defendants, between pages 134 and 135, shall be referred to as if the same was incorporated with, and formed a part of the record in this cause." This statement furnishes all the evidence deemed necessary and pertinent to the investigation of the questions involved in the principal instruction of the Circuit Court to the jury, on the trial of the cause; which instruction is as follows: "The court further instructed the jury that, if said fractional section, No. 22, was capable of being subdivided into an entire southwest quarter-section, and two half quarter sections, leaving a *residuum*, as shown by said map and evidence of the county surveyor, still the surveyor-general was not required, under the acts of Congress, providing for the subdivisions of the public lands, and the instructions of the Secretary of the Treasury, made under the Act of the 24th of April, 1820, entitled 'An Act, making further provision for the sale of the public lands,' to make in his subdivision of the same, either such quarter-section, or half quarter-sections; but might lawfully subdivide the same into two lots, A and B, as indicated by said plat of 1832; and that under said evidence, Etheridge's title would not hold the whole southwest quarter of said fractional section, but only lot A; and that Stone's title would hold lot B, being the balance of said fractional section." To this instruction the plaintiffs excepted.

Upon the construction here given to the act of Congress, and to the instructions of the Secretary of the Treasury thereon, referred to in the above instruction of the court, depends the whole controversy between the parties to this suit. The 1st section of the act of Congress, above referred to, is in these words: "That from and after *the first day of [***663** July next, all the public lands of the United States, the sale of which is, or may be, authorized by law, shall, when offered at public sale to the highest bidder, be offered in half quarter-sections; and when offered at private sale, may be purchased, at the option of the purchaser, either in entire sections, half sections, quarter-sections, or half quarter-sections; and in every case of the division of a quarter-section, the line for the division thereof shall run north and south, and the corners and contents of half quarter-sections, which may hereafter be sold, shall be ascertained in the manner and on the principles directed and prescribed by the second section of an act, entitled 'An Act concerning the mode of surveying the public lands of the United States,' passed the 11th day of February, 1805, and fractional sections, containing one hundred and sixty acres, or upwards, shall, in like manner, as nearly as practicable, be subdivided into half quarter-sections, under such rules and regulations as may be prescribed by the Secretary of the Treasury." (3 Story's Laws, 1774.)

The settled policy of Congress has been to survey the public lands in square figures, running the lines north and south, and east and west, and to extend the subdivisions au-

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thorized by law, as far as practicable, in square figures, to the lowest denomination.

The second section of the Act of the 18th of May, 1796, ch. 29, directs that the public lands "shall be divided by north and south lines, run according to the true meridian, and by others crossing them at right angles, so as to form townships six miles square, unless where the line of the late Indian purchase, or of tracts of land heretofore surveyed or patented, or the course of navigable rivers may render it impracticable, and then this rule shall not be departed from further than such particular circumstances may require." After directing how townships should be divided into sections, it directs that "fractional townships shall be divided into sections in manner aforesaid, and the fractions of sections shall be annexed to, and sold with, the adjacent entire sections." (1 Story's Laws, 422.) The lowest denominations authorized by this act, was sections; but the direction to the surveyor was to divide the fractional townships into as many sections as the particular circumstances would permit. And so by the 1st section of the Act of the 24th of April, 1820, the surveyor is directed to subdivide fractional sections, containing one hundred and sixty acres and upwards, into as many half quarter-sections as practicable, by running the lines north and south. And this statute conferred no power on the Secretary of the Treasury to make any regulation by which a fractional section might be divided into any quarter, or other subdivision than half quarter-sections. The only authority he acquired by the statute, was to make such rules and regulations as would enable the surveyor to make the greatest number of half quarter-sections out of a fractional section, by running the lines north and south, or east and west; and **664*]** this *power he executed, by his circular letter, to the surveyors-general, of the 10th of June, 1820, 2d part, Public Land Laws, &c., 820.

Had the surveyor-general subdivided the fractional section 22, now in controversy, according to law, there would have been two half quarter-sections in the southwest quarter, making that quarter complete, a fractional section in the southeast quarter, and a fractional section in the northeast and northwest quarters, making four tracts or subdivisions instead of two, as returned by him to the land office of the district. None of the lines, subdividing sections, are required by law to be made by actual survey, and marked on the land; but they are to be delineated on the township plats, according to the 2d section of the Act of the 11th of May, 1805, ch. 74, referred to in the Act of the 24th of April, 1820. (2 Story's Laws, 961.) When the township and section lines are run, and the corners marked according to law, the quarter-section lines are ascertained on the plat by protracting lines across the section north and south, and east and west, equidistant from the section lines; and so of other subdivisions. And a surveyor going on the land to ascertain the boundary of a quarter, or half quarter-section, would do it with as much ease and certainty as if it had been delineated on the plat by the surveyor-general. Extending the subdividing lines on the township plats, is not, therefore, essentially necessary to enable the register to sell the land, or to give title to the purchaser. The register is as much bound to know what is a legal subdivision of a section, or fractional section, as is the surveyor-general.

Because he is directed by law to offer the lands, when sold at public sale, in half quarter-sections. To enable him to perform this duty, he must know what a half quarter-section is. And before he can offer a fractional section for sale, he must see that it has been subdivided, so as to enable him to offer as much of it in half quarter-sections as practicable. When Etheridge applied to purchase the southwest quarter of this fractional section at private sale, as he had a right to do, under the act granting pre-emption rights, the register was bound to know whether such a subdivision could be obtained according to law. A bare inspection of the township plat must have satisfied him, in this case, that it was practicable to obtain an entire quarter-section in the southwest corner of the fractional section 22. The 1st section of the Act of the 24th of April, 1820, directed that this fractional section should be divided into as many half quarter-sections as practicable, by lines north and south; and the instructions given by the Secretary of the Treasury under this act, directed that it should be divided into half quarter-sections, by north and south, or east and west lines, so as to preserve the most compact and convenient forms.

There is nothing in any of the acts of Congress, nor in the instructions of the Secretary of the Treasury, to authorize the division of *this fractional section made by the [*665 surveyor-general, and it being a violation of the law, and contrary to the duties of his office, it must be regarded as a void act. (*Miller et al.* v. *Kerr et al.*, 7 Wheat., 1.) So far as Stone's claim was concerned, this division of the fractional section has been treated by the register and the commissioner of the general land office as a legal subdivision, and the register seems to have disregarded entirely the act granting pre-emption rights, and Stone's claim and proofs under it, and to have transferred his claim to the western lot of the fractional section as divided by the surveyor-general. The certificate of the register, recited in the patent of Etheridge, takes no notice of this subdivision of the fractional section, but states that Etheridge had "purchased of the register the lot or southwest quarter of section number 22," &c. The patent is for the whole of the southwest quarter of section 22, by its proper designation, and if no quantity of land had been expressed it in, all the land contained in the quarter-section would have passed, by the patent, to Etheridge; because, by the 2d section of the Act of the 11th of February, 1805, before referred to, it is provided that "half-sections and quarter-sections, the contents of which have not been returned, shall be held and considered as containing the one half, or the one fourth respectively, of the contents of the section of which they make part." The surveyor failed to return the contents of the quarter-section in this case; it was liable, therefore, to be sold by the above rule. But it has been insisted that Etheridge, and those claiming under him, were bound, and concluded by the number of acres expressed in the patent.

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It is evident the quarter section was not referred to for the number of acres contained in it; but by express words reference was made to the plat returned by the surveyor-general, showing the division of the fractional section into two parts, one of which contains the number of acres expressed in Etheridge's patent, and the other the number of acres expressed in Stone's patent. It has been already shown that this plat was illegal, and the subdivision of the fractional section void; and any reference, therefore, to this plat, to show the number of acres granted to Etheridge, is illegal and inconsistent with every previous step taken towards perfecting his title, and utterly repugnant to the previous words of grant used in the patent.

Thus it appears that neither the claim of Etheridge, filed with the register, the certificate of purchase issued by him, nor the patent issued to Etheridge by the commissioner of the general land office, is founded on the division of the fractioned section made by the surveyor-general: but the whole appears to be founded on the subdivision of the fractional section into one quarter-section, and two fractional sections, made by actual survey on the land. It is true that, in undertaking to state the quantity of land contained in the quarter-section, reference is made to what is there called the official plat of the lands returned to the general land office by the surveyor-
666*] general; *which is nothing more than a reference to this same subdivision of the fractional section so often mentioned. But this question necessarily arises: How can the contents of either division of the fractional section, thus divided into two lots or subdivisions, show the contents or number of acres in the southwest quarter of the same section? The ninety-two acres and sixty-seven hundredths of an acre mentioned in the patent, is the number of acres contained in the western subdivision of said fractional section, and consists of part of the southwest, and part of the northwest quarters of the fractional section, as appears by the plat used on the trial. No part of the northwest quarter of this fractional section can by any reasonable construction be considered as being within and part of the land included in a patent for the southwest quarter of the section. This proves that the reference to this plat, in Etheridge's patent, is both delusive and illegal, and must, therefore, be rejected as void and inoperative.

The Act of the 29th of May, 1830, to grant pre-emption rights to settlers on the public lands, ch. 209, appropriated this quarter-section of land, on which Etheridge was then settled, to his claim, under the act, for one year, subject, however, to be defeated by his failure to comply with its provisions. During that time this quarter-section was not liable to any other claim, or to be sold to any other person, except at public sale, under the proclamation of the President of the United States; and that Etheridge had a right to prevent, by paying for it as directed by the act. And as he has complied with all the requisitions of the act, as far as the mistakes and illegal acts of the ministerial officers of the government would permit, he has acquired a good title by his patent, against the United States, for the whole of said southwest quarter-section. The remaining question is, whether Etheridge's title is good against Stone's patent. Stone claimed "the right of pre-emption, under the Act of Congress of the 29th of May, 1830, to the fraction situated in the west part of the southeast quarter of section 22, in township 4, range 1 west." This claim confined his pre-emption right to that specific fraction. And although the act gave to every settler on the public lands the right of pre-emption of one hundred and sixty acres, yet if a settler happened to be seated on a fractional section, containing less than that quantity, there is no provision in the act by which he could make up the deficiency, out of the adjacent lands, or any other lands. The only case provided for in the act, by which the pre-emptioner had the right to enter land outside of the quarter, or fractional section, on which he was settled at the passage of the act, is the case provided for in the 2d section. When two or more persons were settled on the same quarter-section, it might be divided between the two first settlers, and each be entitled to a pre-emption of eighty acres of land elsewhere, in the same land district. But, in this case, Stone was not only permitted to take *land, outside of the frac- [*667
tional section, on which he was settled, but he was permitted to take land on which Etheridge was settled, and to which he had previously proved his right under the same act of Congress.

In the case of *Lindsay et al.* v. *Miller et al.* (6 Peters, 674), the plaintiffs in ejectment claimed title under a patent, dated the 1st of December, 1824, founded on an entry and survey made in the same year. The defendants claimed title under an entry made in January, 1783, upon a military warrant, for services rendered in the Virginia State line, and a survey made thereon, in the same month, and recorded on the 7th of April, of the same year, and a patent, issued by the State of Virginia, in March, 1789. This land lay in what is called the military district, between the rivers Scioto and Little Miami, in the State of Ohio. This district had been reserved, in the deed of cession, dated the 1st of March, 1784, made by Virginia to the United States, to satisfy the claims of the Virginia troops on continental establishment, in the event of there not being sufficient good land for that purpose in a reservation previously made by Virginia, on the southeast side of the Ohio River. Although the defendants proved possession, under this title, for upwards of thirty years, the entry, survey, and patent, were adjudged by the court to be void, on the ground that the land had been reserved for the satisfaction of military warrants, granted for services of the Virginia troops and continental establishment, and was not, therefore, subject to entry upon warrants for services rendered in the Virginia State line.

In the case before the court, all the land in the southwest quarter of the fractional section had been appropriated, by law, to satisfy Etheridge's claim, and no other land could be substituted in lieu of that quarter-section, for any part of it. Stone's claim arose under the same law, and by the same provisions was confined to the fraction in the west part of the southeast quarter of the same section, and gave no right to land elsewhere. So much of the

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patent to Stone as purports to grant land within the southwest quarter of the section, is, therefore, not only an appropriation of land to his claim, not subject to it according to the act, but which, by the same act, had been appropriated to another claim, arising under the same act, concurrent with and equal in all respects to Stone's claim. How, then, could his patent give him title to land that was not subject to his claim; land that he never had legally claimed; and to land that, by law, had been appropriated to and claimed by another? It seems to us, this case is clearly within the principles settled in the case above referred to, and that the patent granted to Stone is void, for so much of the land included in it as lies within the said southwest quarter of the fractional section, and for which Etheridge holds a patent.

It has been insisted, however, that as Etheridge only paid for the quantity of land mentioned in his patent, that he can have no right **668*]** *to land paid for by Stone, and included in his patent. This is one of the results of the mistaken and illegal acts of the ministerial officers of the government, which, as already shown, can neither benefit one party nor prejudice the rights of the other. The United States have received full payment for all the land contained in both patents. And if Stone has paid for land which belonged to Etheridge, that is a matter to be adjusted between themselves, amicable, or by law, as they may choose.

Upon a full view of the whole case, it is the opinion of the court that the judgment of the Supreme Court of Alabama be reversed.

Mr. Justice CATRON:

I feel myself bound to dissent from the foregoing opinion, for the following reasons:

1. By the Act of 29th May, 1830, a pre-emption right settler then in possession was entitled to enter with the register of the land office in the district where the land lay, by legal subdivisions, not more than one hundred and sixty acres.

The controversy before us turns, partly, on what was the true "legal subdivision" of fractional section 22, containing two hundred and three acres. This must be ascertained from the laws on the subject existing in 1830. The lines of public surveys actually run and marked in the field, are township extensions, and section boundaries; the lines dividing sections into quarters, half quarters (and quarter quarters since 1832), being only indicated, or depicted upon the township plats returned and recorded in the office of the register.

The Act of 26th March, 1804, provides for the first time for the sale of the public lands in quarter-sections; and also directs (sec. 9) that fractional sections shall be sold entire; or by uniting two or more together. The Act of February 11th, 1805, directs with absolute precision, leaving no discretion on the subject, the manner in which full sections shall be divided into quarters: but makes no provision for the subdivision of fractional sections. It was not until the passing of the Act of April 24, 1820, that these were authorized to be subdivided; and then only when they contained more than one hundred and sixty acres. The Act of 1820, in directing the manner in which full sections shall be subdivided into half quarters, or eighty-acre lots, is as absolutely precise in its provisions as that of 1805; and, as in the former case, gives no discretionary power so far as these subdivisions are concerned; but in authorizing the subdivision of fractional sections containing one hundred and sixty acres and upwards, it directs that they shall in like manner, "as nearly as practicable," be subdivided into half quarter section, or eighty-acre lots—"under such rules and regulations as may be prescribed by the Secretary of the Treasury." Under the discretionary power here given, rules and regulations were prescribed by Secretary Crawford, on the 19th of June, 1820. (2 Land Laws and Opinions, *p. 820, No. 796.) A circular [***669** was addressed to the surveyors-general of that date, for their government in this respect, by the commissioner of the general land office. It orders that fractional sections, containing more than one hundred and sixty acres, shall be divided into half quarter-sections, by north and south, or east and west lines, so as to preserve the most compact and convenient forms. "You will, therefore," says the commissioner, "be pleased to divide the fractional sections in your district (which remain unsold), in the manner above directed, and report to this office, and to the registers of the land district in which those fractions respectively are situate, the subdivisions, together with the quantity in each. It is not intended to run the subdivisional lines, and mark them, but merely to make them upon your surveys, and calculate the quantity of land in each subdivision."

In January, 1826 (2 Land Laws, p. 583, No. 841), further instructions were given on this subject to the surveyor-general at Washington, Mississippi. The commissioner says, among other things: "A fractional section is a tract of land not bounded by sectional lines on all sides, in consequence of the intervention of rivers, &c., and containing a less quantity than six hundred and forty acres."

Speaking of the regulations, and the circular letter founded on them, the commissioner continues: "The substance of the rule is, that fractional sections of one hundred and sixty acres and upwards are to be subdivided by east and west, or north and south lines, at the discretion of the surveyor, so as to preserve the most compact and convenient forms. Each lot to be, as nearly as practicable, a half quarter-section, containing a quantity of eighty acres; sometimes rather more, sometimes less, as the locality demands."

According to these instructions, fraction No. 22 was divided: two precise eighty-acre tracts could not be made out of it; half quarters, or eighty acres, was the least quantity that could be sold by the Act of 1820, if in regular form and part of a full section; but if in irregular form and the fraction of a section, containing upwards of one hundred and sixty acres, then it was left to the secretary to cause it to be subdivided according to his own regulations, into two or more tracts, approaching, "as nearly as practicable," to eighty acres each. He directed the subdivisions to be made in all cases so as to preserve the most compact and salable forms, accommodating the tracts to the sides of rivers, or other legal intervening boundaries to sub-

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serve the best interests of the government. This practice has prevailed as the governing rule for nearly a quarter of a century, and is now in full operation—large quantities of land have been sold thus subdivided; and great quantities yet remain to be sold. I speak on information derived from the commissioner of the general land office. The idea of taking out of a fraction a quarter-section of one hundred and sixty acres, if found there, as if the section was entire, and leaving surrounding strips of a 670*] few acres each, unsalable *and of little or no value, as will be the case here, never has been entertained at that office as the true construction of the Act of 1820, from the date of Mr. Crawford's instructions (June 10th, 1820) up to this time. On mature consideration, I think the instructions given legitimately within the authority conferred on the Secretary. In this view of the law, as applicable to the present case, I am supported by the opinion of the Attorney-General, given on Etheridge's claim in 1837. (2 Land Laws and Opinions, p. 136, No. 85.)

2. Suppose, however, it was doubtful whether they were or not authorized, is it admissible for the courts of justice, after such a lapse of time, to call in question the construction given to the act; to disturb so many titles taken under it—and to break up existing subdivisions? The sole authority to which the act referred for its exposition, and the prescribing of rules and regulations to carry it into execution, was the Secretary of the Treasury. His jurisdiction was subject to no supervision; he was constituted the only judge from whose decision there was no appeal on part of purchasers; they were compelled to buy in the form, and quantity, the lands were offered for sale, or not be permitted to purchase at all. The Secretary having adjudged and settled the construction of the act according to his views of its true meaning, and this coeval with its passage—a strong circumstance: the government in its executive and political departments, and the community at large concerned in purchasing from the government, having acquiesced without complaint, recognizing the construction as the true one, through so great a lapse of years, it is now supposed by me, the duty of this court, on the question being presented here, and that for the first time, to acquiesce also. That these subdivisions are for the best interests of the United States is manifest; all others have abided by them, and so should the plaintiff.

If one of our own judgments made in 1820, coeval with the statute, had produced similar consequences; if many thousands of titles rested on it (as there surely do on Mr. Crawford's instructions), I should feel myself wholly unauthorized, at this day, to overthrow the decision, however doubtful I might think it to be. The conservative rule of *communis error facit jus* is universal in courts of justice, in regard to their own judgments, under such circumstances; and undoubted judicial propriety requires its adoption, as it seems to me, when dealing with the decision of the secretary in the present instance. This course is peculiarly due to the repose of titles, and the stable maintenance of an established system in a great department; a system that cannot be changed in this respect without much expense, confusion, and delay, in the administration of that department.

3. But suppose the secretary was mistaken, and the subdivision of fractional section 22 is illegal; what, then, is the plaintiff's case? His title is a patent; on his legal title he must recover, therefore he *cannot be heard to [*671 say his patent is void because founded on an illegal subdivision: the question, then, is reduced to this; what does the patent cover? Etheridge had no peculiar rights by the Act of 1830, save that he had a preference of entry; like others purchasing of the United States he was compelled to buy in legal subdivisions; before 1820 not less than an entire fractional section could be sold; nor after the act of that year, could one be sold in subdivisions until divided, under regulations by the Secretary of the Treasury. Further than this, the Act of 1805 remained unchanged, as to fractions. Etheridge could not be permitted to treat a quarter-section in a fraction, although found there, as if it was found in an entire section. He did attempt it, in proving up his preference right, but when he applied to enter at the land office the register rejected his claim, and compelled him to take the land on which he resided in the form and quantity it had been laid off according to the instructions; and this he did take. The government is bound by its patent; is estopped to disavow the subdivision granted; and as estoppels are mutual, Etheridge is equally bound by the grant. It recites the patent certificate; this says it is for ninety-two acres and sixty-seven hundredths, bounded "according to the official plat of the survey of the said lands, returned to the general land office by the surveyor-general—which said tract, described in the plat returned, has been purchased by the said James Etheridge." The plat is part of the patent certificate; is referred to in the patent, and is part of that also, just as much as if it was attached to the same paper. By the plats of public surveys, land must be identified, and the boundaries ascertained, in all cases of the kind. The parties agree of record that exhibit No. 2 is the official map described in the patent of Etheridge; according to this, he purchased lot A for ninety-two acres and sixty-seven hundredths; his eastern boundary being the red line made by the surveyor-general, pursuant to the instructions. This was undoubtedly the land the government intended to sell, and, as I think, as certainly the same Etheridge intended to buy, and did buy; of course he can recover no land east of that line, and, therefore, the judgment ought to be affirmed, even if the instructions were illegal and void.

4. The case does not stop here: Stone's patent is elder than Etheridge's; the same plat is referred to in each; Stone's is for the one hundred and ten acres and fifty hundreths east of the red line. This is not disputed. To overcome it, Etheridge's patent must be supported by a legal entry for the same land, elder than Stone's patent. As already stated, until Etheridge paid his money, he could have no legal entry from which to date his title. There being no such subdivision existing in law as the southwest quarter of fractional sectional section 22, when Etheridge presented his occupant claim, he could not be permitted to enter in that form, or for that quantity. Such was the express instruction of May 31, 1831 (2 Land Laws and

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672*] *Instructions, No. 497, and again in No. 521.) The first subdivision was created afterwards by the act of the surveyor-general, and is indicated by the red line. That it is denominated the southwest quarter in the patent, amounts, in my judgment, to very little; thus the department saw proper to call such subdivisions; the denomination was arbitrary and not precise, but we cannot discard the substance for the sake of correcting terms of description open to verbal criticism. The land contained in plat referred to in Etheridge's patent, is a technical quarter-section in the language of the general land office, and such subdivisions are known by no other name there, as will be seen by No. 488 and No. 486 in the volume of Instructions above referred to. Thus in No. 488, dated July 28, 1830, the commissioner instructs the register at Mount Salus, that the pre-emption law of that year restricted the quantity to be located to one hundred and sixty acres, or a quarter-section; but that it did not intend that an excess over one hundred and sixty acres, "in a tract of land technically known as a quarter-section, "should be cut off so as to restrict the quantity literally to one hundred and sixty acres. "The law (says he), having taken it for granted that every quarter-section contains one hundred and sixty acres, which not being the fact, we must be guided by what we know to be the spirit and intention of law." He then instructs the register, in cases of fractional sections, to conform to the subdivisions as made by the surveyor-general, and to give the quantity as near as practicable.

No. 486 is a general circular, dated September 14, 1830, on the same subject in part. Instruction 8 directs: "Although a quarter-section may be found to contain rather more than the ordinary quantity of one hundred and sixty acres, the right of pre-emption is extended to the full quantity of such quarter-section." In the language, therefore, of the general land office, the southwest quarter of fractional section 22, called for in Etheridge's patent, is as well known by its designation as if the section was entire. This the Instruction No. 497 above explains, where the subdivided quantity is less, to be a "technical" quarter also, as well as if the quantity had been more. But if there be uncertainty, here, as in former cases, we must refer to the plat and quantity to explain the uncertainty. This course was pursued in the case of *McIver* v. *Walker* (9 Cranch, 173), and again in 4 Wheaton, 444. There the plat was held to control the face of the patent, and fixed a different locality, because Crow Creek was laid down on the plat, nearly through its center; the location certificate copied in the patent, as in this case, called for a beginning, and for courses from that point, running off from the creek, which was not named as being crossed by the lines; yet this court disregarded the calls, and held the land lay on both sides of the creek, as indicated in the naked plat. It was a much weaker case than the present. In patents of the United States, from their earliest date down to this day, nothing is referred to 673*] but numbers *on the public surveys. To hold that the surveys did not explain and control the patent as to identity, and side lines, would be an abandonment of both; as nothing else can establish either.

Much stress is laid on the fact that the half-mile post is found on the south boundary of section 22. The same line marks are uniformly made on all sectional lines, regardless of fractions: so it would have been done had the fraction 22 been for less than one hundred and sixty acres, and not subjected to subdivision. The section south may have been entire, and the corner post necessary for the purposes of that section.

Another difficulty stands in the way of the plaintiff's recovery. Stone's patent is the elder; it is admitted it covers the land in dispute—the patent passed the perfect and consummate title; in an action of ejectment the patent is conclusive, as was held by this court in *Wilcox* v. *Jackson*, and *Bagnell* v. *Broderick* (13 Peters, 516, 450). You can only go behind it, and give it earlier date, from a precise legal entry for the same land made by the grantee, to overreach an elder patent; as this court held in *Ross* v. *Barland* (1 Peters, 655). We have seen Etheridge did not enter the land in dispute when he paid his money, and took his patent certificate. To overthrow Stone's patent we must rely on the preference right to enter. At best, it is a remote and doubtful equity; Stone paid for the land, and, if the assumption be true, has an equity attached to it for his purchase money; presenting a case of conflicting equities, with which a court of law cannot deal. In the language of this court in *Bagnell* v. *Broderick*, "we are bound to presume, for the purposes of this action, that all previous legal steps had been taken by Stone to entitle himself to the patent, and that he had the superior right to obtain it, notwithstanding the claim set up by Etheridge; and having obtained the patent, Stone had the best title known to a court of law, to wit, the fee." There a much more imposing equity than Etheridge can pretend to was set up. In no respect, therefore, is there any ground for reversing the decision of the Supreme Court of Alabama, as is supposed by me.

In the case of *Brown et ux.* v. *Hunt*, *Mr. Justice* Daniel dissents from the opinion of the court, and concurs in opinion with *Mr. Chief Justice* and *Mr. Justice* Catron.

Criticised—9 How., 334; 20 How., 377.
Cited—3 How., 803; 7 Wall., 289.

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*LESSEE OF GEORGE CLYMER [*674
ET AL., *Plaintiff in Error*,

v.

GEORGE DAWKINS ET AL., *Defendants in Error*.

Adverse possession—entry and possession of one co-tenant on part under void partition—statute of limitations.

A court is not bound to give instructions to the jury in the terms required by either party; it is sufficient if so much thereof are given as are applicable to the evidence before the jury, and the merits of the case as presented by the parties.

NOTE.—*As to requisites of adverse possession*, see note to Ricard v. Williams, 7 Wheat., 59.
As to the occupancy necessary to constitute adverse possession, see note to Ewing v. Burnet, 11 Pet., 41.

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The entry and possession of one tenant in common, is ordinarily deemed the entry and possession of all the tenants; and this presumption will prevail in favor of all, until some notorious act of ouster or adverse possession by the party so entering is brought home to the knowledge or notice of the others. When this occurs, the possession is from that period treated as adverse to the other tenants.

Such a notorious ouster or adverse possession may be by any overt act *in pais* of which the other tenants have due notice, or the assertion in any proceeding at law of a several and distinct claim or title. If an attempt be made to obtain a partition, although the legal proceedings by which it is effected may be invalid or defective, still, being a matter of public notoriety, the co-tenant is bound at his peril to take notice of the claim to adverse possession thus set up.

If the tenants in possession only claim the undivided interest which was held by their immediate grantors, it is not adverse to the remaining part of the title, and such persons cannot defend themselves in ejectment by giving in evidence an outstanding title elder than that under which they claim; nor can they avail themselves of the statute of limitations.

But if the occupants entered into possession and held the lands for more than twenty years before the commencement of the suit, by a purchase and claim thereof in entirety and severalty, and not an undivided part thereof in co-tenancy, it is an adverse possession, and the statute of limitations is a good plea.

THIS case was brought up by writ of error from the Circuit Court of the United States for the District of Kentucky.

There were three tenants in common of a tract of land in Kentucky, and the question was, how far the possession of the occupiers, holding under two of the three, constituted an adverse possession against the third, so as to entitle them to the benefit of the statute of limitation.

In 1806, a patent was issued by the Governor of Kentucky to George Clymer for one third, and Charles Lynch and John Blanton for two thirds of a certain tract or parcel of land, containing eleven thousand acres by survey, bearing date the 30th of May, 1784, lying and being in the County of Jefferson, on the waters of Harrod's Creek, and bounded as follows, &c., &c.

A division of the land was made by commissioners and offered in evidence during the trial; and as the various proceedings under this commission ran through a long period of time, the whole of them will be stated before passing on to other circumstances in the history of the case.

"Henry County, the first day of January, eighteen hundred and two.

"We, William Neall and Isaac Forbes, having been appointed commissioners by the County Court of the said County of Henry, in con-
675*] formity *to an act of the General Assembly of the State of Kentucky, for the purpose of making division of lands between residents and non-residents in the said County of Henry, having been called on to divide a tract of eleven thousand acres on the waters of Harrod's Creek, in the name of George Clymer for the one third, and Charles Lynch and John Blanton two thirds, agreeably to a patent bearing date the 24th day of December, in the year of our Lord one thousand eight hundred and six, and of the Commonwealth of Kentucky the fifteenth, and signed by Christopher Greenup, the then Governor of Kentucky. It being stated to us that the said George Clymer is a non-resident, we have gone on the ground, and made the following division, to wit: Charles Lynch and John Blanton's portion is lot No. 1, containing seven thousand three hundred and thirty-three and one third acres, agreeably to the plat hereby laid down, which is bounded as followeth, to wit: &c., &c.

"No. 2, on the plat allotted to George Clymer on the division, is bounded as follows, to wit, containing three thousand six hundred and sixty-six and two thirds acres: Beginning, &c., &c., hereby conveying and affirming the foregoing division, agreeable to the said allottment, to the said Charles Lynch and John Blanton, for the two thirds of said eleven thousand acres, and the one third to the said George Clymer, agreeably to the metes and bounds before described.

"Given under our hands and seals as commissioners aforesaid, the day and date first above written.

"WILL. NEALE, [L. S.] Com'r.
"ISAAC FORBES, [L. S.] Com'r.

"Signed, sealed, and delivered in presence of

"Henry County Court, clerk's office, Jan. 1, 1810.

"The within division of land was filed in my office, acknowledged by William Neale and Isaac Forbes, commissioners in said county for the division and conveyance of lands, parties thereto, as their act and deed, and admitted to record. Att. ROW. THOMAS, C. C.

"Henry County, October court, 1827.

"An instrument of writing purporting to be a division of eleven thousand acres of land, in the County of Henry, between Charles Lynch, John Blanton, and George Clymer, the same being made by William Neale and Isaac Forbes, commissioners appointed for that purpose, was this day produced into court (the commissioners being absent), together with the certificate of acknowledgment, entered and attested by Rowland Thomas, clerk. Whereupon, on motion of Charles H. Allen, attorney for the parties, it is ordered that the same be now received and recorded accordingly, which was heretofore done.

"Att. EDMD. P. THOMAS, C.
"By WILL. SHARP, D. C.

*"Henry County Court, clerk's office, [*676
Aug. 8, 1828.

"I, Edmund P. Thomas, clerk of the County Court for the county aforesaid, do certify, that on the day of the date hereof, the foregoing commissioners' report of lands, together with the certificates thereon indorsed, were filed in my office and recorded.

"Att. EDMD. P. THOMAS, C."

In 1813, George Clymer, one of the patentees, residing in Philadelphia, made his will and died. He devised his property to certain persons in trust, for the payment of certain moneys, and these to be divided amongst his children and grandchildren.

Much evidence was given in the court below, to show the nature of the title and possession under which the occupants (residing entirely upon the part allotted to Lynch and Blanton) held their lands. They all claimed under Lynch and Blanton; and the following is a summary of the evidence. It was proved that these per-

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sons entered upon and first improved, settled, and occupied the land; and they, and those claiming under them, have held, claimed, and occupied the land as their own, for upwards of twenty-five years before the commencement of this suit; but no evidence was introduced by either of the defendants conducing to prove that either of them, or any other person, had given any express notice to the patentee, Clymer, in his lifetime, or either of the trustees named in the will of said Clymer, that they, or any of them, held the land adversely to the claim or right of Clymer; nor was any evidence given tending to prove that notice of any sort had ever been given to Clymer, or any of the trustees named in his will, by any of the defendants, or any other person under whom any of them claim, except the facts which the evidence did conduce to establish that the land in possession of each defendant had been taken possession of, improved, and occupied by actual residence, by each defendant (or at first by him of whom he derived his possession and claim of right, and afterwards by himself), as all entirely his or their own, and not as co-tenant with Clymer or his devisees, and had been so ever afterwards held, for upwards of twenty years, and up to the commencement of this suit.

It did not appear by the evidence that either of the defendants, or his predecessor in the possession, had any knowledge or notice, in fact, that Clymer was a copartner with Lynch and Blanton, or had any interest in the land; and plaintiff's counsel insisted only that they were bound to know and notice the right of Clymer, apparent on the patent.

Evidence was also introduced to show that most of the defendants were within the boundary of adverse patents, elder in date than the patent to Clymer, Lynch and Blanton, and that some of them had contracted with the claimants of those elder patents, for the land in their possession, since they became possessed of it.

The suit was brought in December, 1840, by **677*]** the representatives *of Clymer, against sixty-three occupants of the tract, which, as before stated, had been assigned, in the partition, to Lynch and Blanton.

Upon the trial, the plaintiff asked the court to instruct the jury:

1. That if the jury believe, from the evidence, that the defendants, or others under whom they claim, entered upon the land in contest under the claim of Clymer, Lynch and Blanton, for eleven thousand acres, that such of the defendants as the jury may find so entered, by themselves or others under whom they claim, cannot avail themselves of the elder patents read in evidence, as to defeat the plaintiff in this action.

2. That the defendants cannot defeat the plaintiff's right to recover, if the jury believe, from the evidence, the plaintiff ever had right, by reason of the statute of limitation, provided the jury believe, from the evidence, that the defendants, or those under whom they claim, entered upon the land in contest, under the title of Clymer, Lynch and Blanton, for the eleven thousand acres patented to them.

3. That if the jury find, from the evidence, that any of the defendants entered upon the land in contest, under a parol contract of purchase from the agent of Lynch and Blanton, who were tenants in common with Clymer in the eleven thousand acre patent, read in evidence; and the jury also find that such of the defendants as so purchased never notified the patentee Clymer, or the trustees named in his will and codicil, or either of them, that they held adversely to Clymer's title, that the defendants, as to whom the jury may so find, cannot avail themselves of the statute of limitation in defense of this action. Also,

4. That such defendants as the jury may find as above mentioned, if there be any such, cannot avail themselves of the outstanding conflicting elder patents read in evidence, unless the jury further find that such defendants, in the opinion of the jury, have proved a connection with such elder patent or patents, by purchase, either made by them or others under whom they claim.

The court refused to give either instruction, as asked, but instead thereof gave to the jury the following instruction:

"The court instruct the jury, that if they find, from the evidence, that any of the defendants, or those under whom they claimed, entered upon the parcel of the land in controversy in their possession at the commencement of this action, under a contract, whether it was executed or executory, by parol or in writing, with the agent of Lynch and Blanton, or either of their co-grantees with Clymer, of the eleven thousand acres, by the patent read by plaintiff, or any other person claiming under that patent, whereby they purchased an individual two-thirds, or any other such part, and not the entire interest in such parcel or parcels of the land, then such defendants, or those under whom they claimed, and who had so entered, did not, by their entry into the possession, oust Clymer or his devisees of his *or their [***678** undivided third thereof; but the entry of such purchasers and their possession was for him, Clymer, or his devisees, as well as for themselves; and in the absence of all evidence of notice to Clymer, or those claiming under him, of a subsequent adversary holding by such occupants, their possession did not become adversary, in legal effect, to Clymer or his devisees; and no defendant, who so entered, can now avail himself of the outstanding legal title by the elder patents to be read in evidence; nor can any such defendant prevail in his defense of this action by the length of his possession, and the statute of limitation; nor can any defendant who entered, claiming the entire estate in his parcel of the land, add to the length of his own possession that of anyone under whom he claimed and had succeeded, who had so entered under a purchase of an undivided part, and was so a co-tenant with Clymer or his devisees, and thereby make out the twenty years of adversary possession within the statute."

The defendants moved the following instructions, to find as in case of a nonsuit as to all the defendants:

That the plaintiff has shown title only to an undivided interest in the land, and that only one fifteenth.

To find in favor of all the defendants whose tenements fall within the elder claims of Tuttle and Howard.

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To find in favor of all whose possession existed, and continued, and have been held as their own, for twenty years before the commencement of this suit.

To find in favor of those whose possession existed and continued under Lynch and Blanton, and adverse to Clymer, for twenty years before suit brought.

To find in favor of those whose possession originated, and have been held as their own, twenty years before suit brought, under purchases from Lynch and Blanton, or either of them, after the division made under the orders of the Henry County Court.

The court refused to give either of the instructions, as moved by the defendants, but in substitution therefor gave the following instructions:

"The court instruct the jury, that their verdict ought to be for each defendant who, or whose predecessor in possession, from whom he had derived his possession and claim of right, had entered on the land in his possession at the commencement of the action, twenty years before that day, by a purchase and claim thereof in severalty, all as his own, and not an undivided part in co-tenancy with Clymer or his devisees, but adversely to him or them, whether such purchase was from Lynch or Taylor, or Lynch and Blanton, or any other who had ever afterwards, up to the commencement of this suit, continued thus to hold such possession."

To each opinion and decision of the court, in refusing to give the instructions as moved by the plaintiff and each of them, and in giv-679*] ing *the instructions which were given by the court in substitution, or instead thereof, the plaintiff at the time excepted. Also, the plaintiff excepted to the instruction which is given by the court in substitution of the instructions moved by the defendants, at the time the instruction was given, and he now excepts to each opinion and decision, and prays that this his bill of exceptions be signed, sealed, and enrolled, which is accordingly done.

THOS. B. MONROE, [L. S.]

Mr. Crittenden for the plaintiff in error.

Messrs. Tibbitts and *Armstrong*, in a printed argument, for the defendants in error.

Mr. Crittenden made the following points:

1. That the proceedings of the County Court of Henry County, and of the commissioners for the purpose of making a partition of said land, were not authorized by any law, and the division was therefore null and void, because not conformable to the statutes on which its validity depended. (1 Littell's Laws of Kentucky, 691; *Hood* v. *Mathers*, 2 Marshall, 559; 3 Littell's Reports, 40; *Clay* v. *Short*, 1 Marshall, 371.)

2. That the defendants having entered and held under the patent to Clymer, Lynch, and Blanton, could not lawfully set up and rely for their defense upon any other outstanding adverse patents to bar the plaintiff's recovery, and especially as it was not shown to be a subsisting and available title.

3. That the possession of the defendants having been acquired under Lynch and Blanton, or one of them, could not be considered as adverse to their co-tenant, Clymer, or allowed to operate as a bar to the present action; and that this is especially true as to those defendants who showed no deed or written evidence of purchase.

1st. Eight years after the division was said to have been made, it was given to the clerk, and not to the court until 1827. The Act of Assembly does not say when it must be recorded, but twenty-five years is too long a time to elapse. The parties might have had it in their pocket all this time. The courts in Kentucky have always construed such papers strictly. See the authorities above.

2d. If the defendant has acknowledged the title of the plaintiff, he cannot afterwards dispute it. (1 Caines' Rep., 394, 444; 5 Cow. Rep., 129, *et seq.*, 174; 4 Cranch, 419.)

Nor can a defendant, whose predecessors had recognized the title of the plaintiff, afterwards dispute it. (5 Cow. Rep., 129, 130; 4 Johns., 230; 1 Caines' Rep., 394; 4 Munf., 473; 2 Johns. Cas., 353; 3 Peters, 50; 3 Serg & Rawle, 386; 13 Johns., 116; 3 Martin, N. S., 11; 6 Johns., 34; 7 Johns., 157; 19 Johns., 202; 5 Cow., 520; 3 Wash. C. C. Rep., 498.)

The defendants also offered in evidence outstanding titles in *strangers, which they [*680 alleged to be elder and better than the plaintiff's title. Can they do this?

If it be admitted as the settled doctrine, that though the plaintiff in ejectment has a title better than that of the defendant, yet that he is not entitled to recover if the defendant can show a superior title in a third person, though he does not claim any privity with that third person: If this be the admitted doctrine, it is subject to a great many exceptions, which destroy its general applicability, and those exceptions are supposed to include the present case. The instances of such exceptions are numerous, namely:

A mortgageor is never suffered to set up the title of a third person against his mortgagee. (*Doe* v. *Pegge*, 1 T. R., 758, *note*.)

It is established that a mortgageor cannot set up a prior mortgage to defeat the recovery of a second mortgage. He is barred by his own act from averring that he had nothing in the premises at the time of the second mortgage. The principle of this decision has been repeatedly recognized. (*Lade* v. *Holford*, 3 Burr., 1416; *Newhall* v. *Wright*, 8 Mass. Rep., 138, 153; *Jackson* v. *Dubois*, 4 Johns. Rep., 216.)

A lessee cannot do it against his lessor (8 Mass. Rep., 138, 153; 1 Caines' Rep., 444; 2 Caines' Rep., 215; 7 Johns. Rep., 186); but it is needless to cite authorities on this point.

So a person who has entered into possession under another, and acknowledged his title, cannot set up an outstanding title in another. (*Jackson* v. *Stewart*, 6 Johns. Rep., 34; *Jackson* v. *De Walts*, 7 Johns. Rep., 157; *Jackson* v. *Henman*, 10 Johns., 292.)

Nor can a person claiming the land under a tenant set up an outstanding title against the landlord. (*Jackson* v. *Graham*, 3 Caines' Rep., 188.)

A person who has entered by permission under one tenant in common cannot, after partition made, set up an adverse title against another tenant in common, to whose share the premises had fallen. (*Smith* v. *Burtis*, 9 Johns. Rep., 174; *Fisher* v. *Creel*, 13 Johns. Rep., 116.)

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A mere intruder cannot protect himself by setting up an outstanding title. *Jackson* v. *Harder*, 4 Johns. Rep., 202.

But if a defendant have acknowledged the title of the plaintiff, he cannot afterwards dispute it. (*Jackson, ex dem. Love*, v. *Reynolds*, 1 Caines' Rep., 444; *Jackson, ex dem. Smith et al.*, v. *Stewart*, 6 Johns. Rep., 34; *Jackson, ex dem. Davy*, v. *De Walts*, 7 Johns. Rep., 157; *Jackson, ex dem. Browne*, v. *Hanman*, 19 Johns. Rep., 202.)

And even where the predecessors of the defendant had acknowledged the title of the claimant, it was held that the defendant was equally precluded from setting up the defense of adverse possession (*Jackson, ex dem. Van Schaick et al.*, v. *Davis*, 5 Cow. Rep., 129, 130.)

681*] *Where one takes by descent as a coheir and tenant in common, he cannot show (in ejectment by his co-heir, or one claiming under him) that the ancestor had no title. (*Jackson, ex dem. Hill*, v. *Streeter*, 5 Cow. Rep., 520.)

Mr. Armstrong, for defendants in error, stated the case and proceeded thus:

The issue, then, in this cause between the parties seems to be on the question: did the entry of defendants on land to which plaintiff had right in common with their vendor, notwithstanding their ignorance of that right, their want of intention to enter as tenants in common, and their express entry claiming and holding the land as their sole freehold, adversely to the whole world, constitute them tenants in common with Clymer?

It is not, I presume, necessary for me to cite authority to show the intention with which an entry is made on land defines the nature of that entry. These defendants, and those under whom they claim, entered under their purchases as sole owners in fee of the whole lands held by them, and were so possessed thereof for more than twenty-five years before the commencement of this suit.

The counsel for defendants does not deem it necessary to consume the time of the court, by using argument, or citing authority, to prove that possession of land by a purchaser, under a contract for the entire estate, without right in the grantor is adverse to the rightful owner; or that a person in possession of land may purchase in an outstanding title to protect that possession, but will merely call the attention of the court to the case of *Jackson, ex dem. Preston, &c.*, v. *Smith*, in the Supreme Court of New York (13 Johns. Rep., 406), as a case in point. There the defendant held under a deed made by one out of nine tenants in common; but the deed purported to be for the whole fee. The court says (page 411) "the deed," under which defendant held, "for the whole lot cannot control the possession of the defendant, and of his father, so as to make it the entry and possession of a tenant in common, merely because it gave title to no more than one ninth part of the whole lot;" and again (page 112), it is evident, therefore, that the doctrine in relation to tenants in common does not apply to this case. It might as well be urged as applicable to a conveyance made by a stranger of any lands held in common, and it will not be questioned that the purchaser under such a deed, given without right on the part of the grantor, would notwithstanding be adverse to the rightful owners, although held by them in common."

It is believed the case cited presents the true law of this case, and should the court deem it necessary, they are respectfully requested to examine the case referred to for themselves.

Mr. Tibbitts, for the defendants in error, recited the facts and evidence in the case with great particularity, and then added:

***682** *Under this state of the evidence, on [the part of the defendants, we contend that the law of the case was for them, and the verdict of the jury correct on the following grounds:

1. Because the division was a good and valid division, and severed the estate of Clymer from that of his copatentees.

2. Because, if it were not good in its inception, it became good by the lapse of time, and the legal presumptions arising from the lapse of time.

3. Because the defendants held the land adversely to the right or title of the lessor of the plaintiff, and their holding being adverse, his right of entry is barred by the statute of limitations.

By the Act of the Legislature of Kentucky, approved December 19, 1792 (2 M. & B., 1066), it is enacted (sec. 1) that if the owners of lands within this State, who are non-residents, do not attend to have the same divided, where the same is held in conjunction with citizens of this Commonwealth, or with other non-residents, where such non-residents may apply by themselves or agents to have the same divided, or do not appoint agents to make such division within one year from the passage hereof, the courts of the several counties within this State shall appoint six commissioners in each county, who, or any two of them, shall, when called upon for the purpose by the citizens of this Commonwealth, or the owners of lands who are non-residents, or their agents, attend and make such division agreeable to the contract entered into by the parties, "and such commissioners shall make return of such land by them so divided, with the quantity and names of the parties concerned, and by whom called upon to do the business, to the County Court of the county where such land may lie, to be there recorded.

The requisitions of this act are:

1. The appointment of six commissioners by the court, which has been done.

2. The return of the land, with the quantity and names of the parties concerned, and by whom called on, &c., which is construed to mean "a description of the boundaries of the whole tract, and of the particular lots divided, together with the names of each party holding interests, so that it may duly appear who were the parties to the partition" (*Hood* v. *Mather*, 2 Marsh., 560); which has been complied with.

3. That the return shall be made to the County Court of the county; and it is decided (*Ibid.*) that it will not be good to make the return to the clerk's office, but that it must be made to the County Court.

We contend that this condition has also been complied with; for though the division was first returned to the clerk's office and acknowledged by the commissioners, yet it was afterwards presented to the court, which was good, because the statute does not require that the com

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missioners shall present it in person, nor acknowledge it; it being an official act, such as the return of a summons by a sheriff, which, 683*] *with the papers with the return written thereon, may be handed in person, or sent by a third person, or by letter, &c.

Nor does the statute fix any time in which the division is to be returned; nor is there anything to be done by the commissioners in court, or by the court itself, the law itself ordering what is to be done. Besides, it appears from the record of the court that it was received and ordered to be recorded, on the motion of "the agent of the parties," which will include Clymer as well as the other, and will be so intended by the court. (*Vide Pringle* v. *Sturgeon*, Litt. Sell. Cas., 112, and *Parker's Heirs* v. *Anderson*, 5 Monr., 540.) That if the division was not good in its inception, it became good by the lapse of time, and the jury had a right to presume everything which would be necessary to make it good, as a deed of release, or confirmation from Clymer.

"Artificial or legal presumption is arbitrary, inflexible and conclusive. It is the policy of the law substituted for proof of facts, the establishment of which by oral testimony, or written testimony, or written memorial, is rendered impossible by lapse of time."

The presumption not absolutely conclusive is such, that after twenty years a bond is paid off; a mortgage satisfied, the mortgageor remaining all the time in possession; the equity of redemption released, the mortgagee having enjoyed the possession twenty years; or the legal title conveyed to the purchaser after twenty years' possession, &c., &c. These may all be combatted by proofs or explanations, inconsistent with the inference of reason, and from the isolated facts which of themselves would establish the presumption. Hence their consideration belongs to the jury, to whom they will be left upon hypothetical instructions. The jury may presume a deed when neither the Chancellor nor the common law judge will or can. (Starkie, 1216, 1227, 1235; Peake's Ch., 25.)

A possession of thirty years or less, by a purchaser who held a bond for a title, would be sufficient, in the absence of any controlling circumstances, to create a legal presumption of a conveyance from the possessor of the legal title. In such a case, it is not only necessary for peace and justice, that such a presumption should arise, but is intrinsically probable that a deed was made. (10 Johns., 377; 11 Johns., 456; 3 Mass. Rep., 399; 5 Cranch, 262; *Gaines* v. *Conn's Heirs*, 2 J. J. Marshall, 107.)

Although the statute of limitations will not run where the possession held is on pledge, mortgage, &c., yet, "if possession had been of twenty years' duration, it might have justified the presumption, in case there were no repelling circumstances, that the testator relinquished the title to the slaves in satisfaction of the debts, and a court of chancery would not then interfere to disturb the possession. (*Mims* v. *Mims*, 3 J. J. Marshall, 106.)

Without some opposing probability, the jury will presume a deed after possession of twenty years, by one who had purchased the land, 684*] *which, in consequence of his purchase, he shall have so long occupied. (2 Saund., 175 *a.*; Starkie, 502, 1243, 989; 7 Wheat., 59.)

Grants may be presumed from lapse of time. (12 Co. Rep., 5; 2 Hen. & Mun., 370.)

Generally whatever will toll the right of entry will create a presumption of the conveyance of the legal title.

Everything necessary to the validity of a collector's deed will be presumed after twenty years, if it be shown that he was collector of taxes which were committed to him. (14 Mass. Rep., 145; *Ibid.*, 177; *Fitzhugh* v. *Croghan*, 2 J. J. Marshall, 436.)

3. But we contend further, that the defendants held the land adversely to the right or title of the lessor of the plaintiff, and that their holding being adverse, the right of entry is tolled, and the plaintiff is barred by the statute of limitations.

We admit, as a general principle, that the possession of one tenant in common, or joint-tenant, is the possession of the other (*Coleman* v. *Hutchinson*, 3 Bibb, 209); and that the statute of limitations does not run against one tenant in common in favor of another, unless there has been an actual ouster and adverse holding. (*Ibid.*) But in this case we contend that there has been both; we show that the defendants, ignorant of the rights of the ancestor of the lessor of the plaintiff, without any intention to enter as tenants in common, entered upon the land, expressly claiming and holding it as their sole freehold, adversely to the whole world; they, and those under whom they claim, entered under their purchases, as sole owners in fee of the whole land held by them, and were so possessed for more than twenty-five years before the commencement of the suit.

The *quo animo* with which an entry is made on land, will define the nature and character, whether friendly or adverse, and extent of the possession acquired by the entry (1 Marsh., 347; *Calk* v. *Lynn's Heirs*, 3 Marsh., 615); and whether the possession of land is adverse to a certain claim or not, is a question of fact to be found by the jury (*Bowles* v. *Sharp*, 4 Bibb, 550); or as the true doctrine is more distinctly laid down in *Barrett et ux.* v. *French* (1 Conn. Rep.) The possession of one tenant in common recognizing the title of his co-tenants, is in legal consideration the possession of all; that persons under the same title, without partition, cannot prescribe against each other. *Broussard* v. *Duhamel*, 3 Martin's Rep., N. S., 11.)

That where "two persons claim by the same title, there shall be no adverse possession, so as to toll the entry of the one, but an entry of the other be at all times lawful. (2 Esp. *N. P.*, 8, old paging 434; *Carrothers et al.* v. *The Lessee of Dunning et al.*, 3 Serg. & Rawle's Rep., 386.)

But that a person claims to hold land under the same title, is no evidence that he holds amicably with the original holder of that title, or those claiming under him. The purchaser of land sold for the nonpayment of taxes holds adversely to the former owner, and *can [*685 consequently avail himself of twenty years' adverse possession. (*Graves* v. *Hayden*, 2 Litt., 65.) The court say, "the circumstance that the defendant claims to hold the land in controversy under Martin's title, was no evidence of his not holding adversely, nor could it prevent the statute of limitations from running. Being a purchaser in fee, though he held under

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Martin's title, he did not hold under Martin, but in his own right, in virtue of his purchase, and must therefore have continued to hold adversely to Martin and those deriving title through him.

So a purchaser under a sheriff's sale; and

Where a party had obtained a decree, though a void one, for a conveyance in fee absolute, and a conveyance in pursuance thereof of the inheritance of his deceased wife, under the erroneous idea that he was heir of her son, who died shortly after his mother's death, and had sold the land to one who retained the possession twenty years, such alienee is protected in his title and possession by lapse of time. (*Baseman's Heirs* v. *Batterton et al.*, 1 Dana 432.)

So with the defendants, notwithstanding they claim the same title, and though the division may have been void.

Therefore, though the possession of one tenant in common should be deemed the possession also of his co-tenant, nothing to the contrary appearing; yet if a tenant in common enter not as a tenant in common, but adversely to his co-tenant, his twenty years' possession would not only be a good defense against, but would in fact so invest him with the complete title, as to enable him to recover in ejectment against his co-tenant.

"That one tenant in common may oust his co-tenant, and hold in severalty, is not to be questioned. But a silent possession, accompanied with no act which can amount to an ouster, or give notice to his co-tenant that his possession is adverse, ought not, we think, to be construed into an adverse possession. (*McClung* v. *Ross*, 5 Wheat. Rep., 124, per Marshall, *Ch. J.*).

The law is, that nothing but an actual ouster by one tenant in common shall give him the exclusive possession. (*Lessee of Empson* v. *Shackleton*, 5 Burr., 2604; *Carrothers et al.* v. *The Lessee of Dunning et al.*, 3 Serg. & Rawle's Rep., 385.)

But if there has been an actual ouster and adverse holding, it is well settled in numerous cases, that the statute of limitations will run from the time of such ouster and adverse possession. (*Coleman* v. *Hutchinson*, 3 Bibb, 212; and *vide Brackett* v. *Norcross*, 1 Greenl. Rep., 91; *Russell's Lessee* v. *Baker*, 1 Harr. & Johns., 71; *Lessee of Brandt et al.* v. *Whitbeck*, 6 Cow. Rep., 633; *Van Dyck* v. *Van Buren*, 1 Caines' Rep., 84; *Bryans* v. *Atwater*, 5 Day's Rep., 188.)

We contend that the division of the land, the marking the lines, the selling the entire fee, amounted to an actual ouster—no actual force was necessary, and none could have been used **686***] in this case, the *land being wild land. To prove an actual ouster by one tenant in common against another, it is not necessary to show that any real force was used; it is sufficient to show that the tenant in possession claims the whole and denies the title of his co-tenant (*McConnell* v. *Brown*, Litt. Sel. Cas., 468; Adams on Eject., 56); and this rule must work both ways.

Where the defendant, having purchased a lot of land, and received a deed for the whole lot, in which the grantor stated himself to be the heir of the patentee, and he entered into the possession under that deed, and it afterwards appeared that the grantor had title to one ninth part of the lot only, as a tenant in common, this was held not to alter the character of the defendant's possession, so as to prevent its being adverse, but that he must be deemed to have entered under this deed, as sole owner of the fee in the whole lot; and that possession of land by a purchaser under a deed for the entire lot, given without right in the grantor, is adverse to the rightful owners, though tenants in common with the grantor. (*Lessee of Preston et al.* v. *Smith*, 13 Johns. Rep., 406.)

And in the case of *Culler et al.* v. *Motzer* (13 Serg. & Rawle, 356) it is held, that if one tenant in common sell the whole tract, and possession be held adversely for twenty-one years, the sale and possession amount to an ouster of the co-tenant, who is bound by the act of limitations.

This case is fully in point: the court say "the possession here was for twenty-five years, in denial of the right of the other; for the sale of the whole, and the possession under such sale would amount to an ouster." The purchaser, who came into possession in 1800, came into possession under a title adverse. Motzer could never be considered as a co-tenant, and as the bailiff and receiver of James Brown, and as such accountable for the profits in an action for account render. He never entered as a tenant in common; and the charge of the court was altogether correct, for this was an entire tract of land to which there was no adverse claim, and, therefore, the adverse claim was co-extensive with the claim. That was the only right, and the possession, there being no adverse title, was according to that right. There ought not, consequently, to be made any deduction on account of James's supposed outstanding title. (*Jackson, ex dem. Preston*, v. *Smith*, 13 Johns.) Possession of land by a purchaser, under a deed of an entire lot, is adverse to the rightful owner, though tenant in common with the grantor.

If, then, a tenant in common or joint-tenant cannot hold adversely to his co-tenant, and if the holding of the defendants amounts, as we contend it does, to an ouster in contemplation of law, and they do hold adversely to the claim of Clymer, the lessor of the plaintiff, then they can rightfully rely either upon the statute of limitations, or an outstanding elder title, according as their circumstances may require either defense; and there is no error in the proceedings of the Circuit *Court, either in re- [***687** fusing to grant the instructions asked for by the counsel for the plaintiff, or in giving the substituted instruction for the defendants, or in substituting the instruction for those asked for by the plaintiff.

Mr. Justice STORY delivered the opinion of the court:

This is a case of a writ of error to the Circuit Court of the District of Kentucky. The original suit was an ejectment for a certain tract of land in Kentucky, containing eleven thousand acres; and upon the trial, upon the general issue, a verdict was found for the defendants, upon which judgment passed for them. A bill of exceptions was taken by the plaintiff, to the opinions of the court at the trial; and to revise those opinions the present writ of error is brought by the plaintiff.

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On the 24th of December, 1806, a patent for the tract of eleven thousand acres of land was granted by the Commonwealth of Kentucky, unto George Clymer (under whose will the lessors of the plaintiff make claim), one third, and unto Charles Lynch and John Blanton (under whom the defendants make claim) two thirds. In the year 1810, if not at an earlier period (for there is some repugnancy in the various dates stated in the record), Lynch and Blanton procured a partition of the tract to be made, by the authority of the County Court of Henry, by certain commissioners, appointed pursuant to the Kentucky statute of 1792, by which one third was assigned in severalty to Clymer (he being then a non-resident), by certain metes and bounds; and the remaining two thirds were assigned to Lynch and Blanton, by certain other metes and bounds. The return of the commissioners was filed, acknowledged, and admitted to record in the clerk's office of the County of Henry, in 1810; but the court of that county do not seem to have ordered the return to be received and recorded until 1827. How this delay took place, has not been satisfactorily explained; and the omission has been insisted upon as an objection to the validity of the partition.

All the defendants appear, from the evidence, to have derived title to the lands in their respective occupation, and to have entered into possession of the same, after the partition was made, and by titles in severalty, derived exclusively from or under Lynch and Blanton; and the lands held by them are situate exclusively within the tract assigned by the partition to Lynch and Blanton. The main defense relied upon by the defendants, at the trial, was an adverse possession to the title of Clymer, during the period prescribed by the statute of limitations of Kentucky. To rebut this defense, the plaintiff insisted that the partition was void, and being void, the defendants having entered into the land under the patent to Clymer, Lynch and Blanton, who still, notwithstanding the partition, in point of law, remained tenants in common of the land, were not at liberty to set up an adverse possession against that title; nor at liberty to set up any **688*]** *outstanding superior title in any third person, under any elder patent offered in evidence, to defeat the plaintiff in the action.

The plaintiff, upon the evidence (which need not be here particularly recited), moved the court to instruct the jury as follows: [See the statement of the reporter.]

The defendants also moved the court to give certain instructions to the jury; which instructions the court refused to give, but gave the following instruction in substitution thereof: [See statement.]

To the instructions so refused as propounded by the plaintiff, and to the several instructions so given by the court, the plaintiff excepted; and the cause stands before us for consideration upon the validity of these exceptions.

The first point made at the argument for the plaintiff is as to the validity of the partition under the proceedings in the County of Henry. In our judgment it is wholly unnecessary to decide whether those proceedings were absolutely void or not; for, assuming them to have been defective or invalid, still, as they were matter of public notoriety, of which Clymer was bound, at his peril, to take notice; and as Lynch and Blanton, under those proceedings, claimed an exclusive title to the land assigned to them, adversely to Clymer; if the defendants entered under that exclusive title, the possession must be deemed adverse, in point of law, to that of Clymer.

And this leads us to the consideration of the instructions actually given by the court, which cover the whole ground in controversy, and, if correct in point of law, show that the court rightly refused to give the instructions asked by the plaintiff, so far as they were not consistent with the instructions actually given. It is very clear that the court are not bound to give instructions in the terms required by either party; but it is sufficient if so much thereof are given as are applicable to the evidence before the jury, and the merits of the case, as presented by the parties.

The first instruction given by the court is as favorable to the plaintiff, in all its bearings, as the law either justifies or requires, and is in direct response to the substance of some of the instructions asked by the plaintiff. It in substance states that if the defendants entered under the title of Clymer, Lynch and Blanton, as tenants in common, and did not claim any title except to two thirds of the parcels of land respectively held by them, and not to the entirety thereof, then their entry into the possession did not oust either Clymer or his devisees of his or their undivided third part, and was not adverse thereto; and that the defendants so entering could not avail themselves of the defense of the statute of limitations; and they could not avail themselves of the outstanding legal title of third persons by any elder patent. So far as this instruction goes, it is manifest that it was favorable to the plaintiff; and indeed it is not now, *per se*, objected to, but the objection is, that it does not go far enough, and thus was to the prejudice of the plaintiff.

*The real point in controversy turns [***689** upon the second instruction given by the court, in answer to the prayer of the defendants. That instruction, in substance, states, that if any of the defendants entered into possession of the lands respectively claimed by them, and held the same for more than twenty years before the commencement of the suit, by a purchase and claim thereof in entirety and severalty, and not for an undivided part thereof, in co-tenancy with Clymer or his devisees, but adversely to them, then such defendant was entitled to a verdict in his favor, whether he held by a purchase from Lynch, or Blanton, or any other person who had ever afterwards, up to the commencement of the suit, continued thus to hold the possession. We see no objection to this instruction, which ought to prevail in favor of the plaintiff: on the contrary, we deem it entirely correct, and consonant to the principles of law upon this subject. It is true, that the entry and possession of one tenant in common of and into the land held in common, is ordinarily deemed the entry and possession of all the tenants; and this presumption will prevail in favor of all, until some notorious act of ouster or adverse possession by the party so entering into possession, is brought home to the knowledge or notice of the others. When this

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occurs, the possession is from that period treated as adverse to the other tenants, and it will afterwards be as operative against them, as if the party had entered under an adverse title. Now, such a notorious ouster or adverse possession may be by any overt act *in pais*, of which the other tenants have due notice, or by the assertion, in any proceeding at law, of a several and distinct claim or title to an entirety of the whole land, or, as in the present case, of a several and distinct title to the entirety of the whole of the tenant's purparty under a partition, which, in contemplation of law, is known to the other tenants. Upon so familiar a doctrine it scarcely seems necessary to cite any authorities. So early as *Townsend & Pastor's* case (4 Leon. Rep., 52), it was holden in the Common Pleas, by all the justices, that where there are two coparceners of a manor, if one enters and makes a feoffment in fee of the whole manor, this feoffment not only passes the moiety of such coparcener, which she might lawfully part with, but also the other moiety of the other coparcener, by disseisin. This decision was fully confirmed and acted on, in the recent case of *Doe, d. of Reed*, v. *Taylor* (5 Barn. & Adolph. Rep., 575), where the true distinction was stated, that although the general rule is, that where several persons have a right, and one of them enters generally, it shall be an entry for all; for the entry generally shall always be taken according to right; yet that any overt act or conveyance, by which the party entering or conveying asserted a title to the entirety, would amount to a disseisin of the other parties, whether joint-tenants, or tenants in common, or parceners. Upon the same ground, it was held, in New York, in the case of *Jackson* v. *Smith* (13 Johns. Rep., 406), that a conveyance made by one tenant in common, of the 690*] entire *fee of the land, and an entry and possession by the purchaser, under that deed, is an adverse possession to all the other tenants in common. To the same effect is the case of *Bigelow* v. *Jones* (10 Pick. Rep., 161). The reason of both of these latter cases is precisely the same as in the case of a feoffment, the notoriety of the entry and possession, under an adverse title, to the entirety of the land.

Similar principles have been repeatedly recognized in this court. In *McClung* v. *Ross* (5 Wheat. Rep., 116, 124), the court said: "That one tenant in common may oust another, and hold in severalty, is not to be questioned. But a silent possession, accompanied with no act which can amount to an ouster, or give notice to his co-tenant that his possession is adverse, ought not, we think, to be construed into an adverse possession." In the case of *The Lessee of Clarke* v. *Courtney* (5 Peters, 319, 354) this court also held, that where a person enters into land under a deed or title, his possession (in the absence of all other qualifying or controlling circumstances) is construed to be co-extensive with his deed or title; and although the deed or title may turn out to be defective or void, yet the true owner will be deemed disseized to the extent of the boundaries of such deed or title. This doctrine is strongly applicable to the possession under the partition in the present case. There are several other cases affirming the same doctrine, and especially *Green* v. *Liter* (8 Cranch, 229, 280), *Barr* v. *Gratz* (4 Wheat. Rep., 213, 223); and *The Society for Propagating the Gospel* v. *The Town of Pawlet* (4 Peters, 480, 504, 506). The doctrine has been carried by this court one step further; but at the same time one which is entirely consistent with the principles on which the general rule, and the exceptions to it, are founded. In *Blight's Lessee* v. *Rochester* (7 Wheat. Rep., 535, 549–550) it was held, that in cases of vendor and purchaser, although the latter claimed his title under or through the former, yet as between themselves, the possession of the purchaser under the sale, where it was absolute and unconditional, was adverse to that of the vendor, and he might protect that possession by the purchase of any other title, or by insisting upon the invalidity of the title of the vendor, as the foundation of any suit against him. Now, upon this last ground, the defendants were certainly at full liberty as absolute purchasers in fee to maintain their adverse possession to the land, and the bar of the statute of limitations against Lynch and Blanton, and *a fortiori* against Clymer.

Upon the whole, we are entirely satisfied that the second instruction given by the court was correct in point of law; and, therefore, the judgment of the Circuit Court ought to be affirmed with costs.

Cited—2 Blatchf., 7.

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*ROBERT BROCKETT ET AL., *Appellants*, [*691

v.

WILLIAM BROCKETT ET AL., *Defendants*.

Exceptions taken on trial of feigned issue, out of chancery not passed upon here unless adjudicated upon by circuit court—master's report—exceptions to—73d chancery rule.

When an issue is directed by a court of chancery, to be tried by a court of law, and in the course of the trial at law, questions are raised and bills of exceptions taken, these questions must be brought to the notice and decision of the Court of Chancery which sends the issue.

If this is not done, the objections cannot be taken in an appellate court of chancery.

If the Chancery Court below refers matters of account to a master, his report cannot be objected to in the appellate court, unless exceptions to it have been filed in the court below in the manner pointed out in the seventy-third chancery rule of this court.

THIS was an appeal from the Circuit Court of the United States for the District of Columbia, in and for the County of Alexandria.

The case is sufficiently stated in the opinion of the court.

Messrs. Neale and *Bradley* for the appellants.

Messrs. Jones and *Brent* for the appellees.

Mr. Justice McLEAN delivered the opinion of the court:

This is a bill in chancery, brought here by an appeal from the Circuit Court of the District of Columbia.

The complainants filed their bill, alleging themselves to be the legitimate heirs of Robert Brockett, deceased, and claiming as such one half of the real and personal property of which he died seized and possessed. The defendants

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filed their answers, denying the allegations of the bill. An issue at law was directed to try the legitimacy of the complainants, and after hearing the evidence, the jury found a verdict in their favor.

Several exceptions were taken to the rulings of the court, in the admission of evidence to the jury, and to the refusal of the court to admit evidence offered by the defendants, which appear in two bills of exceptions. And these decisions, in relation to the trial of the issue, constitute the principal ground of controversy in the case.

It does not appear that any questions were raised on the chancery side of the court, growing out of these exceptions. And this not having been done, it is proper to inquire whether the exceptions can be considered in this court.

It is contended that as the same judges sat in the court of law as in the Court of Chancery, that it could not be necessary to bring before them as chancellors what they had decided in a court of law. Had the court of law been held by different persons from those who sat as chancellors, it is admitted that it would have been necessary to bring before the latter the points ruled in the trial of the issue. But is not the principle the same in both cases? The capacities in which the same tribunal acts on such occasions, are as distinct as if the same duties had been performed by different tribunals. 692*] *The distinction is the same as where a judgment at law is entered by a court which also exercises chancery powers; and which powers are invoked against its own judgment. In such a case it might as well be said, as in the present one, why may not the same court, whether acting at law or in chancery, having possession of the cause, finally decide it.

The bills of exceptions are copied into the record; but they do not properly constitute a part of it, as they were not brought to the notice and decision of the court sitting in chancery. An issue in part is directed by a court of chancery to inform its conscience. To bring the fact or facts before the jury at law, a feigned issue is made by pleadings, as at law; and if the pleadings of the jury be unsatisfactory to the Court of Chancery, either on account of the admission of incompetent evidence, the exclusion of evidence which is competent, or by a mistake of the facts by the jury, the Court of Chancery will order another trial of the issue. By the consent of parties these issues are sometimes tried without the formality of pleading. But in all cases where objections exist to the verdict, they must be brought before the Court of Chancery which ordered the issue. And where this is not done in an inferior court, the objections cannot be taken in the appellate court of chancery. It is a general rule of practice, that no point arising on the pleadings or evidence in an appellate court shall be made which was not brought to the notice of the inferior court. And we think in this case, that the exceptions taken on the trial of the issue at law not having been acted on by the Court of Chancery below, cannot be insisted on in this court.

Being satisfied of the legitimacy and consequent heirship of the complainants, from the verdict of the jury, the court below referred to a master the rents received by the defendants, and other matters of account pertaining to the estate. And to some of the items allowed by the master, objections are made before this court. But it does not appear that these objections were brought before the lower court by exceptions to the master's report. The seventy-third chancery rule is decisive on this subject. It provides that "the parties shall have one month from the time of filing the master's report, to file exceptions thereto, and if no exceptions are within that period filed by either party, the report shall stand confirmed on the next rule day after the month is expired." No exceptions having been filed in the Circuit Court to the report of the master, none can be heard in this court.

The verdict and the report of the master, which constituted the basis of the decree of the court below, not having been objected to in that court, cannot be objected to here, and consequently the decree of the Circuit Court is affirmed with costs.

S. C., 2 How., 238.
Cited—7 How., 227; 2 Otto, 695; 4 Otto, 379; 10 Otto, 527; 11 Otto, 258.

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*JOHN McDONOGH, *Plaintiff in* [*693
Error,
v.
LAURENT MILLAUDON ET AL., *Defendants.*

Acquisition of Louisiana—treaty between U. S. and France—title to lands—delay waiver of irregularity in issuing certiorari.

The treaty by which Louisiana was ceded to the United States recognized complete grants, issued anterior to the cession, and a decision of a State court against the validity of a title set up under such a grant, would be subject to revisal by this court under the 25th section of the Judiciary Act.

But if the State court only applies the local laws of the State to the construction of the grant, it is not a decision against its validity, and this court has no jurisdiction.

Congress, in acting upon complete grants, recognized them as they stood; and the Act of 11th May, 1820, confirming such as were recommended for confirmation by the register and receiver, had no reference to any particular surveys.

A decision of a State court, therefore, which may be in opposition to one of these surveys, is not against the validity of a title existing under an act of Congress, and this court has no jurisdiction in such a case.

Where a cause has been pending in this court for two terms, a writ of *certiorari* sent down at the instance of the defendant in error, to complete the record, and the defendant in error then moves to dismiss the case upon the ground that the clerk of a State court issued the writ of error, and one of the judges of that court signed the citation, the motion comes too late.

THIS case was brought up by writ of error, under the 25th section of the Judiciary Act, from the Supreme Court of the State of Louisiana.

The decision of this court being against its jurisdiction, it seems best to give the opinion of the Supreme Court of Louisiana, as the facts in the case and the points decided by that court are stated with great clearness.

"Supreme Court of the State of Louisiana.

"The court met, Monday, April 26th, 1841.

"Present, their Honors Henry A. Bullard,

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A. Morphy, E. Simon, and Rice Garland. His Honor Judge Martin is absent on account of indisposition.

"LAURENT MILLAUDON et al., appellees, v. JOHN MCDONOGH, appellant. } Appeal from the District Court for the First Judicial District.

"The plaintiffs (Millaudon *et al.*, who were plaintiffs in the original action) allege that they, with Henry T. Williams and Charles F. Zimpel, purchased a large tract of land of A. F. Rightor, being a portion of a claim or grant generally known as the Houmas, in the parish of Ascension. They took possession with the intention of dividing it into smaller tracts and selling them at auction, to effect a partition; but were prevented from doing so by the acts and conduct of the defendant, who publicly declared that he was the owner of a large portion of the land, and slandered their title. They say they have requested him to desist his slanders, or to bring suit to assert his title, which he declines. They pray that he be compelled to set forth his title, if he has any, and **694*]** if he fail to do so, *that they be quieted in their possession against his claims and pretensions; that he be enjoined and ordered to desist therefrom; and further, that they have judgment for fifty thousand dollars damages for the tortious acts of the said defendant.

"The defendant pleads a general denial; then specially that the plaintiffs have no title; he further avers he is the true and lawful owner of the land by good and sufficient titles, and concludes by a demand in reconvention, in which he prays the plaintiffs may be cited to answer; that they be compelled to produce and exhibit their titles, and that he be quieted and maintained in his possession of the land.

"The plaintiffs, for answer to this reconvention demand, pleaded the general issue, and called on A. F. Rightor, as their warrantor, to maintain and defend their title against that of McDonogh. Rightor answers the call in warranty by a plea of the general issue; second, that the plaintiffs are not entitled to the remedies against him, which they claim; third, that they had a perfect knowledge of the character and extent of the defendant's claim when they purchased, and, therefore, have no right to call on him as warrantor. He further says the plaintiffs have a good and sufficient title; that McDonogh had none at all; and if he has, he is bound to sue the plaintiffs to establish it, or abandon his claim. He prays that McDonogh be compelled to exhibit his title; that it be rejected; and he concurs in the prayer of the plaintiffs against him (McDonogh).

"It is further prayed that the cause be tried by a jury; but, subsequently, the parties agreed to submit the question of titles to the court, reserving the damages to a trial before the jury.

"The issues in this case are somewhat complicated; it has been argued at great length and with eminent ability. A variety of questions have been raised by bills of exceptions, which, with the evidence, have swelled the record to a great size; and both plaintiffs and defendant evidently desire the court to go much further into an investigation of, and decision upon, their respective titles, than is necessary for the settlement of the controversy between them. We think we can see difficulties enough likely to arise out of both these claims, in which persons not now before us may be interested. We shall not anticipate the points that may hereafter be made, and will now only decide what is indispensable to the adjustment of the difficulty between the parties before us.

"The first question is, upon which party lies the burden of proof as to the title of the land? The defendant says it rests upon his adversaries and their warrantor. We think differently. The reasons given by the district judge, in his judgment, have not been refuted, and are, in our opinion, unanswerable. He says the demand of the plaintiffs in their original petition does not constitute a petitory action. It is destitute of the first requisite of that action, not being brought against a party alleged to be in possession. (Code *of [*695 Pract., art. 43.) On the contrary, the plaintiffs allege they were in possession, and are disquieted and prevented from making a legitimate use and profit out of their possession and title by the words and acts of the defendant; for which cause they ask for damages, and that he be enjoined from setting up any claim for the future, unless he do it at once, either in the present action or by another suit. It is true, the defendant says he is in possession also; and had he rested his case upon that allegation, it is possible the question would have been limited to that inquiry, according to art. 49 of the Code of Practice. But the defendant has gone further; without excepting to the form of the action, he comes up to the mark, sets up title in himself, and institutes a reconventional demand, asking that the property be adjudged to him. This reconventional or cross action, which is by the Code of Practice consolidated with the principal or original suit, is clearly petitory, and imposes on McDonogh the obligation of making the proof requisite to sustain his demand. So fully does this seem to have been understood by the parties originally, that all the subsequent proceedings are in accordance with the idea of the original defendant having become *pro hac vice* the plaintiff. The Plaintiffs cite their vendor, Rightor, in warranty to defend their title, according to the Code of Practice, article 379, *et sequitur*. Every provision of that code assumes that the warrantor is a defendant in the issue.

"There are various decisions of this court, and we hold it well settled, that the last warrantor is the real defendant in a suit against his vendees—not only against the party who cites him, but more particularly against the original actor. That person in the present suit, so far as Rightor is concerned, both in substance and form, is McDonogh, whose pretensions he is called upon by his vendees to resist. The question has been heretofore decided by this court, in 9 Martin, 556, and 11 La. Rep., 188; and we see no reason for changing the precedents.

"McDonogh, holding the affirmative of the issue, offered in evidence a certified copy from the register or record of complete grants in the land office in New Orleans, by which it appeared that on the 3d of April, 1769, the French Governor of Louisiana granted to Pierre Joseph Delille Dupard, père, a tract of land having thirty arpents front on the Mississippi River, with all the depth which might be found to Lake Maurepas, of the land where

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formerly stood two villages of the Collapissa Indians, situated about sixteen leagues above the city, on the same side; to take from the plantation of a person named —— Allemand, and join that of a free mulatto named Joseph Lacomb. The usual stipulations and reservations are made in this grant. To its reception in evidence various objections were made, which were overruled, and bills of exceptions taken by Rightor, and the grant attached after 696*] it was received as being a nullity *on various grounds. It is not necessary in the present case to decide any of these questions.

"The counsel for Rightor, on whom devolved the whole defense of this case (the plaintiffs not appearing at all, further than to join issue with McDonogh), insists that, supposing the grant to Delille Dupard to be genuine, given by competent authority, and all the rights of the grantee vested in his opponent (all of which he specially denies, however), that then this action cannot be maintained; because, he says, it being for a certain front and depth, and it not being specified that the lines are to open or close in any manner, it must be located by parallel lines; and the evidence shows conclusively that, if so located, it will not touch any portion of the land claimed by the plaintiffs. But the counsel for McDonogh insists the lines should open upwards of twenty degrees, and endeavor to prove that it has been located, and should so continue, as to let the lower line touch the western shore of Lake Maurepas, and the upper running westerly strike the Amite River at a distance of about nineteen miles from the Mississippi, and nearly that distance from the point where the lower line touches the lake. Nothing is said in the grant about the Amite River, nor is it shown that the lines should open in this manner, so as to include the sites of the two Indian villages mentioned in it. If this location were to be sanctioned, the Dupard claim would cover somewhere about one hundred thousand arpents of land.

"To sustain their position, the counsel for McDonogh insist strenuously on what they call a plat made by Don Carlos Trudeau, in 1790, which they say indicates the partition of the tract among the heirs and legal representatives of Delille Dupard, as on it it is said the lines open in the rear as claimed. This document was objected to as evidence by the counsel of Rightor, but received by the court, with the exception of a written memorandum upon it, and a bill of exception taken, which we consider it unnecessary to decide on, as we think the paper does not prove what is alleged, nor is it entitled to any weight as evidence. It is neither a survey, or plat, or a copy properly authenticated, showing how the partition was made. On the face, it is apparent a partition had been made previously, and there is evidence in the record showing it must have been made several years previous, as one of the heirs sold her portion to Fonteneau, in 1784. This plan is evidently nothing more than a sketch made by Trudeau to represent the front of the tract, which it seems had increased from thirty arpents front, in 1769, to upwards of forty arpents, in 1790. There is not about it that particularity and neatness which marks the operations of the former Surveyor-General of the province of Louisiana. The lines drawn seem to be experimental or provisional. None of those running out from the river have any length marked, and out of fifteen lines drawn or dotted, but six have any bearing indicated, and that is different on each of them. The *statement in writing, on the face of [*697 the sketch, indicates its true character. It is not in the form of a *procès verbal*, but is stated to be a note which says that the land belonging to the succession having been asserted to have thirty-five arpents front, according to the declarations of the parties interested, and conformably to the writing and sales passed by the heirs in favor of Henry Fonteneau, Gelar Pedro Le Bourgeois, Alexandre Lange, mulatto, and Don Francisco Dupard, the son, the only one who had not sold his portion; but from the verification that was had in the month of March, 1787, repeated this day, the 10th of August, in the current year, the same was found to contain forty arpents and twenty-three toises front, on the Mississippi, measured upon the lines marked (*punteas*) A, B, C, &c., &c. This is dated the 10th of August, 1790, and signed by Carlos Trudeau. In no part of this note or statement does he assume any official character. If this plan or sketch was of any validity at all, it would perhaps prove more for the defendant than he wishes, as it fixes this claim in the Parish of St. John the Baptist, instead of the County of Arcadia. In connection with this plan, we find another in the record, which is authentic, that differs from it in various particulars. It appears that Henri Fonteneau, in 1784, purchased of Mad'e Macnamora, one of the heirs of Delille Dupard, her portion of the land, being one fifth. In the act of sale, made in presence of the commandant of the port or parish of St. John the Baptist, the land is described as a tract in that parish, having seven arpents front on the river, by the ordinary depth (*profondeur ordinaire*). Not a word is said about the lines extending to the lake, or their opening. On the 24th of September, in the year 1790, Trudeau makes a survey of this land, places it in the parish aforesaid, gives it a front of eight arpents, four toises, and three feet front, and states the lower side line to run north eight degrees and fifty minutes east, and the upper, north ten minutes west, according to the needle, without attending to the variation. *Norte ocho grados cinquenta minutas este de la actual aguja sin attendes a la variacion.* This varies widely from other plans and surveys submitted to us; it in fact differs from any other plat that we see in the record, and it is the only authentic one of the lower portion of the Dupard claim made by authority of the Spanish government. We have no other evidence of any well founded claim to an opening towards the rear, until McDonogh and Brown became interested in the land. They purchased upwards of eighteen arpents front, by eighty in depth, of Pierre Le Bourgeois, the 8d of March, 1806; and in the act of sale there is nothing said of the lines extending beyond that depth, or opening in any manner; but it is mentioned that two plats of survey exist, and were delivered by the vendor to the purchasers, paraphed by the notary, neither of which are produced.

"When the inventory of Delille Dupard's

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estate was made in 1775, the land is represented as extending to Lake Maurepas, but not a **698*** *word said of there being an opening towards the rear. Sometime after McDonogh and Brown purchased of Le Bourgeois, they presented the claim for confirmation to the commissioners of the United States, in the eastern district of Louisiana, and represented it as having a front of eighteen arpents, three toises, and three feet front, by eighty arpents deep, and having an opening of twenty degrees and seventy-one minutes towards the rear; and with the exception of a small portion, it was confirmed to that extent. (2 Am. State Papers, Public Lands, 332.) This claim was based upon a grant of land of the Spanish government to Le Bourgeois, nothing being said about a grant to Dupard.

"Another portion of this claim was derived from Dupard, through L. H. Guerlain, agent of the Eastern Shore of Maryland Louisiana Company. We have carefully examined this branch of the title, and find nothing to prove the claim had any opening, until sometime after it was recognized by the United States. In 2 American State Papers, relating to public lands, p. 297, this claim was presented for confirmation, and described as 'situate on the east side of the Mississippi River, in the County of Acadia, containing ten arpents and seven toises in front, and a depth extending to Lake Maurepas, bounded on one side by McDonogh and Brown, and on the other by land of Antoine Tregle.' Not a word is said about an opening. The claim is confirmed for a depth of forty arpents, and rejected for the remainder. On pages 300 and 343 of the same volume, it will be seen these claims were again under the consideration of the commissioners, and rejected. An examination of the title of the remaining portion of this claim, which comes through Tregle, establishes the fact that the idea of the Dupard grant opening towards the rear was of modern origin. It is certain that McDonogh did not consider it as extending to the Amite River previous to 1806, as he was himself established on that stream some years previous, under a different title, or as a trespasser.

"We have been thus particular in the examination of all these circumstances, to show that the effects of the subsequent action on the claim are not such as contended for by the defendant.

"In 3 American State Papers, relating to the public lands, p. 254, and from the record, we ascertain that McDonogh & Co. again applied to the register of the land office and receiver of public moneys in New Orleans, to report on this claim, under the provisions of the Act of Congress, passed the 27th January, 1813, entitled 'An Act giving further time for registering claims to land in the eastern and western district of the territory of Orleans, now State of Louisiana.' It is described as 'a tract of land situated in the County of Acadia, on the east shore of the Mississippi, sixteen leagues above New Orleans, containing thirty-two arpents front, with a depth extending as far as Lake Maurepas. This tract has formerly been claimed before the board of commissioners, and **699*** the depth extending *beyond forty acres rejected by them for want of evidence of title; but the claimants have since produced a complete French title for the whole quantity claimed, in favor of Delille Dupard, under whom they claim, dated the 3d of April, 1769.' His claim is placed by the register and receiver in the first class; which, they say, comprehends such claims as stand confirmed by law. It will be observed that the grant to Delille Dupard is now spoken of for the first time; his claim, whenever mentioned previously, was described as one derived from the Collapissa Indians, yet no mention is made in this report of its having any opening in the rear. That difficulty is met by the defendant by the production of a paper which he says is a survey and plat of his claim made by F. V. Potier, a United States surveyor, which it is certified was offered as part of the evidence in support of the claim, when last presented for the action of the United States commissioners; and it is alleged that as the claim was confirmed, it must necessarily be so to the extent mentioned in the plat, it being a portion of the evidence. Admitting for a moment that this plat is valid, we are not prepared to say that the proposition is true to the extent stated. One piece of evidence does not fix the extent and character of a decision, but we must look to all that is offered, and the amount demanded. There is nothing in what is said by the register and receiver which authorizes a belief that any opening was claimed, or any was intended to be confirmed. McDonogh & Co. simply say they claim a 'front of thirty-two arpents, with a depth extending as far as Lake Maurepas,' under a complete title to Dupard, and the commissioners say it is a claim that stands confirmed by law.

"The omission to mention anything about the plat goes to show it was not regarded, or had but little weight, and we can scarcely suppose that so important an opening as is claimed would have been passed over in silence if it had been seriously pressed.

"We are of opinion that the plat, even if admissible as evidence, is not entitled to any weight as establishing the extent of the claim. Although Potier says he is a sworn surveyor, commissioned by the Surveyor-General of the United States, we know of no right that gives him to run out claims under the direction of individuals merely, and fix the boundaries of those not recognized by the government. It is not pretended he acted under any authority from his superior in making what is called a survey; it never was presented to the Surveyor-General for his approval, nor does it seem to have had the legal sanction of any one authorized to act in the premises. Potier does not pretend it is a regular survey; he calls it *'plan extrait des minutes de nos opérations d'arpentage faite dans les années 1806, 1808, et 1812 lesquelles lignes en divers tems ont été parcourues jusqu'à la rivière Amite et demarqué conformément aux lignes du plan.'* He then goes on to say, Delille Dupard had described his title from the Collapissa Indians, and sold it to various persons. *He does not seem even to have [*700 heard of a grant from the French government in 1769, or attempted a location in conformity to it.

" The defendant further states that his claim has been located by the United States since its confirmation, and surveyed in the manner claimed by him. To establish this, he offered

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in evidence copies of three township plats, to wit: township No. 10 south, ranges five and six east, and township No. 11 south, range 5 east. To the introduction of these plats as evidence Rightor objected, because the papers are not, nor do they purport to be, copies of the original plats of those townships, and for other causes mentioned in his bill of exceptions. The district judge admitted them in evidence, in which we think he erred. The papers are copies of copies, and it is a well settled rule of evidence that they are not admissible as testimony when better evidence can be procured. It is further apparent from the certificate of the register of the land office, that they are not correct copies. The claim of McDonogh is represented on these copies in a manner differing from that in which it appears on the plats in the register's office. The register states on one of the plats that on the original 'section No. 1 is not colored,' but that he had 'represented it as it now appears, at the request of John McDonogh, Esq.' The coloring of these maps was, perhaps, not intended to deceive or impose on any person, but when it is recollected that surveyors represent private claims properly located on their plats in a coloring different from public lands or doubtful rights, such a representation is calculated to make an erroneous impression. But the objection most fatal to the reception of these plats as evidence, is that they are certified by a person not the keeper of the original. The Surveyor-General of the United States for this State is the officer who has charge of the public surveys, and he is the proper person to certify the township maps. (2 Land Laws, 294, sec. 6.) The copies of public surveys deposited in the office of the register of the land office are placed there for his government and to enable him to perform the duties imposed by law, but he has not legal authority to certify copies so as to make them legal evidence. The law intrusts that power to another person.

"Although we are of opinion these plats were improperly received in evidence, we have examined them with a view to see if the pretended survey would justify the claim of the defendant. We do not find in the record the slightest evidence of authority from any officer of the United States to locate this claim in any manner. The acts of Congress of the 12th of April, 1814, and the 3d of March, 1831, direct the mode of locating private claims. (1 Land Laws, 652, secs. 3, 4; 2 Land Laws, 294, sec. 6.)

There are also other acts of Congress in rela-
701*] tion to the location *of particular classes of claims, but the defendant does not come within the provisions of any of them.

"It has been decided that the court and jury will look beyond the confirmation of a claim by the land commissioners or Congress, emanating from the former governments of Louisiana, in order to ascertain the extent and boundaries of the land claimed. (11 La. Rep., 587.) We have acted on that principle in this case, and see no reason to depart from our previous decision, that when the expressions in a title only convey a certain front and depth, the grantee or purchaser cannot claim by diverging lines to the rear, and thereby obtain more than the superficies contained in a parallelogram, unless there be something in the grant to authorize the opening, or, from the peculiar position of the claim, it shall be necessary to give the superficial quantity. That does not appear necessary in the case before us.

"We repeat, that it is not our purpose to decide in any manner upon the validity of the Humas grant, under which the plaintiffs claim, nor do we decide anything more in relation to that alleged to be in favor of Delille Dupard, under which the defendant claims, than to say, whether it is for thirty or forty arpents front, and is eighty arpents or more in depth, it must be located by parallel lines, unless the confirmation to McDonogh and Brown for eighteen arpents, three toises, and three feet front, by eighty in depth, should for that quantity authorize the opening mentioned in the report on the claim, but it cannot extend beyond it.

"It is clear from the evidence before us, that the claim of the defendant, if located in the manner specified, cannot in any way interfere with the land claimed by the plaintiffs as shown by the plats laid before us.

"The judgment of the District Court is therefore affirmed, with costs."

To review this opinion, under the 26th section of the Judiciary Act, a writ of error was sued out, by which the case was brought up to this court.

Messrs. Jones and *Meredith* for the plaintiff in error.

Messrs. Coxe and *William Cost Johnson* for the defendants in error.

A motion had been previously made and argued on the part of the defendant in error to dismiss the case upon three grounds.

1. That the writ of error had been irregularly issued.

2. That no jurisdiction was shown by the record to exist under the 25th section of the Judiciary Act.

3. That the judgment of the court below was not final.

The writ of error was issued by A. Cuvillier, clerk of Supreme Court of Louisiana, Eastern District.

Mr. Coxe, in support of the motion to dismiss, referred to 2 Dallas, *401, and [*702 said that in consequence of this decision, an act of Congress was passed in May, 1792 (1 Story, 260). In 8 Wheat., 312, 324, it was held that the 9th section of the Act of 1792 applied to bringing up cases from the circuit courts of the United States, and also from the highest tribunal of a State, when this court can take jurisdiction under the 25th section. (4 Dallas, 22; 9 Peters, 602; *McCollum* v. *Eager*, 2 Howard; 7 Wheat., 164; 12 Wheat., 117; 2 Peters, 580; 8 Peters, 392; 10 Peters, 368; 9 Peters, 224; 7 Peters, 41; 11 Peters, 167.)

Mr. Meredith, in reply, said that there was a difference, which must be borne in mind, between the English system and ours. In England the writ was an original writ, issuing out of the Court of Chancery, which had a double nature. It was a *certiorari* to remove the record, and a commission to the Superior Court to affirm or reverse the judgment. (2 Saund. Rep., 100, 101.)

Under our judiciary system, it is nothing more than a *certiorari* to remove the record. It imparts no authority to this court. It gives

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no jurisdiction. The President of the United States, in whose name the writ issues here, has no power to confer jurisdiction upon this court, as the king has in England, in whose name the writ issues there. Here it is given solely by the Constitution and laws. It is a mere instrument in aid of the revising and appellate power, but is not indispensable. Its sole purpose is to bring the record into court; and if the record is in court, or a copy properly certified and brought there by the party aggrieved by the judgment, with due notice to the other party, there can be no difficulty in proceeding to exercise the appellate power. In order to show that if a copy of the record be in possession of the court the mode of its removal will not be inquired into, it may be mentioned that a large portion of the cases brought here under the 25th section are brought without writs of error, viz., chancery cases and admiralty decrees, which are brought simply by a prayer of appeal with citation; and yet the 25th section requires a writ of error in all cases, decrees as well as judgments. In *Martin* v. *Hunter*, the State court refused to make return to the writ, and the plaintiff in error procured an exemplification of the record and brought it himself into this court. (1 Wheat., 349; 6 Wheat., 264.)

If a writ of error is a mere mode of removing the record, and if the mode of removal is form and not substance; if it gives no jurisdiction to the court, but is a mere instrument to facilitate the exercise of the appellate power, then we contend that any defect in the writ itself, or any irregularity in issuing it, is immaterial.

1. It may be waived. The general rule is, that irregularities and defects in the process or pleadings may be waived.

A writ issued with an illegal teste, may be waived. (2 Pick., 592, and the cases referred to in p. 595.)

703*] *21 Pick., 535. The action was against a deputy-sheriff. The writ was served by a coroner; service bad, but cured by appearance.

1 Metc., 508. A motion to dismiss the action, or quash the writ, if not founded on matter of exceptions, which show want of jurisdiction of the court, comes too late after pleading to the action.

In this case the facts show a waiver. The record was filed 24th October, 1842. There was an appearance. This is the third term the case has been here. There was a motion for *certiorari* at last term. All which make a strong case of implied waiver.

2. If not waived, the defect is cured by the 32d section of the Act of 1789. (1 Paine, 486.)

But we contend that the writ was regularly issued. The record shows a petition signed by the counsel of the plaintiff in error, and addressed to the Supreme Court of Louisiana, assigning reasons why a writ of error would lie, and praying that it may be allowed. Upon which, that court issued the following order:

"Let the writ of error be allowed according to law. The petitioner to give bond and security in the sum of five hundred dollars.

(Signed) "F. X. MARTIN."

From these proceedings it is manifest that the State judge thought he had authority to issue the writ. (See *dictum* of Johnson, *J.*, 1 Wheat., 379.)

There is nothing prohibitory in the section. It says "upon a writ of error." but does not say when or how it is to be issued. The provision respecting a citation shows that it was the design of the law to promote the convenience of suitors. To allow the suitor to apply to a State judge for a citation, and yet compel him to go to the Circuit Court for the writ, would conduce nothing to his convenience.

It may be said that our construction would lead to the anomaly of a court issuing a mandatory writ to itself. But, in fact, this is no anomaly in our legislation. By the Act of 1792, sec. 11 (1 Story, 260), the writ of error is directed to be issued out of the Circuit Court, under its seal, returnable to this court.

2d. The judgment is said not to be final. [*Mr. Meredith's* argument upon this point is omitted.]

3. As to the jurisdiction of this court. A classification of the cases in which jurisdiction is conferred, is made in 10 Peters, 398: 16 Peters, 285.

What appears, then, from the record, and the decision of the court?

It is apparent that McDonogh relied upon the confirmation of his title, by the report of the register and receiver, and the act of Congress.

The district judge decided that his claim was not embraced by the act; that there had been no confirmation.

If the writ of error had been taken to this judgment, there could have been no doubt of the jurisdiction.

*A construction of the act was directly [*704 drawn in question; and the decision was against the right and title specially set up and claimed by McDonogh under the act.

The writ of error, however, is to the judgment of the Supreme Court.

It is apparent that in that court, also, McDonogh relied upon the confirmation of his title by the act of Congress.

What title?

A title to the whole extent of his claim, as established by the evidence of a survey before the register and receiver, and by them so confirmed.

Whatever they reported was confirmed by the act. And in the absence of all evidence of a prior title out of the United States, the report and confirmation were conclusive. (*Strother* v. *Lucas*, 12 Peters, 410; *Grignon* v. *Astor*, 2 How., 319; *Boatner* v. *Walker*, 11 La. Rep., 582.) But the Supreme Court decided, that assuming the confirmation of the act of Congress, it was a confirmation of the bare title, without any ascertainment of location. And that although no title was shown by Rightor, they had a right to look beyond the confirmation, and ascertain the extent and boundaries of the claim.

Now here again, the construction of the act of Congress was drawn in question: for McDonogh relied on it as a confirmation of his title for the whole quantity of land, claimed before the register and receiver.

But the court gave a different construction of the act; and therefore decide against the right and title specially set up under it by McDonogh.

It is a case, then, clearly within the 25th section.

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Mr. Justice CATRON delivered the opinion of the court:

The question in the Supreme Court of Louisiana was one of boundary. The court passed on the grant to Dupard only, and not on the opposing claim; if the lines of the former did not open in their production from the Mississippi, towards Lake Maurepas, then the land claimed under Millaudon's title was not embraced by Dupard's grant, and no necessity existed for the examination of Millaudon's. Dupard's was made in 1769, "for thirty arpents of front to the river Mississippi, upon the whole depth that shall be found, unto Lake Maurepas, of the land where heretofore were two villages of the Collapissa savages; to take from the plantation of one Allemand, unto its junction with that of a person named Joseph Lacombe." The front being ascertained, the court below held that the extention back must be on parallel lines. As this construction excluded the land claimed by Millaudon, it ended the controversy in his favor.

Did this final judgment draw in question the construction of a treaty or statute of the United States; or of an authority exercised under the 705*]*same: and was the decision against the validity of either; or against the title, or right set up or claimed under either? If these questions are answered in the negative, it follows we have no jurisdiction to re-examine, or reverse the judgment under the 25th section of the Judiciary Act; as no other error is within the cognizance of this court.

1. The treaty with France, of 1803, gave no further sanction to the boundary of McDonogh's title than it had by the grant; in respect to its validity, the decision of the State court supported the claim to the same extent that the treaty protected it, and therefore the decision was not opposed to the treaty. A question partly involving this consideration was adjudged in *The City of New Orleans* v. *DeArmas* (9 Peters, 225), to which we refer.

2. Was the decision of the Supreme Court of Louisiana opposed to any act of Congress? Dupard's grant was completed as early as 1769, and presented to the register and receiver as a complete title; was thus reported on by them to the general land office, and by that department the report was laid before Congress; it is as follows:

"No. 406.

"John McDonogh & Company claim a tract of land situated in the County of Acadia, on the east shore of the river Mississippi, sixteen leagues above New Orleans, containing thirty-two arpents front, with a depth extending as far as Lake Maurepas.

"This tract of land has formerly been claimed before the board of commissioners, and, the depth extending beyond forty acres, rejected by them, for want of evidence of title; but the claimant has since produced a complete French title to the whole quantity claimed, in favor of Pierre Delille Dupard (under whom he claims), dated 3d day of April, 1769."

On the report at large, embracing many claims, Congress proceeded; and by the Act of May 11th, 1820, declared "that the claims to lands within the eastern district of Louisiana, described by the register and receiver of said district in their report to the commissioner of the general land office, bearing date the 20th day of November, 1816, and recommended in said report for confirmation, be, and the same are hereby confirmed, against any claim on part of the United States."

McDonogh's claim, No. 406, is of class first, species first, in the report, including twenty-one grants, of which the register and receiver say: "All the preceding claims, being founded on complete titles, are in our opinion confirmed by law." (3 Am. State Papers, 255.) This is explained in page 267, where it is again said: "Those claims which are found under species first of the first class, being founded on complete grants of former governments, we think are good in themselves on general principles, and, therefore, require no *confirma- [*706 tion by the government of the United States to give them validity."

Many incomplete titles were recommended for confirmation, and confirmed by Congress, but in these cases the former governments had not parted with the ultimate interest in the land, and the fee was transferred to the United States by the treaty, with the equity attached in the claimant, which equity was clothed with the fee by the confirming act. The perfect title of McDonogh being clothed with the highest sanction, and in full property, on the change of governments an assumption to confirm it would have been pregnant with suspicion that it required confirmation by this government, in addition to the general law of nations and the Treaty of 1803, which secured in full property such titles. That the grant stands recognized as complete and valid against the United States, and anyone claiming under them, by the proceedings had before the register and receiver and by Congress, we have no doubt; further than this, the government has not acted on it. In such sense similar titles have been treated, as will be seen by the two acts of May 8th, 1822—the first confirming lots in the town of Mobile and claims in West Florida; the second sanctioning the reports of the registers and receivers of the land offices at St. Helena Court House and at Jackson Court House, in the districts east and west of Pearl River; in regard to which reports Congress says: That all complete titles (reported on as such) be, and the same are recognized as valid and complete against the United States, or any right derived under them.

But in McDonogh's case, as in other similar ones referred to above, the recognition extended only to the boundaries the grants themselves furnished, according to their landmarks, and true construction under the local laws in virtue of which they were obtained.

3. To overcome this objection, it is insisted on the part of the plaintiff in error, that McDonogh & Company filed plans of survey and descriptions of the land with the register and receiver, and especially that of F. V. Potier, as part of their title, giving the boundaries as they were claimed before the Supreme Court of Louisiana; that these were confirmed by Congress; that the confirmation to the extent it was made, is binding on the United States, as the opposing claim of Millaudon was not drawn in controversy below, and the lands claimed treated as unappropriated, by individuals.

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If the fact assumed was true, that the plans and descriptions had been confirmed, and boundary given to the title according to them by the United States, then the decision would be opposed to the confirmation, and jurisdiction exist in this court.

There can be no doubt such plans and descriptions were filed and recorded in due time, but no evidence is found in the record that the register and receiver acted on them, or that they were presented to Congress even as documents accompanying the reports if they were, it is manifest that they were disregarded, for
707* two reasons; *first, because Congress did not assume the power to deal directly with this title at all; and, second, because the report had reference singly to the face of the grant, regardless of private surveys made subsequent to its date, at the instance of the successive owners.

The State court held McDonogh's title to be valid to every extent that it has been recognized by the United States, and only applied the local laws of Louisiana in its construction, so far as they had a controlling influence on the manner in which the side lines should be extended from the Mississippi River towards Lake Maurepas; and as, in so doing, neither the Treaty of 1803, nor any act of Congress, or authority exercised under the United States, was drawn in question, this court has no jurisdiction to revise the decision of that court; for which reason, the cause must be dismissed.

The clerk of the Supreme Court of Louisiana issued the writ of error, and one of the judges of that court signed the citation; and, on the ground that such writ could not remove the record, it was moved on a former day of the term to dismiss the cause. It has been here for two terms; a writ of *certiorari* has been sent down, at the instance of the defendant in error, in whose behalf the motion is made, to complete the record; he now moves to dismiss for the first time, and we think he comes too late. If errors had been assigned by the plaintiff here, and joined by the defendant, no motion to dismiss for such a cause could be heard; and as no formal errors are usually assigned in this court, and none were assigned in this cause, we think the delay to make the motion is equal to a joinder in error, even if the clerk of the Supreme Court of Louisiana had no authority to issue the writ, on which we at present express no opinion.

Cited—7 How., 594; 9 How., 450; 13 How., 156; 15 How., 35; 20 How., 210, 523; 4 Wall., 210; 20 Wall., 8.

LESSEE OF DANIEL W. GANTLY ET AL.,
Plaintiff,
v.
WILLIAM G. AND GEORGE W. EWING
Defendants.

Indiana statute—sale of land on execution by sheriff—constitutionality of foreclosure law.

A law of the State of Indiana, directing "that real and personal estate, taken in execution, shall sell for the best price the same will bring at public auction and outcry, except that the fee-simple of real estate shall not be sold to satisfy any execution or executions, until the rents and profits for the term of seven years of such real estate shall have been first offered for sale at public auction and outcry; and if such rents and profits will not sell for a sum sufficient to satisfy such execution or executions, then the fee-simple shall be sold," is not merely directory to the sheriff, but restrictive of his power to sell the fee-simple.

If he sells the fee-simple without having previously offered the rents and profits, his deed is void.

The law of Indiana, passed after the execution was issued, also required that the property should be appraised. The sheriff's deed was not void, because of there being no appraisement.

THIS case came up on a certificate of division from the Circuit Court of the United States for the District of Indiana.

*The facts were stated by an agree- [*708
ment in the nature of a special verdict, and were as follows:

"On the twenty-fifth day of December, eighteen hundred and thirty-eight, one Jacob Linzee was indebted to Daniel W. Gantly, of the city of New York, in the sum of nine hundred and nine dollars and eighty-two cents; and, to secure the payment of the same, Linzee then executed to Gantly a mortgage on town lot numbered one hundred and seventy-nine, in Peru, Indiana, of which Linzee was seized in fee. At the time of the execution of the mortgage, Linzee was in possession of the mortgaged premises, and they were worth from one thousand to fourteen hundred dollars. Linzee made default in the payment, and Gantly, on the eighth day of September, eighteen hundred and forty, obtained a decree in the State court to foreclose the mortgage; and unless the money should be paid in sixty days, an execution was directed to be issued for the sale of the premises.

"In January, eighteen hundred and forty-one, an execution was issued, and on the thirteenth of February following, before the sale of the property, the appraisement law passed, and was published the twenty-third day of February, eighteen hundred and forty-one: on the first of March, eighteen hundred and forty-one, the sheriff, having given due notice, sold the premises at public auction, to the defendants, for seventy-six dollars, and executed a deed to them for the same; which deed was offered in evidence to support the title of the defendants. The property was not valued, nor were the rents and profits offered for sale by the sheriff. And the court was asked to instruct the jury that, as the rents and profits had not been offered, nor the land valued, under the statutes of Indiana, the sheriff's deed was inoperative and void. And on this question the opinions of the judges were opposed; and on motion of plaintiff's counsel, the point is certified to the Supreme Court, under the act of Congress."

Messrs. Cooper and *White* for plaintiffs in error.

Mr. Hoban for the defendants in error.

The argument on behalf of the plaintiff in error was as follows:

The acts of the State of Indiana, which have relation to the question, are certified in the record.

Now, as Linzee made default in the payment

NOTE.—*As to constitutionality of* ex post facto *laws*, see note to Calder v. Bull, 3 Dall., 386; and note to Sturges v. Crowninshield, 4 Wheat., 122.

As to what laws are void, as impairing obligation of contracts, see same notes; also note to Dartmouth College v. Woodward, 4 Wheat., 518.

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of the money the mortgage was given to secure. Gantly forclosed the mortgage in the State court, under the provisions of the Revised Laws of Indiana of 1831, pp. 244 and 245, and issued his execution, as required by that statute, requiring "mortgaged premises to be sold as other lands are sold on execution." All the proceedings, up to the time of issuing the execution, were strictly in accordance with the provisions of the statute above mentioned. And as the defendants claim as purchasers under the execution, they waive all objections to the previous proceedings. (Cowper's Rep., 46.)

709*] *But I contend that the sheriff's deed to the defendants is inoperative and void, for the following reasons:

1. Because the sheriff sold the fee-simple of the land, without having first offered the seven years' rents and profits of the same.

2. Because he did not have the land appraised before the sale of the same.

By the Revised Law of 1831, p. 235, sec. 3, it is enacted, "That real and personal estate, taken in execution, shall sell for the best price the same will bring at public auction and outcry; except that the fee-simple of real estate shall not be sold to satisfy any execution or executions, until the rents and profits, for the term of seven years, of such real estate, shall first be offered for sale at public auction and outcry."

Which appears to be a good and salutary law, enacted to prevent the sacrifice of the fee-simple of real property, to the cupidity of a heartless set of speculators, who hang round sheriff's sales, for the sole purpose of speculating off the misfortunes of their fellow-creatures. In England the fee-simple of land cannot be sold under execution, but the judgment creditor can only take possession of the rents and profits, by a writ of *levari facias*, or take his extent under an *elegit*, but both of which remedies he could not resort to. A similar law I believe still prevails in Virginia. In New York, when the fee-simple has been sold under execution, the owner of the land is allowed a year from the time of the sale to redeem the land. In Ohio, lands are required to be appraised before they can be sold under execution. And I never have learned that either the constitutionality, or the policy, or the propriety of either of the laws of New York or Ohio have ever been questioned.

Then, to give a fair construction to the statute of this State last recited, it must inevitably appear that the offering of the rents and profits was made a condition precedent by the statute to the sale of the fee-simple of the land in controversy, and that a sale, without such previous requisition having been first complied with, is null and void.

Sheriffs in this State receive the whole of their power and authority from the statute laws of the State. They have no common law powers nor implied powers, and it would be dangerous to trust them with either. But, on the contrary, it has been said by the Supreme Court of this State that it may be safely presumed, by a *bona fide* purchaser at sheriff's sale, that the sheriff had done his duty in obeying the directions of the statute as respects the inquest, the advertisement and sale, &c. (1 Black., 210.)

But in the present case the defendants could not be *bona fide* purchasers; the very idea is repelled by the gross inadequacy of the price they bid and gave for the same. We cannot presume that the defendants supposed the rents and profits had first been offered, when the proof is positive that they had not been offered. Presumption can never outweigh positive proof.

*The improper conduct of the sheriff [*710 in selling property may be inquired into, in an action of ejectment on his title, and the owner of the land would have a right to prove on the trial that it was known to the purchasers that the rents and profits had not been offered for sale by the sheriff. (4 Black., 228.)

In the present case, as the property was sold for a price grossly inadequate, and the sheriff never offered the rents and profits, as is proved on the trial, every presumption is against the defendants.

I now come to the second point, that the property had not been appraised before the sale was made.

It appears from the testimony certified of record, that the execution under which the property in question was sold was issued in January, A. D. 1841; that on the 13th of February, and before the sale the Legislature passed the appraisement law; and that the same was published on the 23d of February, A. D. 1841, being five days before the sale of the property in question, by the sheriff, to the defendants; which law was in force, and was, by the 14th section of the same, to take effect from and after its passage. (*Vide* Law of 1841, p. 130–132.)

In the case of *Tredway* v. *Gapin* (1 Blackford, 299) "it was said by the Supreme Court, that from the time a statute is published in print, by authority, at any place within the State, it takes effect in every part of it, unless the act itself otherwise directs."

This statute being in force at and before the time of sale of the property in question, by the sheriff to the defendants, the defendants have no title to the premises, unless they show that it had been strictly complied with; the 6th section of which statute is as follows: "That hereafter no real property shall be sold on execution for less than one half its cash value at the time of such sale." And the 7th section of the same law points out the form of the appraisement and return at the cash value at the time of the appraisement; which statute is not only directory to the sheriff, but it in positive and direct terms prohibits any sale of land under execution, unless the statute has first been complied with.

In the case of *Tweedy* v. *Pickett* (1 Day's Rep., 109) it was decided by the Supreme Court of Connecticut that, "in order to make out a title to land by the levy of an execution, it must be shown the appraisers were indifferent freeholders, and that they were sworn according to law." And in the case of *Mitchell* v. *Kirtland* (7 Conn. Rep., 229) the law is laid down to the effect following:

"The acquisition of title by execution being a proceeding *in invitum*, the requisites of which are prescribed by positive law, in derogation of the common law, a strict compliance with these requisites is indispensable to a transfer of the title." (*Vide*, also, the case of *The United States* v. *Slade*, 2 Mason, 70.)

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And by the statute of Indiana, approved January 6th, 1821 (Laws of 1820, 1821, p. 4), it is enacted "that no real property shall be 711* *sold for less than one half of its real value, by virtue of any execution which may hereafter issue on a judgment which has heretofore been rendered, or which may hereafter be rendered," &c.

Shortly afterwards the Supreme Court of Indiana were called on to give a proper construction to the last mentioned statute, and it decided that a bid and sale of land offered at sheriff's sale under execution under that statute, where the purchaser did not bid half the appraised value of the land, and a sheriff's deed under such a bid and sale, were void, and conveyed no title to the purchaser. (*Vide Harrison et al.* v. *Doe, on the demise of Rapp*, 2 Black., 1); which case, I think, clearly settles the construction of the recent appraisement law, and is in accordance with the cases cited in Connecticut, and the case in Mason's Reports. And they all go to establish the position taken, that, inasmuch as the land was not appraised before the sale, the sheriff's deed to the defendants is inoperative and void.

If the title to the defendants be good under this deed, they (the defendants) get the property for less than a tenth part of the value, and Gantly will have to lose nine tenths of the money Linzee has so long and justly owed him; which, I think, clearly shows the sale by the sheriff to the defendants to be fraudulent and void.

In the third resolution in *Fermor's* case (3 Co. Rep., 78) the court said that "the common law doth so abhor fraud and covin, that all acts, as well judicial as others, and which of themselves are just and lawful, yet being mixed with deceit, are in judgment of law wrong and unlawful."

The question whether a deed be fraudulent and void as to creditors, may be examined and decided in an action of ejectment. (2 Black. Rep., 230.)

It would be unnecessary to produce further authority in support of the second objection to the deed of the sheriff in this case.

It has, however, been contended by the counsel for the defendants that the appraisement law of our State, of 1841, is unconstitutional, and, therefore, that the lessor of the plaintiff has no right to complain of its violation; and the case of *Bronson* v. *Kinzie et al.* (1 How., 311) is by them referred to to support their position. But I am wholly at a loss to find out the least spark of resemblance between the cases. If Gantly (the lessor) had bought the property in question for a nominal price, without the same having first been appraised, and Linzee commenced a suit against him to recover the property, it might have raised a different question to that now before your honors. But, in the present case, the defendants bought the land at sheriff's sale in violation of the appraisement law, after the same was in force. The appraisement law, at the time of the purchase, was the law of the land, entered into and became a part of the contract between the defendants and the sheriff, and if 712* it was *unconstitutional, it would make the argument so much the stronger for setting aside the sale.

A law may be constitutional in its application to some cases, and void as to others. (3 Peters, 94.) The law might have been unconstitutional between Gantly and Linzee, and constitutional between the defendants and the sheriff.

Mr. Hoban, for defendants in error, after stating the case, proceeded as follows:

From the above statement, which is taken word for word from that of the plaintiff in error, it appears that the title of the defendant in error to the premises in dispute is admitted unless the sheriff's deed is inoperative, and the deed is assailed upon these grounds: first, because the sheriff sold the fee-simple of the land without first having offered the seven years rents and profits of the same—and this is supposed to be required by the Act of the Legislature of Indiana of 1831, sections 3 and 18. It must be premised that this law is prior in date to that of the mortgage, which was in 1838. It will appear from the law itself that it applies only to executions on judgments at law; section 18 applies to decrees in equity which provides that sales under them are to take place at public vendue to the highest bidder, as on execution on judgments at law. In the nature of things a law of this kind could not apply to a chancery decree, which orders a specific thing to be done in a manner by the law itself expressly declared to be, as the court may determine "in the premises between the parties, as may be right and just." I do not deem it necessary on this point to do more than to refer the honorable court particularly to section 18 of the law, where the sale of the land and the making of an unincumbered deed to the purchaser are spoken of, but no mention of a valuation of the land, or restriction of the court, first to order the sale of the rents and profits for seven years, before decrees of the unconditional sale of the premises.

The second objection is, that the land was not appraised pursuant to the Act of the Legislature of Indiana of February 13, 1841, which requires, as it appears, that land shall not be sold on execution, except after being appraised, and then only after more than half the value is bid.

The first answer to this is, that the law applies to sales on executions, which, in *Bronson* v. *Kinzie* (1 Howard, 311), is admitted not to apply to sales under mortgage foreclosures.

But if the law be admitted, and be particularly framed to apply to a case of this kind, still it is clearly unconstitutional. The law of Indiana is of 1841; the date of the mortgage 1838. I shall refer your honors only to *Bronson* v. *Kinzie* (1 Howard, 311), where the leading cases are referred to on this subject (*Green* v. *Biddle*, *Sturges* v. *Crowninghield*, *Ogden* v. *Saunders*); these cases, as laboriously and *ably argued as any on record, decide [*713 this general principle, that a State law which materially varies the well ascertained remedy upon a contract, is as to contracts in existence at the time of its passage, in the sense of the amendment of the Constitution, a law impairing the obligation of a contract, and which in consequence no State has a right to pass. *Bronson* v. *Kinzie* (1 Howard, 311) applies this principle specifically to a case of the very char-

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acter now under consideration, and decides that a law extending the time of credit under a mortgage foreclosure, and prohibiting the sale of the mortgage premises, unless after valuation, and unless they produce a certain sum or value, is such an invasion of the ascertained remedy, at the date of the contract, or mortgage (and rendered in legal contemplation a part of the compact between the parties), as to come within the prohibition intended by the Constitution. This law prohibits the sale of the premises until it may be made to produce one half its value by assessment, which may never be.

Mr. Justice CATRON delivered the opinion of the court:

This case comes before us on a certificate of division from the Circuit Court for the District of Indiana. As the facts fully appear in the statement of the reporter, they need not be repeated at large here. The action was an ejectment; the defendants set up a sheriff's deed, and the court was asked to instruct the jury that the deed was void for two reasons: First. Because the rents and profits had not been offered for sale before the fee-simple was sold. Second. Nor had the land been valued under the statutes of Indiana before the sale was made.

The first ground of objection involves the construction of the 3d section of the act of February 4, 1831, which is in the following words:

"That real and personal estate, taken in execution, shall sell for the best price the same will bring at public auction and outcry, except that the fee-simple of real estate shall not be sold to satisfy any execution or executions, until the rents and profits for the term of seven years of such real estate shall have first been offered for sale at public auction and outcry; and if such rents and profits will bring a sum sufficient to satisfy the execution or executions levied thereon, the sheriff, or other officer, selling the same, shall make to the purchaser thereof a deed conveying to such purchaser a term of seven years in and to such real estate; and moreover forthwith deliver immediate and actual possession thereof; and if such rents and profits will not sell for a sum sufficient to satisfy such execution or executions, then the fee-simple, or other estate, of the execution defendant or defendants, shall be sold, and a deed, conveying the same to the purchaser thereof, shall be executed by the officer selling the same."

By this provision the sheriff was governed in [*714] making the sale; if it was merely directory to the officer, then the deed cannot be assailed; but if it contains an inhibition to sell the fee, until the rents and profits are first offered, and the authority to sell the fee in this instance did not exist before, then the sale was void: as it is admitted on the record that the rents and profits were not offered by the sheriff. Had this fact not been established, then we are of opinion the court would have been bound to presume the sheriff did his duty, and that the sale, and deed founded on it, were valid: they being *prima facie* valid, the proof to assail them must come from the opposing side, be it negative or affirmative. This is the general rule applicable to proceedings of courts where they have and exercise general jurisdiction; and of this description is the court of Indiana, from which the execution issued. This being conceded, the question is, does the established fact annul the sale? At common law the fee in lands by a *fieri facias* is not subject to sale; the sheriff's authority to sell in this country is in the nature of a naked power conferred by statute; he takes no title in the land by the levy, as he does in goods, and can confer none on the purchaser, if power to sell is wanting. We admit if the words of a law are doubtful, the sale should be supported, and the benefit of any obscurity in the statute be given to the purchaser, lest he should be misled in cases where a general power is given to the sheriff to sell, and this is limited by indefinite restrictions; and that the safer rule is to hold such restrictions to be directory. Further than this, no general rule need be asserted. Giving the act in question the benefit of these favorable intendments, and what authority did it confer on the sheriff?

The general power to sell lands at auction and outcry is given, but then follows the explicit restriction that the fee simple shall not be sold until the rents and profits shall have been first offered at public auction and outcry; if they bring the amount of the execution, the sheriff is to convey to the purchaser the term of seven years and put him forthwith into possession. Had the power to sell stopped here, then no authority to convey the fee could exist; and the question is, when did the power arise? We think, on the failure of the sheriff to get a bid of the whole amount of the levy for a term of seven years; as before, the fee could not be sold. Nor can we see how the Legislature could have made the exception more explicit, unless negative language had been used, repeating the inhibition; and for this there was no necessity, as the statute conferred a power not known to the common law, and which could only be given affirmatively, and which was not given at all, save with the positive restriction imposed in advance.

To treat the exception as directory to the sheriff would violate, as it seems to us, the general spirit of the laws of Indiana; they cautiously endeavor to maintain debtors in possession and to preserve their houses, at the same time that a remedy is afforded to creditors against lands. It not being our province, however, to construe the State laws on this point, so as to give any binding effect to the adjudication on the courts of Indiana, we forbear to go into an examination in detail of what we suppose to be the policy of that State. [*715]

One consideration has been much pressed on us, to wit: That the purchasers here are not proved to have had notice of a failure on the part of the sheriff to offer the term of seven years for sale first. It is admitted if such notice had been proved the sale would be void.

In our opinion the purchaser must be held to notice. The statute contemplates a sale of the term; or an offer to sell it, and a failure, and this at public outcry, at the same time and place, and immediately preceding the sale of the fee. He who goes to purchase and is present at the sale, and does purchase, rarely if ever can want actual knowledge, as the open outcry and public auction of the term is to be as notorious as that by which the fee is sold; and even

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should the purchaser of the latter not be present at the opening of the vendue, the slightest diligence would command information whether the requisite previous step had been taken. To treat a bidder at the sale in any of its stages as an innocent purchaser, we think would be dealing with him in a manner too indulgent; as it is quite certain in no other instance could the doctrine of innocent purchaser be applied to one having equal opportunities of knowledge, aside from any duty imposed on him to acquire it. Furthermore, this would in almost every case of the kind narrow down the issue to a single point—whether the purchaser had or had not notice; leaving the jury to determine on the validity of the title, by the exercise of an undefined discretion; its verdict being founded on an exception *in pais*, and on one the Legislature did not see proper to make. This is a question of power, and the answer to the suggestion rests on this: The sheriff's duties are plainly prescribed; if he has no power to sell, want of knowledge on part of the purchaser could not confer it, and no such contingency can be let in to help his deed.

It is insisted the question has been settled by the Supreme Court of Judicature of Indiana, in the case of *Doe* v. *Smith* (4 Blackford's Rep., 228), that the purchaser at execution sale takes a good title to the fee, although the land had not been previously offered for sale by the sheriff for the rents and profits of a term of seven years.

That case does not so settle the point as to satisfy us. It applies to a sale, made pursuant to the Act of January 30, 1824, sec. 3; it is in substance like that set forth above, of 1831, but much less stringent and precise in its terms of exclusion, so that the first might be held directory to the officer, and the last an inhibition, if the decision was to the precise effect contended for, which it is not. For another reason we suppose the question not to be settled in Indiana. The certificate of division, although not exclusively contrary to the assumption that the question has been settled, must still be treated [*716] *by us, as assuming *prima facie*, that the construction of the statute is open, and that it requires settlement here for the purposes of the case; as to no other end could the question be brought here in its present form.

It is proper to remark, that it would be our duty on this point to follow the construction of the Supreme Judicial Court of Indiana, had it settled any; and this we would the more cheerfully do from the confidence we have in that tribunal; but nothing can be deemed as settled by the court of last resort in a State, unless it has adjudged the direct question; or unless the subject has, in an indirect form, and at various times, been brought before such court and treated as conclusively settled, and not open to controversy. This not appearing to be the case, it is certified to the Circuit Court that the sheriff's deed is void for the reasons stated.

2. The next question certified is, whether the sheriff's deed is void, because the land was not valued according to the statute of Indiana before the sale took place.

Linzee owed Gantly, who took a mortgage on a town lot, of which Linzee was seized in fee. This occurred in 1838. The debt was for $909, and the property mortgaged worth more than the debt. Linzee made default, and Gantly filed his bill to foreclose. In September, 1840, he obtained a decree of foreclosure, on which an execution issued in January, 1841. On the 13th of February following, the appraisement law was passed. The sheriff sold the property on the 1st of March, 1841, to the defendants.

1. The Act of 13th February provides that the debtor may redeem real estate sold under execution founded on a judgment or decree, at any time within twelve months from the day of sale, by paying the money into the clerk's office, with interest thereon, at the rate of twelve and a half per cent.

2. That junior incumbrances may redeem in like manner.

3. That if the judgment debtor neglected, or was unable to make the stay by the laws then in force, the property should be sold on a credit, equal to the stay, and bond be taken by the officer selling for the purchase money.

4. That thereafter no property should be sold on execution for less than one half of its cash value at the time of the sale, to be ascertained by three freeholders at the instance of the officer; and if the property did not sell for half the value, the fact was to be returned on the execution, and another might issue subject to the same conditions.

The decree ordering foreclosure was made in conformity to the existing laws, at the date of the mortgage, and of the decree. An execution sale was the appropriate mode of foreclosure, and this without any of the restrictions contained in the Act of February 13, 1841. The decree followed the provisions of the 18th section of the Act of 1831, chap. 36. The contract of mortgage was a vested interest, and [*717 its main incident a right to have the land applied in discharge of the debt, either by an execution executed, as on a judgment at law, or in some form of remedy substantially equal. The new remedy, prescribed by the Act of 1841, changed the contract, and required among other things that the mortgaged premises should not be sold to satisfy the debt unless they were first valued, and one half of that value was bid for them. If the Legislature could make this alteration in the contract, and in the decree enforcing it, so it could declare the property should bring its entire value, or that it should not be sold at all; thereby impairing, or defeating the obligation under the disguise of regulating the remedy. This court held, in *Bronson* v. *Kinzie* (1 How., 319), that the right, and the remedy substantially in accordance with the right, were equally parts of the contract, secured by the laws of the State where it was made; and that a change of these laws, imposing conditions and restrictions on the mortgagee, in the enforcement of his contract, and which affected its substance, impaired the obligation, and could not prevail; as an act directly prohibited, could not be done indirectly. This being the settled doctrine of the court, and applying as forcibly to the case before us as it did to the one cited, we answer to the second ground of objection, that the sheriff's deed is not void on this ground, although no valuation of the property was made before the sale.

Cited—6 How., 22; 24 How., 465; 2 Bond., 183; 1 Abb. U. S., 176.

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WILLIAM H. McFARLAND

v.

WILLIAM M. GWIN, late Marshal.

Marshal out of office must complete levy made during term—only authorized by law to receive gold and silver.

A marshal is not authorized by law to receive anything in discharge of an execution but gold and silver, unless the plaintiff authorizes him to receive something else.

A marshal, like a sheriff, is bound, after the expiration of his term of office, to complete an execution which has come to his hands during his term; and an execution is never completed until the money is made and paid over to the plaintiff, if it is practicable to make it.

THIS case was brought up by writ of error from the Circuit Court of the United States for the Southern District of Mississippi.

McFarland had recovered a judgment against one Passmore for the sum of $9,763.10, and on the 6th of July, 1839, issued a *fieri facias*.

On the 1st of November, 1839, the execution was levied upon sundry pieces of property by the marshal.

On the 20th of December, 1839, a *venditioni exponas* was issued, to which the marshal made the following return:

"The within named property was sold on 718*] the 27th day of January, *1840, and I received in payment therefor, on that day, the sum of nine thousand dollars in the post notes of the Mississippi Union Bank, which are herewith returned. Received, also, on the same day, the balance of the execution from the defendants, in the same kind of money, which is likewise herewith returned.

"Wm. M. Gwin, Marshal,
"Per J. F. Cook, Deputy."

Attorney's Receipt.

"May 22d, 1840. Received of Wm. M. Gwin, marshal, the sum of five hundred and fourteen dollars and fifteen cents, being the amount of my commissions, I having refused to received the balance belonging to the plaintiff, as the same was tendered me by Mr. Gwin in Union Bank of Mississippi post notes, in which kind of money he says and returns that it was collected.

"Wm. R. T. Chaplain, Plaintiff's att'y."

At November Term, 1841, McFarland, by his counsel, moved the court for a judgment against Gwin for the amount due on the original judgment, with interest at the rate of eight per cent. from the 14th of May, 1839, to the 27th of January, 1840, and for interest upon the aggregate sum at the rate of thirty per cent. per annum, from the 22d of May, 1840, until paid.

The motion was submitted to the court upon the following agreed case, viz.:

The writs and returns were stated, and then the agreement continued thus:

"And it was proved that the money was demanded, on the 22d day of May, 1840; also, that at that date the Union post notes were at forty per cent. discount.

"The defendant proved that on the demand he tendered the post notes of the Mississippi Union Bank, which were refused by the attorney of the plaintiff. He also proved that from August, 1838, when the Mississipi Union Bank went into operation, until about the middle of February, 1840, the post notes of that bank constituted nearly the entire circulating medium of the State. That they had been treated as cash in all business transactions during that time. That they were habitually and ordinarily received by the sheriffs throughout the State in satisfaction of executions, and in payment of property sold under them. That the marshal had been accustomed, during all that time, to collect the post notes of said bank upon executions; and that the attorneys of the court, and plaintiffs in executions, had always, without objection, received such notes from the marshal as money. That on the 27th day of January, 1840, the day of sale, the post notes of said bank were worth five or six per cent. less than specie, and were worth more than they had previously been. That about the middle of February, *1840, they suddenly [*719 depreciated in value, and continued to decline until the 22d May, 1840.

"The above was all the evidence in the case.

H. S. Eustis,
"W. Yerger."

Upon this statement of facts, the court were of opinion that judgment should be entered for the defendant. To which opinion of the court the plaintiff, by his counsel, excepted, and upon this exception the case came up.

Mr. Coxe for the plaintiff in error.

Mr. Walker for the defendant in error.

Mr. Justice McKinley delivered the opinion of the court:

McFarland recovered judgment against Ellis P. Passmore, for the sum of $9,763.10, in the Circuit Court of the United States for the Southern District of Mississippi; and on the 6th day of July, 1839, a *fieri facias* issued thereon, directed to the marshal of the Southern District of Mississippi, commanding him that of the goods and chattels, lands and tenements of the said Ellis P. Passmore, he should cause to be made the said sum of $9,763.10, upon which *fieri facias* the marshal returned, that he had levied of the goods and chattels, lands and tenements of the defendant sufficient to satisfy the *fieri facias;* but which property had not been sold for want of time.

And thereupon a *venditioni exponas* issued to the marshal, commanding him to expose to sale the goods and chattels, lands and tenements levied on, upon which he returned that he had sold the property levied on, and received the full amount of the *fieri facias*, in the post notes of the Mississippi Union Bank. The attorney for the plaintiff received of the marshal, $514.15, being the amount of the attorney's fees; for which he gave a receipt, but refused to receive any part of the notes for the plaintiff. At the November Term, 1841, of the Circuit Court, the plaintiff moved the court for judgment against the marshal for the amount of the *fieri facias* and interest thereon. On the trial of the motion, it was proved by the plaintiff that the money was demanded on the 22d day of May, 1840; and at that date the post notes of the Union Bank were selling at a discount of 40 per cent. Gwin, the defendant, proved that on the demand made he had tendered the post

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notes of the Union Bank, which were refused by the attorney of the plaintiff; and that from August, 1838, when the Mississippi Union Bank went into operation, until about the middle of February, 1840, the post notes of that bank constituted nearly the entire circulating medium of the State; that they had been treated as cash in all business transactions during that time, and had been received by the marshal and the sheriffs of the State in payment of exe-
720*] cutions. And *thereupon the court rendered judgment against the plaintiff, and for the defendant.

To reverse this judgment the plaintiff has prosecuted this writ of error.

This question is fully settled in the case of *Griffin & Ervin* v. *Thompson* (2 How. Rep., 244.) In that case this court held that the marshal was not authorized by law to receive anything in discharge of the execution but the gold or silver coin of the United States. To this general proposition we give our full assent; but we do not mean to say there is no exception to this general rule. If the plaintiff were to authorize the marshal to take bank notes, of any description, in payment of the execution, we have no hesitation in saying, a payment by the defendant to the marshal in such bank notes would be a satisfaction of the judgment.

But as Gwin failed to prove any such authority from the plaintiff, he was clearly liable for the whole amount of the execution with legal interest thereon, except the amount paid to the plaintiff's attorney. It has been contended, however, in this case, that, at the time this motion was made, Gwin was not marshal, his time having expired, and another having been appointed in his stead. It is a well settled principle of law, that if an execution come to the hands of a sheriff to be executed, and his term of office expire before he executes it, he is bound nevertheless to complete the execution; and the same rule applies to a marshal. An execution is never completed until the money is made and paid over to the plaintiff, if it be practicable to make it.

All the remedies against the marshal, necessary to compel him to pay over the money he has made, survive his term of service, and remain in full force against him until the execution shall be completed.

The judgment of the Circuit Court must, therefore, be reversed.

NEIL, MOORE & COMPANY, *Plaintiffs in Error,*

v.

THE STATE OF OHIO, *Defendants.*

Charging toll to passengers in mail stages on Cumberland road is against compact between U. S. and Ohio, and void—unnecessary division of mail, abuse of privilege.

Under the Acts of Congress and of the State of Ohio, relating to the surrender and acceptance of the Cumberland Road, a toll charged upon passengers traveling in the mail stages, without being charged also upon passengers traveling in other stages, is against the contract, and void.

It rests altogether in the discretion of the Postmaster-General to determine at what hours the mail shall leave particular places and arrive at others, and to determine whether it shall leave the same place only once a day or more frequently.

It is not, therefore, the mere frequency of the departure of carriages, carrying the mail, that constitutes an abuse of the privilege of the United States, but the unnecessary division of the mail bags amongst a number of carriages in order to evade the payment of tolls.

THIS case was brought up under the 25th section of the Judiciary Act, by writ of error, from the Supreme Court of Ohio.

*It involved the construction of the [*721 acts of Congress and the State of Ohio, relative to the cession of the Cumberland Road, which are narrated in a preceding part of this volume, in the case of *Searight* v. *Stokes et al.*, p. 151.

It is proper, however, to state the law of Ohio with more particularity than it was necessary to do in the report of that case. The proviso contained in the 4th section of the Act of 1831 was there recited, but the 5th section was not. They are as follows:

Sec. 4 lays tolls, and adds: "Provided, That nothing in this act shall be construed so as to authorize any tolls to be received or collected from any person passing to or from public worship, or to or from any muster, or to or from his common business on his farm or woodland, or to or from a funeral, or to or from a mill, or to or from his common place of trading or marketing, within the county in which he resides, including their wagons, carriages and horses, or oxen drawing the same: Provided, also, That no toll shall be received or collected for the passage of any stage or coach conveying the United States mail, or horses bearing the same, or any wagon or carriage laden with the property of the United States, or any cavalry or other troops, arms or military stores belonging to the same, or to any of the States comprising this Union, or any person or persons on duty in the military service of the United States, or of the militia of any of the States.

"Sec. 5. That it shall be lawful for the General Assembly, at any future session thereof, without the consent of Congress, to change, alter, or amend this act: Provided, That the same shall not be so changed, altered, or amended, as to reduce or increase the rates of toll hereby established, below or above a sum necessary to defray the expenses incident to the preservation and repair of the said road, to the erection of gates and toll houses thereon, and for the payment of the fees or salaries of the superintendent, the collectors of tolls, and of such other agents as may be necessarily employed in the preservation and repair of the same, according to the true intent and meaning of this act."

On the 6th of February, 1837, the State of Ohio passed an act containing, amongst other provisions, the following, viz.:

"Sec. 4. That one daily stage, coach, or other vehicle, and no more, with the horses drawing the same, belonging to any contractor or contractors for carrying the United States mail on said road, with the passengers therein, shall be permitted to pass in each direction free from the payment of tolls; and each additional stage, coach, or other vehicle belonging to such contractor or contractors, although the same may contain a mail, or portion thereof, shall be charged with the same tolls as other

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vehicles of the like kind. But if the Postmaster-General shall order the mail to be divided, and carried in two or more stages, coaches, or vehicles, in any one direction daily, then in such case the coaches or vehicles in which 722*] mails *shall actually be carried, shall pass free of toll; but on each passenger transported in any such additional stage, coach, or vehicle, there shall be charged and collected at each gate, three cents, in manner hereinafter provided.

"Sec. 5. That each and every driver of any stage, coach, or other vehicle, belonging to any such mail contractor or contractors, other than such as are entitled to carry passengers free of toll, shall, at each and every gate, report the number of seats occupied in such stage, coach, or other vehicle, to the keeper of such gate, whose duty it shall be to open an account against the proprietor or proprietors of such stage, coach, or other vehicle, and charge, in a book to be kept for that purpose, three cents for each passenger, as provided in the preceding section of this act; and said proprietor or proprietors shall pay over to such gate keeper, at the end of every three months after the taking effect of this act, the aggregate amount of tolls which shall have become due for passengers, and charged as above provided.

"Sec. 6. That should the driver of any stage, coach, or other vehicle, belonging to such mail contractor or contractors, other than such as are entitled to carry passengers free of toll, neglect or refuse to report to any gate keeper the number of seats occupied in said stage, coach, or vehicle, it shall be the duty of such gate keeper to charge the proprietor or proprietors of such stage, coach, or other vehicle, at the rate aforesaid, for each and every seat which might be occupied in the same, to be recovered in an action of debt, in the name of the State of Ohio, in any court having competent jurisdiction.

"Sec. 8. That the Board of Public Works, or their authorized agent, may be allowed to collect tolls from any proprietor or proprietors of any line of stages, post coaches, or other vehicles for the conveyance of passengers, quarterly; and if any proprietor or proprietors of any such line of stages, post coaches, or other vehicles as aforesaid, shall neglect or refuse to pay quarterly, that from and after such neglect or refusal, the said proprietor or proprietors as aforesaid shall be required to pay at each and every gate as they pass: Provided, That the Board of Public Works, or their authorized agent, shall have made out and presented to any such proprietor or proprietors, or any one of them, the amount of the toll due from him or them for each and every gate."

The Act of the Legislature of March 19, 1838, provides as follows:

"Sec. 24. That the said Board of Public Works shall have power to revise the rates of toll to be paid by persons passing on or using the National Road in Ohio, and so to modify the same, from time to time, as to raise and collect, in the most equal manner, the sum necessary to defray the expenses incident to the preservation and repair of said road, to the erection of gates and toll houses thereon, and for the payment of the fees or salaries of the superintendent, the collectors of tolls, and of such other agents as may be necessarily employed in *the repair and preservation of [*723 the same, according to the true intent and meaning of the Act passed February 4th, 1831, entitled 'An Act for the preservation and repair of the United States Road.'"

The order of the Board of Public Works, above referred to, is as follows:

"By virtue of the powers vested in the Board of Public Works, by the 24th section of the Act 'in addition to an act for the preservation and repair of the United States Road,' passed March 19th, 1838, it is hereby

"Ordered, That instead of the rate of toll charged on each passenger by the 4th section of the Act 'fixing the rates of tolls on the National Road,' passed February 6th, 1837, there shall be charged ten cents, at each gate, on each of such passengers."

In October, 1842, a suit was brought in the Court of Common Pleas, in Franklin County, against Neil, Moore & Co., for tolls on passengers conveyed in stages by the defendants, on the National Road, and the following agreed statement of facts was filed:

"In this case, the following facts are agreed by the parties: The partnership of the defendants, as alleged, is admitted. The plaintiff claims to recover for tolls on passengers carried upon the National Road, in Ohio, in coaches belonging to the defendants, other than and besides one daily stage coach, carrying the mail of the United States; which said coach, with the horses, passengers, and everything else pertaining to it, was permitted to pass toll free. The order of the Board of Public Works, hereto annexed, was made in due form, at the date thereof, and is to be admitted in evidence. The passengers upon whom toll is sought to be recovered, were carried by the defendants, as above mentioned, between the first days of April and October, A. D. 1842. The defendants were contractors for carrying the mail of the United States upon said road, and said passengers were all carried in coaches in which a part of said mail was carried at the same time; the mail being thus carried in more than one coach, pursuant to the orders from the Postmaster-General; one coach, containing a part of the mail, and the passengers, and baggage, and everything on it, being, at the same time, permitted to pass toll free, as above stated. The mail was carried in one line of coaches, down to the time stated in the annexed statement of the Postmaster-General, which, together with the accompanying orders of the department, are taken in evidence in this case. Both before and since the construction of the National Road, it was the uniform practice, in Ohio, to carry passengers on the coaches carrying the mail; and since the construction of the National Road, no claim was made for toll on such passengers, or coaches, or on anything pertaining to them, except as shown by the case of *The State of Ohio* v. *Neil & Moore* (7 Ohio Rep., 132). Until the mail was carried in two separate lines of coaches, as specified in the said statement of the Postmaster-General, and in the manner and for the *purpose therein mentioned, the defend- [*724 ants were required to carry the mail in two separate lines of coaches, and did so carry it accordingly. It is admitted that the acts of the Legislature of Ohio, and the orders of the Board

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of Public Works, in existence when the tolls in question accrued, did not reduce or increase the rates of toll, hereby established, below or above a sum necessary to defray the expenses incident to the preservation and repair of the said road, to the erection of gates and toll houses thereon, and for the payment of the fees or salaries of the superintendent, the collectors of tolls, and of such other agents as may be necessarily employed in the preservation and repair of the same; but it is not intended by this admission to preclude the defendants from objecting to the validity or legality of said charge of toll upon passengers, upon any ground they may think proper to take in the argument. It is understood and agreed that this case shall not in anywise prejudice the rights of the plaintiff, nor of the defendants, in any other suit, upon any demand not included in the facts hereby agreed. For the mutual convenience of the parties, this case is narrowed down so as to present only the question arising upon the facts above stated. Any material fact left out in this agreement may be supplied by proof, on the trial, by either party, after giving the other party reasonable notice of such intention. It is agreed by the parties that the whole number of passengers charged with toll at all the gates, between the first days of April and July, A. D. 1842, was ten thousand seven hundred and fifty-six, and that the whole number chargeable between the first days of July and October, A. D. 1842, was twelve thousand six hundred and seventeen; and that if the plaintiff be entitled to recover, judgment shall be entered for the sum of $1,075.58, with interest from the first day of July, 1842, and $1,261.67½, with interest from the first day of October, A. D. 1842, and costs, or for such other sums as may be due, computing the tolls on said passengers at any other rate than that fixed by the Board of Public Works, if the court deem it competent to adopt any other rate, with interest on the gross sums due on the first days of July and October above mentioned, from those times respectively, and costs."

The Court of Common Pleas were of opinion that judgment should be entered for the plaintiff, and the damages were assessed at $2,438.25.

The defendants carried the case to the Supreme Court of Ohio, where, in December, 1843, the judgment of the court below was affirmed, and the following certificate was annexed to the record:

"And it is hereby certified, that on the trial of this cause the defendants set up and claimed the right and authority to transport, in their two daily lines of mail coaches, which carried the United States mail, under a contract with the Postmaster-General, and by the authority of the United States, passengers traveling therein, free of toll, along the United States Road, in 725*] the State of Ohio, and *through the toll gates erected by the said State thereon; that the said defendants set up and claimed this power and authority under and by virtue of the Act of Congress approved the 2d day of March, A. D. 1831, entitled "An Act declaring the assent of Congress to the act of the General Assembly of the State of Ohio," recited therein; and that in said case there were drawn in question the construction, effect, and validity, of said act of Congress, and the right and authority claimed by the said defendants under the United States, by virtue thereof, and that the decision was against the validity of said act to confer the right and authority so claimed."

The defendants sued out a writ of error, to bring this decision of the Supreme Court of Ohio before this court.

Mr. Ewing, in writing, for plaintiffs in error.

Mr. Swayne for defendant in error.

Mr. Ewing referred to the law of Ohio, passed in 1838, and the order of the Board of Public Works (both of which have been already cited), and then proceeded thus:

Under this law and this order, there was charged against the plaintiffs in error, on passengers transported in one of their lines of coaches, in which they carried the United States mail, by order of the Postmaster-General, a large amount of tolls, which charge, as stated, in the agreed case, is the foundation of this suit.

I contend that the second proviso in the 4th section of the statute of Ohio, of February 4th, 1831, which exempts from the payment of toll "any stage or coach conveying the United States mail," &c., when assented to by the Act of Congress of March 2d, 1831, became and was an essential part of a contract, over which Ohio alone had no power or control. On the other side, I understand, it will be contended that the 15th section of the statute reserves to Ohio the right to alter or abolish that exemption at pleasure. This is the first question which we present for the consideration of the court.

If we leave out of view the 15th section, this statute, as assented to, is clearly a contract. By it the United States surrenders the road to Ohio, in consideration of which Ohio agrees to levy tolls, and keep the road in repair, and suffer the mails and other property of the United States to pass along it toll free. Now, could it have been the intent of the contracting parties to put it in the power of one of them to annul at pleasure a valuable provision of that contract, and is such intent unequivocally expressed in the 15th section? I think not. It is not reasonable to suppose it, and the statute does not necessarily require, if, indeed, it will admit of a construction which will allow it.

The first four sections of the statute contain, 1st. A contract. 2d. The means in detail by which Ohio proposes to execute it on her part, couched in very special directions to the governor to that effect. *The contract was [*726 not properly an act of the Legislature, and I do not admit that it was so considered or treated of in the 15th section. But all those matters which did not pertain to the contract, those provisions which touched not its execution, but the mode and manner of its execution, fell at once within the sovereignty of Ohio; and the statute, so far as it relates thereto, became and was, to all intents and purposes, an act of her Legislature. Now, there are here a contract and a statute. Ohio reserves the right to "change, alter, and amend" the statute, but surely not to change, alter, and amend the contract. Indeed, if there be a contract, such a provision would be void, because it would be inconsistent with and destructive of it. But the

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two provisos in the 4th section, and the proviso in the 15th section, do all, as I think, look to the distinction between that which is contract, and that which is merely a legislative act.

The first proviso in the 4th section, which makes some domestic exemptions from toll, with which Congress had nothing to do (such as persons going to market, to public worship, &c.), is couched in this language: "Provided, That nothing in this act shall be so construed as to authorize" the collection of tolls from such objects; but it does not say that no tolls shall be collected from them. This statute does not authorize such collection, yet some future act may. But the second proviso which follows this immediately, and which might have been included under the first, without any "provided also," had it not been intended to place the two subjects in totally different categories, declares "that no toll shall be received or collected for the passage of any stage or coach conveying the United States mail," &c., not confining it to the construction of this statute merely, as in the other case, but a universal prohibition, extending to all future time.

The proviso in the 15th section seems to contemplate alteration and amendment in the rates of toll, not in the objects on which it is to be levied.

"It shall be lawful for the General Assembly, at any future session thereof, without the consent of Congress, to change, alter, or amend this act: Provided, That the same shall not be so changed, altered, or amended, as to reduce or increase the rates of toll hereby established below or above, &c." So that the objects exempted from toll by the second proviso, are, for that reason, out of the operation of the 15th section. They may, it is true, be some inconsistency in the apparent ends and objects of the first proviso in the 4th and the proviso in the 15th section—the one implying that the objects subject to toll might, and the other that they might not be thereafter extended. Yet both are inconsistent with the supposition that toll might be levied on the objects exempted in the second proviso. But it is still more important that the chief end and purpose of the contract would be frustrated and destroyed by allowing Ohio to repeal that proviso.

[727*] *But if Ohio had a right to change and alter that proviso, and if it were so changed by the Act of February 24th, 1837, it is restored by the 24th section of the Act of March 8th, 1838. That act empowers the Board of Public Works to revise the rate of tolls on the National Road, and to modify the same so as to raise and collect, in the most equable manner, the sum necessary to defray expenses, &c., "according to the true intent and meaning of the act of February, 1831." And the Board of Public Works, by virtue of the power so vested in them, charged the toll which is the subject of this suit; so that at last the case rests upon the true intent and meaning of the Act of February 4th, 1831," just as it stood when it was adopted by Congress, and became a contract between the United States and Ohio.

2. I contend that the levy of the toll, which is the subject of this suit, was a violation of that contract.

Nominally, and in express words, by the statute of March 19th, 1838, the second mail coach, as well as the first, is permitted to pass toll free; but toll is charged against the proprietor of such coach for the passengers which are carried in it. Now, no toll is charged to persons who pass the gates, unless they pass in a mail coach. Out of the mail coach they go free—in it, toll is charged upon them against the proprietor, because he owns the mail coach; or in other words, toll is charged upon the mail coach to the amount of ten cents for each passenger which it carries.

Now, it cannot for a moment be contended that, under this contract (if it be a contract), and within its spirit, either the horses drawing the mail coach, or the person driving it, can be charged with toll. It would be a mere evasion to contract that the mail should pass toll free, and yet charge toll on its necessary incidents. I think it would be equally so, though not at first view so striking, to charge toll on that which was its uniform incident at the time of the contract, because not absolutely indispensable to its passage. Thus it is with the transportation of passengers. The agreed case shows that, at the time of the contract, and before and since, it has been the uniform practice to carry passengers in the mail coaches.

It must be presumed that the contract was made with a view to that practice; and in stipulating that the mail coaches should pass free of toll, that both parties intended they should so pass with their usual incidents — horses, coachmen, guards, passengers. If not with all, with what part? It will be answered, that only which is necessary. But the question recurs, how far necessary, and who is to determine the necessity which will bring the case within the spirit of the contract? Horses are necessary, but how many? Persons to conduct the coach and protect the mail, but how many of them? May you take an agent or guard free of toll? The necessity for each of these is in the same degree with the necessity of passengers—both tend to the security of the mail; but it is possible that it may *go safely without either, and [*728 both or neither should be exempt from toll.

Such was clearly the understanding at, and long after, the date of the contract. The agreed case shows that Ohio permitted, and still permits, one daily line of mail coaches to go, with its passengers, toll free. There was, therefore, a perfect understanding as to what was carried, and should continue to be carried, in the mail coach, and partake of its exemption. But the State now claims to limit this exemption to the passengers in one daily line of mail coaches, and to charge toll on those transported in the second daily line. I think there is nothing to warrant this limitation. It is true, that at the time of making the contract the mail was carried in one daily line of coaches, but there is nothing in the contract to limit it to; that but, on the contrary, it must have been within the contemplation of the parties that the number of lines should be increased according to the wants of the country and the convenience of the department. This, also, seems to be admitted; for the second line of coaches is permitted to pass toll free, if it carry no passengers. Now, if the first line of coaches has a right, under the contract, to carry its passengers toll free, and if the second line has a right to pass toll free, no toll can be charged upon it for its pas.

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sengers, for they are just as much the usual and well understood incidents of a second, as of a first line of mail coaches. Toll, therefore, can be charged upon them only were the mail is put into more than one line of coaches wrongfully, for the purpose of avoiding the payment of toll. We show that such is not the case here.

3. But I contend, also, that the coach carrying the United States mail, upon a post road established by law, is a matter over which a State has no power or sovereignty, and which it cannot by law burden with any toll or imposition whatsoever. It is another question, how a road, which is the property of a State, is to be made a post road; but when it once is so, and fairly the property of the United States, as this road was, and is to that extent and for that purpose, the State has no power to interfere with, lay burdens upon, or prescribe the manner of its use. The mail is transported under a law of Congress, by contracts made with the Postmaster-General. For the convenience of the public and the security of the mails, he requires it to be carried in coaches adapted to the transportation of passengers, and the contracts could not be executed according to their spirit, and with due regard to the safety of the mails, should the contractor fail to provide for the transportation of passengers. The compensation paid for carrying the mail is fixed with a view to these duties and conditions, and any tax or toll levied on a contractor on account of passengers, by so much lessens his compensation, or it compels the department to increase it to an equivalent amount. Nay, if such toll may be levied, it enables a State, at pleasure, to prohibit the transportation of pas-**729*]** sengers in all mail coaches, and *thus take away its greatest safeguard. In like manner, the State might tax, at its toll gates, even to prohibition, a guard passing upon and with the coach carrying the mail. This case, as I view it, falls within the reasoning of the court in *Dobbins* v. *The Commissioners of Erie County* (16 Peters, 448, 450).

The transportation of the United States mail is a substantive power in Congress, to which the establishment of post roads, though specially granted by the Constitution, is but an incident; for it can be only with a view to the transportation of the mail that Congress could use the power to establish post roads, and the passage of the mail in the coach along the post road, with the horses which move it, and the drivers who guide, and the passengers, or guards who protect it from violation, are, to borrow the language of the court, in *McCulloch* v. *Maryland*, which is repeated by *Chief Justice* Marshall in *Weston* v. *The City of Charleston* (2 Peters, 46), "those means which are employed by Congress to carry into execution the power conferred on that body by the people of the United States," and "the attempt to use the power of taxation," or the levying of tolls "on the means employed by the government of the Union in pursuance of the Constitution, is itself an abuse, because it is the usurpation of a power which the people of a single State cannot give;" for "the States have no power, by taxation or otherwise, to retard, impede, burden, or in any manner control the operation of the constitutional laws enacted by Congress to carry into execution the powers vested in the general government."

The right to tax these contracts for the transportation of the mail must operate upon the contractors before they make their bids, and thus have a sensible effect upon the contracts. If this power be allowed to exist at all, in this case "its extent depends upon the will of a distinct government. It may be carried to an extent which will arrest them entirely."

Mr. Swayne's argument was as follows:

Before proceeding to the discussion of the question arising in the case, I respectfully submit to the consideration of the court the following preliminary points:

1. The Act of the Legislature of Ohio of February 4, 1831, which lies at the bottom of this controversy, and upon which it must be determined, is a local State law, and, being such, this court, in giving it a construction, will follow the decisions of the highest judicial tribunal of that State. (*McKean* v. *Delancy's Lessee*, 5 Cranch, 32; *Polk's Lessee* v. *Wendall*, 9 Cranch, 87; *Mutual Ass. Society* v. *Watts*, 1 Wheat., 279; *Shipp et al.* v. *Miller's Heirs*, 2 Wheat., 316; *Gardner* v. *Collins*, 2 Peters, 58; *U. S.* v. *Morrison*, 4 Peters, 127; *Anderson et al.* v. *Griffin*, 5 Peters, 151.)

"We receive the construction given by the courts of the nation as the true sense of the law, and feel ourselves no more at liberty *to [***730** depart from that construction than to depart from the words of the statute. On this principle, the construction given by this court to the Constitution and laws of the United States is received by all as the true construction; and on the same principle, the construction given by the courts of the several States to the legislative acts of those States is received as true, unless it conflict with the Constitution, laws, or treaties of the United States."

"This course is founded upon the principle supposed to be universally recognized—that the judicial department of every government where such department exists, is the appropriate organ for construing the legislative acts of that government." (*Elmendorf* v. *Taylor et al.*, 10 Wheat., 152.)

"Nor is it questionable that a fixed and received construction of their respective laws in their own courts, makes in fact a part of the statute law of the country, however we may doubt the propriety of that construction." (*Shelby et al.* v. *Guy*, 11 Wheat., 361.)

2. If there be doubt in the minds of the court as to the proper construction of the legislative Act of 1831, that doubt will be so resolved as to sustain the claim of the defendant in error.

"The presumption must always be in favor of the validity of laws, if the contrary is not clearly demonstrated." (*Cooper* v. *Telfair*, 4 Dall., 14.)

If the first of these points be sustained, it determines this case. This identical question has been twice decided by the highest court of judicature of the State, in favor of the defendant in error. The first of these decisions was made in 1835, by the Supreme Court of the State, sitting in bank (*The State of Ohio* v. *Neil & Moore*, 7 Ohio Rep., 132); the second, by the Supreme Court in this case.

Why is this point not tenable? It is true, Congress assented to the act of the Legislature

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but that assent was given without limit or qualification. It does not make the act any the less "the act of the Legislature of a particular State"—nor does it in any wise change the principles upon which it is to be construed. I am unable to perceive any reason why its construction should not be determined by the same lights which are applied in this court to other State enactments; and I think it may be safely affirmed that every argument advanced in the authorities cited, to sustain the principle which they decide, applies with undiminished force in this case.

If in this I err, if these two solemn decisions of the highest judicial tribunal of the State have not settled the question, then I rely upon the merits of the case.

Before considering them, it is proper briefly to advert to the circumstances under which the road was ceded by the United States to the State of Ohio.

"In the construction of the statutory or local laws of a State, it is frequently necessary to recur to the history and situation of the country, in order to ascertain the reason as 731*] well as the meaning of *many of the provisions in them, to enable a court to apply with propriety the different rules of construing statutes." (*Preston* v. *Browder*, 1 Wheat., 115.)

At the time of the passage of the Act of the Legislature of 1831, a considerable part of the road in Ohio had been finished and in use some time. It was rapidly going to ruin. The general government made no appropriations, and took no other step to keep it in repair. There was no prospect of any such provision being made. The same course had been pursued in regard to the road east of the Ohio River, and large sections of it were nearly impassable. Under these circumstances, the State of Ohio came forward and proposed to take charge of the road within her limits, and keep it in repair upon the terms specified in the act referred to. Congress immediately assented, and the State thereupon took charge of the road. This act provided for a loan of money to the road fund. Such loans have been frequently made since for repairs; and notwithstanding that the tolls have been repeatedly extended and enlarged, both as to objects and rates, the road is at this time largely in debt, and yet needs constant and large repairs. With all the tolls now levied upon it, including the important item in controversy in this suit, the road is a heavy burden to the State, and has required and still requires unremitted vigilance and effort to prevent it from becoming an entire ruin.

Treating the question under consideration as an open one, I lay down two propositions:

1st. That the State has as broad a right to levy and collect tolls upon this road, as if it had been constructed by her, without the United States having been in any wise connected with it; subject, however, to this perpetual and only restriction—that the whole amount collected shall be neither more nor less than sufficient to meet the costs and charges, direct and incidental, of keeping the road in repair.

2d. That the levying of toll upon passengers conveyed in mail coaches is not in conflict with the proviso in the 4th section of the Act of 1831—"that no toll shall be collected for the passage of any stage or coach conveying the United States mail, or horses bearing the same."

If the first of these propositions be sound, the second is not material in this case. I rely, however, confidently upon both.

1. As to the first proposition.

It has been shown already that Congress consented unqualifiedly to all the provisions of the Act of the Legislature of February 4, 1831.

For the sake of clearness and continuity of view, at the hazard of being tedious, I will here again quote the 15th section of that act. It is the turning point of this case.

"Sec. 15. That it shall be lawful for the General Assembly at any future session thereof, without the assent of Congress, to change, *alter, or amend this act, provided the [*732 same shall not be so changed, altered or amended, as to reduce or increase the rates of toll hereby established, below or above a sum necessary to defray the expenses incident to the preservation and repair of said road, to the erection of gates and toll houses thereon, and for the payment of the fees or salaries of the superintendent, the collectors of tolls, and of such other agents as may be necessarily employed in the preservation and repair of the same, according to the true intent and meaning of this act."

First. The power "to change, alter, or amend," is given in the broadest language. What is the restriction? Simply that "the rates of toll" thereby established shall not be reduced or increased "below or above a sum necessary" for the preservation and repair of the road. This is the only restriction upon the power of the State. The object of both parties was to preserve the road. Congress asked no guaranty beyond this, and the State gave none. To secure the preservation of the road, and at the same time to get rid of the burden, was the inducement to the general government. To prevent the destruction of the road, and to provide the means of preserving it, from the road itself, was the purpose of the State.

Such being the only restriction upon the power of the State, whenever any act is done by her, the validity of which is questioned, the true mode of arriving at a sound conclusion, is to inquire whether it is within this restriction. If it be not, however unwise or impolitic it may be, it is as valid as any other act of the State.

Since the passage of the Act of 1831, various objects, not enumerated in it, have been subjected to toll; but it is admitted in the agreed facts, that the "rates" of all the tolls are neither above nor below the sum prescribed in the act. Passengers in one of the lines of mail coaches are a part of these objects. Are they within this restriction? Suppose the stages and horses carrying the mail had in like manner been embraced in these objects, and subjected to toll, as upon other turnpike roads; how could they be said to be within a restriction, which does not allude to them in the most distant manner, and which relates to a wholly different subject?

It may possibly be contended that the proviso in this section is confined to the rates of toll upon the objects enumerated in that act. If it be so, it is immaterial in this case. The tolls in that act have been repeatedly increased,

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but never reduced. If this construction be adopted, then the agreed fact, that all the tolls (including those upon new objects) are neither "below nor above" the sum required to be collected is an immaterial matter. Whichever construction be adopted, it is clear that levying toll upon an object not subjected to toll by the Act of 1831 is not within this restriction.

The literal meaning of this proviso may possibly be as suggested, but a few words will be sufficient to show that such is not the proper construction. If it were, this absurd conse-
733*] quence would follow, *the State may raise the tolls upon the objects specified in the act so high as to yield a sum sufficient to keep the road in repair; and in addition, levy any amount of tolls upon other objects, and apply it to other purposes.

To insist upon such a construction, would be about as rational as for the defendant in error to contend that coaches carrying a part of the mail are not within the terms and meaning of the clause exempting from toll coaches carrying the mail.

If we look beyond the letter of the proviso to the context of the act, no doubt can remain as to its true meaning. Either construction, however, affects the defendant in error alike, and suits equally with the views here presented.

After this examination of the subject, can it be doubted that it was the intention of both parties, when the Acts of 1831 were passed, that the State should have all the power claimed for it in this proposition, subject only to the restriction mentioned.

Second. The Act of February 4, 1831, contains a proviso, at the end of the 1st section, and two at the close of the 4th section, to which, in connection, I desire to call the attention of the court.

The first provides that the number of gates on the road shall not exceed one for every twenty miles.

The second exempts from toll persons passing to or from public worship; or to or from musters; or to or from their common business on their farms or woodlands; or to or from a funeral; or to or from a mill; or to or from their common places of trading, or market, including their carriages and horses, or oxen drawing the same.

The third exempts from toll any stage or coach conveying the mail of the United States, and the horses drawing the same; any wagon or carriage laden with the property of the United States; any cavalry or other troops of the United States; arms or military stores belonging to the United States; arms or military stores belonging to any of the States, or to any person on duty in the military service of the United States, or of the militia of any of the States.

All these provisos stand upon the same footing. They are alike obligatory as to duration and inviolability.

If the State can "alter, amend, or change" any of them, she can do all. She can abrogate all or none. All or none were intended to be perpetual and unalterable.

The State has found it necessary, besides increasing the rates of toll, to increase the number of gates. There are gates now every ten miles, and, in some instances, "half gates" at the end of five miles.

She has abrogated the exemption from toll in favor of those going to mill, market, and their common places of trading.

She has abrogated nearly all the other exemptions.

That in favor of mail coaches and horses is one of the few left.

*Was it a violation of the Act of 1831 [*734 to erect these gates, and abrogate these exemptions? Was it within the restriction contained in the 15th section?

Have not all those passing the additional gates, and all those going to mill, market, or their usual places of trading, much more ground for complaint than the plaintiffs in error?

Can they resist the payment of the new tolls imposed upon them?

If the State had a right to make these changes in the Act of 1831, and to abrogate these exemptions, has she not the same right to abrogate the remaining exemption as to mail coaches, whenever she may think proper to do so? Wherein lies the difference, and how are the cases distinguished?

It will be observed that these exemptions contain no words of perpetuity.

The part of the statute which contains them is separated from the part containing the power to alter and amend and restricting it by ten intervening sections, which are wholly silent upon the subject.

If it had been the intention of the Legislature that this exemption as to mail coaches and horses should be perpetual, would there not have been added, at the end of the 15th section, after the other perpetual restriction which it contains, a clause like this:

"And provided, also, That no toll shall ever be collected from any stage coach carrying the mail of the United States, nor from the horses drawing the same?"

Nothing of this kind is to be found in any part of the act.

I think these views fully sustain the first proposition.

2. As to the second proposition.

The ground upon which the plaintiffs in error mainly rely, is, I understand, that passengers conveyed in coaches carrying the mails are within the proviso of the fourth section of the Act of 1831, which exempts the coach and horses from toll, and consequently that such passengers are exempted also.

If this were so, I think I have shown that it was in the power of the Legislature at any time to abrogate all or any part of this exemption, and if it were necessary, I might safely contend that as respects such passengers the Legislature has done so.

But I rely confidently upon the proposition that such passengers are not within this exemption.

In the year 1835, the Supreme Court of Ohio, in bank, in a case between the same parties (adverted to elsewhere in this argument in another connection), delivered the following unanimous judgment upon this point:

"First, then, is the Act of the General Assembly imposing this toll, unconstitutional? Or, in other words, is it a tax on the coach itself, calculated in its consequences to impede or obstruct the conveyance of the United States

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mail? We hold the negative. The coach, the horses, the drivers, and the proprietors are ex-
735*] empted in *express terms. But it is said that contracts for the transportation of the mail were made in reference to the conveyance of passengers. Such may have been the case. The Postmaster-General is not authorized, however, to make any contract exempting passengers, either in coaches or on foot, from the payment of toll. His contracts can extend only to the mail, and the mode of its conveyance. The defendants have the right to the road secured to them by the acts of Congress, and of the Assembly, free from toll, for such carriages, horses, and attendants, as may be necessary to enable them fully to comply with their contracts; but when they attempt to go beyond this, and resort to means to increase their profits, not necessarily connected with their contracts, they, like others, are rightfully subjected to the inconvenience of paying the toll, which the convenience of a good road imposes.

"The proposition cannot, we think, be maintained, that passengers are necessary for the conveyance of the mail, and if they are not, a tax on them is in no light in which the subject can be viewed a tax on the coach itself, nor calculated, in its consequences, to impede or obstruct the transportation of the mail." (*State of Ohio* v. *Neil & Moore*, 7 Ohio Rep., 133.)

This opinion was adhered to and deliberately affirmed in the case at bar. The reasoning of the court seems to me to be conclusive. It covers the whole ground of the objections urged by the plaintiffs in error. Further discussion can add little to its force. I should not fear to rest this part of the case entirely upon it. The proposition which it maintains, however, assailed, requires, I think, little effort to support it. It seems to me to be such, as almost to present one of those cases in which "the truth is discoverable by its own light, without the aid of argument."

This toll is levied, not upon the plaintiffs in error, but upon the passengers conveyed in their coaches. If those from whom it is exacted pay it, surely it is no burden upon those who convey them. The latter are not compelled to pay it, unless they assume it. Stripped of all circumlocution, the language of the plaintiffs in error is, in effect, this: Allow us to receive this toll, instead of the State, and the mail will be carried at less cost to the Postoffice Department. The same reasoning upon which they rely, would apply equally to everything else they may choose to carry in their mail coaches, or, indeed, in any other vehicle in which they may carry a part of the mail, with the sanction of the Postmaster-General. The answer is, that the general government has not asked, and that the State had not conceded any such exemption. I do not see but that the same argument would apply with equal force to any other toll collected on the road. Give to the plaintiffs in error any other toll, and undoubtedly they would carry the mail at so much less cost to the government. The circle of this argument is wide enough to include every toll levied upon
736*] the road. If we depart *from the construction of this exemption, contended for by the defendant in error, where shall the departure be limited?

Another act of the Legislature of Ohio provides that "all boats" belonging to the United States "shall be permitted to navigate either of the canals of this State free from the payment of tolls." (38 Ohio Laws, 87.) Does this exemption of the boat from toll exempt from toll also the lading upon it belonging to private individuals? If the exemption of the coach exempts the passengers, why does not the exemption of the boat also exempt the lading?

Before and at the time of the passage of the Act of 1831, it was no more "usual" to convey passengers in mail coaches on the National Road, than it was before and at the time of the passage of this law, to transport lading in boats upon the canal. "If not necessary, it is useful" in the same manner. Were the boat removed, by contract, from point to point, upon the canal, the exemption of the lading would as much lessen the cost of the removal of the boat, as the exemption of the passengers would lessen the cost of the transportation of the mail. Were the boat a mail boat, the exemption of the lading would be much more important to the United States than the exemption of passengers as claimed in this case. Lading is as closely associated with the idea of a boat upon the canal, as passengers are with that of a mail coach on the National Road. The term "boat" as much includes lading, as the term "mail coach" does passengers. I am aware of no argument applicable to one, that does not apply equally to the other. In my apprehension the parallel is perfect.

To insist seriously that the exemption of the boat exempts the lading, would probably be deemed by all a gross absurdity. Does not this claim of the plaintiffs in error, by the clearest analogy, embrace that case and lead to this result?

A proposition leading to a consequence so absurd, must, itself, necessarily be unsound.

It will be observed that the decision of the Supreme Court in 1835 was made before the plaintiffs in error entered into the contract with the Postmaster-General, which was in existence when this cause of action arose. That contract was made and this liability incurred, of course, with full knowledge of that decision.

It will also be observed that the objection to the toll in question does not come from the general government, which is said to be aggrieved, nor from those upon whom the toll is laid, but from the mail contractors, who have voluntarily assumed a vicarious responsibility for their passengers, and patriotically seek in this suit, unbidden, to vindicate the violated rights of the United States.

Upon what consideration this is done, it is not material to inquire.

Since the foregoing was written, I have seen the argument of the plaintiffs in error. It renders a few additional remarks necessary.

*It is not denied that it was within [*737
the power of Congress to surrender the road to the State upon any terms that might be agreed upon. The whole question is, what were the terms? They are to be found in the 15th section of the Act of 1831. There is the "contract." The power to "alter, change, and amend," is (as before remarked) unlimited by "any qualification," except as to the amount to be collected. *Mr. Ewing's* argument would change the contract, and impose a condition which is

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contrary both to the terms and implication of the agreement. In order to warrant his construction of this act, it would be necessary (as suggested in the preceding argument) to "dislocate" the proviso upon which he relies from its place in the 4th section, and, thrusting it over the ten intervening sections, interpolate it as a second proviso at the end of the 15th section. Otherwise, it is clear that the construction for which he contends is both grammatically and logically incorrect. It is only by confusing these provisos together, and losing sight of their different and relative places in the context, that any doubt can arise on this point.

It is admitted that it was competent for the State to abrogate all the exemptions contained in the 4th section, except that relating to mail coaches. The distinction attempted to be established between that and those which precede it, is unwarranted by any principle of construction with which I am acquainted. They stand upon the same footing, and are all alike alterable and unalterable.

When the Act of 1821 was passed, the Legislature obviously believed that the road, with all the exemptions specified in the 4th section, would yield a sum sufficient for its preservation. But as the experiment was an untried one, the State was willing to bind herself by no restriction whatever, but that the sum collected should be neither more nor less than sufficient to keep the road in repair. Her experience has shown the wisdom of this caution.

The Act of February 6th, 1837, imposes a toll at each gate, of three cents, upon the passengers in question. The Act of March 19th, 1838, authorizes the Board of Public Works to "revise" the rates of all the tolls—"to be paid by persons passing on, or using, the National Road." In the exercise of this power the board has raised the toll in controversy from three to ten cents. It is admitted that they have not transcended the limitation contained in the 15th section of the Act of 1831. Their action, then, is "according to the true intent and meaning of the Act of February 4th, 1831." The Legislature used the language just quoted in the Act of 1838, obviously with a view to the restriction contained in the 15th section of the Act of 1831, and not, as intimated in argument of the plaintiff in error, for the purpose of submitting the question to the board, as an open one—whether the Act of 1831 permitted such a toll to be exacted. That question had been determined by both the Legislature and the Supreme Court. The duty devolved upon
738*] the board *was, to "revise," upon the principles indicated, the pre-existing tolls.

It is said that the State still exempts from toll the two lines of mail coaches, and the passengers conveyed in one of them.

This is true; and the exemption is practically larger and more injurious to the fund arising from the road, than it was when the Act of 1831 took effect. Then, the exemption was confined to one line of coaches and the passengers conveyed in it. How long the State will be able to continue this exemption in its present extent, will depend upon the amount of expenditure necessary to keep the road in repair. She is bound by her contract with the United States to collect this amount. The sum constantly increases as the road becomes more worn. Her forbearance during the few years which has elapsed since she took charge of the road, can surely afford no argument against any right to which she is entitled under a fair construction of the act of cession.

It is said, also, that this road "is a post road established by law."

Admitting this to be so, in my view of the subject it does not affect the question under consideration. But the assumption is erroneous. Congress has designated the points where post-offices shall be established, and directed the mail to be conveyed to them; but the road is not specified upon which it shall be conveyed. This, then, is no more "a post road established by law" than any other road over which the mail is carried. Indeed, the power to establish post roads, it is said, has never been exercised by Congress in any instance. (3 Story's Const., 43.)

Whenever this power shall be exercised either as respects State roads already existing, or those to be constructed for that purpose by the general government, a host of new and most difficult questions will at once arise between the several States and the United States. A glance at the learned work referred to will show them. It is unnecessary to consider any of them here.

This not being a post road established by law, the argument founded upon that assumption falls to the ground.

It may, however, be contended, that this and all other roads upon which the mail is conveyed are established as post roads by necessary implication from the acts of Congress establishing postoffices upon them, and directing the mail to be conveyed to such offices.

If so, the answer is obvious. If the United States buy in the property of a debtor in satisfaction of a judgment, such property is still liable to taxation by the State. A branch of the Bank of the United States was not liable to be taxed, but the real estate held by the bank, which the branch occupied, was so liable.

It has never been questioned that the coaches and horses belonging to the contractor, which he uses in the transportation of the mail, are liable to taxation by the State, like all other individual property, *and if the con- [*739
tractor convey the mail upon a turnpike on which tolls are collected, he is liable to the same tolls as other persons. The power to levy such taxes and collect such tolls, is within the exceptions distinctly recognized in all the cases decided by this court in which this subject has been considered. (4 Wheat., 316; 9 Wheat., 867; 12 Wheat., 136; 2 Peters, 46; 16 Peters, 442.)

The argument upon the other side is broad enough to maintain the proposition, that such coaches and horses are exempted both from taxation and toll.

Whenever the general government uses the instrumentality of private means to effect its objects, such means are liable to taxation or toll, as the case may be, to the same extent as if they were employed in the business of private individuals. This reasoning applies as much to this road as to any other; and the case must necessarily turn upon other points.

It is strenuously contended that the exemption of the coaches and horses from toll exempts also the passengers as an "incident."

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It will be readily perceived by the court, that if the argument of the defendant in error fail on all other points, yet, "unless the plaintiff in error succeed in maintaining this proposition, the judgment below must be affirmed."

If my recollection serves me correctly, it is not many years since the transportation of passengers in the mail lines, on the great routes, was greatly restricted, if not entirely prohibited, by the head of the Postoffice Department. Does he contract for the conveyance of passengers? Is that a matter about which the government concerns itself? The letter of the Postmaster-General in this case sets up no such claim as is insisted upon by the plaintiff in error, and manifests no interest in the subject.

It has been held by this court, that a branch of the Bank of the United States was not liable to taxation by a State, but that the stock in the bank, held by a citizen of the State, was. (4 Wheat., 316.) Was not the argument for the exemption of the stock in that case much stronger than the argument for the exemption of the passengers here? The analogy is too obvious to need comment. If the right claimed to collect toll from passengers be sustained, it is apprehended that "the State might tax at its toll gates, even to prohibition, a guard passing upon a coach carrying the mail." The connection between the mail and the coach, horses, driver, and guard, is certainly very different from that which subsists between the mail and the passengers. No right has been asserted by the Legislature to collect toll from the proper incidents of the mail upon this road. When such a case shall occur, it will be early enough to adjudicate upon it. The question in this case is a very different one. It relates solely to passengers.

For a fuller examination of this point, I refer to the preceding argument.

740*] *Mr. *Ewing*, in reply:

I have said in the opening argument, that the National Road in Ohio was, at the time of the transfer to that State, and still is, a post road. This is denied by *Mr. Swayne*.

Acts of Congress, passed every four years since its construction, direct that the mail shall be carried daily from town to town (as from Wheeling to Zanesville, and thence to Columbus), which towns are upon the National Road. The agreed case shows that the mail was so carried upon said road ever since its construction. The usage applying the law to this road, and the subsequent laws coinciding with the usage, the reservation in the contract of the right to transport the mail along the road, and its subsequent continued transportation, make it, I contend, as fully a post road as if it had been expressly declared so by act of Congress.

Mr. Chief Justice TANEY delivered the opinion of the court:

This case has risen out of two acts of Assembly, passed by the Legislature of Ohio, one in 1837, and the other in 1838, and an order of the Board of Public Works of that State, whereby a toll has been imposed upon passengers traveling in the mail stage on the Cumberland Road.

We have already, at the present term, fully expressed the opinion of this court, in relation to the compacts between the United States and the States of Ohio, Pennsylvania, Maryland, and Virginia, concerning this road, and the rules by which they ought to be interpreted. It is only necessary, therefore, on this occasion, to apply the principles there stated to the case before us.

The material parts of the laws in question are the 4th section of the Act of 1837, and the 24th section of the Act of 1838. The first imposes a toll of three cents on every passenger in the mail stage, at each toll gate; and the second authorizes the Board of Public Works to revise and modify the rates of toll to be paid by persons using the road; and in pursuance of this authority the board passed an order raising the toll on each passenger in the mail stage to ten cents. But no toll is charged, either by the law or the order of the board, upon persons traveling in any other carriage.

The 4th section of the Act of 1831, whereby the State of Ohio, proposed, with the assent of Congress, to take charge of the road and keep it in repair, contains a specific enumeration of the tolls she intended to charge upon carriages of every description, and other property; and after making this enumeration, the section concludes with the following proviso: "That no toll should be received or collected for the passage of any stage or coach conveying the United States mail, or horses bearing the same, or any wagon or carriage laden with the property of the United States, or any cavalry or other troops, arms or military stores belonging to the same or to any of the States comprising this Union, or any person or persons on duty *in the military service of the United [*741 States, or of the militia of any of the States?

We shall hereafter speak of the 15th section of this act, which has been supposed to justify the toll in question. But, subject to the modifications, if any, authorized by that section, the entire contract in relation to the tolls, offered by the State and accepted by Congress, is to be found in the 4th; the residue of the act containing nothing more than detailed regulations for the collection and application of the tolls.

At the time this compact was made, it was well known that the mail was always transported by contractors, and that whenever it was conveyed in carriages, the vehicles belonged to them, and were their own private property, and not the property of the United States. It was equally well known that upon this road, as well as many others, the Postmaster-General, in his contracts, uniformly required that the mail should be carried in a stage or coach capable of accommodating a certain number of passengers, the presence of the passengers being regarded as adding to the safety of the mail, and superseding the necessity of any other guard.

This mode of transporting the mail must have been perfectly known to the State in 1831, when the agreement was made; and in providing for the exemption of carriages conveying the United States mail, both parties must have intended to exempt the vehicles usually employed in that service; and that carriages belonging to the contractors, although carrying passengers, were to pay no toll, while all other vehicles were to be charged at the rate specified in the law. The reason of this exemption is evident; for a toll charged upon the carriages of the contractor would, in effect, be a charge

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upon the Postoffice Department, since the contractor would be obliged to make provision for this expense when bidding for the contract, and regulate his bid so as to cover it.

In the proposition made by Ohio, nothing was said of a toll on the passengers in a carriage of any kind, but the charge is made upon the carriage itself, according to its description, and the number of horses, without any regard to the number of persons that may be traveling in it; and it is evident that it was at that time supposed that the rates specified and agreed on would prove sufficient to keep the road in repair, and that the United States would always thereafter have the free use of it, for mail carriages of the usual kind, without any burden upon them, direct or indirect.

If the expectations of the parties had been realized, and the tolls mentioned in the law had produced revenue enough to preserve the road, no one, we think, would have supposed that tolls could be collected from passengers in the mail stage, or that the specified charges upon the carriages could have been reduced, and the deficiency supplied by a toll upon persons traveling in the carriages which conveyed the mail.

742*] *In the case of *Searight* v. *Stokes et al.*, we have already said, that with an agreement like this before us between the United States and a State, we must look at the relation in which the parties stood to one another, as well as to the subject matter of the contract, and the object which the high contracting parties intended to attain; and we must expound it upon principles of justice, so as to accomplish the purposes for which it was made, and not defeat their manifest intention, by a narrow and literal interpretation of its words. And regarding it in this point of view, we think it very clear that no part of the burden of supporting this road was intended to be levied upon the United States, but was to be obtained altogether from other sources; and that the relative position and privileges of the mail coaches in regard to tolls, as prescribed in the law, were to be always afterwards maintained, unless a deficiency or superabundance of revenue should render it necessary to increase or diminish the rates fixed in the law. For if this were not the case, the whole detailed and particular provision in relation to the things to be charged, and the rates to be imposed, as set forth in the law of Ohio, and so cautiously recited in the act of Congress consenting to the surrender of the road, would be nugatory and without an object. On the other hand, this mode of proceeding was the natural and proper one, where two sovereignties were contracting with each other by means of legislative action; and it was obviously adopted by the parties in this instance in order to show the terms proffered by Ohio, and assented to by Congress, and forms the conditions of the compact between them, so far as their respective rights were concerned.

We proceed to apply these principles to the question before us. The law of the State, and the order of its Board of Public Works, impose a toll upon everyone traveling in the mail stage, while the passengers in every other vehicle are allowed to go free. If this can be done, it is manifest that the United States will derive no benefit from the compact, and so far from enjoying the privilege for which they stipulated, and for which they paid so heavily in the construction of the road, a large portion of the burden of repairs will be thrown upon them. This is strikingly illustrated by comparing the toll charged upon coaches similar to those employed in conveying the mails, with the toll indirectly levied upon the mail stage by a charge upon its passengers. According to the rates contained in the law of which we are speaking, a four-wheel carriage, drawn by four horses, pays at each gate thirty-one and a quarter cents, and if it is not conveying the mail, it pays nothing on its passengers. This sum is therefore the whole amount of the toll to which it is liable. Now, the mails on this road have, we understand, been always transported in coaches of the above description, and although under the order of the Board of Public Works no toll is charged directly upon the carriage, yet every passenger must pay ten cents at each *gate, so that the carriage of a [*743 mail contractor, containing six passengers, pays nearly double as much as a like carriage owned by anyone else with the same number. And what still more strongly marks the disadvantages to which the United States are subjected by this order of the board, these passengers may be persons in the service of the United States, passing along the road in the execution of some public duty, for the order makes no exceptions in their favor. And although this toll, in form, is laid upon the passengers and not upon the vehicle, the result is the same; for in either case it is, in effect, a charge upon the proprietor of the carriage, diminishing his profits in that portion of his business; and when thus leveled exclusively at passengers in the mail stage, it accomplishes indirectly what evidently cannot be done directly by a toll upon the carriage, and in its consequences must seriously affect the interests of the United States. For in bidding for a contract upon a road so much traveled as this, the bidder would undoubtedly be greatly influenced by the advantages which a contract would give him in the conveyance of passengers, as his carriages, when carrying the mail, are entitled to go free. But if they, and they alone, are to be subjected to this burdensome and unequal toll, it is obvious that he must seek to re-imburse himself, by enlarging his demand upon the government. Indeed, if this system of levying toll can be sustained, the mischief may not stop here; and it will be in the power of any one of the States through which the road passes so to graduate the tolls as to drive all passengers from the mail stages into other lines, and by that means compel the United States, contrary to their wishes, and contrary to the public interest, to transport the mails in vehicles in which no passengers would travel.

Nevertheless we do not mean to deny the right of the State to impose a toll upon passengers in the mail stages, provided the power is exercised in a manner and upon principles consistent with the spirit and meaning of the argument by which the road was transferred to the care of the States. On the contrary, in the case of *Searight* v. *Stokes et al.*, we have already said that such a toll may be lawfully collected. But as no toll on passengers had been

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proposed by the law of Pennsylvania, the opinion, on that occasion, is expressed in general terms as to the right; the case then under consideration, not calling upon the court to speak more particularly upon the subject. The Ohio law, however, brings the question directly before us, and makes it necessary to state more fully and precisely the opinion of the court.

The true meaning of the compact we understand to be this. The carriages carrying the mail, with their passengers, traveling in the known and customary manner, were to pass toll free, as well as other vehicles laden with the property of the United States and the persons employed in their service, as mentioned in the proviso hereinbefore recited, and the road 744*] was to be kept in repair by the *revenue derived from the tolls specified in the Ohio law, according to the rates there set forth, provided they should prove to be sufficient for the purpose. No toll was at that time proposed upon passengers in any vehicle, and passengers in the mail stage, therefore, had no peculiar privilege in going free, and merely passed along the road upon the same terms with those who were traveling in other carriages. And as the compact contains no stipulation for the exemption of travelers in the mail stages, the general government can demand no advantages in their behalf, which are not extended to passengers in other vehicles. But they have a right to insist that the equality upon this subject, which the law of Ohio originally proposed, shall still be maintained; that the privilege and advantages intended to be secured to the carriages conveying the mail, over those granted to other vehicles, shall be preserved in substance and reality as well as in form; and that the passengers in the mail stages shall not be selected and set apart, as the especial objects upon which burdens are to be laid, and to which travelers in other carriages are not to be subjected.

If, therefore, the revenue from the road, according to the rates originally agreed on, was found to be inadequate, then the State had undoubtedly a right to increase the rate on anything before subject to toll; or might, if it was deemed more advisable, leave the tolls as they stood, and charge in addition to them a toll on passengers. And if instead of selecting the persons traveling in the mail coaches, and laying the burden exclusively upon them, all passengers in vehicles of any kind had been equally charged, the real and substantial advantages and privileges to which the United States are entitled under the agreement would have been preserved, and the equality in relation to passengers originally existing between the mail coaches and other carriages would not have been disturbed. And it is in this manner only, in our judgment, and as a toll in addition to that specifically stated in the contract, and imposed equally upon passengers in every description of vehicle, that persons traveling in the mail stages can be lawfully charged, without first obtaining the assent of Congress.

The 15th section of the law of 1831 has been relied on in the argument, as reserving to the State the right to make any alteration it might afterwards think proper without regard to the assent of the general government. It is true that this section begins with a declaration that it shall be lawful for the General Assembly at any future session, without the assent of Congress, to change, alter, or amend the act. But this clause evidently relates to the various provisions made in the law for the collection and disbursement of the money arising from the tolls proposed to be charged. The United States could have no interest in these details, and they were therefore properly retained in the hands of the State. And so in regard to the privilege of passing free on certain occasions, given by the *law, it is undoubtedly in the power [*745 of the State, if it thinks proper, to revoke it, since the exemption was a mere voluntary act, founded on no valuable consideration, but growing out of what was then supposed to be a just and liberal policy, which the State could afford to exercise; but which it had the right to change whenever it was deemed necessary to do so. But a full and valuable consideration had been paid by the United States for the privileges reserved to them, and they were a part of the contract which transferred the road to the care of the State. And this being the case, the section in question cannot by any sound rule of construction be regarded as inconsistent with the contract contained in another part of the same law, and as placing the rights secured to one party entirely at the discretion and the control of the other. The reservations of power to the State evidently relate to subjects in which the general government had no separate interest; and they would have been altogether unnecessary and useless if the State had not considered the preceding part of the law as the proffer of a compact which was to be obligatory upon it, if assented to by Congress.

There is a clause in the law of 1837, which would appear to distinguish between the mail stages, in relation to toll, where more than one mail passed along the road on the same day. Upon this point it may be proper to say, that, in the opinion of the court, it rests altogether in the discretion of the Postmaster-General, where the power has been conferred on him by Congress, to determine at what hours the mail shall leave particular places and arrive at others; and to determine whether it shall leave the same place only once a day or more frequently. Upon this point his decision is absolute, when the discretion is committed to him by the laws of the United States, and cannot be controlled by a State or by the courts. And in the case of *Searight* v. *Stokes et al.*, when the court speak of abuses by the contractors in the number of carriages employed, and of the right of the court to enforce the compact, it will be seen by a reference to the opinion, that it is confined to cases where the mail bags, directed to leave the postoffice at the same time, are unnecessarily divided among a number of carriages in order to evade the payment of toll; and the opinion expressed on that occasion by the court does not apply to stages leaving the postoffice with mails at different hours, in obedience to the orders of the department. In the latter case it is immaterial whether the mails are light or heavy. The Postmaster-General is, upon this subject, the proper and only judge of what the public interest and convenience requires, and his decision cannot be questioned by the courts.

The provision upon this subject, however, appears to have been intended to guard against abuses by contractors, rather than to interfere

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with the powers of the Postmaster-General. And in regard to the toll imposed, as hereinbefore mentioned, if it is necessary for the support of the road, it is in the power of the par-
746*] ties to the compact *to modify it at their pleasure, and to give the State the power it has exercised. But according to the terms of the contract, as it was originally made, and still stands, the toll upon passengers in the mail stages, laid in the manner hereinbefore stated, cannot lawfully be demanded; and the judgment of the State court must therefore be reversed.

Mr. Justice DANIEL:

From the decision just pronounced on behalf of the majority of the court, I am constrained to dissent. Upon the principles involved in the decision, so far as they have been assumed as the foundation of rights in the federal government, or in the Postmaster-General as its agent or representative, independently of any agreement with the State of Ohio, my opinion has already been declared. That opinion was expressed on a similar point arising in the case of *Searight* v. *Stokes et al.*, during the present term; it is unnecessary, therefore, on this occasion to repeat it. With respect to the compact which is said to have been made between the federal government and the State of Ohio, by the act of Congress relinquishing the control of the Cumberland road to the State, and by the act of the Ohio Legislature, assuming the control and management of that road, it has not to my mind been shown that this compact has in any respect been violated by the State. A cursory view of the legislation, both by the State and by Congress, will establish the very converse of any such inference. That the several proceedings on the part of the State steer entirely clear of collision with the letter of that compact, has not, so far as I have heard, been even disputed. The statute of Ohio, passed on the 4th of February, 1831, after several provisions—1st, investing the governor of the State with power to take under his care that portion of the Cumberland road comprised within the limits of the State; 2d, prescribing the rates of toll to be collected; 3d, laying down regulations for the police of the road—contains in the second proviso of the 4th section the following enactment; "Provided, also, that no toll shall be received or collected for the passage of any stage or coach carrying the United States mail, or horses bearing the same, or any wagon or carriage laden with the property of the United States, or any cavalry or other troops, arms or military stores belonging to the same, or to any of the States of the Union; or any person or persons on duty in the military service of the United States, &c., &c." The 15th section of the same law is in the following words: "That it shall be lawful for the General Assembly at any future session thereof, without the assent of Congress, to change, alter, or amend this act; provided that the same shall not be so changed, altered, or amended as to reduce or increase the rates of toll hereby established, below or above a sum necessary to defray the expenses incident to the preservation and repair of the said road, to the erection of gates and toll
747*] houses *thereon, and for the payment of the fees or salaries of the superintendent, the collection of tolls, and such other agents as may be necessarily employed in the preservation and repair of the same, according to the true intent and meaning of the act." The Act of Congress of the 2d of March, 1831 (4 Story's L. U. S., p. 2250), is nothing more than a literal recital of the law of Ohio, and an entire and unqualified assent to, and adoption of that law. These statutes comprise all that has ever been done by the State and federal governments, which amounts to anything in the nature of an agreement or compact between them in reference to the Cumberland Road. Let us now inquire what it is that, by reasonable and proper construction, these laws import. And it should, in their examination, ever be borne in mind, that whatsoever the law of Ohio has ordained in reference to its subject matter; whatever rights or powers it has claimed for the State in regard to it, the act of Congress has unconditionally recognized the whole. The second proviso of the 4th section, already quoted, contains no stipulation that ordinary travelers or passengers, or any others, indeed, or any descriptions of property, save those expressly enumerated in the proviso, shall pass upon the road free of toll. It concedes to the federal government that stages carrying the mail, *i. e.*, the carriages and the horses necessary for their use, and the mail itself, should not pay toll; but with respect to private travelers, and to everything within or without those carriages, the law is entirely silent. By what correct implication, then, can the power of the State to levy tolls on travelers in such carriages be taken away. I can conceive of no implication tending to such a result, which would not obviously do violence to the language of the statute, as it would to every correct rule of construction, and to every intendment consistent with the natural and plain objects of the law. The fact that the State has exacted tolls on passengers in the stages carrying the mails, only beyond a certain number of carriages so employed, can by no correct reasoning affect the right of the State in this matter, however it might be received as a measure either of policy or liberality; for having the power absolutely to exact tolls of all travelers on the road not exempted by the proviso, this power carried with it, by every sound rule of logic, the right to discriminate between the subjects of her power. She had then a perfect right to declare that travelers in specified carriages carrying the mail should pass free of toll, and that those transported in other vehicles, although bearing the mail, likewise should be subjected to the payment of toll. Such a regulation the State had the power to enact, had it been the dictate of mere caprice. A correct apprehension, however, of her policy and interests in reference to this road, and in reference to the accommodation of the public, will develop a more enlarged and more equitable motive for the measures adopted by the State, showing those measures to have been produced by the *force of supervening [*748 circumstances. It cannot be denied that in assuming the management of this road, the purpose of the State was to maintain and preserve it as a commodious highway. By the title of the law passed for its assumption, viz., "An Act for the preservation and repair of

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the United States Road," as well as by every clause and provision of that law, this object is clearly evinced. It is equally undeniable, that the means in contemplation for the accomplishment of this object were the usual and natural means by which artificial highways are supported, viz.: the tolls collectable on travelers and on property transported upon it. The concession to the federal government of the free passage of a portion of its mails over this road, and of the vehicles in which they might be carried, was an act of fairness and liberality which should not be made the pretext for abuse and monopoly, such as must, if permitted, dry up the source whence the means of maintaining the road are to be derived, and which would operate for the exclusive advantage of the favorites of such monopoly, and for the serious injury of the public. To guard against consequences like these, the power reserved by the 15th section of the law of 1831 was retained by the State, a power expressly recognized to its full extent by the act of Congress adopting the former law; and it can as little be doubted, that, in the practical experience of those consequences, and in the intention of applying a remedy for them, the law of Ohio of March 9th, 1838, and the order of the Board of Public Works of the same State, had their origin.

But it is argued that the exaction of tolls on travelers in stages carrying the mails, would be a violation of the compact between the two governments, because it would enhance the demands of contractors for transporting the mail, and thereby become a tax upon the federal treasury, and in the same degree an impediment to the conveyance of the mails. It is a sufficient reply to such an argument to remark, that neither the law of Ohio nor the act of Congress adopting that law, stipulates any exemption from tolls on travelers, but the exemption is limited to carriages only; and it is an inflexible rule of contract, too familiar to be commented on here, that neither party, singly, can superadd a term or condition to a contract completed. This argument is therefore utterly without force, even if the effects it seeks to deduce could be demonstrated. It is fallacious, too, in another respect. The monopoly in support of which it is adduced, by enabling the mail contractor to drive off all competition, whilst it puts it in his power to withhold the tolls by payment of which the road would be supported, enables him to practice the very extortions upon the government which fair competition would be the surest means of preventing. But conceding, for the moment, that a denial to the contractor of the privilege now contended for, might enhance the price of transporting the mails, the question still very properly arises, 749*] whether this effect *(were the language of the law even doubtful) would justify the extension to him of such a privilege. A just view of the legislation of both the State and federal governments, and of the obvious purposes of that legislation, must compel a negative answer to this question. The purposes designed by this legislation were the preservation and repair of the National Road. Such are the objects announced, not only in the titles of the laws themselves, but provided for in all their enacting sections; and the *quo modo* declared by these enactments is the levying of tolls. Is it, then, reasonable or logical, or rather, is it not inconsistent and contradictory, to attempt to deduce from them conclusions which fall not within their terms, but which go to defeat every end which must have been within the contemplation of the parties; for which, indeed, these enactments all profess to have been made. Is not this attempt in violation of all rules for the construction either of statutes or contracts, which always preserve the main and obvious intentions of legislators or of contracting parties, to the exclusion of minor though seemingly contradictory considerations? But the language of these laws is by no means equivocal. Except for the exemption contained in the second proviso of the 4th section of the Ohio statute of 1831, all mails and the carriages in which they are transported, the troops, arms, and property of the United States of every description, would have been subject to the payment of tolls; and the exemption can be extended no further than the plain and natural import of the language of that proviso will justify.

Again, it has been said, that the exaction of tolls from travelers in the mail stages would be a violation of the contract, because by such a demand travelers would be excluded from those stages, and that the safety of the mails would be endangered by this exclusion; it being assumed by this argument that the travelers are to constitute a guard to the mails. To this seemingly strange and far fetched argument, it might be sufficient to answer, as was done to the former, that no stipulation for the transportation of such a guard (if by any violence to language ordinary casual wayfarers could be so denominated) is contained in the contract; and that the attempt thus to introduce any such stipulation or engraft it upon that contract, is a palpable and unwarrantable interpolation upon its terms and its objects. In the next place, the propounders of this argument may be challenged to show either the duty or the willingness of such travelers, to take upon themselves the hazards, the trouble, or the responsibilities of guarding the United States mails. With equal cogency may those who thus reason be called upon to prove, that amongst the promiscuous multitudes who travel in stages, there may not be comprised those who roam the country with the view of committing depredations, and from whose designs the safety of the mails may be most endangered.

Upon a full consideration of this case, I am brought to conclude, *that the Acts of [*750 the Legislature of Ohio, subsequent in date to the 2d of March, 1831, and the proceedings of the Board of Public Works of that State, founded upon those statutes, are in violation of no principle or right guarantied by the Constitution of the United States, nor of any acts of Congress passed in pursuance thereof; nor of any contract at any time existing between the State of Ohio and the federal government. I am further of opinion, that the aforesaid laws of Ohio were on the contrary designed, and are of a tendency, fairly and justly, to distribute the tolls collectable within her limits, on the road in question, so as to make them properly subservient to the views of the federal govern-

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ment and of the government of Ohio, at the times of passing of the State law of February 4th, 1831, and the Act of Congress of the 2d of March, 1831; and in conformity with the express language of those laws; and to prevent unwarrantable monopoly, and serious if not fatal detriment to the road. I think that the decision of the Supreme Court of Ohio, being a correct exposition of the laws designed to effect these important objects, ought therefore to be affirmed.

Rev'g 7 Ohio, 132.
Cited—7 How., 521; 12 How., 296.

LESSEE OF PHILIP HICKEY ET AL., *Plaintiff in Error*, v. JAMES A. STEWART ET AL.

Ejectment—decree of equity declaring complainant equitable owner, partly executed, no bar to action of—Supreme Court of Mississippi has no jurisdiction to examine into Spanish titles.

A defendant in ejectment cannot protect himself by setting up the record in a prior chancery suit between the same parties, by which the plaintiff in the ejectment had been ordered to convey all his title to the defendant in the ejectment, but in consequence of the party being beyond the jurisdiction of the court, no such conveyance had been made.

And this is so, although the Court of Chancery, in following up its decree, had legally issued a *habere facias possessionem*, and put the defendant in ejectment in possession of the land.

By the Treaty of 1795, between the United States and Spain, Spain admitted that she had no title to land north of the thirty-first degree of latitude, and her previous grants of land, so situated, were of course void. The country, thus belonging to Georgia, was ceded to the United States in 1802, with a reservation that all persons who were actual settlers on 27th October, 1795, should have their grants confirmed. Congress provided a board of commissioners to examine these grants, and declared that their decision should be final.

The Court of Chancery of the State of Mississippi had no authority to establish one of these grants which had not been brought within the provisions of the act of Congress. The claim itself being utterly void, and no power having been conferred by Congress on that court to take or exercise jurisdiction over it, for the purpose of imparting to it legality, the exercise of jurisdiction was a mere usurpation of judicial power, and the whole proceeding of the court void.

The doctrine of this court in 1 Peters, 340, reviewed and confirmed, viz., "that the jurisdiction of any court exercising authority over a subject may be inquired into in every other court where the proceedings of the former are relied on, and brought before the latter by the party claiming the benefit of such proceeding."

751*] *THIS case was brought up, by writ of error, from the Circuit Court of the United States for the Southern District of Mississippi.

It was an ejectment brought by Hickey's lessee against the defendants, as the heirs of Robert Starke, for two thousand acres of land in the State of Mississippi.

The facts in the case are fully set forth in the opinion of the court.

The question was, whether or not the court below erred, in permitting to be read in evidence, on the part of the defendants, the record of a former chancery suit between the same parties, in which the court had decreed that all the title of Hickey *et al.* should be conveyed to the heirs of Starke.

Messrs. Coxe and *Walker* for the plaintiff in error.

Messrs. Henderson and *Jones* for the defendants in error.

Mr. Coxe said that the condition of the country where the land in question was situated was described in 12 Wheat., 524. The distinction is important between an acquired country and that where a disputed boundary was settled. Different codes of laws prevail in the one and the other. (12 Wheat., 535, another case.)

This being an adjusted boundary, there was no obligation to recognize Spanish grants. (12 Wheat., 535.)

The United States derived all their proprietary title from Georgia (1 Laws U. S., 488); and took it only upon certain conditions. (3 Laws U. S., 39, 380, 491, 546.)

The Act of 1803 provided that the decisions of the commissioners should be final. Under it our claim was registered and confirmed in 1804.

Our title, therefore, is complete. But the defendants set up the decree of a court of equity, and the first question is, can the courts of the United States recognize any power in a State court to devest us of our title? The judgment of the commissioners was made final, and as to the effect of this, see 4 Cranch, 269; 9 Cranch, 127; 3 Wheat., 246; 6 Wheat., 109; 9 Peters, 8; 10 Peters, 449; 2 Bos. & Pull., 392.

Decisions may be impeached for fraud, but it must be fraud in obtaining the judgment, and not pre-existing. (Story's Conflict of Laws, 590, 591, 592; 2 Kent's Com., 118.)

The State of Mississippi could not have devested us of our title by an act of legislation. How, then, can one of its courts do it?

Again, it is a decree of a court of equity. The title of the plaintiff is a statutory title from the United States, whose authority no one doubts. Can equity interfere? The act of Congress says that the decision of the commissioners shall be final. The rule of law is positive, and equity cannot relieve against a positive law. (1 Story on Equity, secs. 10, 11, 64.)

*An action at law cannot be main- [*752
tained upon a decree in equity. (8 Wheat., 697; 3 Barn. & Adolph., 52.)

If the party cannot maintain a suit, he cannot defend himself in ejectment. (Levin on Trusts, 247, 482.)

[*Mr. Coxe* then objected to the decree in many points of form.]

Mr. Henderson, for defendants:

Of the second and third instructions refused to the plaintiffs, we justify the court's refusal in the language of the decree itself:

"That the title of the defendant was obtained by fraud and force and violence, against the equity of complainant's ancestor, ...it is therefore ordered, adjudged and decreed, that the title of defendants to said tract of land be, and the same is hereby declared to be fraudulent and void as against complainants."

The legal title of the plaintiffs herein does not, therefore, "remain unaffected at law by said decree," . . . . and the decree does not limit its cancellation of title to equity

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merely; but it finds and adjudges the title "fraudulent and void," as against our grantors and title. And so, too, we defend the court below in refusing the fourth instruction asked by plaintiffs below.

The decree is, that the defendants shall "deliver to complainants the full, peaceable, and actual possession of said tract of land."

The presumption of law must arise, therefore, that the facts found to subsist, in conformity with the decree, were brought about in conformity with its command, and possession so surrendered, and so taken, may assuredly be lawfully retained. It was so ordered to be given, that it might be retained.

And of the charges given by the court, at the instance of the defendants, they vindicate themselves on reading—self-evident propositions on their face.

Without further noting these particular criticisms, we pass to meet the substantial propositions from which they proceed, viz.:

1. Was the chancery record admissible in evidence for any purpose? And if so,

2. What was its legal effect?

It is objected that these chancery proceedings do not purport to be a record at all. But, besides, that the defendants have denominated and regarded them as a record, and acted upon them as a final decree of the highest court of law and equity in the State, and should, therefore, be estopped in this objection (see the case on their appeal, 1 Peters, 94); it is manifest, on inspection, it possesses all the elements of a formal and complete record. It is between all proper parties, and consists of a bill, answer, plea, and replication.

Much testimony on the matter in controversy appears to have been taken, on which the court exercised their chancery discretion in directing an issue at law. This was duly tendered, joined in, and verdict thereupon rendered; 753*] exceptions taken, argued, and overruled, and thence decree ordered, made out, and duly enrolled, and then thereafter appealed from to the Supreme Court of the United States. A judicial proceeding with these forms and contents, duly certified as it is, must be a record. (7 Cranch, 408.)

It is assumed, too, that the Supreme Court, in treating the case as with plenary and original powers, transcended their jurisdiction. This conclusion is deduced from the assumption that, as the decree was not pronounced till 1824, the powers of the court were governed by the laws of 1822, found in Poindexter's Code; and that, by these laws, the Supreme Court, in such a case, could only certify its opinion to the inferior court to which the case had been referred; and the inferior court must adopt and execute a final decree in conformity with the opinion so certified.

We do not consider, if this record were to be tested by the acts of 1822, in Poindexter's Code, the conclusions of the appellants would follow, or that the final jurisdiction exercised by the Supreme Court in this case would be rendered doubtful. (See sec. 30, p. 91; sec 8, p. 150; sec. 21, p. 154, of Poindexter's Code.)

But, it is to be observed this bill in chancery was filed in the "Superior Court of law and equity," in Adams County, as early as 1815. The date of filing the bill does not appear in the record, but the plea of one of the defendants is sworn to 14th of October, 1815. The controversy continued a *lis pendens* till final decree at December Term, 1824.

The Territorial Act of 22d December, 1809 (Turner's Dig., p. 178, sec. 116), gave the jurisdiction under which this suit was instituted.

A further act of the territory, of 20th January, 1814 (Turner's Dig., p. 201, sec. 203), gave the jurisdiction of the Supreme Court by which they took cognizance of the cause on reference, and which expressly authorized them "to grant judgment thereon according to the right of the matter, and award execution."

In the year 1817, the territory became a State, and the laws generally were soon afterward, in 1822, revised by Poindexter, to conform to the modified system of jurisprudence appointed by the new constitution. By this constitution, the jurisprudence of the Supreme Court was not specified, but left to the Legislature to prescribe. (See Constitution, title "Judicial Department," p. 550, Poindexter's Code.)

The Act of 1822 (sec. 5, pp. 149, 150, Poin. Code) established this jurisdiction. The Poindexter Code was adopted and operative in 1823, and while this chancery case was yet pending. But the code expressly saved from its operation all such cases as were pending, by providing, per sec. 7, p. 8, of the Code,

"That all remedies, which shall have been commenced under former laws, shall be and remain as though the said code had never been adopted."

*This decree is, therefore, in con- [*754 formity to the laws in Turner's Digest, and this exception of the appellants is manifestly groundless. And full to this point, see *Blanchard's Adm.* v. *Buckholt's Adm.* (Walk. Miss. Rep., 64.)

It is further objected to this record and decree, that the Chancery Court of Mississippi had no jurisdiction of the subject matter, on the ground that the title of the patentee was fixed by the government or sovereign power: 1st, by the decision of the Spanish Governor; 2d, by the 1st article of the compact of cession from Georgia to the United States, of 1802; and 3d, by the ascertainment of those entitled to confirmation under said article by the board of commissioners, as per section 6 of Act of Congress of 3d March, 1803.

To this we answer, 1st, that no title, emanating from this or any other government, for lands now within the United States, can claim immunity from investigation and adjudication in the courts. And if the willful wrong or mistake of the ministerial officers of government, or the fraud and misrepresentation of the donee or grantee, has induced the issuance of a patent to one who, by the laws and policy of the government, was not equitably entitled to receive it, the court may, as they perpetually do, redress the wrong. And 2d, as to the claim under the act of cession, the appellants cannot be heard to invoke any protection to their title from that article, to the prejudice of the court's jurisdiction, as they did not show themselves within the provision of that article on that occasion. (See the case on appeal, 1 Peters, 94.)

And showing it now could in no degree impair the jurisdiction then exercised. The

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patentee did not, in the chancery suit, prove himself a settler on 27th October, 1795. But it had been shown, by the finding of the board of commissioners under the 6th section of the Act of 1803, such proceeding could not preclude Starke from his judicial inquiry into his rights for the same lands; and so the Supreme Court in Mississippi had previously adjudged. (See case of *Winn* v. *Coles' Heirs*, Walker's Rep., 119; 2 Howard, 603.)

It having been thus shown, the court in Mississippi had rightful jurisdiction of the cause; their decisions upon the matters in issue, and embraced in the decree, is final and conclusive until reversed. (16 Peters, 87; 6 Wheat., 109; 1 Mason C. C. R., 515; 3 Wash. C. C. R., 28; 1 Brock. C. C. R., 126; 3 Dall., 101; 2 Howard, 338 to 342.)

What, then, shall be adjudged the proper and legal effect of our record, as offered in defense to the plaintiffs' action? The decree entitled those under whom we claim to have had a formal conveyance of the legal title from the patentee. The order in this behalf having been disregarded, this act of contumacy is now relied on as remitting the parties to their patent right of title, unaffected by the decree pronouncing it fraudulent and void as against us.

In the view we entertain of this point, the in-
[*755] quiry is not regarded *essential, whether our decree has qualified the legal title with a trust to our use or not; or whether, in this relation of trustee and *cestuis que trust*, our equitable title is a bar in ejectment to the recovery of our trustee against us. We think the authorities would sustain us in this position. A mortgagee, whose debt has been paid to him, or a party holding the legal title as a resulting trust, or that of a trustee by deed, after the trust is fully executed, cannot maintain ejectment, against his *cestui que trust*, so entitled to call for the immediate conveyance of the legal estate. (2 Harris & McHenry, 17; 7 Wendell, 379; 3 Johns. Rep., 222; 2 Wendell, 134; 6 Mumford, 41; 1 Cowper, 46; 18 Johns. Rep., 12.)

And an equitable title, of like description, is also adjudged in Mississippi (whose decisions must furnish the law to this court in this case), as a bar to this action. (*Brown* v. *Weast's Heirs*, 7 Howard's Rep., here in manuscript.)

Clear, however, as our defense may be, under this aspect of the authorities, we think it more obviously sustained, on grounds less technical and of more ready comprehension, viz.: upon the rule, that whatever takes away the plaintiff's right of possession must bar his recovery in ejectment, notwithstanding his legal title. This rule is displayed in its most simple instances, when the defendant claims as a lessee, or tenant in dower, or by the courtesy, &c. But it holds whenever the right to possession exists in one party, though right of property be in another. (6 Peters, 441, 442; 9 Wheat., 524; 3 Wash. C. C. R., 204; 16 Johns. Rep., 200.)

Now, the decree offered in evidence has expressly found that the patent is fraudulent and void as against the better right of our vendors. And the defendants therein, besides being commanded to convey their title to the complainants, are required, also, within sixty days thereafter, to "deliver to complainants the full-and peaceable and actual possession of said tract of land."

Our derivative title under these complainants, and our actual possession of the said tract of land being admitted, our right to the possession must be sustained at law or equity.

In the *Cincinnati Common* case (6 Peters, 441), the defendant's claim to right of possession was established by no such formal and solemn proof as here presented, and yet sustained as a bar to the ejectment. The matters put in issue by the parties in our record, and found by the decree, are proven and established conclusively, till the judgment be reversed. (6 Wheat., 113, 114, 117; 3 Wash. C. C. R., 28; 1 Brock. C. C. R., 129.) And, in deraignment of title before a court, a decree of title is good evidence even against a stranger to the record. (4 Wheat., 217.)

The appellants maintain, however, that the matters decreed in a court of chancery are only available as evidence in a chancery court; or if admissible at all, in a court of law, must be received with diminished consideration, than if adjudged in a court of law. Not so.

*The cases of 6 Wheat., 113, 114, and [*756
3 Wash. C. C. R., 28, were of decrees offered in evidence in courts of law, and held of equal validity as judgments at law. And the former speculative opinions, that debts and charges on real estate, established by decree, were of less dignity and validity than judgments at law, no longer prevail. (3 P. Wms. 401, *n.*, F.)

In the view we have taken of the sufficiency of our defense in showing our right of possession, it is of course unnecessary to maintain that a decree of title, in legal consideration, is equivalent to a conveyance of title. Yet, on principle, it must be so. A commissioner's deed, executed under a decree, is in itself form without substance. It has no force or validity, but in virtue of the decree. (6 Peters, 400, 401.) In 10 Peters, 245, it was decided that a deed of conveyance, made pursuant to a decree, was in effect cancelled and annulled by a reversal of the decree under which it was executed. But if, as the appellants would maintain, the deed so executed passed the legal title, it is adjudged in this case that the mere reversal of the decree cancels and revests the legal title. Why, then, when the decree (as in our record), acting directly on the legel title, cancels it in the hands of the holder, and expressly adjudges it to belong to another; why does it not transfer the legal title? In 1 Peters, 558, 559, 560, this principle is fully maintained. True, the statute of Ohio is referred to for its authority, but *quære*, if that statute should be regarded as anything more than declaratory of the legal effect of a decree of title.

Chancellor Kent considered the decree, even on the foreclosure of a mortgage, to operate so directly on the land and the title, that on motion of the purchaser of the land (sold under the decree) to have possession awarded him against the mortgageor's wife who refused to surrender, it was adjudged the decree concluded the question of possession, as against all parties and privies, and the court's writ of assistance was directed in favor of the application, and this, though the decree had not

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directed the possession, should be so surrendered. (4 Johns. Ch. Rep., 614.)

We believe, therefore, our case is so fortified in every aspect, both in its equity and at law, that this court must affirm the adjudgment of the court below.

Mr. Justice McKINLEY delivered the opinion of the court:

This case is brought before the court by a writ of error to the Circuit Court for the Southern District of Mississippi.

The plaintiffs brought an action of ejectment against the defendants in the court below; and upon the trial, the plaintiffs read in evidence, to the jury, the copy of a plat and certificate of survey, signed by Charles Trudeau, royal surveyor of the province of Louisiana, for two thousand acres of land, French measure; and a patent, issued by the Spanish Governor of that 757*] province, thereupon, to James *Mather, dated the 3d of April, 1794; and a deed of conveyance from James Mather to George Mather, dated the 26th day of April, 1803, for the same tract of land; and they also read in evidence a certificate, dated the 10th day of April, 1806, signed by the commissioners, appointed by the President of the United States, under the Act of Congress of the 3d of March, 1803, and the Act supplemental thereto, of the 27th of March, 1804, confirming to George Mather the said tract of land, by virtue of the articles of agreement and cession between the United States and the State of Georgia. It was also proved that George Mather died about the year 1812, and that James Mather was his heir; and that James Mather had died pending the suit; and it was admitted by the defendants, that the plaintiffs were the heirs of James Mather, "and whatever title he had at his death vested in them or any others, his heirs, to be shown."

And it was admitted by the plaintiffs "that the defendants were in possession of the land in controversy, and were so at the time this suit was brought, under derivative titles from Robert Starke's heirs, valid so far as Starke's title was valid." And the defendants in support of the issue, on their part, offered to read the record of the proceedings in a suit in chancery, in the Supreme Court of the State of Mississippi; in which the heirs of Robert Starke were complainants, and the heirs of James Mather defendants. And by which record it appeared that the complainants set up and claimed title to the land here in controversy, under a warrant or order of survey, for two thousand acres of land, dated about the 29th day of December, 1791, and the survey thereon; and the defendants claimed title under the survey and patent of the Spanish government to James Mather. And by the order and decree of that court, the land, in controversy in this suit, was adjudged and decreed to the heirs of Robert Starke.

To the reading of which record and proceedings, as evidence to the jury, the plaintiffs objected, on these grounds: "First. That it does not purport to be a record on its face, and in its context. Second. That said record does not disclose, nor contain a final decree; neither the said record, nor the said decree therein being signed by the judges of the said Supreme Court of Mississippi. Third. That the pleadings and context of said record show that the chancery suit was entertained and treated by said Supreme Court as a matter of original jurisdiction; whereas the statutes of Mississippi expressly provide that the opinion of the Supreme Court shall be certified to the court below, whose action and adoption alone can render the opinion of the Supreme Court final upon a question of law adjourned for its opinion. Fourth. That the facts and the law of the case did not give the Chancery Court jurisdiction, inasmuch as, after the Treaty of 1783, a Spanish warrant or order was a mere nullity, and could only be rendered valid, by the holder bringing himself within the first section of the Act of Congress of 1803, by *residence and cultivation; whereas, as [*758 the record shows, that Starke was not within that act; nor, if he had been, could he have derived any equity against a title, confirmed by the articles of agreement and cession between Georgia and the United States, of the 14th of April, 1802. Fifth. That jurisdiction, legal and equitable, was vested elsewhere by the 6th section of the Act of 1803; such investiture of jurisdiction in an inferior tribunal being exclusive of that of any other tribunal. Sixth. That a record or decree out of chancery is not evidence of a legal, but an equitable title only, and is, therefore, not pertinent to the issue joined. Seventh. That the decree, if read at all, must be read as an estoppel by the record, and subject to the rules as to estoppels. Eighth. That a decree in chancery must be read on the same footing as a judgment at law; and, unless carried out by a conveyance, can have no greater effect than a judgment in ejectment."

The court overruled these objections, and permitted the record to go to the jury, as evidence of any fact decided by it. To which opinion of the court the plaintiffs excepted. The plaintiffs, among other instructions, some of which were refused and some granted, but which need not be noticed here, moved the court to instruct the jury, "that the decree read in evidence, by the defendant's counsel, does not, *per se*, devest the plaintiffs, or the ancestors of the plaintiffs, of the legal title, but that said title remains unaffected at law by said decree, and is still in plaintiffs, if the jury believe them to be the heirs of said Mather."

There were several instructions moved by the defendants, some of which were granted, and some refused; but as they are either included in the ruling of the court, already noticed, or unnecessary to the decision of the points on which we think this case ought to be decided, they will not be noticed in the investigation of the subject.

Two questions are distinctly presented by the ruling of the Circuit Court. First. Whether the decree in the suit in chancery was a bar to the action of the plaintiffs. Second. Whether the Court of Chancery had jurisdiction of the subject matter in controversy before it in that case. For the plaintiffs in error, it has been insisted, that the decree is not evidence of a legal title, even if it were otherwise valid, and, therefore, no bar to the action of ejectment; and that the possession of the defendants under the decree, without a deed of conveyance as directed by it whether by the writ of *habere facias pos-*

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sessionem or otherwise, gave no legal title to the defendants; and, therefore, opposed no legal bar to the plaintiffs' action. And, second, it was insisted that neither the Court of Chancery, nor the Supreme Court of the State of Mississippi, had jurisdiction of the subject matter presented by the bill of the complainants. The whole power to confirm Spanish titles, protected by the contract of cession by the State of Georgia to the United States, having been conferred, by act of Congress, on a board of com-
759* missioners, *whose decision was by law made final, no other court could decide upon the validity of those claims.

The converse of these propositions was maintained by the counsel for the defendants. And it was insisted that the decree operated as a conveyance, and also as a judgment in ejectment, the Court of Chancery having the power by statute to award the writ of *habere facias;* and, therefore, the decree, and possession under it, is a legal bar to the action of ejectment. And upon the second point it was insisted that the jurisdiction of the court over the subject matter of the decree could not be inquired into by the court below, nor by this court, when brought before either collaterally. To arrive at the legal effect of the decree, we must inquire into the object and intention of the complainants in bringing the suit in chancery. They charge in their bill that James Mather had obtained from the Spanish government the legal title to the land in controversy, in fraud of the rights of their ancestor, Robert Starke; and they pray that by decree of the court Mather may be compelled to surrender to them the full and entire possession of the land, together with the evidences of title which he has thereto, and that they may be quieted in their title; "and such other and further relief in the premses as to the court shall seem meet."

The court by its decree established the right of the complainants to the land in controversy, and ordered Mather's heirs, who were all non-residents of the State of Mississippi, to convey the land to the complainants, and to deliver to them the possession, and awarded the writ of *habere facias;* which writ the Court of Chancery is authorized to order by a statute of the State. Without the aid of this writ, the court could not have put the complainants into possession, the defendants being out of their jurisdiction; nor could they for the same reason compel a conveyance of the title to the land. The decree is, therefore, if otherwise valid, nothing more than an equitable right, ascertained by the judgment and decree of a court of chancery; and until executed by a conveyance of a legal title, according to the decree, Starke's heirs, and those claiming under them, have nothing but an equitable title to the land in controversy.

To enable the defendants in this case to defend their possession sucessfully, upon their own title, that title must be shown to be a good and subsisting legal title, and superior in law to that set up by the plaintiffs; otherwise it opposes no legal bar to the recovery in the action of ejectment. And conceding, what was contended for in argument, that the decree and possession under it, by the writ of *habere facias* is equivalent to judgment in ejectment, followed by like possession it would avail the defendants nothing in this case; because such a judgment and possession are no bar to another action or ejectment for the same premises. The defendant in ejectment can never defend his possession against the plaintiff upon a *title [*760 in himself, by which he could not recover the possession, if he were out, and the plaintiff in possession. Reversing the positions of the parties in this case, could the defendants, if plaintiffs, recover the land in controversy upon this decree, and evidence of possession under it, against the title of the plaintiffs? We have no hesitation in saying they could not; and, therefore, the decree, if founded upon a valid equitable title, would be no legal bar to the action of the plaintiffs.

To a correct understanding of the question of jurisdiction, argued at the bar, it is necessary to ascertain the character of the grant set up by Starke's heirs in the suit in chancery. This grant was obtained from the Spanish Governor of Louisiana, prior to the Treaty between the United States and Spain of the 27th of October, 1795. By this treaty, Spain admitted she had no right to the territory north of the thirty-first degree of north latitude. In consequence of which all the grants made by her authority, within that teritory, were void. This territory then belonged to the State of Georgia; but by deed, bearing date the 24th day of April, 1802, she ceded it to the United States. And in that deed it was stipulated "that all persons who, on the 27th of October, 1795, were actual settlers within the territory thus ceded, shall be confirmed in all the grants legally and fully executed prior to that day, by the former British government, or the government of Spain," &c. The first section of the Act of Congress of the 3d of March, 1803, ch. 80 (2 Story's Laws, 893), enacts "That any person or persons that were residents in the Mississippi territory on the 27th of October, 1795, and who had prior to that day obtained, either from the British government of West Florida, or the Spanish government, any warrant or order of survey for lands lying within said territory, to which the Indian title had been extinguished, and which, on that day, had been actually inhabited and cultivated by such person or persons, or for his or their use, shall be confirmed in their claims to such lands in the same manner as if their claims had been completed." This section places those who had obtained a warrant or order of survey upon the same ground with those who had complete titles. The 5th section of the act declares "That every person claiming lands by virtue of British grant, or of the three first sections of this act, or of the articles of agreement and cession between the United States and the State of Georgia, shall, before the last day of March, 1804, deliver to the register of the land office, within whose district the land may be, a notice in writing, stating the nature and extent of his claims, together with a plat of the tract or tracts claimed; and shall also, before that day, deliver to said register, for the puspose of being recorded, every grant, order of survey, deed of conveyance, or other written evidence of his claim, and the same shall be recorded by the said register in books to be kept for that purpose." And upon the failure of the claimant to comply with these requirements, *his claim [*761

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is declared to be void, and shall never "be received or admitted as evidence in any court in the United States against any grant derived from the United States."

The 6th section of the act provides for the appointment of two boards of commissioners, for the purpose of ascertaining the rights of persons claiming the benefit of the articles of agreement and cession between the United States and the State of Georgia, and of the three first sections of the act. Each board was authorized to hear and decide, in a summary manner, all matters respecting such claims within their respective districts, and their deter mination was declared to be final.

The record of the chancery suit between Starke's heirs and Mather's heirs, shows that Starke was not resident in the Mississippi territory on the 27th of October, 1795, but had removed therefrom some years before that period; that no notice of his claim had been given to the register of the land office, within whose district it lay, together with a plat of the tract claimed and delivered to the register, to be recorded as required by law. Nor does it appear that the claim was ever submitted to the board of commissioners for their determination. Many years afterwards, the exact time not appearing by the imperfect record read in evidence, the Court of Chancery for the Mississippi territory, without any authority having been conferred on it by act of Congress for that purpose, took cognizance of Starke's claim, and established its validity by its own judgment and decree.

In the case of *Henderson* v. *Poindexter* (12 Wheat., 543, 544), the court says, "The whole legislation on this subject requires that every title to lands in the country which had been occupied by Spain should be laid before the board of commissioners. The motives for this regulation are obvious; and as the titles had no intrinsic validity, it was opposed by no principle. Claimants could not complain, if the law which gave validity to their claims should also provide to examine their fairness, and should make the validity depend upon their being laid before that board. The plaintiff in error has failed to bring his case before the tribunal which the Legislature had provided for its examination, and has, therefore, not brought himself within the law. No act of Congress applies to a grant held by a non-resident of the territory in October, 1795, which has not been laid before the board of commissioners. It is true that no act has declared such grants void; but the Legislature has ordered the lands to be sold which were not appropriated in a manner recognized by law, and the land in controversy is of that description.

"If this view of the subject be correct, no Spanish grant, made while the country was wrongfully occupied by Spain can be valid, unless it was confirmed by the contract with Georgia, or has been laid before the board of commissioners." This tribunal was created for the express purpose of deciding all questions [*762] arising under the deed of cession by Georgia, securing to a particular class of claimants the lands they occupied and cultivated at the date of the Treaty between the United States and Spain of the 27th of October, 1795, and its decision was to be final; and, therefore, its jurisdiction was exclusive; unless, by express words, Congress had conferred concurrent jurisdiction on some other judicial tribunal. From these propositions results the inquiry, whether the decree in the chancery suit was void, the court having no jurisdiction of the subject matter of the decree, or only erroneous and voidable? If the former, then its validity was inquirable into in the current court, when offered as evidence, and it ought to have been rejected.

According to the decision in the case of *Henderson* v. *Poindexter*, above referred to, Starke's claim, when submitted by the heirs to the Court of Chancery, was utterly void; and no power having been conferred by Congress, on that court, to take or exercise jurisdiction over it for the purpose of imparting to it legality, the exercise of jurisdiction was a mere usurpation of judicial power, and the whole proceeding of the court void.

In the case of *Rose* v. *Himely, Chief Justice* Marshall said: "A sentence professing on its face to be the sentence of a judicial tribunal, if rendered by a self-constituted body, or by a body not empowered by its government to take cognizance of the subject it had decided, could have no legal effect whatever. The power of the court then is, of necessity, examinable to a certain extent by that tribunal, which is compelled to decide whether its sentence has changed the right of property. The power under which it acts must be looked into, and its authority to decide questions which it professes to decide, must be considered." "Upon principle, it would seem that the operation of every judgment must depend on the power of the court to render that judgment; or, in other words, on its jurisdiction over the subject matter which it has determined." In the case of *Elliott et al.* v. *Piersol et al.* (1 Peters, 340), it was held by this court that "where a court has jurisdiction, it has a right to decide every question which occurs in the cause; and whether its decisions be correct or otherwise, its judgment, until reversed, is regarded as binding in every other court. But if it acts without authority, its judgments and orders are regarded as nullities. They are not voidable, but simply void; and form no bar to a recovery sought, even prior to a reversal, in opposition to them. They constitute no justification; and all persons concerned in executing such judgments or sentences are considered, in law, trespassers. This distinction runs through all the cases on the subject; and it proves that the jurisdiction of any court exercising authority over a subject, may be inquired into in every other court when the proceedings of the former are relied on, and brought before the latter by the party claiming the benefit of such proceedings."

The same doctrine was maintained, by this court, in the case of *Wilcox* v. *Jackson* (13 Peters, 511), and the case of *Elliott et al.* v. *Piersol et al.* referred to, and the decision approved. These cases being decisive of the question of jurisdiction, we deem it unnecessary to refer to any other authority on that point. From the view we have taken of the whole subject, it is our opinion the decree of the Supreme Court of Mississippi would have been no bar to the action of the plaintiffs in this case, if the subject matter of the suit had been within [*763]

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its jurisdiction. But we are of the opinion that court had no jurisdiction of the subject matter, and that the whole proceeding is a nullity. The Circuit Court erred, therefore, in permitting the record to be read to the jury, as evidence for any purpose whatever.

Wherefore, the judgment of the Circuit Court is reversed.

Cited—3 How., 787; 6 How., 38; 8 How., 541; 9 How., 170, 171; 10 How., 644; 18 Wall., 467; McAll., 405.

THOMAS WILSON & COMPANY, *Plaintiffs*,

v.

HORACE SMITH, *Defendant*.

Authority of agent to appoint sub-agent—action against sub-agent by principal—credit by sub-agent of principal money to agents account.

Whenever, by express agreement of the parties, a sub-agent is to be employed by an agent to receive money for the principal; or where an authority to do so may fairly be implied from the usual course of trade, or the nature of the transaction; the principal may treat the sub-agent as his agent, and when he has received the money, may recover it in an action for money had and received.

If, in such case, the sub-agent has made no advances and given no new credit to the agent on account of the remittance of the bill, the sub-agent cannot protect himself against such an action by passing the amount of the bill to the general credit of the agent, although the agent may be his debtor.

THIS case came up on a certificate of division in opinion between the judges of the Circuit Court of the United States for the District of Georgia.

The record being very short, it will be inserted entire.

"This was an action of *assumpsit* brought in this court by the plaintiffs, to recover from the defendant the sum of eight hundred dollars and interest, being the amount of a draft or bill of exchange drawn by one Henry B. Holcombe, of Augusta, in the State of Georgia, upon one Charles F. Mills, of Savannah, in said State, and accepted by him, and paid to the defendant. The declaration contained two counts. The first was for money collected and received by the defendant to and for the use of the plaintiffs, upon the particular bill of exchange set out and described in the declaration; the second count was generally for money had and received. The plea of *non assumpsit* was pleaded by the defendant in bar of the action, 'it being proved that the draft or bill of exchange upon which the money was collected and received by the defendant was the property of the plaintiffs;' that it had been by them placed in the hands of their agent, David W. St. John, at Augusta, Georgia, for collection, 764*] *and by him, St. John, forwarded to the defendant, St. John's agent, at Savannah, Georgia, for acceptance and collection; that it was accepted and paid to the defendant, by whom the proceeds were received and credited to the account of St. John, from whom the defendant received the draft or bill for collection, and who was indebted to the defendant at the time. That at the time the said bill was so paid to the defendant, and by him credited to the account of St. John, he, St. John, had failed in business, and had departed this life; that he failed, and had not recovered his affairs at the time of his death, and was insolvent; that the credit for the amount of the bill, carried by the defendant to St. John's account, was made in payment of a previously existing debt due by St. John to the defendant, no new transaction having arisen between the defendant and St. John after the payment of the said bill to the defendant; 'that to secure the payment of his debt to the defendant, St. John had transferred to the defendant three hundred shares of the capital stock of the Augusta Insurance and Banking Company, upon which $100 per shares had been paid; that the defendant appeared satisfied with this security, and that St. John would then have given additional security had the defendant required it.' That the draft or bill of exchange was made payable to the order of Henry B. Holcombe, the drawer, and by him indorsed in blank, and indorsed by St. John to H. Smith, Esq. (the defendant), or order. That when the draft was sent to the defendant for collection he was not apprised to whom it belonged, nor were any instructions or directions given to him as to the disposition of the money when collected.

"The following point was presented, during the progress of the trial, for the opinion of the judges, on which the judges were opposed in opinion, viz.: Whether there was such privity of contract between the plaintiffs and defendant, either express or implied, as would enable the plaintiffs to maintain the action for money had and received.

"Which said point, upon which the disagreement has happened, is stated above, under the direction of the judges of the said court, at the request of the counsel for the parties in the cause, and ordered to be certified into the Supreme Court of the United States at the next session, pursuant to the act of Congress in such case made and provided."

Mr. Berrien for the plaintiffs.

Mr. Nelson, Attorney-General, for the defendant.

Mr. Berrien. The question is, whether there is such a privity of contract between the plaintiff and defendant, either express or implied, as will enable the plaintiff to sustain the action for money had and received.

It is not necessary that the relations of contract should exist between the parties.

*There are many cases in which the [765 defendant has received the money of plaintiff, under circumstances which would render him liable *ex delicto*, in which plaintiff is permitted to waive the tort, and sue in this action. (1 Leigh's *N. P.*, 45, 46.) Wherever defendant has received money, the property of plaintiffs, which defendant is bound *ex æquo et bono* to refund, it may be recovered in this action. (*Moses* v. *McFarlane*, 2 Burr., 1012.) The true question is the right of plaintiff to receive, or of defendant to retain the money.

In the eye of the law, there is always such privity of contract as is necessary to sustain this action, between a person who holds the money of another, which in equity and good conscience he is bound to refund, and the person whose money is thus withheld. (*Camp* v. *Tompkins*, 9 Conn. Rep., 553.)

Again. Where one has received the money

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of another, and has not the right to retain it, the law will imply privity of contract. (*Mason* v. *Waite*, 17 Mass. Rep., 560; *Hall* v. *Marston*, 17 Mass. Rep., 575.)

Two propositions may be laid down.

1. On the facts stated, Smith, defendant, was the agent of plaintiffs, bound to account to them on notice of their claim; and, therefore, the amount collected by him was money had and received to their use.

2. That his ignorance of the real owner of the bill cannot affect the right of plaintiffs to recover in this action, on notice and proof of their title, so long as defendant stands in his original situation, and until there has been a change of circumstances, by his having paid over the money to his immediate employer, or done something equivalent to it.

1. Smith, the defendant, was the agent of plaintiffs. The case states,

1st. That the bill was the property of plaintiffs.

2d. That it was collected by defendant, who received it from St. John, the agent of plaintiffs.

On this state of facts, did the necessary privity exist? Or, in other words, had defendant the right to retain after notice of plaintiffs' claim?

It is objected that delegated power cannot be delegated without authority for that purpose, because it implies trust and confidence, which cannot be assigned to a stranger. That the sub-agent has no claim upon the principal, for commissions, advances, &c., therefore is under no responsibility to him, his sole remedy being against his immediate employer, and therefore that his sole responsibility is to him. For qualifications of the rule, see Story on Agency, sec. 14, p. 16.

Authority implied.

Licensed auctioneer. When indispensable by the laws to accomplish the end.

766*] *Ship-broker. 2. Ordinary usage of trade.

Factor. 3. Where understood by parties as the mode in which the business would or might be done.

The authority exclusively personal, unless from express provision, legal necessity, usage of trade, or fair presumptions growing out of particular transaction, a broader power was intended to be conferred. (Story on Agency, sec. 14, p. 17.)

Test the present case, by this rule, thus qualified.

A foreign house, holding a bill drawn on a citizen of Savannah, in Georgia, has a correspondent at Augusta, in the same State, to whom he remits it for collection, and by whom it is sent to his correspondent in Savannah, where the drawee resides.

Is this not conformable to the usual course of such transactions? Could plaintiffs have expected that St. John, abandoning his own place of business, should have repaired to the distant residence of the drawee, to present this bill personally? Would not the remittance of it there, to his correspondent, be "understood by the parties, to be the mode in which this particular business would or might be done?" Was St. John bound to do more than select a competent and trustworthy agent to receive the contents of the bill? If with the bill he had stated plaintiffs' interest, would any have doubted that defendant would have been the agent of plaintiffs in this matter? And does this not settle the right to delegate his authority? What effect withholding that information would have, will be considered hereafter.

It suffices at present, in order to sustain the first position, to show that this bill was dealt with according to the usual mode of transacting such business. That in appointing a sub-agent, St. John did no more than plaintiffs designed and intended. If so, defendant was agent of plaintiffs, by an authorized substitution; an authority implied from the circumstances, and as strong as if expressly given; and, as their agent, is, therefore, directly accountable to them for the money received under that agency, as money had and received to their use.

2. Defendant's ignorance of the real owner of the bill, and St. John's prior indebtedness to him, cannot affect plaintiffs' right to recover, unless, before notice of their claim, defendant had made advances to St. John, or delayed his prior claim against him, relying for re-imbursement or payment on this fund.

St. John, in remitting the bill, did not state that plaintiffs were owners of it. He was indebted to defendant, who, on receiving its contents, credited him in account, and now claims to retain the money of plaintiffs, in payment of the debt due to him by St. John.

The defendant's having passed the money, in account, cannot affect this question. (*Buller* v. *Harrison*, Cowp. Rep., 565; *Coxe* v. *Prentice*, 3 Maule & Selw., 348.) Lord Ellenborough says: "I take it that an agent who receives money for his principal, is liable as a *principal so long as he stands in his [*767 original situation, and until there has been a change of circumstances," &c., &c.

This money is, therefore, to be considered as in the hands of defendant, without any disposition having been made of it. Defendant's want of knowledge that the money belonged to the plaintiffs, cannot affect their right after notice and proof of their title. (*De Valengin's Adm'r* v. *Duffy*, 14 Peters, 282,290.) This was a case where money was received by an administrator, as property belonging to his intestate, though it belonged in fact to another. The court said, that "the want of knowledge, or the possession of knowledge, on the part of the administrator, as to the rights or claims of other persons, on the money thus received, cannot alter the rights of the party to whom it is ultimately due."

Something more is necessary to enable a sub-agent to retain for his general balance against his immediate employer, than his mere want of knowledge of the real principal. (Story on Agency, secs. 389, 390, pp. 481, 483, and the authorities there cited.) The lien exists for advances made, and (as it seems) for his general balance. But why? The reason is given. It is the presumption that the advances were made, or the demand delayed, relying on the credit of the fund allowed to remain in his hands. No advances were made in this case. Defendant did not rely on this fund for the payment of his demand. He did not delay it. That demand was prior, and had been secured

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to the satisfaction of defendant by a pledge of bank stock.

When St. John failed, and the security became (as is to be presumed) inadequate, then, for the first time, defendant looked to this fund, but he had undertaken the agency without any such reliance. The presumption is, therefore, negatived by the facts of the case. (*The Bank of the Metropolis* v. *New England Bank*, 1 How. Rep., 234.) This will probably be relied on. The court held:

1. That the paper in question continued the property of the New England Bank, notwithstanding the indorsement, these having been made to enable the agent to collect.

2. That a long course of dealing and repeated settlements in conformity to it, in which the parties were mutually credited with the proceeds of bills remitted by them, balances being suffered to remain, until they were reduced by the proceeds of bills and notes deposited, made this case the same in principle as if money had been advanced on the paper deposited.

The court said there was no difference in principles between an advance of money and a balance suffered to remain upon the faith of these mutual dealings.

The case under consideration is unaccompanied by any of these circumstances. Here there was no advance made, or demand delayed in reliance upon this fund; or any course of dealing and usage founded upon it, by which balances were suffered to remain undrawn **768*]** *for, looking to re-imbursement from the proceeds of bills or notes to be collected, which would be deemed equivalent, as in that case, to advances actually made.

Mr. Nelson, Attorney-General, for defendant:

The bill was drawn by Holcombe on Mills, accepted by Mills, and indorsed by Holcombe, and sent to Augusta for collection. All that was necessary was for St. John to indorse it in blank, but he indorsed it specially to Smith. In this state of the case, whose agent was Smith? To whom would he have written to give information of the payment or nonpayment of the bill? Certainly to St. John, who would have compelled him to pay over the money. A defense by Smith, that he was not the proper person to be paid, would not have been listened to. A sub-agent can be created, and in this case Smith must have been the agent of St. John. The question of agency must settle that of privity of contract. (Story on Agency, 395 to 400, where the subject is discussed.)

An agent is responsible only to his employer. (Paley's Agency, 48; 1 Livermore on Agency, 64, 65, 66; 6 Taunt. 148; 1 Vesey, Jun., 291, 292, where a son was employed as sub-agent by his father, who was agent, and it was held that the son could not be an accounting party to the owner of the mine, because there was no privity; 14 East, 582; 1 Crompton & Jervis, 83; 3 Barn. & Ald., 354; 4 *Ibid.*, 375; 2 Campbell, 123.)

It is said, by the other side, that usage must govern. This is admitted. But what usage or facts does the record show? Not that Smith was a factor or broker, but only that he was a creditor of St. John. The court cannot presume usage, and there is nothing in the record to show it.

What are the respective equities of the parties? The action for money had and received is analogous to a bill in equity. Suppose that the bill had belonged to St. John, could he have claimed to receive the amount of it whilst he was a debtor? The creditor had a right to apply the fund to pay himself. It is admitted that if Smith had forborne to press St. John for the amount of this debt, he would have a right to retain the amount of this bill. But the plaintiff, by his acts, has been the cause of lulling Smith into a false security. (Story, 383, 484.)

Where a party may be supposed to rely on a particular security, it is enough. (Case of *New England Bank*, 1 How., 234.)

The death of St. John does not defeat the lien. (Story on Agency, 378 to 388, authorities collected.)

It is a general rule that where a factor holds property as his own, the real owner cannot come in and claim, where third persons are concerned, having claims upon the agent. (5 Taunt., 56; 2 Bell's Com., sec. 807 to 812; Chitty's Commercial Law, 544, 545, 546; 2 Bell's Com., 789 to 806.)

Mr. Berrien*, in reply: [*769**

The controversy here is not about general principles, but their application. The cases in Taunton and 6 Vesey establish that between a sub-agent and principal there is no privity. I do not deny the existence of the general rule which these cases support, but say that there are exceptions to the rule, of which this is one. [*Mr. Berrien* here examined the cases.] One of the exceptions is, where it is manifest that some other person would be employed.

As to the equities of the parties. Shall the defendant retain money which confessedly belongs to the plaintiff, when the position of the defendant has undergone no change in consequence of getting this money? If his circumstances had been changed upon this account, I have conceded that he could retain it. Smith could not have been lulled into a false security, because the statement affirms that no new transaction happened. St. John, therefore, could not have received a fresh advance. The case of *The New England Bank* was decided upon the ground that there had been "mutual and extensive dealings;" that they "did not draw;" and that these things were like an "actual advance." Strike these facts out of the case, and it would not have been decided as it was, but would then have resembled ours. Here is an insulated transaction without any evidence of advance of forbearance.

Mr. Chief Justice TANEY delivered the opinion of the court:

We think the question certified has been settled by the decision of this court, and that it is unnecessary to go into an examination of the English laws which were cited in the argument. It is admitted that the bill was the property of the plaintiff, and was transmitted to St. John, at Augusta, for collection, and by him transmitted to the defendant, at Savannah, where the drawer resided; and that no consideration was paid for the bill, either by the defendant or St. John. According to the usual course of dealing among merchants, the transmission of the paper to St. John gave him an implied authority to send it for collection to

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a sub-agent at Savannah, for it could not have been expected by the plaintiff that St. John was to go there in person, either to procure the acceptance of the bill, or to receive the money, nor could St. John have so understood it. So far, therefore, as the question of privity is concerned, the case before us is precisely the same with that of *The Bank of the Metropolis* v. *The New England Bank* (1 How., 234). In that case, the bills upon which the money had been received by the plaintiff in error, were the property of the New England Bank, and had been placed by it in the hands of the Commonwealth Bank for collection, and were transmitted by the last mentioned bank to the Bank of the Metropolis, in Washington, where the bills were payable. And upon referring to the case, it will be seen that the court entertained no doubt of the right of the New England Bank to 770*] maintain the action *for money had and received, against the Bank of the Metropolis; and the difficulty in the way of its recovery in the action was not a want of privity, but arose from the right of the Bank of the Metropolis to retain, under the circumstances stated in the case, for its general balance against the Commonwealth Bank. In that case, as in the present, the agent transmitting the paper appeared, by the indorsements upon it, to be the real owner, and the party to whom it was transmitted had no notice to the contrary, and the money received was credited to the Commonwealth Bank. We think the rule very clearly established, that whenever, by express agreement between the parties, a sub-agent is to be employed by the agent to receive money for the principal, or where an authority to do so may fairly be implied from the usual course of trade, or the nature of the transaction, the principal may treat the sub-agent as his agent, and when he has received the money, may recover it in an action for money had and received.

Another question has been raised in the argument, that is, whether the defendant has a right to retain on account of the money due to him from St. John. As this point has not been certified, it is not regularly before the court, yet as it has been fully argued on both sides, and evidently arises in the case, it seems proper to express our opinion upon it, as it may save the parties from further litigation and expense.

Upon this part of the case, as well as upon the question certified, we think the case of *The Bank of the Metropolis* v. *The New England Bank* decisive against the defendant. It appears from the statement that he made no advances, and gave no new credit to St. John on account of this bill. He merely passed it to his credit in account. Now, if St. John had owed him nothing, upon the principles we have already stated, the plaintiff would be entitled to recover the money; and we see no reason why he should be barred of his action because St. John was debtor to the defendant, since the case shows that he incurred no new responsibility upon the faith of this bill, and his transactions with St. John remained in all respects the same as they would have been if this bill had never been transmitted to him. In the case of *The Bank of the Metropolis* v. *The New England Bank*, it appeared in evidence that there had for a long time been mutual dealings between these two banks, in the collection of money for each other, and that balances were suffered to remain and credit given upon the faith of the paper transmitted or expected to be received, according to the usual course of their business with one another. And the court held, that if credit had been so given, the party giving it had the same right to retain as if he had made an advance of money; the hazard he ran by the extension of the credit giving him as just and equitable a right to retain as if he had incurred responsibility by an advance of money. The right to retain, in that case, depended upon the fact that credit was given. But in *the case at bar this [*771 fact is expressly negatived, and there is no ground, therefore, upon which he can retain, according to the principles decided in the case referred to.

As this point, however, is not in strictness regularly before this court, we shall confine our answer to the question sent here for decision, and shall direct it to be certified to the Circuit Court, that there was such a privity of contract between the plaintiffs and defendant, as would enable the former to maintain the action for money had and received.

Cited—Otto, 314; 6 Otto, 35.

THOMAS B. WINSTON
v.
THE UNITED STATES.

Where the matter in dispute is below the amount necessary to give jurisdiction to this court, the writ of error must be dismissed, on motion.

MR. NELSON, Attorney-General, moved to dismiss this case for want of jurisdiction, under the circumstances stated in the opinion of the court, which was delivered by

Mr. Chief Justice TANEY:

A motion has been made to dismiss the case for want of jurisdiction.

It appears that an action was brought by the United States against the plaintiff in error, in the District Court of the United States for the Northern District of Mississippi (the said court having the powers of a circuit court), for the purpose of recovering damages against the plaintiff in error, who was a notary public, for having failed to give notice to the indorsers of a promissory note, put into his hands for protest, whereby the United States lost their remedy against them. The note was for $537.27, and the damages in the declaration laid at one thousand dollars. There was a verdict and judgment for the sum of $750.36, and it is upon this judgment that the writ of error is brought.

The matter in dispute is below the amount necessary to give jurisdiction to this court, and the writ of error must therefore be dismissed.

Cited—16 Wall., 345.

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HUGH ROSS, Administrator of HIRAM PRATT, Deceased, *Appellant*,

v.

WILLIAM PRENTISS, Marshal, *Defendant*.

Appeal—jurisdiction—amount in dispute.

Where a bill was filed on the equity side of the court below, to enjoin the marshal from levying an execution upon certain property, which execution was for a less sum than two thousand dollars, an appeal from a decree dismissing the bill will not lie to this court, although the entire value of the property may be more than two thousand dollars.

The jurisdiction of the court does not depend upon the amount of any contingent loss or damage which one of the parties may sustain by a decision against him, but upon the amount in dispute between them.

772*] *IT was moved by *Mr. Nelson*, Attorney-General, to dismiss the case for want of jurisdiction, under the circumstances stated in the opinion of the court, which was delivered by

Mr. Chief Justice TANEY:

It appears from the record in this case that a bill in chancery was filed in the Circuit Court for the District of Illinois, by the appellant against the appellee, who was the marshal for that district, stating, among other things, that the United States had recovered a judgment in the District Court for the District of Illinois, against one John S. C. Hagan and Gholson Kirchenal, for the sum of $600 damages, and $35.25 costs, upon which an execution had been issued, directed to the said marshal, who had levied it upon a certain lot of land and premises described in the bill, upon which the complainant, as administrator as aforesaid, held a mortgage to a large amount mentioned in the bill, and which he was then proceeding to foreclose; and averring that the said property was not chargeable with the said judgment, and that he was in danger of losing the benefit of his mortgage, by a sale under the execution, and praying that the marshal might be enjoined from making such sale.

Upon this bill an injunction was granted, and the appellee afterwards put in his answer, and the cause was proceeded in until a final hearing, when the injunction was dissolved and the bill dismissed.

It is unnecessary to state more particularly the character of the controversy, because the case now comes before us on a motion to dismiss, upon the ground that the matter in dispute is not sufficient in amount to give jurisdiction to this court.

The motion is resisted by the appellant, who insists that the jurisdiction depends on the value of the property upon which the execution has been laid, and the amount of the appellant's interest in it. And as the property is worth much more than the sum required to give jurisdiction, and the mortgage also for a larger amount, he has a right to appeal to this court from the decree of the Circuit Court; because, as he allows, he may lose the whole benefit of his mortgage by a forced sale under the execution.

We think otherwise. The only matter in controversy between the parties is the amount claimed on the execution. The dispute is whether the property in question is liable to be charged with it or not. The jurisdiction does not depend upon the amount of any contingent loss or damage which one of the parties may sustain by a decision against him, but upon the amount in dispute between them;

And as that amount is in this case below two thousand dollars, the appeal must be dismissed.

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*THE UNITED STATES, *Plaintiff in Error*,

v.

RICHARD KING AND DANIEL W. COXE *Defendants*. [*773

Alleged Spanish survey certificate declared antedated and forged—grant from U. S. will prevail over imperfect Spanish title—Spanish grant not connected with survey.

The certificate of survey alleged to have been given by Trudeau, on the 14th of June, 1797, and brought forward to sustain a grant to the Marquis de Maison Rouge, declared antedated and fraudulent.

The circumstance that a copy of this paper was delivered by the Spanish authorities in 1803, is not sufficient to prevent its authenticity from being impeached.

Leaving this certificate out of the case, the instruments executed by the Baron de Carondelet in 1795 and 1797, have not the aid of any authentic survey to ascertain and fix the limits of the land, and to determine its location.

This court has repeatedly decided, and in cases, too, where the instrument contained clear words of grant, that if the description was vague and indefinite, and there was no official survey to give it a certain location, it could create no right of private property in any particular parcel of land, which could be maintained in a court of justice.

An equitable title is no defense in a suit brought by the United States. An imperfect title derived from Spain, before the cession, cannot be supported against a party claiming under a grant from the United States.

The Act of Congress of the 29th April, 1816, confirming the grant to the extent of a league square, restricted it to that quantity, and cannot be construed as confirming the residue.

Quære: Whether the acceptance, by the claimant, of this league square, affected his title to the residue.

THIS case was brought up by writ of error from the Circuit Court of the United States for East Louisiana.

It involved a claim for upwards of two hundred thousand arpents of land in Western Louisiana, commonly known as the Maison Rouge claim, the history of which is this:

About the year 1795, a number of French royalists arrived in New Orleans, and amongst them the Marquis de Maison Rouge, a knight of St. Louis, who had been banished from France, and whose property had been confiscated in the Revolution.

On the 1st of January, 1795, he obtained the following passport:

"The Baron de Carondelet, knight of the religion of St. John, brigadier of the royal armies, Governor, vice-patron of the provinces of Louisiana, West Florida, and inspector of the troops thereof, &c., &c.

HOWARD S.

NOTE.—*As to jurisdiction of United States Supreme Court, depending on amount in controversy*, see note to Gordon v. Ogden, 3 Pet., 33.

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"It is hereby permitted Messrs. De Maison Rouge, De Breard, and other persons of their suite, to pass on to Ouachita, to examine its position, and there to form a settlement. In consequence, Mr. de Filhiol will afford them every assistance, and the information necessary for that object.

"Given in our government house, at New Orleans, this 1st day of January, one thousand seven hundred and ninety-five.

(Signed) "THE BARON DE CARONDELET,
"ANDREW LOPEZ ARMESTO."

On the 17th of March, 1795, the following contract was entered into:

774*] *"We, Francis Lewis Hector, Baron de Carondelet, knight of Malta, brigadier-general of the royal armies of His Catholic Majesty, military and civil Governor of the provinces of Louisiana and West Florida; Don Francis Rendon, intendant of the army and deputy-superintendent of the royal domains in the said provinces; Don Joseph de Orue, knight of the royal and distinguished order of Charles III., principal accountant for the royal chests of this army, exercising the functions of fiscal of the royal domains, declare, that we agree and contract with the Senior Marquis de Maison Rouge, an emigrant French knight, who has arrived in this capital from the United States, to propose to us to bring into these provinces thirty families, who are also emigrants, and who are to descend the Ohio, for the purpose of forming an establishment with them on the lands bordering upon the Washita, designed principally for the culture of wheat and the erection of mills for manufacturing flour, under the following conditions:

"1. We offer, in the name of His Catholic Majesty, whom God preserve, to pay out of the royal treasury two hundred dollars to every family composed of two white persons fit for agriculture, or for the arts useful and necessary for this establishment, as house or ship carpenters, blacksmiths and locksmiths, and four hundred dollars to those having four laborers, and in the same way, one hundred to those having no more than one useful laborer or artificer, as before described, with his family.

"2. At the same time, we promise, under the auspices of our sovereign monarch, to assist them forward from New Madrid to Washita, with a skillful guide, and the provisions necessary for them till their arrival at their place of destination.

"3. The expenses of transportation of their baggage and implements of labor which shall come by sea to this capital shall be paid on account of the royal domains, and they shall be taken on the same account from this place to the Washita: provided, that the weight shall not exceed three thousand pounds for each family.

"4. There shall be granted to every family containing two white persons fit for agriculture ten arpents of land, extending back forty arpents, and increasing in the same proportion to those which shall contain a greater number of white cultivators.

"5. Last, it shall be permitted to the families to bring or to cause to come with them European servants, who shall bind themselves to their service for six or more years, under the express condition that, if they have families, they shall have a right, after their term of service is expired, to receive grants of land, proportioned in the same manner to their numbers. Thus we promise, as we have here stated, and that it may come to the knowledge of those families which propose to transport themselves hither, we sign the present contract with the aforesaid Senior Marquis de Maison Rouge, to *whom, that it may be made plain, a [*775 certified copy shall be furnished.

(Signed) "THE BARON DE CARONDELET.
"FRANCIS RENDON.
"JOSEPH DE ORUE.
"THE MARQUIS DE MAISON ROUGE.
"New Orleans, the 17th of March, 1795."

On the 14th of July, 1795, this contract was approved by the king as follows:

"Having laid before the king what you have made known in your letter of the 25th of April last, No. 44, relative to the contract entered into with the Marquis of Maison Rouge for the establishment on the Washita of thirty families of farmers, destined to cultivate wheat for the supply of these provinces, his majesty considering the advantages which it promises, compared with the preceding, has been pleased to approve it in all its parts.

"By his royal direction, I communicate it to you for your information. God preserve you many years.

(Signed) "GARDOGORI.
"Madrid, 14th of July, 1795.
"The Intendant of Louisiana."

On the 12th of August, 1795, the following letter was addressed to the Marquis de Maison Rouge:

"NEW ORLEANS, August 12th, 1795.

"SIR: I have received the honor of your letter of the 25th June last, with a statement of the families. Your perseverance, in the opinion you have formed of the excellence of the land you inhabit, and which you are going to make flourish for the happiness of this province, as well as for those in its neighborhood which ought to partake of these advantages, ought to animate you to make the greatest efforts to effect its early accomplishment. The picture you draw of these enchanted places convinces me of the solidity of your judgment and of the fortunate selection you have made in your plan, as well as of the facility of means to carry it into execution in all its branches.

"I have paid Mr. Merieult the $300 for Alexander Laurent, Peter Relè, and James Fèret.

"By this opportunity, I inform the commandant of what is to be done when any new family arrives—giving him distinctly to understand that, if the least formality or a certificate is wanting, and not conformable to the copy which I send him, no payment whatever will be made from the royal treasury.

"I have the honor to be, with respect, sir, your very humble and most obedient servant,

(Signed) "FRANCISCO RENDON.
"Mr. De Maison Rouge."

*On the 26th of August, 1796, the [*776 following letter was written:

"Under this date, I have written to the commandant, John Filhiol, as follows:

"By the certificates which you sent me in behalf of the individuals who were brought here lately by the Chevalier Breard, I learn tha

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there were among them many single men, who cannot, therefore, be considered as composing families, and, consequently, they ought not to have received the $100 stipulated in the 1st article of the contract which the Marquis of Maison Rouge made with the Governor and intendant of this province. On this occasion, we passed over this irregularity in order to avoid disputes in future, it being inconsistent with the spirit of the contract, and of no use to the interests of the king, to spend the public money on individuals who, having no inducements to remain in the country, could leave it with the same facility they came. It must not occur again: and inform the Marquis that there are no funds in the public treasury destined to that object; and that, as soon as he has completed the number of thirty families which he contracted for, nothing will be paid out of the royal treasury to any who should exceed that number, and who wish to come and establish themselves in this district; and you will consider yourself instructed to this effect, and conform to it in future, advising me in conformity of what is done in the premises. I consider you as the agent, and authorized to act for the Marquis of Maison Rouge, in the business of bringing families to that post, and, therefore, communicate this for your government and information. The Lord preserve you many years.

(Signed) "JUAN VENTURA MORALES.

"To Mr. Augustus de Breard.

"New Orleans, 26th August, 1796.

On the 14th of June, 1797, it was alleged that Trudeau, the Surveyor-General, issued the following certificate:

"Figurative plan of the thirty leagues of superfices of land granted to the Marquis of Maison Rouge, not including the lands held by anterior titles.

"Don Carlos Trudeau, Surveyor-General and particular of the province of Louisiana.

"I certify in behalf of the Marquis of Maison Rouge, that the plats of land represented and sketched in the foregoing plan of vermilion color, may contain thirty superficial leagues, to wit: the first plat marked No. 1, on the right bank of the river Ouachita, commencing or starting five arpents below the mouth of the bayou Cheniere au Tondre till it reaches the bayou Calumet, with the depth necessary to complete or produce one hundred and forty thousand superficial arpents. The 2d plat marked No. 2, on the left bank of the same river Ouachita, to start or begin two leagues below the 777*] Fort Miro at *the point called Laine, till it reaches the prairie de Lee, with the necessary depth to complete or produce sixty thousand arpents superficial. The third plat marked No. 3, to start in front of the bayou de la Loutre, and from thence on a line running south sixty-five degrees east to the bayou Siar, which line the bayou Siar and bayou Barthelemy, and the Ouachita bound said plat No. 3 and the plat No. 4; on the right bank of the Ouachita, to start in front of the entrance of bayou Barthelemy, running down the river till it reaches the Bayou la Loutre; which plats Nos. 3 and 4, with the corresponding or necessary depth, are to complete eight thousand three hundred and forty-four superficial arpents, and, added to the plats No. 1 and 2, form together the superficial total of two hundred and eight thousand three hundred and forty-four superficial arpents, equal to the foregoing thirty leagues, at the rate of two thousand five hundred toises or fathoms per side for each league, which is the agrarian measure of this province; it being well understood that the lands included in the foregoing plats, which are held by titles in form, or by virtue of a fresh decree of commission, are not to compose a part of the foregoing thirty leagues; on the contrary, the Marquis of Maison Rouge promises not to injure any of the said occupants, promising to maintain and support them in all their rights, since, if it should happen that the said thirty leagues should suffer any diminution of the land occupied, there will be no objection or inconvenience to the said Marquis of Maison Rouge's completing or making up the deficiency in any other place where there are vacant lands, and to the satisfaction of the concerned.

"And in order that it may so appear or be made patent, I give the present, with the preceding figurative plan, formed or drawn by order of the Governor-General, the Baron de Carondelet, to which faith is to be given this fourteenth of June, one thousand seven hundred and ninety-seven.

(Signed) "CARLOS TRUDEAU.

"Noted in book A."

On the 20th of June, 1797, the following grant was issued:

"The Baron de Carondelet, knight of the order of St. John, marshal de camp of the royal armies, Governor-General, vice-patron of the provinces of Louisiana and West Florida, inspector of troops, &c.

"Forasmuch as the Marquis de Maison Rouge is near completing the establishment of the Washita, which he was authorized to make for thirty families, by the royal order of July 14, 1795, and, desirous to remove, for the future, all doubt respecting other families or new colonists who may come to establish themselves, we destine and appropriate conclusively for the establishment of the aforesaid Marquis de Maison Rouge, by virtue of the powers granted to us by the king, the thirty superficial leagues marked in the plan annexed *to the [*778 head of this instrument, with the limits and boundaries designated, with our approbation, by the Surveyor-General Don Carlos Lareau Trudeau, under the terms and conditions stipulated and contracted for by the said Marquis de Maison Rouge.

"And that it may at all times stand good, we give the present, signed with our hand, sealed with our seal at arms, and countersigned by the underwritten honorary commissary of war and secretary of his majesty for this commandancy general.

(Signed) "THE BARON DE CARONDELET.

"ANDRES LOPEZ ARMESTO.

"New Orleans, the 20th of June, 1797.

"Note. That, in conformity with his contract, the Marquis de Maison Rouge is not to admit or establish any American in the lands included in his grant.

(Signed) "THE BARON DE CARONDELET."

In the latter part of the year 1799, Maison Rouge died, leaving a will, which was dated

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on the 26th of August, in that year. It was as follows:

"First. Recommending my soul to the same Lord God who gave it to me, and created and redeemed it at the price of his most precious blood, passion, and death, I implore him by the most holy bowels of his divine mercy, that he will pardon it and send it to eternal rest among the chosen, for which it was created.

"My body I order to be placed in the earth, out of which it was made; and, when I die, I desire to be buried in the plainest manner, and that my funeral shall take place in such place as my executor chooses, to whom I leave the management of the rest of my funeral and interment, in order that he may act as to him appears best—such being my will and pleasure.

"I also direct that three masses be said for the rest and repose of my soul, for each of which three bits or rials shall be paid once, and to each of the donations into which my goods and effects are divided.

"I also declare that I am a bachelor, that it may so be made manifest and certain. I also declare and make known that I possess property in Paris, Berry, and Querry, which was confiscated, of which I possess no documents to establish my claim.

"I also declare that I possess, in Ouachita, a house and land, which I give and bequeath to my servant maid, called Maria, an Irish woman—such being my wish and pleasure.

"I also declare that I owe some small sums to my work people, which I desire to be paid from the present harvest.

"I also name as my executor and property holder Mr. Louis Bouligny, whom I empower and give authority to, after my death, to take possession of my goods and property, without the 779*] intervention *or interference of judicial proceedings; to make inventories, valuations, and sales thereof; to appoint such appraisers as he chooses, and to adopt all necessary proceedings until my mortuary affairs are concluded and wound up; for which purpose I postpone and extend the year of executorship, and further time which may be necessary for that purpose; and such is my will and pleasure.

"I also declare that I have, at the house of Don Pedro, all the articles necessary to build a saw-mill for cutting plank, and a pump auger.

"I also desire and declare that, in the donation which by this will I make to my servant maid Maria of a house and land, there is only included five acres front, by the usual depth, and the aforesaid house, and not the rest, or other land; such being my will and pleasure.

"And the residue and remainder of my goods, rights, and actions, as well within as out of this province, in case my parents are dead, I constitute and name, for my sole and universal heir, the aforesaid Louis Bouligny, in order that, after my decease, he may have and inherit them, with the blessing of God and myself; and such is my will and pleasure.

"I revoke and annul, and declare void, cancelled, of no value nor effect whatever, any other wills and testamentary dispositions I may have heretofore made by word, or in writing, which I desire no faith or value shall be attached to, saving and excepting this, which I at present authorize and declare in such manner and form as may stand good and right.

"In faith of which this instrument is dated in the city of New Orleans, the 26th of August, one thousand seven hundred and ninety-nine."

"I, the notary, give faith to and know the declarer, who, to appearance, possesses his natural judgment, memory, and understanding, and signed it in the presence of Don Andres Lopez de Armesto, honorary commissary of war and secretary of this government, Dn. Pedro Gondillo, and Dn. Vizente Texeiro Lientard, inhabitants.

"DE MAISON ROUGE."

In 1802, Bouligny went upon the ground and caused a survey to be made by McLaughlin, who had been a deputy-surveyor under Trudeau.

In 1803, Daniel Clarke applied for and obtained from the intendant-general of New Orleans copies of the contract with Maison Rouge, and of the order of the 14th July, 1795.

Congress having passed an act for the purpose of ascertaining the rights of persons to land within the district and territory of Orleans, the commissioners appointed under that act reported upon Bouligny's claim as follows:

[*780

Extract B.

Reported No.	Register's No.	By whom claimed.	Original proprietor or claimant.	Quantity claimed.	Nature and date of title or claim.	Class.
* 16 *	* 11 *	* Louis Bouligny. *	* Marquis de Maison Rouge. *	* 30 square leagues. *	* Spanish grant, 20th June, 1797. *	* B. *

*"Claims to land in the County of Washita.

Class B, in which the claim was placed by the commissioners, is thus described by them.

To the second class, comprising "claims which, though not embraced by the provisions of the said acts, ought nevertheless, in the opinion of the commissioners, to be confirmed in conformity with the laws, usages, and customs of the Spanish government," the letter B will be affixed.

By an act of the 29th April, 1816, the claims marked B were confirmed: "provided, nevertheless, that under no one claim shall any

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person or persons be entitled under this act to more than the quantity contained in a league square."

In 1841, the defendant Coxe, who had become owner of this claim, applied for patents for a league square, which were accordingly given to him, under the circumstances stated in the opinion of the late Mr. Attorney-General Legaré, under date of 22d December, 1841.

On the 13th of February, 1843, the United States, by Bailie Peyton, their attorney, filed a petition in the Circuit Court of the United States, stating that Richard King had taken possession of, and claimed title to, a part of the land. The petition prayed that the land might be adjudged to belong to the United States, &c., &c.

King answered and called Coxe in warranty, who also answered and set forth his title *in extenso* under the grant to Maison Rouge.

On the 10th of July, 1843, the court, after argument, pronounced the following decree:

"The court having maturely considered the law and the evidence in this case, doth now order, adjudge and decree, that the plaintiff's petition be dismissed, and that the grant made by the Baron de Carondelet, as the Governor of Louisiana, on the 20th June, 1797, to the Marquis de Maison Rouge, be, and the same is hereby declared valid; that the said Richard King, the defendant, and the said Daniel W. Coxe, warrantor, be, and they are hereby declared and recognized to be the lawful owners of the parts of the said grant held by them, as described in the answer of the said Richard King, **781***] *and in the schedule 'A,' and that they be quieted in the ownership and possession of the same.

(Signed) "THEO. H. MCCALEB,
"U. S. Judge."

In the course of the trial, the United States filed five, and the defendants three bills of exceptions. The following were assigned as errors on the part of the United States:

1. That in the matters stated in the several bills of exception, not necessary here to be restated, the court below committed error.

2. That the evidence in the cause does not sustain the claim of title of the defendants to the lands in controversy.

3. That the acceptance by the defendant Daniel W. Coxe, of a patent, for one league square of said land, under the Act of Congress of the 29th April, 1816, operates as an extinguishment of his title to any other portion of said land.

The evidence refered to in the second point of error was very voluminous. It consisted of a number of letters written by the Baron de Carondelet, by the Marquis de Maison Rouge, and by others, and of the deposition of sundry persons; all of which it is impossible to insert at length or to compress within a reasonable compass.

Mr. Nelson, Attorney-General, for the United States.

Mr. Coxe for the defendants.

Mr. Nelson, after referring to and explaining the papers above cited, laid down four propositions which he proposed to maintain.

1. That the paper relied upon by the defendants is not a grant.

2. That assuming it to be so, it was to take effect upon conditions which were not complied with.

3. That the paper purporting to be a survey by Trudeau is a forgery, and covers land not covered by the grant.

4. That the grant is void from indefiniteness, and cannot be located. [As the decision of the court turns upon one of these points only, it is deemed unnecessary to report the arguments of the respective counsel upon the other points.]

3. That the paper purporting to be a survey is a forgery; and, apart from that paper, the grant contains no description.

It is remarkable that no one ever saw this survey, although professing to have been made in 1797, until 1803. It was not appended to the grant. In 1802 there was a grant by Trudeau to Filhiol, of land below Fort Miro, and yet the survey made in 1797 calls for Filhiol's line, which was not established until 1803.

Moreover, this grant to Filhiol says that his land is bounded on every side by vacant lands, and yet if the former survey were genuine, Filhiol's grant was in the midst of the land which had been granted to Maison Rouge.

[*Mr. Nelson* then examined minutely the testimony of various *persons; of Mr. Fil- [*782 hiol, the commandant of the post of Washita, from 1783 to 1800; of the widow Bayergeon of Mr. Pomier, a settler under the contract; of Mr. Belin; of Mr. McLaughlin, who said that Trudeau was never on the spot, and never had any other deputy-surveyor than himself.]

In 1802, Bouligny went out to the spot and had a plat made by McLaughlin, who says that the "plat dated 14th June, 1797, is copied from the one which he made in 1802.

Mr. Coxe, for defendants, gave a history of the case, and referred to various State papers, Report of a Committee, Senate U. S., July 20, 1842; Instructions of Solicitor of the Treasury, December 23, 1842; 2 American State Papers, June 9, 1813; Land Laws, 744, 745; Greene's Public Lands, 247.

In 1 Laws U. S., Brown's edition, 549, the title is set out just as it is in the present record.

In 2 Land Laws (American State Papers), 771, 774, there is a copy of the very plat which we have.

It is objected that no one ever saw Trudeau's certificate of survey until 1803. At the foot of the grant, in Spanish, which is in the record, are these words: "*Anotado en el libro* A No. 1, *vergo 35, y copia sicada.*"

What became of the book A we do not know.

In American State Papers, Public Lands, Vol. II., page 774, there is a translation of Trudeau's certificate of survey, with the following remark:

"LAND OFFICE, OPELOUSA, Aug. 15, 1812.

"The foregoing is the substance of the *procès verbal* (certificate), of the Surveyor-General, subjoined to the plat (of which the annexed is a copy) filed in the claim of Louis Bouligny, holding under Maison Rouge.

"S. CHACIRE, Translator to the Commissioners.

"L. POSEY, Clerk of the Board."

If there is any defect in the record, the government must bear the consequences. The Spanish books were handed over to public authorities. It is the first time

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paper was ever denounced as a forgery. The grant itself says, "Marked in the plan annexed," showing that some plan was annexed to it. The evidence of Tessier verifies it. He was a principal clerk in the office for making grants of land under the Spanish government, and this grant is in his handwriting. He says he "cannot recollect whether he had or had not Trudeau's figurative plan and *procès verbal* before him, but he is certain that he performed his duty, either by dictation or written instructions of his superiors, or by seeing the document B, though he cannot say in which of the three respective modes he acted upon this occasion." 783*] *The decision of the Board of commissioners is final against the United States. In the case of *McDonald* v. *Millaudon*, decided at this term, the court say that a complete grant requires no confirmation by Congress. The limit to a league square in the confirmatory act does not negative the residue of the title; there are no words to that effect. The proviso was put in because it was thought that Spanish governors could not grant more than a league square. This court entertained the same doubt. (4 Peters, 511.)

Congress could not annul the title to the land beyond a league square, because it rested on a treaty. The act does not profess to annul it, but leaves it where it found it, subject to judicial decision. This construction of the act reconciles it with justice and good faith, and these considerations were held to be operative in (7 Wheat., 203; and 6 Peters, 718. The United States never claimed what was severed from the public domain. Our title, therefore, is equal to a patent, and can only be assailed on the ground of fraud. This is a charge which is easily made. It is not pretended that any was practiced by Carondelet, nor is the signature of Tradeau denied, but it is said to be antedated. The United States knew all about these papers, but the petition in this case does not allege fraud. It is true that the defendants are said to have no title. But suppose we were in chancery, would the court permit a party to raise such a question upon the trial if it was not alleged in the bill? It ought to have been put in issue and evidence taken upon it, and in that case the *onus probandi* would have been upon the United States. By the treaty they became possessed of all vacant domain, and must make out their title. It will not do to claim all and make the defendant show his title. (9 Peters, 298; 2 Burchard's Land Laws, 669.)

The fraud here is charged upon high functionaries of a foreign government forty-eight years ago. Fraud, for what purpose? There was no motive for it. Carondelet might have made the grant if he chose; he had the power to do it. Both these papers were before Congress in 1820, and the defendant met the accusations which were then brought against them. The United States have never attempted to rescind this patent for twenty years. If they were a private person, they would be bound by their acts. The accusation of fraud now made by the Attorney-General rests on two grounds:

1. A pamphlet published by Giraud.

2. On evidence taken in another suit.

With regard to the pamphlet, it has been answered in the same way. With regard to the latter, the evidence was taken under a notice served by a hostile party before another hostile party, all on the same day, and the suit then not prosecuted.

[*Mr. Coxe* then examined this testimony.]

Mr. Nelson, in reply and conclusion:

This is a mere question of title, to be settled on principles of law. *The defendant [*784 claims under a grant from the Spanish government. The treaty gave the public domain to the United States. There is no contest about their title, if the land had not previously been granted by Spain. We concede freely that the United States only succeeded to the rights of Spain, and that all grants, perfect or imperfect, are binding. If the rights were imperfect, the United States are bound in equity to carry them out; but not this branch of the government, which can look only at the legal title. Is this such?

But first let us examine a proposition laid down by the other side, that this claim has been recognized by all the departments of the government. If so, the United States must be estopped. If Congress has conferred a title on the representatives of Maison Rouge, there is an end of the question. So, if the judiciary has recognized it. But no misapprehension of the executive on such a subject is binding on this court.

[*Mr. Nelson* here examined the papers and documents cited by *Mr. Coxe*.]

The laws requiring commissioners to report to Congress, cannot be construed as erecting them into a judicial tribunal whose decisions should be final.

The alleged legislative confirmation is equally defective.

[*Mr. Nelson* here referred to 2 Story, 1410, 1429.]

The executive department of the government has always resisted this claim from 1804. It offered the lands for sale, but withdrew them on account of the dispute. A survey had to be made to ascertain what was unclaimed.

There has been no regulation by any branch of the government, but the question is entirely open for this court.

It is said that no fraud was alleged in the court below. That is very true. But it would have been odd if the United States, when instituting a proceeding similar to an ejectment, had gone on in their declaration to say that the title of the defendant was fraudulent.

It is also said that we have no right to supervise the action of the Spanish authorities. This is true, if they are *bona fide*, but not if they are fraudulent.

Congress has always provided, in its laws, for cases of fraud. The fraud was concocted in 1802, after Carondelet had gone away.

It is true that a great part of the testimony was taken in another case; but it was introduced into this by consent, and the defendant must abide by it.

Mr. Chief Justice TANEY delivered the opinion of the court:

This case is one of great importance, from the amount of property in dispute; and if the court entertained any doubt upon the questions of law or of fact which are presented by the record, we should regard it as our duty to hold it under advisement, and postpone the decision

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to another term. But the principles of law 785*] upon which it *depends are not new in this court, and have often been the subjects of discussion and consideration since the cession of Louisiana and Florida to the United States. And having, after a careful examination of the evidence, formed a decided opinion upon the facts in the case, we deem it proper to dispose of it without further delay.

The claim in question arises upon two instruments of writing, executed by the Baron de Carondelet, civil Governor of Louisiana; one in 1795, and the other in 1797; the latter of which is alleged, by the defendant in error, to be a grant to the Marquis de Maison Rouge, for the land included in a plat made out by Trudeau, the Surveyor-General of the province, and dated the 14th of June, 1797, and which survey embraces the land in controversy. It is insisted, on the part of the United States, that this certificate of Trudeau is antedated and fraudulent; and in order to determine the state of the facts upon which the questions of law will arise, the authenticity of this survey will be the first subject of inquiry.

Upon this point, a good deal of testimony has been taken upon both sides. But it would extend this opinion to an unreasonable and unnecessary length to enter upon a minute comparison and analysis of the testimony of the different witnesses, and of the other evidence contained in the record. It is sufficient to say, that, after an attentive scrutiny and collation of the whole testimony, we think it is perfectly clear that this certificate of Trudeau is antedated and fraudulent, and we refer to the evidence of Filhiol, McLaughlin, and Pomier, as establishing conclusively that the actual survey upon which this certificate was made out, did not take place until December, 1802, and January, 1803; and that the one referred to by the governor, in the paper of 1797, was for land in a different place, and higher up the Washita River. We are entirely convinced that the survey now produced was not made in the lifetime of the Marquis de Maison Rouge, who died in 1799, but after his death, and at the instance of Louis Bouligny, who, according to the laws of Louisiana, was what is there termed the "forced heir" of the marquis; and that it was made in anticipation and expectation of the cession of the country to the United States; the negotiations upon that subject being then actually pending, and the treaty of cession signed on the 30th day of April, 1803. We see no reason to doubt the truth of the witnesses to whom we have referred. On the contrary, they are supported by the testimony of other witnesses, and by various circumstances detailed in the record.

It has, however, been argued that, inasmuch as an attested copy of this certificate, with the two instruments executed by the Baron de Carondelet, were delivered to Daniel Clarke, in August, 1803, by the Spanish authorities at New Orleans, upon his application for the documentary proofs of the title to this land, the authenticity of the paper in question ought not to be impeached; and that it is inconsistent with the comity due to the officers of a foreign gov- 786*] ernment, *to impute to them fraud, or connivance in a fraud, in an official act where their conduct has not been questioned by the authority under which they were acting, and to which they were responsible. This proposition is undoubtedly true, where no other interest is concerned except that of their own government or its citizens. And as regards the interest of others, the acts of the officer, in the line of his duty, will, *prima facie*, be considered as performed honestly, and in good faith. And although this certificate and the other documents were delivered to Clarke after the country had been ceded to the United States, yet as possession had not been taken, and the evidences of titles to lands in the ceded province were still lawfully in the hands of the Spanish authorities, the documents upon that subject, obtained from the proper officer, ought to be regarded as genuine, unless impeached by other testimony; and to that extent this court is bound to respect the certificate in question. But it would be pushing the comity usually extended to the tribunals and officers of a foreign government, beyond the bounds of justice and the usages of nations, to claim for them a total exemption from inquiry, when their acts affect the rights of another nation or its citizens. Certainly, the political department of this government has never acknowledged this immunity from inquiry, now claimed for the Spanish tribunals and officers; and in every law establishing American tribunals to examine into the validity of titles to land in Louisiana and Florida, derived from the government of Spain, they are expressly enjoined to inquire whether the documents produced in support of the claim are antedated or fraudulent; and we have no doubt that it is the right of this court to hear and determine whether the certificate of Trudeau, although recognized and sanctioned by the colonial authorities of Spain, is antedated and made out either with or without their privity and consent, in order to defraud the United States, and to deprive them of lands which rightfully belonged to them under the treaty; and that it is our duty to deal with it as the evidence may require. We desire, however, to be understood, when speaking upon this subject, as not intending to charge the present claimants with having participated in the fraud; but from the testimony in the record, we are fully convinced that it was committed in the manner hereinbefore mentioned, by Bouligny, under whom they claim title.

Regarding the case in this point of view, the right of the defendant in error must stand altogether upon the instruments executed in 1795 and 1797, by the Baron de Carondelet; and it has not the aid of any authentic survey, to ascertain and fix the limits of the land, and to determine its location. The instruments themselves contain no lines or boundaries whereby any definite and specific parcel of land was severed from the public domain; and it has been settled, by repeated decisions in this court, and in cases, too, where the instrument contained clear words of grant, that if the description was vague *and indefinite, as in the case before us, [*787 and there was no official survey to give it a certain location, it could create no right of private property in any particular parcel of land, which could be maintained in a court of justice. It was so held, in the cases reported in 15 Peters, 184, 215, 275, 319, and in 16 Peters, 159, 160. After such repeated decisions upon the subject,

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all affirming the same doctrine, the question cannot be considered as an open one in this court. Putting aside, therefore, and rejecting the certificate of Trudeau, for the reasons before stated, the instruments in question, even if they could be construed as grants, conveyed no title to the Marquis de Maison Rouge for the land in question, and, consequently the defendants in error can derive none from him. The land claimed was not severed from the public domain, by the Spanish authorities, and set apart as private property, and, consequently, it passed to the United States, by the treaty which ceded to them all the public and unappropriated lands. It is unnecessary, therefore, for the decision of the case, to say anything in relation to the construction and effect of these two instruments, or the purposes for which they were intended.

As relates to the claim of an equitable title arising from the number of immigrants alleged to have been introduced under those instruments, it would not avail the defendant in error in this action, even if the proofs showed a performance equal to that contended for on his part. For if these instruments were regarded as grants, and it appeared that the Marquis de Maison Rouge had originally selected this very district as the place where the grant was intended to be located; and the immigrants introduced by him had been settled upon it in performance of the conditions of his contract; and if it should be held that he had thereby acquired an equitable right to have the quantity of land mentioned in the paper of 1797 laid off to him at this place, still it would be no defense against the United States. For in the case of *Choteau* v. *Eckhart* (2 How., 375), this court decided that an imperfect title derived from Spain, before the cession, would not be supported against a party claiming under a grant from the United States, unless it had been confirmed by act of Congress. The same point was again fully considered and decided, at the present term, in the case of *Hickey et al.* v. *Stewart et al.* These decisions stand upon the ground that such titles are not confirmed by the treaty itself so as to bring them within judicial cognizance and authority: and that it rests with the political department of the government to determine how and by what tribunals justice should be done to persons claiming such rights. If, therefore, this controversy was in a court of equity, and no suspicion of fraud rested upon the claim, yet it could not be supported against a grantee of the United States, because Congress has not confirmed it, nor authorized any other tribunal to determine upon its validity. This case, however, is in a court of law; the petitory action brought by the United States in [*788 the Circuit Court of Louisiana, being in the nature of an action of ejectment in which the decision must depend on the legal title; and that title under the treaty of cession being in the United States, an equitable title, if the defendant in error could show one, would be no defense.

It has indeed been urged in the argument, that the Act of April 29, 1816, sec. 1 (3 Story's Laws, 1604), confirmed this grant to the claimants to its whole extent. Upon this point we do not think it necessary to go into a particular and minute examination of the acts of Congress upon this subject, nor, indeed, of the act referred to. Because the provision in this act, that the confirmation shall extend only to the quantity of land contained in a league square, is in the judgment of the court too clear and unambiguous to admit of serious controversy. The restriction of the confirmation to the quantity above mentioned, appears to be as plainly stated in the proviso as language could make it; and Congress certainly, in a claim of this description, addressing itself to the political power, had a right to confirm a portion of the claim, and, at the same time, to refuse to give the claimant a title to the residue, if they supposed it just to do so.

Another question of more difficulty arises under this act of Congress, but as it has not been pressed in the argument, we forbear to express an opinion upon it. It appears that the claimant has accepted a patent for a league square. In similar cases in Florida, the act of Congress upon that subject provided that the patent for the quantity confirmed should not issue unless the claimant released all title to the residue. The law in relation to the land in question does not, it is true, require this release, and the patent was issued and accepted under an understanding with the commissioner of the general land office, that the acceptance should not prejudice the claim to the residue. Yet it is a question worthy of serious consideration, how far the acceptance of the land proffered by Congress, even under these circumstances, must affect any title to the residue, which the party might be supposed to have had, and ought to influence the judgment of the court, where the fact appears in the record.

It is unnecessary, however, to pursue the inquiry, since, for the reasons before stated, the judgment of the Circuit Court must be reversed.

S. C., 7 How., 833.

Cited—7 How., 865, 866; 8 How., 65; 9 How., 448, 469; 10 How., 267; 11 How., 127, 568, 653-657; 17 How., 43, 576; 18 How., 547, 550; 20 How., 22; 21 How., 167; 8 Wall., 660; 17 Wall., 280; Hemp., 384; 5 Dill., 233.

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APPENDIX.

From circumstances which it is not necessary to explain to the public, the two following dissenting opinions of *Mr. Justice* McLEAN, in the cases of *Kendall* v. *Stokes*, p. 87 and *The United States* v. *Gear*, p. 121, have been omitted from their proper places, and are here inserted.

AMOS KENDALL
v.
STOKES ET AL.

Mr. Justice McLEAN:

This case is a writ of error. The facts and merits of the case are before us only so far as they are connected with the legal points raised by the bills of exceptions. I will consider these points, and not indulge in a course of remarks which could only be proper on a motion for a new trial.

Before taking up the exceptions, I will observe, that from the finding of the jury the defendant below was acquitted of all malice with which he stands charged in the declaration. And I will add that there is nothing in the record inconsistent with the inference that he acted from a sense of duty, and with a desire to advance the public service.

The second, third, and fourth counts in the declaration were discontinued, so that the judgment was entered on the first and fifth counts.

The first count states that the plaintiffs were contractors for the transportation of the mail of the United States under William T. Barry, then Postmaster-General, and that for services so rendered the said Postmaster-General caused credits to be entered in their accounts on the books of the department for the sum of one hundred and twenty-two thousand dollars. The defendant below was appointed to succeed William T. Barry, in the office of Postmaster-General, and that he wrongfully, &c., caused the above sum of money, which had been paid to the plaintiffs as aforesaid, to be suspended on the books of the department and to be charged as a debit against them; by reason whereof the plaintiffs were unable to obtain from the department moneys under their several contracts for the transportation of the mail, which subjected them to great losses in raising funds to enable them to carry on their contracts; that their credit was destroyed, and that they were obliged to incur great expense in obtaining payment of the above sum, &c.

The fifth count claims damages for the refusal of the Postmaster-General to credit them with the amount of the award of the solicitor of the treasury, as by the act of Congress he was required to do; by reason whereof they were kept out of the money for a long space of time, and were subjected to expensive litigations, &c.

790*] *The first exception, by the defendant below, that I shall consider, is as follows: "That the acts of defendant, as Postmaster-General, in suspending the allowances mentioned in the two letters from P. S. Loughborough, as treasurer, both dated 14th May, 1835, the one addressed to Messrs. Stockton & Stokes, the other to L. W. Stockton, and above given in evidence by plaintiffs, and in continually holding the same under suspension and refusing to credit or pay the same till the rendition of the solicitor's award, above given in evidence by plaintiffs, were not such as laid him liable to the plaintiffs in the right in which they now sue, to the aforesaid action, and that upon the evidence so as aforesaid produced and given on the part of the plaintiffs, they are not entitled to maintain this action on their said first, second, and third counts, of their amended declaration."

As the second and third counts of the declaration were discontinued, no reference can be had to them in considering the legal questions in the case.

The court properly refused to give the last clause of the above instruction, on the ground that it requested them to determine the effect of the evidence. This has been so often decided by this court, that no reference to authority is deemed necessary. The other part of the exception goes to the capacity in which the plaintiffs sue as partners.

The contracts under which they sue were made in the name of Richard C. Stockton, but they were made for the benefit of the plaintiffs equally, as jointly interested with Stockton. When the contracts were about being executed, the Postmaster-General was informed that all the plaintiffs were interested in them; and inquiry was made of him whether the contracts made in the name of Richard C. Stockton would inure to the benefit of all concerned. The reply was, that they would; and with that understanding the contracts were signed.

The duties under the contracts were apportioned among the parties. From this state of facts, the question arises, whether the plaintiffs having a joint interest in the contracts may not sue as partners. They made the contracts in the name of Richard C. Stockton, and can there be any doubt of their right thus to make them? In this view the others are not subcontractors under Stockton, but are jointly interested with him in the contracts. And if anything has been done to render the head of the department liable to Richard C. Stockton, his associates, being jointly interested with him, are proper parties in the action for damages. The action is not on the written contracts, but by those interested in them for a wrong done. No subdivisions of the labor among the partners can affect this question. I can have no doubt as to the right of the plaintiffs to sustain this action, if there be a ground for any action. The Circuit Court, therefore, in my judgment, did not err in refusing the above instruction.

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791*] *The evidence of O. B. Brown, a clerk in the department, to show the interest of the plaintiffs, is objected to, on the ground that parol evidence cannot be heard, to contradict a written agreement. How this applies in the present case, it is difficult to perceive. Brown does not contradict the written contracts, but swears that the plaintiffs made them with the department in the name of Richard C. Stockton. And this evidence was admissible, on the ground that where any association of individuals bind themselves by a particular name or designation, in a written contract, in an action by or against the persons thus bound, the facts may be shown by parol.

The practice which prevails in this district, of praying the court for instructions on the close of the plaintiff's evidence, is a most inconvenient one, and can answer no other purpose than to introduce confusion in the case, and perplex the jury. In this case, there were two prayers for instructions on the evidence of the plaintiffs, as regards the capacity in which they sue; and a similar instruction is again asked after the close of the defendant's evidence. These instructions are founded upon the evidence, and are substantially the same, though expressed in different words.

The third instruction asked by the defendant in the court below, will be considered in connection with the second one prayed, after all the evidence had been heard.

The fourth instruction refused by the Circuit Court was, "that the evidence so as aforesaid produced and given, on the part of the plaintiffs, so far as the same is competent to sustain any count in the declaration, is not competent and sufficient to be left to the jury, as evidence of any act or acts done or omitted, or refused to be done by defendant, which legally laid him liable to the plaintiffs in this action, under such count, for the consequential damages claimed by plaintiff in such count."

This instruction goes only to the admissibility of the evidence. The question would have been more properly raised by a motion to overrule the evidence. But viewing it as an instruction, it prays the court to instruct the jury that the facts proved are not competent and sufficient; not to prove the right of the plaintiffs to recover, but to be left to the jury, "as evidence of any act or acts done or omitted, or refused to be done by defendant," &c.

No particular facts proved are alleged to be incompetent evidence, and the court, consequently, could not give the instruction, provided there was any legal evidence before the jury, which conduced to sustain the plaintiffs' right under any one of the counts in their declaration.

That the above instruction should be mistaken by any one as a demurrer to evidence, is, to me, very extraordinary.

A demurrer to evidence withdraws it from the jury, but this instruction calls upon the court to say whether "the evidence was competent to be considered by the jury." The 792*] instruction is not in *form or effect like a demurrer to evidence. It was nothing more nor less than an objection to the admissibility of the evidence.

The fifth instruction prayed is, as to the capacity in which the plaintiffs sue, and which I have already considered.

I now come to the instructions prayed by the defendant below after the close of his evidence.

The first one, being substantially of the character of the fifth, above stated, will not be examined.

The second instruction was, "if the jury find, from the said evidence, that the defendant, as Postmaster-General, acted in the premises from a conviction that he had the lawful power and authority as such Postmaster-General, to set aside the extra allowances, as claimed under the allowance of his predecessor, and to suspend and recharge the same, and from a conviction that it was his official duty to do so; and if plaintiffs suffered no oppression, injury, or damage, from such official act of the defendant, but the inconveniences necessarily resulting from such official act, then he is not liable to plaintiffs in this action for having so set aside, suspended, and recharged such extra allowances."

The principle imbodied in this instruction is this: if an executive officer do an act in good faith, and, as he believes, within his power, he is not responsible for an injury done to an individual.

It will require but little reflection to show that the proposition, to the extent here stated, is unsustainable. The principle is made to depend, not upon the character of the act or its consequences, but on the intent with which it was done. Now, there are many duties of an executive officer which are purely ministerial, and others which are discharged under prescribed limitations. It is inconsistent with the nature of our institutions, that an irresponsible power should be exercised by any public agent. Every officer, from the highest to the lowest, in our government, is amenable to the laws for an injury done to individuals. An act which the law sanctions cannot be considered as injurious to anyone. And where a discretion may be exercised, if it be exercised in good faith, the officer is not responsible for an error of judgment. But this, of necessity, is limited to matters which come within his jurisdiction. He can claim no immunity beyond this. If he could, he might act without any other restraint than his own discretion; and this would be to exercise an unmitigated and irresponsible despotism.

If a member of this court should imprison a citizen, for causes over which the law gave him no jurisdiction, he would be responsible for damages in an action at law. And it is supposed that no higher immunity can be claimed by an executive officer. It is a fundamental principle in our government, that no individual, whether in office or out of office, is above the law. In this our safety consists.

Of all the powers exercised by the departments of this government, *those of the [*793 executive are the most extensive and the most summary. They have not the forms and the deliberations of a judicial procedure. Hence it is of the utmost importance that the executive power should be defined and guarded by law. From the nature of these duties, an enlarged discretion is indispensable; and with the exercise of this discretion no other power can interpose, and no legal responsibility results from its rightful exercise. But this is not an

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unlimited discretion. If its boundaries be not specifically defined by statutory enactments, yet they are found in the thing done, and in the well established principles of private right. The courts are often called on to exercise their discretion, but it must be a legal discretion. The same rule applies, where individual rights are involved, to every executive officer.

A postmaster-general, by the terms of every mail contract, on the happening of certain failures by the contractor, may forfeit it. But if he shall arbitrarily annul the contract, when by the terms of it he had no power to do so, he is unquestionably responsible to the party injured. And in such a case, the plea that he acted in good faith and with a desire to discharge his duty, would not avail him. He is presumed to be acquainted with his duties, and the powers he may exercise. A contrary presumption would suppose him to be unqualified to discharge the duties of his office. It therefore follows, when a public officer does an act to the injury of an individual, which did not come within the exercise of his discretion, and was clearly not within the powers with which he is invested by law, he may be held legally responsible.

In the first count of the declaration, the plaintiffs charge that the defendant not only refused to pay to them the sum of $122,000, which under their contracts they had earned, and which had been credited to them in their accounts; but that he caused that sum to be recharged to them, which represented them, on the books of the department, as defaulters, &c.

Now, had he power to do this? As this point has been expressly adjudged by this court, I need refer to no other authority.

In the case of *The United States* v. *Bank of Metropolis* (15 Peters, 400), the court say: "The third instruction asked the court to say, among other things, if the credits given by Mr. Barry were for extra allowances which the Postmaster General was not legally authorized to allow, then it was the duty of the present Postmaster-General to disallow such items of credit;" and to this instruction this court answer: "The successor of Mr. Barry had the same power, and no more, than his predecessor, and the power of the former did not extend to the recall of credits or allowances made by Mr. Barry, if he acted within the scope of official authority given by law to the head of the department. This right in an incumbent of reviewing a predecessor's decisions, extends to mistakes in matters of fact arising from errors of calculation, and in cases of rejected claims in which 794*] *material testimony is afterwards discovered and produced. But if a credit has been given or an allowance made, as these were, by the head of a department, and it is alleged to be an illegal allowance, the judicial tribunals of the country must be resorted to, to construe the law under which the allowance was made, and to settle the rights between the United States and the party to whom the credit was given. It is no longer a case between the correctness of one officer's judgment and that of his successor."

The point here ruled is, in every respect, the point under consideration. And the decision is clear and unequivocal against the power of the Postmaster-General to supervise the allowances and contracts of his predecessor. And more especially must this be the case, where the allowances have not only been made for services rendered, but credited to the party on the books of the department.

On the ground of fraud or mistake, a postmaster-general may suspend or annul the acts of his predecessor. But in such a case the ground should be set up as matter of justification. No such defense has been made in the present case.

Here is an act done by the defendant, as Postmaster-General, which this court say he had no power to do. And as a consequence of that act great injury has been done to the plaintiffs, as alleged in the declaration, shown by the evidence and sanctioned by the verdict of the jury. And here the question arises whether the act so complained of subjects the defendant to an action at law. My brethren think it does not; I have come to a different conclusion.

In stating the grounds of my opinion, I aquit the Postmaster-General of all improper intention. And I not only do this, but I am willing to admit that the circumstances under which he acted were such as to require from him great vigilance and firmness. He, acted, too under the sanction of the President, and in accordance with the opinion of the Attorney-General. These precautionary measures go to explain his action, and show that whatever damages might have been incurred by the plaintiffs and recovered by them, the defendant should be indemnified by the government. He should no more be subjected to loss in this respect than a collector of the customs who, under the instructions of the Treasury Department, collects an illegal duty upon goods imported, which subjects him to a judgment for damages.

But if the right of action exist, these circumstances cannot destroy it. They create a clear case of indemnity by the government, but they do not lessen nor excuse the injurious consequences to the plaintiffs.

There are three grounds on which a public officer may be held responsible to an injured party.

1. Where he refuses to do a ministerial act, over which he can exercise no discretion.

*2. Where he does an act which is [*795 clearly not within his jurisdiction.

3. Where he acts willfully, maliciously and unjustly, in a case within his jurisdiction.

The first position is sustained by this court in the case of *Kendall* v. *The United States* (12 Peters, 613). Speaking of the act required by the law, to be done by the Postmaster-General, the court say, "it is a precise definite act, purely ministerial; and about which the Postmaster-General had no discretion whatever." And again, in 612, they say, "the plaintiff's right to the full amount of the credit, according to the report of the solicitor, having been ascertained and fixed by law, the enforcement of that right falls properly within judicial cognizance." In page 614 they say, "it is seldom that a private action at law will afford an adequate remedy" where the damages are large. The act required to be done was, that the Postmaster-General should cause a credit to be entered on the books of the department in favor of the plaintiffs below, for a certain sum. "His re-

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fusal to do this subjected him to an action." This decision, then, sustains the position that a public officer is liable to an action for damages sustained, for refusing or neglecting to do a mere ministerial act, over which he could exercise no discretion.

In the case of *Ferguson* v. *Earl of Kinnoull* (9 Clark & Finnelly's Rep., 279), a decision in the House of Lords, in 1842, the Lord Chancellor said: "When a person has an important public duty to perform, he is bound to perform that duty; and if he neglects or refuses so to do, and an individual in consequence sustains injury, that lays the foundation for an action to recover damages by way of compensation for the injury he has so sustained." And he cites *Sutton* v. *Johnston* (1 Term Rep., 493). His lordship further remarks: "A party had applied to a justice of the peace to take his examination under the statute of Elizabeth, the statute of hue and cry; the justice had refused to do this, and the party had in consequence sustained injury, because he was deprived of his right of bringing a suit against the hundred in consequence of that neglect. It was held, upon the principle I have stated, that he was entitled to recover damages against the justice for the neglect of his public duty; he having in consequence sustained a personal injury." (*Green* v. *Bucklechurches*, 1 Leon, 323, ch. 456.) He states another case, of *Stirling* v. *Turner*. "Stirling was a candidate for the office of bridgemaster; the mayor refused to take a poll, in consequence of which he brought an action against him, and it was held that that action might be sustained to recover damage for the injury. Upon what principle? That it was the duty of the Lord Mayor to take the poll; that he neglected that duty; that the party in consequence sustained injury, and it was therefore held that the action might be maintained."

In his opinion Lord Brougham says, page **796***] 289: "Courts of justice, *that is, the superior courts, courts of general jurisdiction, are not answerable, either as bodies, or by their individual members, for acts done within the limits of their jurisdiction. Even inferior courts, provided the law has clothed them with judicial functions, are not answerable for errors of judgment; and where they may not act as judges, but only have a discretion confided to them, an erroneous exercise of that discretion, however plain the miscarriage may be, and however injurious its consequences, they shall not answer for. This follows from the very nature of the thing; it is implied in the nature of judicial authority. But where the law neither confers judicial power, nor any discretion at all, but requires certain things to be done, every body, whatever be its name, and whatever other functions of a judicial or of a discretionary nature it may have, is bound to obey; and with the exception of the Legislature and its branches, every body is liable for the consequences of disobedience."

Lord Cottenham said: "I feel much satisfaction at finding that this case has been so deeply considered and so fully discussed by the noble and learned lords who have preceded me. I concur in the opinions which they have stated."

Lord Campbell said: "Where there is a ministerial act to be done by persons who, on other occasions, act judicially, the refusal to do the ministerial act is equally actionable as if no judicial functions were on any occasion intrusted to them. There seems no reason why the refusal to do a ministerial act by a person who has certain judicial functions, should not subject him to an action, in the same manner as he is liable to an action for an act beyond his jurisdiction. The refusal to do the ministerial act is as little within the scope of his functions as judge, as the act where his jurisdiction is exceeded. In the act beyond his jurisdiction, he has ceased to be a judge."

And the House of Lords, without a dissenting voice, affirmed, on the above principles, the judgment.

2. An officer is liable where he does an act injurious to another, which is clearly not within his jurisdiction.

In the case of *Tracy et al.* v. *Swartwout* (10 Peters, 95), this court say: "It would be a most dangerous principle to establish, that the acts of a ministerial officer, when done in good faith, however injurious to private rights, and unsupported by law, should afford no ground for legal redress. The facts of the case under consideration will forcibly illustrate this principle. The importers offer to comply with the law by giving bond for the lawful rate of duties; but the collector demands a bond in a greater amount than the full value of the cargo. The bond is not given, and the property is lost, or its value greatly reduced in the hands of the defendant. Where a ministerial officer acts in good faith, for an injury done, he is not *liable to exemplary [*797 damages; but he can claim no further exemption where his acts are clearly against law."

In the language of Lord Campbell, above cited, "where a judge does an act, which is clearly beyond his jurisdiction, he ceases to be a judge." And if he cease to be a judge, all the immunities connected with his official character, as relates to the act, also cease.

The Treasurer of the United States, in the exercise of his discretion, withholds the salary of a judicial or other officer, on the ground that such officer has not faithfully discharged his duties. Now, this is a matter about which the treasurer can exercise no discretion. He is, therefore, liable to an action. And on this principle any and every officer may be made responsible for injuries done to another.

3. That an officer is liable where he acts willfully, maliciously, and unjustly in a case within his jurisdiction, would seem to result from the foregoing considerations. But, as there is no pretense that this action is to be maintained on this ground, I shall not consider it farther than to say, that the law is clear where the facts are established.

The third instruction prayed by the defendant, and refused by the court, is as follows: "If the jury, in addition to the facts above supposed in the last preceding form of instruction, further find, from said evidence, that the defendant, in refusing to credit plaintiffs with such parts of the solicitor's awards as he refused to credit them with as aforesaid, acted from a conviction that the solicitor had no lawful jurisdiction or authority to audit, settle, or adjust the claims or items of claims upon which

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he awarded the several sums of money, constituting the sum of what defendant refused to credit them with as aforesaid, and from a conviction that it was, therefore, his official duty to refuse to credit them with so much of the amount awarded by the solicitor as aforesaid; and if plaintiffs suffered no oppression, injury, or damage, from such refusal of the defendant, but the inconvenience necessarily resulting thereupon, then he is not liable to plaintiffs in this action for such refusal."

This instruction, as the one preceding it, rests the liability of the defendant upon the intention with which the act was done; and consequently, however injurious it might have been to the plaintiffs, if done with a *bona fide* intent, they are without remedy. This principle has been examined under the preceding instruction, and nothing further need here be said, than that this court, in the *mandamus* case above cited, held that the act referred to in this instruction was ministerial; that the defendant had no discretion over it, but was bound to enter the credit under the act of Congress. And for not doing so, they held he was liable to an action.

The fourth instruction refused was, "that the defendant is not liable in this action for any of his said acts in the premises, if, in addition to the facts supposed in the two last preceding 798*] forms of *instruction, the jury believe, from the whole evidence, that he acted in the premises with the *bona fide* intention to perform duly the duties of his office, and without malice or intention to injure and oppress the plaintiffs."

The record shows no evidence of malice against the defendant below. His liability on other grounds has been already discussed.

The third and last bill of exceptions was, "the plaintiffs, further to support the issues on their part, above joined, produced and offered evidence to prove their special expenses, losses, &c., in consequence of the defendant's acts in the premises, to wit, such expenses and losses as are set out in the papers annexed, marked A, B, C, D, (copied in pages 633–638); and also their expenses and losses in the form of bank discounts, paid by Stockton and Stokes, on postoffice acceptances, and interest paid by them on money borrowed from May 30th, 1835, to Nov. 9th, 1836, amounting to $9,749.14, a particular account whereof (being the same as the document 52, annexed to the solicitor's report above given in evidence by plaintiffs) they produced, as taken from the books of Stockton and Stokes, and proved that all the original entries in the said account were in the handwriting of one A. Matter, at that time the clerk who kept the said books, and has since deceased; and further evidence to prove that Stockton and Stokes were in good credit up to May, 1835, when said suspensions were made by order of the defendant, and that their credit was afterwards destroyed in consequence of such suspensions." To the admission of which evidence defendant objected, but the court overruled the objection. This objection goes to the entire evidence in the case. And although a part of that evidence thus objected to should have been overruled, if specially objected to; yet as the exception extended to other evidence clearly admissible, it was properly overruled. This point has been so often decided, and is, in itself, so evident, that I shall not cite any authority. The objection, to prevail, must always be limited to that part of the evidence offered, which is incompetent.

Does the *mandamus* suit bar this action? My brethren think it does; in my opinion it does not.

There is no plea in bar, and how the proceedings by *mandamus* can constitute a bar, without being pleaded, I am at a loss to determine. It is true, those proceedings were given in evidence by the plaintiffs, to show what expense they had incurred, in prosecuting that suit, for the balance of the award, which should have been credited promptly by the Postmaster-General. But how can this constitute a bar to this action?

What was the object of the *mandamus*? Not to recover money, but to obtain an order from the court directing the Postmaster-General to enter a credit to the plaintiffs for the balance of the award, on the books of the department. And such an order was made by the court, *in pursuance of which the credit was [*799 given. The Act of the 2d of July, 1836, referred the claims of the plaintiffs, against the Postoffice Department, to the solicitor of the Treasury, who was authorized to make them "such allowances therefor as, upon a full examination of all the evidence, may seem right according to the principles of equity; and that the Postmaster-General be, and he is hereby directed to credit the plaintiffs with whatever sum or sums of money, if any, the said solicitor shall so decide to be due to them, &c." The solicitor reported in favor of the plaintiffs $161,563.89, as the amount of principal and interest due to them by the department. Of this sum $122,101.46 were credited to the plaintiffs on the books of the department. But the Postmaster-General refused to credit the balance, and for this cause the *mandamus* was brought.

Could the *mandamus* have been pleaded in bar of the present action? The objects of the two suits are entirely distinct. By the *mandamus* a credit for the full amount of the sum awarded to the plaintiffs was sought. By the present action the plaintiffs seek to recover damages sustained by them, in their business as contractors for the transportation of the mail, by reason of the suspension of more than $120,000 which they had earned, and which had been allowed and credited to them by the predecessor of the defendant; but which the defendant had recharged against them. And also for the refusal to credit $39,000 of the award, as the law required.

Notwithstanding this suspension and refusal, the plaintiffs allege that they were required rigidly to perform their contracts with the department, which they did at a great expense and sacrifice; and that in the prosecution of their rights, they were subjected to great expense in employing counsel, loss of time, &c. This is the foundation of the present action. And it is only necessary to state it to show that the *mandamus*, if pleaded, could have been no bar. The two actions are distinct in their character and objects, and also in the evidence on which they rest. Interest was allowed to the plaintiffs for the sums of money withheld

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from them by the department; but no allowance was made by the solicitor to the plaintiffs for the consequential damages sustained by them in the premises. The evidence acted upon by the solicitor, as stated in document 52, was before the jury, but the plaintiffs could claim no item which had been allowed by the solicitor. The sums allowed by the solicitor had been credited to the plaintiffs. Those sums, therefore, constituted no part of the present case. Still the document was proper evidence to prove the award of the solicitor, as a part of the proceedings in the *mandamus* case. Indeed, the record in that case was properly received as evidence to show the delays and expenses to which the plaintiffs were subjected by the acts of the defendant.

It is said that in an action against the Postmaster-General, the sum awarded might have been recovered, and also the damages claimed **800*]** *in this action, if such damages constitute a legal right of action. And from this an argument is drawn in support of the position, that the *mandamus* suit bars the present action. The force of this argument is not perceived. For if the damages as above stated could have been recovered by an action against the Postmaster-General, it does not follow that the same damages were recoverable by the *mandamus*. In fact no damages were recovered by the *mandamus* suit. It is true that that proceeding would bar an action on the award, as it procured a credit to be entered for the amount of the award. But the solicitor was not, by the act of Congress, authorized to inquire, and he did not inquire into any consequential damages suffered by the plaintiffs, beyond the interest on the sums suspended. And the present action is brought for the consequential injuries sustained by the plaintiffs, under the peculiar circumstances of the case.

From this view it must be apparent that the *mandamus* suit, if technically pleaded, could be no bar to this action. The history of judicial proceedings, it is confidently believed, affords no similiar bar to this, which has been sustained. Nor does the award constitute a bar, for the reason that the arbitrator did not allow, nor was he authorized by the law to allow, a single item which is claimed in the present action. All the items allowed by the arbitrator were before the jury, as they could not be separated from the proceedings in the *mandamus* case; but all those items were shown to have been credited to the plaintiffs, and, therefore, the plaintiffs could not insist that those items should be any ground of recovery in this action. To say, therefore, that the evidence in this action, on which the verdict was rendered, is the same as that in the *mandamus* suit, is, in my judgment, wholly unsustained by the facts in the case.

I think the judgment of the Circuit Court should be affirmed.

THE UNITED STATES
v.
H. H. GEAR.

Mr. Justice McLEAN:

I dissent from the opinion of the court.

The question certified, in my judgment, should be answered in the affirmative.

That it was the intention of Congress to sell, at public sale, the land in question, is clear, if that intention is to be ascertained by their own language. In the 4th section of the Act of 26th of June, 1834, it is provided, "that the President shall be authorized, as soon as the surveys shall have been completed, to cause to be offered for sale, in the manner prescribed by **801*]** law, all the lands lying in said *land districts at the land offices in the respective districts in which the land so offered is embraced, reserving only section 16 in each township, the tract reserved for the village of Galena, such other tracts as have been granted to individuals and the State of Illinois, and such reservations as the President shall deem necessary to retain for military posts, any law of Congress heretofore existing to the contrary notwithstanding."

The land lies in one of the land districts above referred to, and is not within any one of the reservations named in the section. This being admitted, is there any ground to doubt that Congress authorized the President to sell all lands covered by the section and not reserved in it. They have said so expressly. The language of the section is so clear as to admit of no other construction. And it would seem to me that such must be our judgment, unless we can judicially say, that when Congress speak in the authoritative language of law, they do not mean what they say. Such a decision would constitute a new rule for the construction of statutes.

It is said that the land occupied by the defendant was reserved by the 5th section of the Act of the 3d of March, 1807. This is admitted. But the question is, whether it was reserved by the Act of 1834. The 5th section above referred to provides "that the several lead mines in the Indiana territory, together with as many sections contiguous to each as shall be deemed necessary by the President of the United States, shall be reserved for the future disposal of the United States; and any grant which may hereafter be made for a tract of land containing a lead mine which had been discovered previous to the purchase of such tract from the United States, shall be considered fraudulent and null." Now, the tract in question had on it a lead mine, and, being then within the Indiana territory, of course, came within the reservation just cited. But such reservation was made only "for the future disposal of the United States." And the Act of 1834 does authorize the President to dispose of this and all other tracts in the districts named not specially reserved in that Act. This latter act, then, by consequence, repeals the Act of 1807. In this respect the acts are repugnant. They cannot stand together. The first act reserves the land for the future disposal of the United States, and the last act disposes of it. The President is, undoubtedly, bound within a

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reasonable time, after the surveys were executed, to issue his proclamation offering for sale, at public auction, the lands in the above districts. And after such sales all the lands not sold or reserved were open for entry as the law provides. A failure of the President to execute a duty enjoined by law cannot affect any individual right involved in this case.

It is not doubted that if no other consequence resulted from the above construction of the Act of 1834, than the mere authority of the President to sell the land, there would have been little or no diversity of opinion on the subject; but a pre-emptive right in the defend-
802*] ant *may follow such a construction, and this creates the difficulty in the case. But when the law is clear we should follow it without regard to consequences.

In my judgment the pre-emptive right of the defendant, if he shall bring himself within the law, is as clear as that the President was authorized to sell the land.

By the 1st section of the Act of 29th May, 1830, it is provided "that every settler or occupant of the public lands prior to the passage of this act, who is now in possession, and cultivated any part thereof in the year 1829, shall be, and he is hereby authorized to enter with the register of the land office for the district in which such lands may lie, by legal subdivisions, any number of acres, not more than one hundred and sixty, or a quarter-section, to include his improvement, upon paying to the United States the then minimum price of said land: Provided, however, that no entry or sale of any land shall be made, under the provisions of this act, which shall have been reserved for the use of the United States," &c.

By the Act of the 19th of June, 1834, every settler prior to the passage of that act, then in possession, and who cultivated any part of the land in 1833, was declared to be entitled to the benefit of the Act of 1830, which act was continued in force two years. And by the Act of the 22d of June, 1838, it is provided, that every actual settler of the public lands being the head of a family, or over twenty-one years of age, who was in possession and a housekeeper by personal residence thereon at the time of the passage of this act, and for four months next preceding, shall be entitled to all the benefits and privileges of the above Act of the 29th May, 1830. And that act was declared to be in force two years. In the same section it was declared that said right should not extend "to any land specially occupied or reserved for town lots, or other purposes, by authority of the United States."

As the Pre-emption Act of the 19th of June, 1834, passed seven days before the act which authorized the President to sell the land in question, and as, prior to this latter act, the land was reserved from sale by the Acts of 1807 and 1830, the pre-emption right may not have attached to the residence of the defendant. But if this be admitted, the Act of 1807 having been repealed, as above shown, by the 4th section of the Act of the 26th of June, 1834, there seems to me to be no doubt that the pre-emption right did attach under the law of 1838. After the land was authorized to be sold, it could no longer be considered as reserved from sale by the Act of 1807; and the Act of 1838 only excepted, from the right of pre-emption, such tracts as were at that time reserved by the authority of the United States. In this view, then, it would seem the right of pre-emption is in the defendant, if he were a resident on the land within the provisions of the Act of 1838.

It is said the law authorizing the sale of these lands and the pre-emption *laws, being [*803 all on the same subject, must be taken together, and so construed as to effectuate the intention of Congress. This is admitted. But does this rule of construction authorize the court to say, that where a subsequent law is repugnant to a prior one they may both stand. It is impossible to give effect to both, as they are inconsistent. The truth of this is forcibly illustrated by the acts in question. By the 4th section of the Act of 1807, the lead mines are reserved for the future disposal of the United States. By the 4th section of the Act of 1834, these with all other lands, not specially reserved in that section, are authorized to be sold. It is true the lead mines are not named in the section as authorized to be sold, but they are not reserved from sale by it, and the authority to sell all other lands not reserved in the section necessarily includes them. Now, how are these two laws to stand together? The one reserves the lands for the future disposal of Congress, and the other disposes of them. Can effect be given to both of these laws? Can we say that this repugnancy does not necessarily repeal the Act of 1807? A negative answer to this inquiry would add, as I think, a new principle to the construction of statutes. Instead of following the rule on this subject, which is obvious, sensible and just, we should involve ourselves in the mysteries and uncertainties of the alchemist.

It is said Congress did not intend to dispose of the lead mines and the lands adjacent thereto by the act in question. To this I answer, that I have no other mode of ascertaining the intention of Congress except by the plain and unequivocal language which they have used in the solemn form of law. Whether the lead mines were valuable or not, is not a matter of any importance in regard to a right construction of the act. We cannot go out of the law to ascertain what is meant by it. If it were proper to investigate the policy of reserving lead mines, salt springs, and mill seats, for the benefit of the United States, it would not be difficult to show that they had not been a source of revenue to the United States. In most instances, it is believed, if not in all, the expenses of superintendencies have absorbed the profits.

The case of *Brown et ux.* v. *Hunt et al.*, decided at the present term, has a strong bearing upon the principles involved in this case.

It is contended that the main point in this case was decided in *Wilcox* v. *Jackson* (13 Peters, 509). In my judgment, that decision has no bearing on the present question. Beaubean in that case set up a pre-emption right to the tract of land in controversy, having obtained from the register and receiver of the proper land office a certificate sanctioning his right. But the government showed that the land had been reserved for a military post in 1804, and was occupied as such until, in 1812, during the late war, the fort was taken by the enemy and

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the troops were massacred. It was re-occupied in 1816, and from that time the government 804*] continued to occupy it *for a military post, as a trading establishment with the Indians, and also for a light-house, which had been built upon the ground at an expenditure of five thousand dollars. This possession was continued by the government up to the time the pre-emption was claimed. But in addition to these facts, the 4th section of the Act of 1834 specially reserved from sale such places "as the President shall deem necessary for military posts." So that here was not only an express reservation of the land from sale, in the above section, but a reservation in fact was shown of more than thirty years, and a continued possession by the government.

Now, is there any similarity, as to the legal points, in the two cases? I can see none. It is true that *Mr. Justice* Barbour says: "We do not consider this law (the Act of 26th June, 1834) as applying at all to the case. That has relation to a sale of lands in the manner prescribed by general law at public auction, whilst the claim to the land in question is founded on a right of pre-emption, and governed by different laws. The very Act of the 19th of June, 1834, under which this claim is made, was passed but one week before the one of which we are now speaking; thus showing that the provisions of the one were not intended to have any effect upon the subject matter on which the other operated. But we go further, and say, that whensoever a tract of land shall have been once legally appropriated to any purpose, from that moment the land appropriated becomes severed from the mass of public lands; and that no subsequent law, or proclamation, or sale, would be construed to embrace it, or to operate upon it; although no reservation were made of it."

But one of the points above stated was necessary to a decision of the case. The tract in question was reserved for a military post; and such reserves, by the 4th section of the Act of 26th June, 1834, were excepted from the lands to be sold. Now, the reservation was fully proved by the evidence, and that, under the above section, ended the controversy. The remark that the above act had no application to the case, was correct in the sense only that it had no application to affect injuriously the title of the government; and that, it is presumed, was the sense in which it was used by the judge. It is strictly true, as stated, that the pre-emption right set up was assumed to be derived under a different law. But the statement that the above Act of 26th of June, 1834, could have no effect upon the Pre-emption Act which was passed on the 19th of the same month, was not in the case, was unauthorized, and is wholly unsustainable. It was not in the case, because the 4th section of the Act of the 26th did reserve the land. No court can deliberately say that an act, which is wholly repugnant to a preceding act, does not repeal it. And it can be of no importance whether the preceding act had been passed seven days or seven years before the last act; the effect is the same.

*There can be no doubt that when a [*805 tract of land is appropriated for a military post, or for any other permanent object, it becomes separated from the mass of the public lands, and need not be specially reserved in the President's proclamation for the sale of lands in the same district. And the illustration of *Mr. Justice* Barbour shows his meaning. "Thus, in the Act of 26th June, 1834," he says, "there is expressly reserved from sale the land granted to individuals and the State of Illinois." "If such lands were sold," says the judge, "could the purchasers hold them? Certainly they could not. Having been previously granted by the United States, the second grant would be void."

But what is the case now under consideration? There was no appropriation of the lead mines, of a permanent character, which separated them from the mass of the public lands. "They were reserved for the future disposal by the United States." And, as has been shown, the Act of the 26th June, 1834, authorized the President to sell them. This, then, if there be any meaning in language, was a disposal of them within the Act of 1807, by which they were reserved.

There seems to be an impression that pre-emption rights are without merit, and that the acts under which they arise should receive a strict construction. In my judgment, the acts granting these rights are remedial in their nature and policy, and should be so construed as to effectuate the intention of Congress. It is a right arising under the statute, and must, of course, be brought within it. But the policy of the statute was a benign one, and it was founded upon a meritorious consideration. That legislation which tends to make every citizen a freeholder cannot be unwise or impolitic.

This opinion has been submitted to *Mr. Justice* STORY, and *Mr. Justice* MCKINLEY, who have authorized me to say that it coincides with their own views on the subject.

HOWARD J.

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REPORTS

OF

CASES

ARGUED AND ADJUDGED IN

THE

Supreme Court of The United States,

IN JANUARY TERM, 1846.

BY BENJAMIN C. HOWARD,

Counselor at Law, and Reporter of the Decisions of the Supreme Court of the United States.

VOLUME IV.

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JUDGES

OF THE

SUPREME COURT OF THE UNITED STATES

DURING THE TIME OF THESE REPORTS.

The Hon. ROGER B. TANEY, *Chief Justice.*
The Hon. JOHN M'LEAN, *Associate Justice.*
The Hon. JAMES M. WAYNE, *Associate Justice.*
The Hon. JOHN CATRON, *Associate Justice.*
The Hon. JOHN M'KINLEY, *Associate Justice.*
The Hon. PETER V. DANIEL, *Associate Justice.*
The Hon. SAMUEL NELSON, *Associate Justice.*
The Hon. LEVI WOODBURY, *Associate Justice.*

JOHN Y. MASON, Esq., *Attorney-General.*
WILLIAM THOMAS CARROLL, Esq., *Clerk.*
BENJAMIN C. HOWARD, Esq., *Reporter.*
ALEXANDER HUNTER, Esq., *Marshal.*

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PROCEEDINGS OF COURT

HAD UPON THE

DEATH OF JUDGE STORY.

At the opening of the court this morning, Mr. Mason, the Attorney-General of the United States, addressed the court as follows:

"May it please your honors:

"Since your last term, the senior Associate Justice of this court has departed this life. At a meeting of the members of the bar and officers of the court, held on yesterday, resolutions were adopted expressive of their veneration for the memory of the deceased, and of their sense of the loss which has been sustained by the court, the profession, and the country. They have done me the honor to impose on me the melancholy task of communicating their proceedings to the bench.

"I am but too sensible of the disadvantages under which I labor, in acquitting myself in this presence of the duty thus confided to me. I had not the advantage of any intimate personal acquaintance with *Mr. Justice* Story. But he was known to me, as to every lover of an enlightened jurisprudence, and to every admirer of learning and purity in our magistracy, through the fame which he had honorably won, and the light which he had shed on all the various subjects of professional learning, in his opinions delivered from that bench, and the works which he published to the world.

"At the early age of thirty-two years, he was appointed an Associate Justice of this court. In thirty-four years of service in his high office, he acquitted himself of all his responsible duties with a dignity, integrity, and learning, which proved him worthy of this exalted judicial tribunal.

"He gave to the profession an example of successful industry above all price. It is wonderful that he should have accomplished so much; unfailing in his attendance here, participating largely in all the learned labors which bear so oppressively on this court, constant in the discharge of his judicial duties in one of the most important circuits in the Union, he found time to instruct, as a professor, large classes for many successive years, and to prepare and publish a greater number of learned legal works than any other author. Yet, in the midst of the severe and incessant studies which could alone produce such results, he was devoted to the enchanting delights of elegant literature, and was distinguished for his happy and cheerful domestic life, and his spirited social intercourse.

"The learning which he displayed as a jurist and author extended his fame to every country where an enlightened jurisprudence prevails; and the amiable and Christian character of the man has filled the whole community with grief at his death.

"But your honors, with whom he associated for a period so far beyond what falls to the lot of most of those who reach this elevated distinction, can best appreciate his character as a judge, and his virtues as a man, and will confirm the testimony of the gentlemen whose proceedings I now have the honor to present."

At a meeting of the members of the bar and officers of the Supreme Court of the United States, at the court room in the Capitol, on the 3d day of December, A. D. 1845, David B. Odgen, Esq., was appointed chairman, and the Hon. George M. Bibb, secretary.

The Hon. John Davis, the Hon. George Evans, and the Hon. R. C. Winthrop were appointed a committee to prepare resolutions expressive of the sentiments and feelings of the meeting on the melancholy event of the recent death of the Hon. Joseph Story, one of the Associate Justices of the Supreme Court of the United States.

Whereupon Mr. Davis, in behalf of the committee so appointed, presented the following preamble and resolutions, which were unanimously adopted by the meeting:

"Since the last annual session of the Supreme Court of the United States, one of its most distinguished members has fallen a victim to the lot of humanity. The earthly career of that able and faithful judge, Joseph Story, of Massachusetts, has terminated, and we trust that his exalted virtues will secure rest to his spirit among those who are made perfect.

"The bar has been deprived of one of its brightest ornaments, and the bench of one of its most learned and illustrious members. Those who have long witnessed the pure example, and venerated the talents, learning, and untiring zeal of the deceased, cannot permit an event so solemn and afflictive to pass unnoticed. Few men of any age or country have left behind them stronger proofs of great and successful labors in legal research, or higher claims to public respect and gratitude. He explored, with extraordinary powers of analysis, the learning of the past, employing and systematizing those great principles of jurisprudence which illustrate his decisions as a judge, and give imperishable value to his works as an author.

"As a magistrate, he aimed to win esteem and respect for the bench by the purity of his example, and to inspire confidence in its decisions by a prompt, just, enlightened, and faithful administration of the laws.

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"In the midst of the urgent duties of his high and responsible station, which were sufficient to task a more than ordinary mind, he found leisure to indulge his love of legal study, and produced a series of works which have taken rank among standard authorities, and will carry his fame to posterity as a jurist of great accomplishments.

"His decisions on the bench, as well as the productions of his pen, prove alike the earnest zeal with which his mental energies were applied to sustain the constitution and laws of the republic, and the conscientious rectitude with which he discharged the great and complicated duties which devolved upon him.

"While we feel just pride in the attainments of one so distinguished as a public officer and as an author, we cannot forget those extraordinary social qualities, and that amiable deportment in private life, which endeared him to his friends and acquaintance. If in his high public station he commanded the esteem and confidence of the public, in the ordinary duties of life he won and retained the respect and love of all who were connected with him in the varied relations in which he stood to the community.

"When so pure and so illustrious a man descends to the tomb, while his usefulness is unimpaired and his work unfinished, the calamity is the more severely felt, and the occasion is a fit one for his bereaved friends and the public to give utterance to their grief, and to testify their veneration and respect for the memory of the deceased.

"Therefore, Resolved, 1. That we hold in the highest estimation the learning, the integrity, the distinguished services, and the exalted virtues of the late *Judge* Story, and deeply deplore the loss which the bench and the country have sustained by the death of one so eminently qualified for the high station which he filled.

"2. That we sympathize with his bereaved family in their affliction, who mourn the loss of an affectionate husband, a kind parent, and a good citizen.

"3. That from respect to the memory of him who has filled so large a space in the affairs of the country, we will, during the present session of the court, wear the usual badge of mourning.

"4. That these resolutions be communicated to the court by the Attorney-General, with a request that they may be entered upon the records, and further, that they be communicated to the family of the deceased by the chairman of this meeting.

"DAVID B. OGDEN, Chairman.
"GEO. M. BIBB, Secretary."

To which Mr. Chief Justice replied:

"It is difficult for me to express how deeply the court feel the death of *Mr. Justice* Story. He held a seat on this bench for so many years, and was so eminently distinguished for his great learning and ability, that his name had become habitually associated with the Supreme Court, not only in the mind of those more immediately connected with the administration of justice, but in that of the public generally throughout the Union. He had, indeed, all the qualities of a great judge; and we are fully sensible that his labors and his name have contributed largely to inspire confidence in the opinions of this court, and to give weight and authority to its decisions.

"It is not, however, in this country only, that the name of *Justice* Story is respected and honored. His works upon various branches of jurisprudence have made him known to eminent men wherever judicial knowledge is esteemed and cultivated; and wherever he is known, his opinions are quoted with respect, and he is justly regarded as one of the brightest ornaments of the age in which he lived. But it is here on this bench that his real worth was best understood, and it is here that his loss is most severely and painfully felt. For we have not only known him as a learned and able associate in the labors of the court, but he was also endeared to us as a man, by his kindness of heart, his frankness, and his high and pure integrity. We most truly and deeply deplore his death, and cordially unite with the bar in paying appropriate honors to his memory.

"The proceedings of to-day will therefore be entered on the records of the court, as a lasting testimony of our respectful and affectionate remembrance of our departed brother."

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ORDER OF COURT.

There having been an Associate Justice of this court appointed since its last session, it is ordered that the following allotment be made of the Chief Justice and the Associate Justices of said court among the circuits, agreeably to the act of Congress in such case made and provided; and that such allotment be entered of record, viz.:

For the 1st circuit, the Hon. LEVI WOODBURY.
For the 2d circuit, the Hon. SAMUEL NELSON.
For the 3d circuit, the Hon. ——— ———
For the 4th circuit, the Hon. ROGER B. TANEY, *Ch. J.*
For the 5th circuit, the Hon. JOHN MCKINLEY.
For the 6th circuit, the Hon. JAMES M. WAYNE.
For the 7th circuit, the Hon. JOHN MCLEAN.
For the 8th circuit, the Hon. JOHN CATRON.
For the 9th circuit, the Hon. PETER V. DANIEL.

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THE DECISIONS

OF THE

Supreme Court of the United States,

AT

JANUARY TERM, 1846.

1*] *WILLIAM M. GWINN, Marshal,
Plaintiff in Error,
v.
BUCHANAN, HAGAN & CO., for the use of WILLIAM HOLLIDAY & Co.

Marshal, when not liable for deputy's disobedience to plaintiff's instructions.

A plaintiff has a right to direct a deputy-marshal to receive a certain description of money in satisfaction of an execution.

But the deputy-marshal then acts as agent of the plaintiff, and not as agent of the marshal.

If, therefore, the plaintiff, when he does this, gives to the deputy-marshal other instructions, which are disobeyed, the marshal himself is not responsible, but the plaintiff must look to the deputy.

THIS case was brought up by writ of error from the Circuit Court of the United States for the District of Mississippi.

A judgment was obtained in that court at May Term, 1839, by the defendants in error against Ephriam Gwinn and James Ballance, for the sum of $2,679.88, with interest at the rate of eight per cent., from the 27th of May, 1839, until paid, and costs.

An execution was sued out upon this judgment on the 25th of June, 1839, and property of the defendants levied upon to the amount due on the execution, which property was suffered to remain in their possession, according to a law of that State, upon their executing a forthcoming bond with sufficient security. This bond was returned by William M. Gwinn, the marshal, at the next term (November Term, 1839), "forfeited," whereby the said bond, according to the laws of Mississippi, had the force and effect of a judgment against the defendants in the original judgment, and their securities in the said bond.

Upon this last mentioned judgment, another *fi. fa.* was issued on the 19th of December, 1839, returnable to the next term of the court, to be held on the first Monday of May, 1840. This *fi. fa.* came to the hands of the marshal (the plaintiff in error), and was placed by him in the hands of T. M. Ferguson, one of his 2*] deputies, *to be executed. At the May Term the following return was made:

"Satisfied in full on the third day of April, 1840. W. M. GWINN, Marshal,
"Per T. M. FERGUSON, Deputy-Marshal."

The money was thereupon demanded of the marshal by the attorney for the plaintiffs (who are the present defendants in error), and upon this demand the marshal tendered to him the amount in the following funds: A treasury note of the United States for one thousand dollars, and the balance in post notes of the Mississippi Union Bank, due in May and April, 1840, with fifteen per cent. added for exchange. These funds were refused by the plaintiffs' attorney, who thereupon moved the court for a judgment against W. M. Gwinn, the marshal, for the amount due on the said execution, upon the ground that the money had been collected by the marshal and not paid over on demand.

It appeared, on the hearing of the motion, that the following letter had been addressed by the plaintiffs' attorney to Ferguson, the deputy-marshal, while the execution was in his hands:

"March 23d, 1840.

"DEAR SIR: In the case of *Buchanan, Hagan & Co., use of William Holliday & Co.*, v. *Gwinn & Ballance*, we are authorized to receive one thousand dollars in United States Treasury notes, and the balance in post of the Union Bank, maturing May and April, 1840, adding on the post notes fifteen per cent. for exchange. This was what Mr. Gwinn proposed to us, and the plaintiff directs us to accede to the proposition, provided the payment be made to us without delay, in order that the funds may be remitted before any further depreciation shall occur. You will please communicate this to the parties at the earliest moment.

"Very respectfully your ob't servants,
"HARRISON & HOLT."

It appeared, also, that the money had been collected by the deputy-marshal on the 3d of April, 1840, in the funds mentioned in the said letter, and tendered to the attorney at May Term, 1840, when he made the demand above mentioned; that the deputy-marshal did not notify the plaintiffs, or their attorney, of the receipt of the money, and that no demand for it was made previous to the term at which the execution was returnable, before which time the bank notes had suddenly and greatly depreciated; and that Gwinn, the marshal, knew nothing of the instructions given by the plaintiffs' attorney, nor of the collection of the money, until the meeting of the court.

Upon this evidence, the Circuit Court gave

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3*] judgment against *William M. Gwinn, the marshal, for the amount of the debt, interest, and costs due upon the judgment of the forthcoming bond. An exception was taken to this opinion of the court, and the present writ of error brought by the marshal upon this judgment against him.

The case was argued by the Attorney-General, for the plaintiff in error. No counsel appeared for the defendants.

Mr. Chief Justice TANEY delivered the opinion of the court:

As a general principle, it is undoubtedly true that the marshal is responsible for the acts of his deputy in the execution of process; and if the deputy had taken the funds mentioned in the testimony without any orders from the plaintiffs, or their attorney, and returned the execution satisfied, the plaintiffs would not have been bound to accept these funds in discharge of their judgment, and might have insisted on the full amount from the marshal in gold and silver.

But it is clear that the plaintiffs had a right to accept in payment of their execution whatever they thought proper. The deputy-marshal was bound to obey their directions upon that subject; and neither the deputy nor the marshal can be held responsible to the plaintiffs for any loss they may sustain by reason of an act done in pursuance of their own instructions.

But the plaintiffs seem to suppose that the authority given to the deputy was not pursued, and that the payment of the money to them without delay was a condition annexed to the authority, which had been disregarded by the deputy. But however this may be, as between him and the plaintiffs, the act or omission of the deputy in that respect cannot make the marshal himself liable. Gwinn knew nothing of the directions given by the plaintiffs' attorney. So far as Ferguson was acting as deputy-marshal, he had no right to receive, in payment of the debt, anything but gold and silver. He had no authority from the marshal to take anything else. But when the plaintiffs interfered, and directed him to receive the funds above mentioned, he was, in receiving such funds, not acting under the authority of the marshal as his deputy, but as agent of the plaintiffs. And if, in executing the power they gave him, he disobeyed their instructions, they must look to him, and not to the marshal, who knew nothing of these instructions, had no concern with them, and who cannot, therefore, upon principles of law or equity be held responsible for the manner in which they were executed.

The judgment of the Circuit Court must therefore be reversed, with costs.

4*] *JAMES BROWN, *Plaintiff in Error*,
v.
JOHN CLARKE, *Defendant.*

Mississippi law—lien of judgments under—forthcoming bond on execution and levy—quashing bond—conflicting executions between federal and State courts, first actual seizure gives priority—bills of exception, mode of taking.

By the law of Mississippi, a judgment is a lien upon personal as well as real estate from the time of its rendition.

Where there has been a judgment, an execution levied upon personal property, and a forthcoming bond, the property levied upon is released by the bond, and the lien of the judgment destroyed.

If, therefore, after this, another judgment be entered against the original defendant, this second judgment is a lien upon the property which has been released by the bond.

The lien thus acquired by the second judgment is not destroyed by subsequently quashing the forthcoming bond. The effect of such quashing is not to revive the first judgment, and thus restore the lien which was superseded by the execution of the bond.

If the forthcoming bond had been shown to have been void *ab initio*, the result would be different.

In cases of conflicting executions issued out of the federal and State courts, a priority is given to that under which there is an actual seizure of the property first.

The mode in which bills of exceptions ought to be taken, as explained in Walton v. The United States (9 Wheat., 651), and in 4 Peters, 102, will be strictly adhered to by this court.

THIS was a writ of error to the District Court of the United States for the Northern District of Mississippi, to bring up for review certain instructions delivered to the jury in an action of trover, brought by the defendant in error against the plaintiff in error, and in which the plaintiff below obtained the verdict.

The case was this: Brown, the defendant below, obtained a judgment of $8,640.37, by confession, against one Haywood Cozart, in the Circuit Court of Lafayette County, Mississippi, which was docketed on the 18th of May, 1840. Upon which execution was issued on the 8th, and delivered to the sheriff on the 20th of June following, and a levy made the same day on several slaves, the property of the defendant on the execution. A forthcoming bond was given by the defendant, with H. M. Cozart as surety, and which was approved of by Brown, the plaintiff.

This bond is in the penalty of double the amount of the judgment, made payable to the plaintiff in the execution, and conditioned well and truly to deliver the property levied on to the sheriff on the 17th of August (then) next, the day of sale, at a certain place, to be sold to satisfy the judgment, unless the same should be previously paid.

Clarke, the defendant in error, recovered a judgment of $2,117.31 against the same Haywood Cozart, in the District Court of the United States for the Northern District of Mississippi, at the June Term of said court, 1840; upon which an execution was issued to the marshal of the district, and a levy made, on the 9th of November following, upon six of the slaves in the possession of Cozart, and which had been before levied on under Brown's execution. They were sold by the marshal on the 7th December thereafter, and purchased in by Clarke, the plaintiff, the highest bidder.

*The sheriff returned upon the execu- [*5
tion in the case of *Brown* v. *Cozart*, and upon the forthcoming bond, that the property was not delivered in pursuance of the condition, nor the money paid; and that it was therefore forfeited. And Brown, at the November Term

NOTE.—*As to exceptions, and what particularity in is necessary in order to a review in appellate court; and that general exception or objection is not sufficient*, see note to Moore v. Bank of Metropolis, 13 Pet., 302.

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of the Circuit Court of Lafayette County, at which the execution was returnable, made a motion to the court to quash the bond, which was granted accordingly; the ground of the motion is not stated. And on the same day, the 23d of November, 1840, he sued out an *alias fieri facias* on the original judgment, returnable at the next term of said court.

To this execution the sheriff returned that he had levied upon six slaves, naming them, in the hands of the marshal of the Northern District of Mississippi, and also on other property which it is not material to notice. And further, that after the sale of the slaves by the marshal, he was indemnified by Brown, and required to make a levy upon them on the 7th of December, 1840, and that, on the 4th of January following, he sold them, by virtue of the execution, to Brown, the highest bidder.

It further appeared, that, at the time the marshal levied on the slaves, the 9th of November, 1840, Cozart had some fifteen or eighteen other slaves in his possession; that the marshal took those levied on into his custody, and on the sale under the execution delivered them to Clarke, the purchaser; and that they were afterwards taken out of his possession by the sheriff, under his execution, by the direction of Brown; that Hiram M. Cozart, the surety in the forthcoming bond, was a brother of Haywood Cozart, was a man of but little property, and lived with his brother, some six miles distant from Brown; and that after the levy by the marshal, and before the sale, the two Cozarts left the State of Mississippi for Texas, and carried away with them the fifteen or eighteen slaves not levied on by this officer.

When the testimony closed, the counsel for the plaintiff, Clarke, requested the court to give the following instructions to the jury, namely: That if they believed the marshal made lawful levy on the property in dispute, the sale under his execution was valid, and vested in the purchaser a good title against other executions, whether founded on judgments of the State or federal courts; and that, if they believed that the sheriff levied his execution on the slaves and took a forthcoming bond, which was afterwards forfeited, the same was a satisfaction of the original judgment, and the subsequent quashing of the same did not affect the rights of the plaintiff, acquired by virtue of the marshal's levy after such forfeiture of the bond; and also, if they believed that the sheriff, after his levy, took a forthcoming bond, which was afterwards forfeited, and that the slaves therein named remained in the possession of the defendant Cozart, the levy of the marshal, made after the forfeiture of said bond, and sale in 6*] pursuance thereof, were *valid, notwithstanding the bond was quashed before the sale, but after the levy. And, further, if the jury believed that the defendant (Brown) agreed to approve of the surety on the forthcoming bond, and thereby permitted the slaves to remain in the possession of the said Cozart, the subsequent quashing of the bond upon his own motion did not place him in any better situation than if he had not issued an execution on the judgment. And, also, if they believed the approval of the bond by Brown was with a view to allow Cozart to remain in possession of said slaves, and to keep off and delay other creditors, then they should find for the plaintiff; and, also, if they believed the conduct of Brown was fraudulent in obtaining proceedings on his judgment, then they should find for the plaintiff. All which instructions were objected to by the defendant's counsel; but the objection was overruled by the court, and the instructions given.

The counsel for the defendant proposed the following instructions, namely: That, if the jury believed from the evidence, the defendant (Brown) obtained a prior judgment in the Circuit Court of Lafayette County to the judgment obtained by the plaintiff (Clarke) in the District Court of the United States, Brown thereby obtained a prior lien upon Cozart's property for the satisfaction of his judgment, and that said lien could only be defeated and postponed by some act of Brown fraudulent in law; that the taking of the forthcoming bond by the sheriff, and the quashing of the same, were not acts deemed fraudulent in law; that the levy and sale of the slaves of Cozart by the marshal, by virtue of an execution on a junior judgment, was subject to the lien of the prior judgment, and communicated no title to the purchaser paramount to the lien of the prior judgment; that the forfeiture of a forthcoming bond, which is quashed for want of conformity to the statute, is not such an one as has the force and effect of a judgment, because not in conformity to the statute. Which instructions were objected to by the counsel for the plaintiff, and were refused by the court.

The record adds, the jury returned a verdict for the plaintiff, and the defendant moved the court to set it aside and grant a new trial, which motion was overruled. To all which the defendant excepts, and tenders this his bill of exceptions, which he prays may be signed and sealed by the court.

The case was argued by *Mr. Chalmers* and *Mr. Johnson* for the plaintiff in error, and *Mr. Mason* and *Mr. Milton Brown* for the defendant. Of these arguments, the reporter has no notes except of *Mr. Brown's*.

Mr. Brown.

John Clarke, the defendant in error, brought his action of trover *against James Brown, [*7 the plaintiff in error, for five slaves, in the District Court of the United States for the Northern District of Mississippi. At the December Term, 1841, of said court, a verdict was rendered for $3,225, the value of the slaves, and judgment entered accordingly for the amount of the verdict and costs. No exception appears of record to have been taken or filed to the opinion of the court during the progress of the trial. After the verdict and judgment, Brown, by his counsel, moved the court to set aside the verdict and grant a new trial. The court, on argument, overruled the motion. The entry of this proceeding of record is as follows:

"This day came the parties, by their attorneys, and then came on to be heard defendant's motion for a new trial; and, after argument, as well in support of as against said motion, it is considered by the court that the same be overruled; to which decision of the court overruling said motion, the defendant, by attorney, excepts, and tenders his bill of exceptions, which is signed and sealed by the court,

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and ordered to be made part of the record in this cause."

On this alleged error of the court, in refusing to grant a new trial, this writ of error has been sued out. That the refusal to grant a new trial is no ground for a writ of error is the well settled doctrine of this court. (3 Peters's Dig., 106; *Barr* v. *Gratz*, 4 Wheat., 213; 4 Cond. Rep., 430; *United States* v. *Daniel*, 6 Wheat., 542; 5 Cond. Rep., 179.)

What in this cause purports to be a bill of exceptions is founded on and follows the overruling the motion for a new trial, and was, as appears on its face, drawn up and signed, not only after the trial, but after the motion for a new trial was disposed of. It contains nothing that can be reviewed by this court. It contains a mere statement of facts given in evidence, and the charge of the court to the jury, not made matters of record, but only retained in the memory of the judge, and recalled to regulate the discretion of the court in granting or refusing a new trial. (*Inglee* v. *Coolidge*, 2 Wheat., 363.)

A bill of exceptions, to be the foundation of a writ of error, can only be for matters excepted to at the trial, and must appear of record to have been actually reduced to form, and signed pending the trial; and if, as in this case, it appear to have been drawn up and signed after verdict, it will be fatal. (*Walton* v. *The United States*, 9 Wheat., 651; 5 Cond. Rep., 717.) And although it may in some cases be the practice for the court to note exceptions at the trial, and reduce them to form and sign them afterwards, yet, in the language of the court in the case of *Walton* v. *The United States* (above cited), "In all such cases the bill of exceptions is signed *nunc pro tunc;* and it purports, on its face, to be the same as if actually reduced to form and 8*] signed *pending the trial. And it would be a fatal error if it were to appear otherwise; for the original authority under which bills of exceptions are allowed has always been considered to be restricted to matters of exception taken pending the trial, and ascertained before verdict."

Even if exceptions had been taken at the trial and signed, the motion for a new trial would have been a waiver of them. (*Cunningham* v. *Bell*, 5 Mason's C. C. Rep., 161.) In that case, *Mr. Justice* Story said: "The motion for a new trial cannot be entertained, according to the practice of the court, unless the bill of exceptions is waived. The party has his election, either to proceed on the writ of error to the Supreme Court, in order to have it determined there whether the points were correctly ruled at the trial; or, waiving that remedy, to apply here for a new trial. But he cannot be permitted to proceed both ways."

It is believed that the authorities referred to show conclusively that the writ of error in this case cannot be sustained. But should the court rule otherwise, and consider the matters contained in the bill of exceptions entitled to further examination, then the following statement of the case, in behalf of the defendant in error, is presented.

Clarke, the defendant in error, brought a suit against one Haywood Cozart in the District Court of the United States for the Northern District of Mississippi, and at the June Term, 1840, obtained a judgment. Cozart, in May, 1840, during the pendency of Clarke's suit, confessed a judgment for a large amount in the Circuit Court of Mississippi for Lafayette County, in favor of James Brown, the plaintiff in error. Executions, in due time, issued on both these judgments, and went into the hands of the proper officer of each court. Brown's execution was levied by the sheriff on twenty-two slaves, and the sheriff took a forthcoming or delivery bond, with surety from Cozart. The surety was approved by Brown himself. The bond required the delivery of the slaves in August, 1840. They were not delivered, and the bond, under the statutes of Mississippi, was returned forfeited, having in itself the force of a judgment, and entirely extinguishing the original judgment.

On the 9th of November, 1840, after this forfeiture of the delivery bond, the marshal levied Clarke's execution on five of the slaves previously levied on by the sheriff, and sold them, Clarke becoming the purchaser. On the 23d of November, 1840, Brown, by his own motion, procured the delivery bond from Cozart, taken on his own execution, and by his own express consent, to be quashed, with a view of reviving the lien of his original judgment, and overreaching that under which the sale of the five slaves to Clarke had been made. Brown then issued an *alias fieri facias* on his original judgment, and seized upon the five slaves *purchased by and in the posses- [*9 sion of Clarke, and had them again sold, he himself becoming the purchaser. Clarke brought his action of trover against Brown for the slaves taken out of his possession, and recovered judgment; to reverse which, this writ of error is sued out.

Was Clarke's title to the slaves in question complete by virtue of the sale to him by the marshal? That the sale was in all things regular is not denied; but it is contended that Brown's judgment against Cozart, in May, 1840, gave him a prior lien on the property of Cozart, which overreached Clarke's judgment in June, 1840.

In Mississippi, by the Act of 1824, a lien on all the property of the defendant commences with the date of the judgment. Brown, therefore (aside from the circumstances under which his judgment was obtained), had a lien commencing with his judgment of May, 1840. But this priority was lost, both by operation of law and his own act. An execution issued, a levy was made, and a forthcoming or delivery bond taken, which, in August, 1840, was forfeited. The bond, after forfeiture, at once, and without further action on it, has the force and effect of a judgment. The statute enacts, "that any bond which shall be forfeited shall have the force and effect of a judgment, and execution may issue thereon against all the obligors thereon." (How. & Hul. Dig., 653.) By the uniform decisions of the Court of Appeals of Mississippi, under this statute, the forfeiture of a forthcoming bond creates a new judgment, in which the original judgment is merged and extinguished. In an early case on the subject, this language is employed by the court: "The forthcoming bond, after forfeiture, becomes, by operation of law, a judgment; and as the law will not permit two

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judgments to exist at the same time against the same person for the same debt, this judgment, by operation of law, necessarily extinguishes the former." (*Clark* v. *Anderson*, 2 How. Rep., 858.) In a very recent case it is said, "The original judgment, after the forfeiture of the bond, is no longer in existence." (*Burns* v. *Stanton*, 2 Sme. & Mar., 461.) The lien of the first judgment ceases, and a new and more comprehensive lien arises upon this statutory judgment, embracing the property of both principal and sureties in the forthcoming bond. And no action of the court on the forfeited bond is necessary; as soon as the bond is forfeited, the old judgment is extinguished, and a new lien attaches. (*Lancashire* v. *Minor*, 4 How. Rep., 351; *Lusk* v. *Ramsey*, 3 Mun., 434.)

Brown's original judgment, therefore, was extinguished, and his lien rested on his statutory judgment of August, 1840. This the law designed to be ample, by requiring ample security on the bond. If it was in fact not ample, it was because of Brown's own act in directing the sheriff to take security, which he, 10*] without *such directions, would not have taken, and which Brown knew was not responsible.

In this posture of things, Clarke's lien, under his judgment of June, 1840, took precedence, and was entitled to prior satisfaction. While thus clearly entitled to precedence and priority, Clarke's execution was levied and the property sold, which Clarke purchased. Standing on this state of the case, it would be scarcely possible to doubt Clarke's complete title.

But now comes a new point in the cause. Cozart, and his brother, who was irresponsible, but who had been taken as security in the bond by Brown's directions, gathered what property they could, and both put out to Texas. Clarke, by his diligence, had saved the five slaves in question. It became important, therefore, for Brown to get clear of his new judgment, and get back to his old one. Accordingly, he moved the court to quash the delivery bond, which was done; on what ground does not appear. And it is believed no good ground existed; and that, if this new state of things had not arisen, no such motion would have been made.

And now comes the question, what was the effect of quashing this bond? Its effect, as between the parties themselves, was to restore Brown to all his rights under his original judgment of May, 1840, without regard to his subsequent statutory judgment. But not so when the rights of third persons intervened. Clarke was no party to that proceeding, nor was he, or could he be, heard on the motion to quash the bond. Had he been a party, and been heard on the question, it is believed he could have successfully resisted the motion. His rights, therefore, cannot be effected by the proceeding. So far as his rights are concerned, they stand as though such motion had never been made or decided.

If Clarke's rights are to be affected, it can only be upon the doctrine of relation; that the new judgment having been quashed, the old lien by relation was revived, to operate from the rendition of the first judgment. But it is a cardinal principle of the doctrine of relation, that it can never be extended to the prejudice of the rights of third persons. It leaves them as it finds them. (*Heath* v. *Ross*, 12 Johns., 140; *Jackson* v. *Bard*, 4 Johns., 230.) Then, although this proceeding restored Brown to his rights against Cozart, it cannot operate to devest the intermediate rights of Clarke, acquired without wrong on his part. This view does not in the slightest degree conflict with the cases of *Andrews* v. *Doe, ex dem. Wilkes* (6 How., 554), and *Commercial Bank of Manchester* v. *Coroner of Yazoo County* (6 How., 530). These cases relate to valid subsisting liens, not altered or affected by any circumstances subsequent to the rendition of the judgment.

Brown's priorty of lien was not only lost by the extinguishment of his original judgment by the forfeiture of the forthcoming bond, but it *was also lost by his own act. The lien [*11 of a judgment is a mere security, conferring no *jus in rem*, and which may be voluntarily abandoned, either expressly or by implication; and when so abandoned, the property becomes freed from its influence, and subject to all the general incidents of other property.

The sheriff, it would seem, on making the levy, was not willing to let Cozart retain the property upon the faith of the security offered. It was his duty, therefore, to take the property into possession until sufficient security was offered. Brown, however, stepped forward, approved and accepted the surety, which he knew to be insufficient, relying on Cozart's good faith rather than on the forthcoming bond, and discharged the sheriff from the responsibility of taking insufficient security. By this act he placed it in the power of Cozart to do what he afterwards did do—run his property out of the country, leaving his creditors to suffer.

Brown, by voluntarily waiving his right to a good and sufficient surety to the forthcoming bond, and leaving the property in possession of Cozart, and by voluntarily suspending his right to proceed on his judgment and execution, lost the priority of lien which the law gave him; and which, being once gone by his own voluntary act, cannot be regained. The principle here contended for is analogous to that under which a surety may be discharged under an ordinary contract. If the creditor, without the consent of the surety, puts it out of his power to proceed for even a single day against the principal debtor, the surety is discharged. So, by parity of reasoning, if a judgment creditor suspend his right to enforce his lien but for a day by his voluntary act, his priority over other judgment creditors is gone.

The jury was also well authorized to find in favor of Clarke, on account of the course pursued by Brown in regard to his execution. It is to be observed that the judgment was obtained by confession, just before the setting of the court which rendered Clarke's judgment. Cozart was the neighbor of Brown; his brother, the surety in the delivery bond, lived with him; he was poor, and wholly insufficient as surety for such an amount. With a knowledge of all this, Brown accepted him as surety in the bond, indorsed his approval upon it, thereby discharging the sheriff from responsibility for taking insufficient security, and permitted the negroes to remain in custody of Cozart. They so re-

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mained until the marshal levied the execution of Clarke, when both Cozarts absconded, and carried off the remaining slaves, enough, or nearly enough, to have satisfied Brown's execution. From these facts and circumstances, the jury were well warranted in concluding that the judgment was confessed, with the understanding that Cozart was to remain in possession of his slaves, on giving his brother as surety; that this was intended to keep off other creditors; and that, finding it did not have the desired 12*] effect, he *absconded to Texas. Such conduct was calculated to hinder other creditors, and was fraudulent and void as to Clarke, the present defendant in error.

In conclusion, the defendant in error, by his counsel, contends, that upon the whole case it appears that substantial justice has been attained, and that the judgment should be affirmed.

Mr. Justice NELSON delivered the opinion of the court:

By the law of the State of Mississippi, a judgment is a lien upon the personal as well as real property of the defendant, from the time of its rendition (*Smith et al.* v. *Everly et al.*, 4 How., 178; *Commercial Bank of Manchester* v. *Coroner of Yazoo County*, 6 How., 350); and if the first judgment obtained by Brown against Cozart could be upheld against the objections taken to it, there is no doubt, according to the law of Mississippi, that the instructions given by the court below to the jury were erroneous. That judgment was docketed on the 18th of May, 1840, whereas Clarke's was not recovered till the 16th of June following.

It is insisted, however, that the seizure of the property of the defendant by the sheriff, under the first judgment, and discharge of it on the execution and delivery of the forthcoming bond, operated to extinguish the lien, and let in that of the junior judgment of Clarke, so as to give it the preference. This raises the principal question discussed in the case.

By the Act of 1827 (Laws of Miss., p. 123, sec. 2), the sheriff or other officer is required, upon the levy of an execution upon personal property, to take a bond, if tendered, with sufficient security, from the debtor, payable to the creditors, reciting the service of such execution, and the amount due thereon, in a penalty of double the amount of such execution, with condition to have the property levied on forthcoming at the day of sale; and if the owners of such property or the defendant in the execution shall fail to deliver the same according to the condition of the bond, such sheriff or other officer shall return the bond so forfeited, with the execution, to the court from which the same issued, on the return day thereof; and every bond so forfeited shall have the force and effect of a judgment, and execution shall issue against all the obligors thereon, &c.

Under this statute, it appears to have been uniformly held in the courts of Mississippi, that the bond thus given to the creditor on the seizure of the goods was intended as a substituted security for the lien acquired by the judgment and seizure; and consequently, on its execution and delivery, the goods, by operation of law, are released from all charge, and left in the possession of the debtors as free and unencumbered as before it attached; and if the property is not delivered, in pursuance of the condition, the remedy is then upon the bond, which on the breach or forfeiture becomes, by *opera- [*13 tion of the statute, a statutory judgment against the defendant and sureties from that time, followed by a new lien upon the real and personal estate of all the obligors. The original judgment is merged and satisfied by the new and more comprehensive statutory judgment upon the bond, and the remedy of the creditors limited to the enforcement of this judgment.

This is, in substance, the view of the statute as expounded by the courts of Mississippi in several cases, and particularly in the case of *The Bank of the United States* v. *Patton et al.* (5 How., 200) in the Court of Appeals, which was argued twice, and very fully considered by the court. (*Stewart* v. *Fuqua*, Walk. R., 175; *Witherspoon* v. *Spring*, 3 How., 60; *Archibald et al.* v. *Anderson*, 2 How., 853; *King* v. *Terry*, 6 How., 518; *Minor* v. *Lancashire*, 4 How., 347.) In the case of *The Bank of the United States* v. *Patton*, the court, speaking of what would have been the effect of the forthcoming bond, if the statute had not annexed to it the force of a judgment, say: "As it releases the levy, and restores the property to the debtor, it is tantamount to a satisfaction of the execution, and the creditor would be left to pursue his remedy upon the bond."

The court then liken it to the replevin bond in Virginia, which had been held to be a substitute for the original judgment, and operated as a satisfaction; and add: "It was no doubt in view of this principle, that the framers of our statute saw proper to relieve the creditors from the delay and expense of a second suit upon the bond, by giving to it after forfeiture the force of a judgment against all the obligors therein, with a consequent right to have execution on the same; and also to provide that no security should be taken on the execution which is sued out upon the new judgment."

It will be seen, therefore, that the forthcoming bond and statutory judgment consequent upon the forfeiture, in its operation and effect, reversed the original position of these parties in respect to the priority of lien under their respective judgments, and gave to Clarke, the plaintiff below, the preference, his judgment having been docketed the 16th of June, and the new judgment of Brown not taking effect till the 17th of August, the date of the forfeiture of the bond. (*Minor* v. *Lancashire*.)

If the case stood upon this footing, it is very plain that Clarke, the purchaser under the sale of the marshal, acquired the better title to the property in question, and that the instructions were in conformity to the law of the case.

It is contended, however, that the quashing of the forthcoming bond, and consequently the new statutory judgment, operated to revive the original one, and to restore the priority of lien, the same as it stood before any of the proceedings on that judgment had intervened.

*We do not assent to this view of the [*14 effect of the order vacating the new judgment, so far, at least, as respects the liens or rights of third parties which have legally attached in the mean time to the goods of the defendant, discharged from the original judgment by the giving of the forthcoming bond. After that

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lien was suspended or discharged, the original judgment being, in contemplation of law, satisfied by the new and substituted security, the debtor was at liberty to deal with the property as his own, and it remained in his possession, subject to any charge or lien impressed upon it either by the act of the party or by operation of law, the same, after the forthcoming bond, as before the entry of the original judgment. Possibly, as between the parties the judgment revived, but it would be against principle, and work manifest injustice, to give to it this retrospective operation, so as to extinguish the intermediately acquired legal rights of third persons. We deny to it this effect.

It would be otherwise if the forthcoming bond had been shown to be void, as it might then be treated as a nullity, and as affording no foundation for the statutory judgment consequent upon the forfeiture. Under such circumstances, the lien of the original judgment would remain unaffected, and might be enforced by execution; it would then, of course, continue uninterrupted by the lien of any subsequent judgment entered up against the defendant.

This view of the statute was taken by the court of Mississippi, in *Carleton et al. v. Osgood et al.* (6 How., 285).

But no such ground is presented in the record before us; nor did it exist in point of fact in the case. On the contrary, the forthcoming bond was in conformity to the statute, and the only reason for the action of the court in quashing the proceedings, for aught that appears or has been shown, was either that the tribunal conceded to the plaintiff the right to vacate his own judgment at his election, and thus voluntarily give up all the rights acquired under it, or that the surety was irresponsible, which latter ground would probably have been unavailing had the fact appeared before the court, that Brown himself, with full knowledge of all the circumstances, approved of the sufficiency of the security.

At all events, it is enough to sustain the ground upon which we have placed the priority of lien upon the property, that, for aught appearing in the case, the new judgment of Brown upon the forthcoming bond was regular, and existed in full force and effect until set aside and vacated on his own motion. For, if so, it is clear, upon the statute and decisions of the courts of Mississippi, that the lien of his original judgment against Cozart became thereby lost and postponed, so as to let in that of the junior judgment of Clarke, and consequently the sale of the marshal, by virtue of the execution under it, vested in the purchaser the better title.

We have thus far examined this case upon 15*] the law of Mississippi *where the cause of action arose, as we understand it to have been expounded and applied by the courts of that State.

Another view may be taken, leaving out of consideration the priority of lien as acquired under the judgments of the respective parties, and looking solely to priority as acquired by virtue of an actual seizure of the property under execution, regarding that as the test in cases where the conflicting executions issued out of the federal and State courts, and to the executive officers of the different jurisdictions. (*Hagan v. Lucas*, 10 Peters, 400.) In this aspect of the case, the legal result is equally decisive in favor of the right of the plaintiff below.

If we have not misapprehended the rule of law prevailing in Mississippi in the view already taken, the right to the property acquired under the seizure of the first execution of Brown became extinguished by the operation and effect of the forthcoming bond. No title, therefore, can be set up by virtue of that seizure.

The case, then as it respects the right depending upon priority of actual seizure and legal custody of the property, instead of priority of judgment, stands thus: The marshal levied upon the slaves on the 9th of November; the sheriff not till the 7th of December following. The former, therefore, under the law giving effect to the first seizure, was entitled to the property, and of course the purchaser at his call acquired the better title.

In every view we have been able to take of the case, we are satisfied the judgment of the District Court was right, and should be affirmed.

The court have had some difficulty in noticing the exceptions taken to the instructions in this case, in the form in which they are presented upon the record. It is matter of doubt whether they point to the instructions given and refused to the jury, or the refusal of the court below to grant a new trial. If to the latter, no question is presented upon which error would lie, according to the repeated decisions of this court. (4 Wheat., 213; 6 Wheat., 542.)

The counsel were probably misled, in making up the record, by the practice in Mississippi, where error will lie to the appellate court for a refusal to grant a new trial by statute. (Laws of Miss., p. 493, sec. 53.) But the rule is otherwise in the federal courts. That State has also a statute providing for the case of exceptions to be taken in the progress of the trial in the usual form (p. 620, sec. 40), which is the form that should have been observed in this case. The practice is particularly stated and explained in *Walton* v. *The United States* (9 Wheat., 651), and in several later cases. (4 Peters, 102.)

The practice is well settled and exceedingly plain and simple, and will be strictly adhered to by the court.

Cited--13 How., 167; 16 How., 29; 1 Wall., 371, 598; 20 Wall., 418; 3 Wood. & M., 225; 1 Biss., 9, 270; 2 Curt., 415; 11 Bank. Reg., 232.

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*THE TOMBIGBEE RAILROAD COMPANY v. WILLIAM H. KNEELAND. [*16

Alabama, contract made in, by agents of corporation created by another State, valid.

A corporation, created by the laws of another State, can sue in Alabama upon a contract made in that State.

The decision of this court in 13 Peters, 519, reviewed and confirmed.

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THIS case was brought up by writ of error to the District Court of the United States for the Middle District of Alabama.

It was an action of *assumpsit* on a promissory note made by the defendant to the plaintiff. The declaration stated that the Tombigbee Railroad Company was a corporation constituted by law in the State of Mississippi, the officers and stockholders of which were citizens of that State; and that the defendant, who was a citizen of the State of Alabama, by his promissory note, made at Gainsville, in the last mentioned State, on the 20th of January, 1838, promised to pay to the plaintiff or order, six months after date, at the plaintiff's banking-house in Columbus, in the State of Mississippi, the sum of nine thousand dollars, for value received, concluding with the usual averment that the defendant had not paid.

The defendant appeared and pleaded: 1st. *Non assumpsit*. 2d. That the plaintiff was a banking institution without the limits of the State of Alabama, to wit, in the State of Mississippi, and, unauthorized by and contrary to the laws of the State of Alabama, exercised the franchise of banking in the State of Alabama, on the day and year in the declaration mentioned, and at Gainsville, in the County of Sumpter, in the State last aforesaid, in the unlawful exercise of the said banking franchise, did, as a bank, discount the said note, contrary to the laws of the State of Alabama.

3d. That the plaintiff, unauthorized by and contrary to the laws of the State of Alabama, did establish at Gainsville, in the County of Sumpter, in the State of Alabama, an office and bank to carry on in the State of Alabama the franchise of banking, and, in the exercise of that business, issued their bills and promissory notes for the purpose of circulation as cash bank bills and currency, on the day and year in the declaration mentioned, and before and after; and that the note in the declaration mentioned was made to and for the purpose of same being discounted by the plaintiff, exercising such banking privileges as aforesaid, on the day and year and at the place aforesaid, and that the plantiff did discount the said note, and issue therefor its note and bills, in the exercise of the banking franchise aforesaid, contrary to the laws of Alabama, by reason whereof the said note was void.

4th. That there was no such corporation as the plaintiff had in that behalf averred in his declaration.

The plaintiff joined issue on the first and fourth pleas, and demurred to the second and third. And upon the hearing of the demur-

17*] rers, *the District Court held that these pleas were sufficient in law to bar the plaintiff of its action, and gave judgment in favor of the defendant. From this judgment the present writ of error is brought.

The case was submitted to the court without argument by the *Attorney-General* for the plaintiff in error, referring the court to 13 Pet., 519. No counsel appeared for defendant.

Mr Chief Justice TANEY delivered the opinion of the court:

The only question arising on this record is, whether, by the laws of Alabama, a contract made in that State by the agents of a corporation created by the law of another State is valid. This point was fully considered and decided in the case of *The Bank of Augusta* v. *Earle* (13 Pet., 519), and cannot now be considered as open for argument in this court.

The principles decided in that case must govern this; and the judgment of the District Court is therefore reversed, with costs.

Cited—1 Blatchf., 432-437.

ALEXANDER LEVI
v.
JOHN THOMPSON ET AL.

Iowa law—title acquired by register's certificate may be levied on—equitable estate.

The holder of a register's certificate of the purchase of a lot in the town of Dubuque, lawfully acquired, and issued by the register under the two Acts of 2d July, 1836, and 3d March, 1837, has such an equitable estate in the lot, before the issuing of a patent, as will subject the lot to sale under execution under the statute of Iowa.

The doctrine established in the case of Carroll v. Safford (3 Howard, 441), reviewed and confirmed.

THE commissioners under the Act of the 3d of March, 1837, amendatory of the Act entitled "An Act for laying off the Towns of Fort Madison," &c., approved July 2d, 1836, confirmed unto Alexander Levi and John Thompson, as tenants in common, the right of purchase, by pre-emption, of lot No. 68, in the town of Dubuque, being of the first class, containing seventeen one hundreths of an acre. The lot was entered in the land office, and the receiver's receipt given to Levi and Thompson for the purchase money, on the 1st of April, 1840. It appears that William Chilson and Joel Campbell had instituted a suit, on the common law side of the District Court of Dubuque County, against Levi and Thompson, and that judgment was rendered against them for $780.50 and costs of suit in August, 1839. Execution was issued upon the judgment in due form of law; it was placed in the sheriff's hands to be executed, and he levied upon the lot for which Lee and Thompson had a pre-emption certificate, and the same was sold to satisfy the execution, before a patent had been issued *by the United States to Levi and [*18 Thompson for the same. Thompson, the tenant in common with Levi, became the purchaser, paid the purchase money, and took the sheriff's deed for the same. Thompson, in November, 1841, sold the lot to the other defendants, who had paid for the same before Levi sued out his bill. They state, in answer to Levi's bill, that when they bought the lot from Thompson, they were informed by him, and so supposed the fact to be, that he had a full and perfect right thereto, free from all incumbrances and of all claim by any other person or persons, and that at the time of their purchase, and when they made the payments to Thompson for the same, they were utterly ignorant of any title or claim to property in Levi, or that he set up or pretended to have any claim or title to the same. That the first notice they had of any such claim by Levi was about three weeks before the date of their an-

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swer to his bill, when he sent them word that he desired them to make a division of the property with him. They further state, at the time of their purchase there was a small log house upon the lot, of little or no value to them, which they tore down and removed. That they went into quiet and peaceable possession of the lot at the time of their purchase, and have so remained ever since; that they had made lasting and valuable improvements upon the lot; that for a considerable part of the time whilst they were making these improvements, Levi had been in the city of Dubuque, and they believe must have discovered them, as he frequently passed and repassed the lot, and never informed them of his having any claim to the same: The cause was tried in the District Court, upon the bill and answers of the defendants, and the court adjudged that the petition of the complainant should be dismissed. An appeal was taken to the Supreme Court, and that court affirmed the decree of the court below; and from that court it has been brought to this court by appeal.

The cause was submitted on printed arguments, by *Mr. Washington Hunt* for the appellant, and *Messrs. Davis* and *Crawford* for the appellees.

Mr. Hunt contended that the Legislature of the Territory of Iowa could confer no authority upon the sheriff to sell the property in question, because the title was yet in the United States, and had not passed to Levi and Thompson at the time of the sheriff's sale, and cited *Bagnell et al.* v. *Broderick* (13 Peters, 436), and *Wilcox* v. *Jackson* (13 Peters, 498, 516, 517).

He also contended that the sheriff's deed could pass no title, because it was sold as real estate, whereas the fee-simple was at that time in the United States.

Mr. Hunt also raised other objections, which 19*] it is not necessary *to state, because the decision of the court turned upon a single point.

Messrs. Davis and *Crawford*, for the appellees, relied upon the validity of the statute of Iowa.

Mr. Justice WAYNE delivered the opinion of the court:

The only question raised by the pleadings in this cause, and it seems to us the only one argued at its hearings in the district and supreme courts of Iowa, was, whether the lot, for which Levi and Thompson had a pre-emption certificate, which had been entered and paid for by them, was or was not liable to be sold upon execution issued upon a judgment rendered against them previous to a patent having been issued for the land by the government of the United States. Their right to a pre-emption purchase of the lot was acquired under the Act of the 2d of July, 1836, ch. 262, entitled "An Act for laying off the towns of Fort Madison and Burlington, in the County of Des Moines, and the towns of Bellevue, Dubuque, and Peru, in the County of Dubuque, Territory of Wisconsin, and for other Purposes," and under the Act of the 3d of March, 1837, ch. 36, amendatory of the act preceding just recited. The right of Levi and Thompson to a pre-emption, under those acts, is not a controverted point in the case. Taking it for granted, then, that it had been lawfully acquired, that they entered the land in the proper office, and that it was paid for in their names, this gave them the right to the register's certificate of purchase, to be transmitted to the commissioner of the general land office, as in other cases of the sale of public lands. The fee continues in the United States until the issue of the patent, but the right to the fee was in the purchasers, and they were entitled to a patent for the land, unless there was some legal objection by the United States against issuing it, of which this court is not advised.

This right to the fee and a patent in this case gave to Levi and Thompson that "equitable right" to the land, under the certificate from the receiver of the land office, which the law of Iowa has made subject to execution for the satisfaction of judgments. (Stat. Law Ter. of Iowa, 197, January 25th, 1839.)

We further remark, that the principle upon which the case of *Carroll* v. *Safford* (3 How., 441) was decided, covers this case. Nor do we find anything in the case of *Bagnell* v. *Broderick*, or of *Wilcox* v. *Jackson*, cited by the counsel for the plaintiff in error, or in any other case decided by this court, which conflicts with the decision it here gives.

We direct the decree of the court below to be affirmed.

Aff'g Morris, 235.

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*McKEAN BUCHANAN, *Plaintiff in* [*20
Error,
v.
JAMES ALEXANDER.

Disbursing officer of U. S., money in hands of, due and payable to seamen, not attachable by creditors of seamen.

Money in the hands of a purser, although it may be due to seamen, is not liable to an attachment by the creditors of those seamen.

A purser cannot be distinguished from any other disbursing agent of the government; and the rule is general, that, so long as money remains in the hands of a disbursing officer, it is as much the money of the United States as if it had not been drawn from the treasury.

A decision of a State court, sanctioning such an attachment, may be revised by this court under the twenty-fifth section of the Judiciary Act.

MR. JUSTICE McLEAN delivered the opinion of the court:

This is one of six cases depending upon the same principle, which have been brought before this court by writs of error to the Circuit Superior Court for the County of Norfolk, State of Virginia, under the twenty-fifth section of the Judiciary Act of 1789.

Six writs of attachment were issued by a justice of the peace of the above County of Norfolk, by boarding-house keepers, against certain seamen of the frigate Constitution, which had just returned from a cruise. The writs were laid on moneys in the hands of the purser, the plaintiff in error, due to the seamen for wages. The money was afterwards paid to the seamen by the purser, in disregard of the attachments, by the order of the Secretary of the Navy.

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The purser admitted before the justice that the several sums attached were in his hands due to the seamen, but contended he was not amenable to the process. The justice entered judgments against him on the attachments. The cases were appealed to the Superior Court of the county, which affirmed the judgments of the justice. And that being the highest court of the State which can exercise jurisdiction in the cases, and its judgments being against a right and authority set up under a law of the United States, may be revised in this court by a writ of error.

The important question is, whether the money in the hands of the purser, though due to the seamen for wages, was attachable. A purser, it would seem, cannot, in this respect, be distinguished from any other disbursing agent of the government. If the creditors of these seamen may, by process of attachment, divert the public money from its legitimate and appropriate object, the same thing may be done as regards the pay of our officers and men of the army and of the navy; and also in every other case where the public funds may be placed in the hands of an agent for disbursement. To state such a principle is to refute it. No government can sanction it. At all times it would be found embarrassing, and under some circumstances it might be fatal to the public service.

The funds of the government are specifically appropriated to certain national objects, and if such appropriations may be diverted and defeated by State process or otherwise, the functions of the government may be suspended. 21*] So long as money remains in the *hands of a disbursing officer, it is as much the money of the United States as if it had not been drawn from the treasury. Until paid over by the agent of the government to the person entitled to it, the fund cannot, in any legal sense, be considered a part of his effects. The purser is not the debtor of the seamen.

It is not doubted that cases may have arisen in which the government, as a matter of policy or accommodation, may have aided a creditor of one who received money for public services; but this cannot have been under any supposed legal liability, as no such liability attaches to the government, or to its disbursing officers.

We think the question in this case is clear of doubt, and requires no further illustration.

The judgments are reversed at the costs of the defendants, and the causes are remanded to the State court, with instructions to dismiss the attachments at the costs of the appellees in that court

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LYMAN A. SPALDING, *Plaintiff in Error*,

v.

THE PEOPLE OF THE STATE OF NEW YORK, ex rel. FREDERICK F. BACKUS, *Defendants.*

U. S. Bankrupt law, certificate of discharge under, is no release from fine imposed by State chancery for breach of injunction.

THIS case was brought up from the Supreme Court for the Trial of Impeachments and the Correction of Errors of the State of New York, by a writ of error issued under the 25th section of the Judiciary Act.

The facts were these:

The relator, Frederick F. Backus, previous to the 20th day of July, 1840, had obtained a judgment in the Supreme Court of the State of New York against Lyman A. Spalding, the plaintiff in error, for the nonperformance of promises, and on the said last mentioned day the relator, as complainant, filed a creditor's bill against the said Spalding, in the Court of Chancery of said State, before the Vice-Chancellor of the Eighth Circuit, on which an injunction was issued and served on said Spalding, to restrain him, among other things, from collecting, receiving, transferring, selling, assigning, delivering, or in any way or manner using, controlling, interfering or meddling with, or disposing of, any property, money, or things in action belonging to him.

On the 13th day of December, 1841, an order was made by said court to attach said Spalding for a violation of said injunction, and such proceedings were had in said court, that on the 21st day of March, 1842, the said court declared and adjudged that the said Lyman A. Spalding had been and was guilty of a contempt of court in willfully violating said injunction, by disposing of property and paying out money contrary to the terms of said injunction; and that such misconduct of the said Lyman A. Spalding was calculated to *and did impair, impede, [*22 and prejudice the rights and remedies of the complainant in the said cause, and it was ordered that he pay a fine for said contempt to the amount of $3,000, and the costs and expenses in relation to said contempt of $196.51; and that he be committed to the common jail of the County of Niagara, until the fine, costs, and expenses are paid, and that a mittimus issue accordingly to the sheriff. And it was also ordered, that the costs and expenses be paid to the solicitor of the relator, and the $3,000 be paid to the clerk of said court, subject to the further order of the court.

On the 6th day of May, 1842, an *alias* mittimus was issued; on the 7th day of May, the said Spalding was arrested, and continued under said arrest until the 29th day of September, 1842.

On the 11th day of April, 1842, the said Lyman A. Spalding presented his petition to be declared a bankrupt, pursuant to the Act of Congress entitled "An Act to establish a uniform system of bankruptcy throughout the United States," passed August 19th, 1841, ch. 9, and on the 17th day of September, 1842, was duly and fully discharged, under said act, from all the debts owing by him at the time of presentation of his said petition to be declared a bankrupt, and received his certificate thereof, pursuant to said act.

Afterwards, on his application, he was brought before a Supreme Court commissioner of said State, on *habeas corpus*, and claimed to be discharged from the mittimus, on the ground of being discharged by his certificate from the fine, costs, and expenses. The relator, having been duly notified, appeared by counsel and opposed said discharge, but the commissioner on the presentation of the said certificate, discharged said Spalding from the mittimus on the 29th day of September aforesaid.

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On the 18th day of November after, the relator made application to the said vice-chancellor for another mittimus to enforce the collection of said fine, costs, and expenses, and an order was entered that the said Spalding show cause before the vice-chancellor why the same should not issue.

On the 28th of said month, the relator and Spalding appeared before said vice-chancellor; and the said Lyman A. Spalding presented his certificate in bankruptcy aforesaid, and claimed that by the said Bankrupt Act he was by said certificate discharged from all his debts, and from the said fine, costs, and expenses.

On the 18th day of January, 1843, the said vice-chancellor ordered, adjudged and decreed, that a new mittimus issue, to commit the said Spalding to the common jail of the County of Niagara, until he pay the said fine, costs, and expenses, $196.51, to be paid to the solicitor of the relator, and the $3,000 be paid to the clerk of the court, subject to the further order of the court, and declared and decided that the dis-
23*] charge of the said Lyman A. *Spalding, under the bankrupt law, did not entitle him to be released from the payment of the said fine, costs, and expenses, nor from imprisonment for its collection.

From which decision and decree the said Spalding appealed to the Chancellor of the said State, and the said Chancellor, on the 2d day of June, 1843, affirmed the decision and order or decree appealed from, and decided that the said defendant, Lyman A. Spalding, was not and could not be discharged from the said fine, costs, and expenses under the Bankrupt Act. (10 Paige, 284.)

And on appeal by the said Lyman A. Spalding to the Court for the Correction of Errors of the State of New York, the said court affirmed the said order or decree of the said Chancellor, with costs and interest on the amount decreed to be paid, and decreed that the said Spalding was not by the Bankrupt Act discharged from the payment of the said fine, costs, and expenses.

The following is the opinion of the Court for the Correction of Errors, as pronounced by *Chief Justice* Nelson:

The appellant was adjudged guilty of a contempt of court for a willful violation of an injunction by the Vice-Chancellor of the Eighth Circuit, on the 21st of March, 1842, and amerced in the sum of $3,000, and costs and expenses of the proceeding, which were taxed at $196.51, with directions that he be committed to the jail of Niagara County until the same were paid.

On or about the 7th of May, he was arrested for nonpayment of said fine, but succeeded in preventing an actual commitment into the custody of the jailer, by the use of the writ of *habeas corpus*, until he obtained his discharge under the bankrupt law, 17th September following, when he was soon after set at liberty on the production of said discharge, by Joseph Center, a commissioner to do the duties of a judge of the Supreme Court at chambers.

On the 18th of November, the relator, upon full statement of the foregoing facts, applied to the vice-chancellor for a recommitment, on the ground that the discharge of the commissioner was without authority, and void; which, after hearing counter affidavits, and counsel for both parties, he adjudged accordingly, and entered an order for said recommitment to close custody till the fine was paid.

On appeal to the Chancellor, this order was affirmed, and the question is now here on appeal to this court.

Chief Justice NELSON. Upon the view I have taken of the case, the only question at all material to examine is, whether the fine inflicted upon the appellant for a willful violation of the injunction is a debt within the meaning of the bankrupt law so that his discharge, granted under it, will operate to exonerate him from imprisonment. If not, then, beyond all question, the act of the commissioner in discharging the appellant from the mittimus was *without authority, and the order of the [*24 vice-chancellor directing a recommitment proper.

By the 4th section of the bankrupt law (Laws Cong., 1841, p. 11), the certificate shall "be deemed a full and complete discharge of all debts, contracts, and other engagements of such bankrupt which are provable under this act," &c.

The adjudication upon which the fine was imposed, is as follows: "The said Lyman A. Spalding has been and is guilty of a contempt of this court in willfully violating the said injunction, and by disposing of property and receiving and paying out money contrary to the terms of the said injunction; and that said misconduct of the said Lyman A. Spalding was calculated to, and actually did, impede and prejudice the rights and remedies of the complainant in the said cause."

This act, for which the appellant has thus been adjudged guilty, is a criminal offense under the Revised Statutes (Vol. II., p. 577, Sec. 14), and was before, at common law (4 Bl. Com., 129), for which he was liable to an indictment, and, on conviction, to fine and imprisonment.

He might have been punished in this way, and subjected to a fine not exceeding $250 and imprisonment for one year. (2 Rev. Stat., 582, sec. 46, and p. 577, sec. 14.)

But this remedy by indictment for suppressing the mischief is oftentimes found too tardy for the exigency of the case; and hence the law has also authorized the more summary proceeding by attachment, as for a criminal contempt, whereby the offender is arraigned at once upon the charges, and the course of justice more promptly vindicated and sustained. As has been well remarked in reference to this subject, laws, without a competent authority to secure their administration from disobedience and contempt, would be vain and nugatory. A power, therefore, in the courts of justice to suppress such contempts by an immediate attachment of the offender results from the first principles of judicial establishments, and must be an inseparable attendant upon every superior tribunal.

This summary mode of punishment is the one that has been resorted to in the instance before us; and upon a conviction, the propriety and justice of which is not in question, a fine of $3,000 and costs of proceedings has been imposed; a penalty, as we have seen, for

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a strictly criminal offense, and inflicted under a strictly criminal proceeding.

It appears to me, therefore, the very statement of the case is enough to show that there is no color for the ground taken, that the fine is a debt within the bankrupt law, any more than would exist in the case if it had been imposed after conviction, on an indictment for any other of the numerous minor offenses within the calendar of crimes.

It is contended, however, that these pro-
25*] ceedings, being under the * provisions in the Revised Statutes (Vol. II., p. 440, tit. 18) designed for the purpose of enforcing civil remedies, should, though in form criminal, be regarded simply as another remedy for collecting the debt claimed in the suit in the Court of Chancery, and upon which they have been founded; that the fine is, in point of fact, imposed for the purpose of being applied to the extinguishment of that debt, whenever, in the progress of the suit, it shall have been established; that it is but incidental to the debt, and dependent upon it, and a discharge of the one must necessarily discharge the other.

The answer to all this is, that several cases of strictly criminal contempts have been incorporated into the provisions of the statute under this head, "Of proceedings as for contempts, to enforce civil remedies," &c., of which the case before us is one, for the purpose of authorizing the court to impose the fine, with a view to the actual loss or injury sustained by the party aggrieved, in consequence of the criminal act, and of applying the money in satisfaction of the same, instead of imposing it for the benefit of the people.

This is most manifest from a perusal of the several provisions. We find there the case of persons assuming to be officers, attorneys, solicitors, and counselors of the court, and acting as such without authority. Also for rescuing property from seizure, and persons from arrest; for unlawfully detaining a witness or party from court; and for any other unlawful interference with the process or proceedings in the action; the refusal of a witness to attend or to be sworn, the improper conduct of jurors, in conversing with a party to the suit, receiving communications from him, or from any other person, in relation to the merits; for disobedience to any lawful order, decree, or process of the court, &c. (2 Rev. Stat., 441, sec. 1, Sub. 3, 4, 5, 6.)

All these are, strictly, cases of criminal contempts, which have nothing to do with the collection of debts, or enforcement of civil remedies beyond the support and vindication of the general administration of the laws; and the following provisions of the statute, regulating the punishment to be inflicted, shows the reasons for bringing them under this head. (Sec. 20, p. 443.) If the court shall adjudge the defendant to have been guilty of the misconduct charged, and that such misconduct was calculated to, or actually did, defeat, impair, impede, or prejudice the rights or remedies of the party, it shall proceed to impose a fine, or to imprison, or both, as the nature of the case shall require. (Sec. 21.) If an actual loss or injury shall have been produced by the misconduct alleged, a fine shall be imposed sufficient to indemnify the party, and to satisfy his costs and expenses, which shall be paid over on the order of the court; and the payment and acceptance of such fine shall be a bar to any action by the aggrieved party to recover damages for said injury. (Sec. 23.) When such misconduct consists in the omission to perform some act or duty yet in the power of the defendant *to perform, he shall be impris-[*26 oned only until he shall have performed such act or duty, &c.

Here, in cases confessedly criminal and indictable, and the penalties for which, ordinarily, would go for the benefit of the people, the courts are authorized to impose them, with a view to the indemnity of the party aggrieved, making, at the same time, his acceptance of the fine a bar to any private action for the injury.

But the fine imposed is no less a penalty for a criminal act, and intended as a punishment for the same, than if inflicted for the benefit of the people. The imposition in the way prescribed by the statute, accomplishes the double purpose of punishment for the misconduct on the one hand, and indemnity to the aggrieved party on the other.

I am satisfied, therefore, that the discharge under the bankrupt law has no sort of application to the case, and that the order for the recommitment by the vice-chancellor was proper and legal.

It has been urged, that, whether the commissioner erred or not in discharging the appellant from the mittimus, under the writ of *habeas corpus*, the vice-chancellor had no authority to recommit; that the order discharging him should have been first reversed by *certiorari* before the second commitmemt. (Sec. 61, p. 478.)

This would be true, if the commissioner had had jurisdiction over the subject matter, and had rendered only an erroneous judgment in the premises; but has no application where his proceeding is wholly without authority, and void, as in this case. (2 Rev. Stat., 470, sec. 42, Sub. 3, sec. 44; *Cable* v. *Cooper*, 15 Johns. R., 152.) (A Copy.)

N. HILL, JR., Reporter.

To review this judgment of the Court of Errors, the present writ of error was brought.

The case was argued by *Mr. Curtenius* for the plaintiff in error, and *Mr. Delano* for the defendant in error.

Mr. Curtenius, for the plaintiff in error:

By the affirmation of the said order or decree, it is decided that the said fine, costs, and expenses is not a debt, within the late bankrupt law of the United States. And that the certificate of the plaintiff in error under the said law did not discharge him from the payment of the said fine, costs, and expenses.

We insist on the contrary, and shall seek to maintain that the said fine, costs, and expenses imposed on the said plaintiff in error is a debt. And that his certificate of discharge under the said bankrupt law did and does discharge him from the payment thereof.

On the decision of these points rests the whole of this cause. We make, therefore, as our

*First Point. That the fine, costs, and [*27 expenses imposed on the plaintiff in error, previous to his petition in bankruptcy, was a debt,

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from which he was duly discharged by his certificate under the bankrupt law of the United States.

By the late bankrupt law (Laws of Congress, 1841, chap. 9), "any person whatsoever residing in any State or territory of the United States owing debts 'may petition' except where the debts were created by defalcation, as," &c., "or while acting in any fiduciary capacity, and on compliance with the act, 'shall be entitled to a full discharge from all his debts.' And that said discharge and certificate, when duly granted, shall in all courts of justice be deemed a full and complete discharge of all debts, contracts, and engagements of such bankrupt, which are provable under this act."

In our case there is no pretense that the plaintiff in error or his debts come under any of the exceptions in the first section; or that there is any exception in the law which excludes him or it. But the decision is against us on the ground that the law itself was not intended to apply to a case like ours. What, then, is our case?

In answer, it becomes necessary to inquire by what power, under what statute, and for what purpose, the imposition of this fine, costs, and expenses was made, and the plaintiff in error placed beyond the reach of relief from the bankrupt law, and subjected to perpetual imprisonment.

The power is claimed to be exercised by virtue of the revised statutes of the State of New York, "as for a contempt."

There are two statutes, under the one or the other of which the fine, costs, and expenses were imposed. The one (2 Rev. Stat. 2d ed., 207) is entitled, "Provisions concerning courts of record, their process and proceedings," by which power is given to punish as criminal contempts willful disobedience of any process or order lawfully issued or made by a court of record. The punishment to be by fine or imprisonment, or both, but the fine is limited to $250, and the imprisonment to thirty days. And section 14 expressly states that these sections shall not extend to any proceeding against parties or officers, as for a contempt, for the purpose of enforcing any civil right or remedy. Under this statute, the fine, &c., could not have been imposed.

The other statute (2 Rev. Stat., 2d ed., 410) is entitled, "Of proceedings, as for contempts, to enforce civil remedies, and to protect the rights of parties in civil actions," which provides, that,

Sec. 1. Every court of record shall have power to punish, by fine and imprisonment, or either, any neglect or violation of duty, or any misconduct, by which the rights or remedies of a party in a cause or matter depending in such court, may be defeated, impaired, impeded, or prejudiced, in the following cases.

28*] *Sec. 20. If the court shall adjudge the defendant to have been guilty of the misconduct alleged, and that such misconduct was calculated to, or actually did, defeat, impair, impede, or prejudice the rights or remedies of any party, in a cause or matter depending in such court, it shall proceed to impose a fine, or to imprison him, or both, as the nature of the case shall require.

Sec. 21. If any actual loss or injury shall have been produced to any party by the misconduct alleged, a fine shall be imposed sufficient to indemnify such party, and to satisfy his costs and expenses, which shall be paid over to him on the order of the court. And in such case the payment and acceptance of such fine shall be an absolute bar to any action by such aggrieved party to recover damages for such injury or loss.

Sec. 22. In all other cases, the fine shall not exceed two hundred and fifty dollars, over and above the costs and expenses of the proceedings.

Sec. 26. Persons proceeded against according to the provisions of this title shall notwithstanding be liable to indictment for the same misconduct, if it be an indictable offense; but the court before which a conviction shall be had on such indictment shall take into consideration the punishment before inflicted, in forming its sentence.

The adjudication was under section 20, as the mittimus is in the words of this section. And the fine, &c., is under section 21, for the purpose of indemnifying the relator for the removal of so much of the property, or money, on which he had a lien by his injunction.

That is, it belongs to the party, on his establishing his right to it by obtaining a decree of the court on his bill of complaint. The damage was the money, or value of the property, on which the relator had his lien by his bill and injunction; the offense, the disposing of that amount by the plaintiff in error; the fine is the amount of that damage, termed by the statute a "fine." It is a certain, fixed and definite amount, a debt, and belongs to the relator if he obtains a decree on his bill; if not, it then belongs to the plaintiff in error.

Here, then, we have the power, the statute, and the purpose under and for which the fine, costs, and expenses were imposed.

But it is urged against us that this is a fine for a contempt, and alleged willful contempt; as though that implied a criminality which placed the unfortunate party adjudged guilty beyond relief, and interposed an insurmountable barrier between him and the benefit of the bankrupt law.

[*Mr. Curtenius* then proceeded to argue that the object of this statute was only to enforce civil remedies, by the people's interposing between party and party, and permitting a party to use the same process which the people do in their cases of contempt; that *the money [*29 was payable to one party to indemnify him for the loss which he had sustained by the act of the other party; that the offending party might still be indicted for the same offense, which could not be the case if both were offenses against the public; that in case the claimant failed afterwards to establish his right to the money, it would be paid to the defendant, but never to the people; that even if it was a debt due to the people, it would be discharged by bankruptcy, inasmuch as they had chosen to produce the relation of debtor and creditor between themselves and the offending party.]

It is then a debt. (2 Jacob's Law Dictionary, 200; *Ex-parte Smith*, 5 Cowen, 277; *Wallsworth* v. *Mead*, 9 Johns. Rep., 367; *McDougall* v. *Richardson*, 3 Hill's Rep., 558; Case of *James Baker*, 2 Strange, 1152.) It is not only a debt, but a debt discharged by the bankrupt law. (2

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Molloy, 442; *Ex-parte Parker*, 3 Vesey, 554; 1 Deacon, 235; *Hopcroft* v. *Farmer*, 8 Moore, 424; *Lewis* v. *Morland*, 2 Barn. & Ald., 56; 1 Sch. & Lef., 169.) These cases establish that the form of the process is not to be considered, but the cause of its issuing; that if the ground of the proceeding be a debt, it is a process of debt; and that if the process is to compel payment of a sum of money, it is a debt. The same views are sustained by the following authorities: 2 Rose's Cases in Bankruptcy, 196; Cooper's Cases in Chancery, 198; *The King* v. *Edwards* (9 Barn. & Cress., 652); 1 Bos. & Pull., 336; 1 Cowp., 136.

Second Point. That there is error in the affirming the decree of the $196.51 of costs to be paid to the solicitor of the relator, and that the decree in this case, being void in part, is void in whole, and must be reversed. (1 Moore's Rep., 494; 4 Bl. Com., 285; 13 East, 190.)

Third Point. That if the fine was imposed for a criminal offense, the statute under which the same was imposed is repugnant to a law of Congress and the Constitution of the United States, and is therefore illegal and void.

It is repugnant to the bankrupt law.

1st. Because it operates as a fraud on the act, by securing a preference of one creditor over the general creditors.

2d. It seeks to compel the bankrupt to violate the act by paying one creditor before, and at the expense of, the others.

3d. It seeks to compel a violation of the act, and debars the bankrupt of its benefits.

The act declares all payments, &c., in contemplation of bankruptcy, and all preferences, void, and a fraud on the act, and that the person making such unlawful payments and preferences shall receive no discharge.

In our case, after the filing of his petition, the plaintiff in error was devested of all his property. He could not pay, for he had nothing. He could not pay the property in his [*30 schedules, because *it did not belong to him. And neither the relator nor the court could receive, and if received, the assignee might have recovered it again.

The order and the mittimus, then, sought to enforce an illegal act, a fraud on the creditors of the bankrupt, and a violation of the principle of equality among the creditors.

It is repugnant to the Constitution.

1st. If a criminal offense, it imposes, under the circumstances, an excessive fine, and a consequent cruel and unusual punishment.

We have seen that, on filing his petition in bankruptcy, the plaintiff in error was by the act devested of all his property. If he swore to the truth, his schedules contained it all. If he did not, it still would belong to the assignee. His decree in bankruptcy was evidence that he had sworn to the truth, and the imposition of this fine, if criminal and going to the people, was excessive, and was a cruel punishment for the offense, for it imposed an impossibility. The law never imposes a fine, where it presumes the party can have nothing to pay. Here was no presumption, but actual legal evidence, that there was nothing. If it be said that the order was made before his petition, and without knowledge of it, we answer, with full knowledge of all these facts it is sustained, and sought to be enforced.

2d. It doomed him, in fact, by the order of a single judge, to perpetual imprisonment.

This follows of course; devested of everything —deprived of liberty—the narrow bounds of a prison cell the field of his enterprise—and hours of solitude, without means for the exercise of his industry, could never enable him to pay this heavy fine, costs, and expenses.

3d. It subjects him to punishment twice for the same offense.

We have insisted, that if the fine was imposed for a criminal contempt, it is still a debt. And that if the offense is criminal, the statute is illegal and void; and that the only way in which the statute can or ought to be sustained is on the ground that it is civil, and that the fact that the fine under it belongs to the party is proof that it is so.

But it is objected that the contempt is criminal, because, both at common law and by the statute, it is indictable; we say it is also civil. If indicted, the fine is limited to $250. If civil, to the damages of the party. In our case, the contempt is civil, and the fine the damages; and the plaintiff in error is still subject to indictment, and fine of $250. From which does he ask to be discharged? Certainly not from the fine on the indictment. Although from that, we insist, as before, that he would be discharged. We make as our

Fourth Point. The judgment of the relator against the plaintiff in error, at the time of the filing of his petition under the Bankrupt Act, *was a debt, and the ground on which [*31 the proceedings in chancery were had. The decree or order imposing the fine, costs, and expenses, therefore, is either a new or additional debt, founded and resting on the original; or, it is the remedy given by statute, to enforce, as for contempt, the payment of so much of the old debt.

If the fine creates a new or additional obligation on the part of the plaintiff in error to pay, it is a debt—a debt of no higher nature or greater importance than a judgment for a tort, as a trespass on the person or the property of the relator, from which under the bankrupt law he would be discharged. (Cooke B. R., 2, 5, 574.)

As a new or additional debt, it was certain, fixed, and definite, previous to the filing of his petition, and provable under the act—provable by the relator, being his ascertained damages, imposed for his benefit, and payable to him, by the statute ascertaining and fixing it. By his certificate, therefore, he is discharged from it. (2 Rose, 196; Cooper, 198; 9 Barn. & Cress., 652; 1 Bos. & Pull., 336.)

Or, if so much of the old debt, and the order, decree, and mittimus, the remedy under the statute for its enforcement, then the plaintiff in error, being discharged from the debt itself, must be from the remedy for its enforcement.

Here, then, the plaintiff in error was ordered and decreed to pay the relator $3,000 and the expenses; which $3,000 would and must, if received by the relator, reduce so much of his judgment; what act or event would discharge the plaintiff in error from this order? Would the receipt of the relator? Certainly. Would a satisfaction of that judgment under the hand of the relator? Undoubtedly. Why? Because it would be a legal discharge.

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Then why not, by the law of the land, as fully and clearly discharged from that judgment by his certificate discharging him from all his debts, as though he had produced the satisfaction piece of the relator? The one, the legal discharge of the relator; the other, equally so of the bankrupt law.

When discharged from the judgment, he is discharged from the execution, or process to enforce its collection, or any part of it, the same as if imprisoned on a *capias ad satisfaciendum;* the debt being discharged, the remedy passes with it, for there is nothing left to operate upon. For, if the money had been paid into court, it never could have become the relator's without proof of the existence of the judgment as alleged in his bill. If that judgment is satisfied at any time before the money paid over by court to the relator, the money would revert to the plaintiff in error, or, in this case, to the assignee in bankruptcy.

As a new debt or obligation, or as a remedy 32*] for the collection *of so much of the old debt or judgment, therefore, the plaintiff in error is equally discharged by his certificate.

Again, this is manifest. The relator sought by his bill to collect this debt, say $5,000; he obtains a lien on $3,000, which is removed by the plaintiff in error; and he is ordered to replace it by paying that amount into court. If done, the relator suffers no injury. The relator sustains his bill by proving his judgment or debt of $5,000, and obtains an order that the $3,000 in court be paid over to him. Can it be supposed for a moment that he is still entitled to a decree for the full amount of his judgment of $5,000 in addition?

And yet this is the certain result of the decision of the Court of Errors. For if the $3,000 is paid to the relator, it cannot be applied to the payment of so much of the payment, because the whole of that is discharged by the certificate in bankruptcy. And because, under the present decision, the fine is no part of it.

The relator, however, must prosecute his bill of complaint to a decree before he can obtain an order for the payment of the $3,000 to him. And that decree must be for the whole amount of his judgment of $5,000, because, under the said decree, the $3,000 is no part; thus receiving the $3,000, and a decree for $5,000 in addition. Presenting the extraordinary fact—a fact, too, without precedent in the courts of law or equity of this or any other country (but in direct violation of the common principles of both)—that a party seeking to collect a civil demand of $5,000, may, by the act of the defendant, occasioning no injury whatever to him, be entitled to recover of that defendant $8,000. A decision producing such a result is erroneous, and must be reversed.

We have not urged in this court the point made by us in the courts below, in relation to the power of the Supreme Court commissioner to discharge the plaintiff in error on his certificate, because it does not involve the all-important questions on which this case depends, and if the certificate entitles him to a discharge, it ceases to be a point of importance.

The point, that the voluntary part of the bankrupt law is unconstitutional, although on the printed points of the defendants in error in the court below, was not passed upon, raised, presented, or alluded to in the Court of Errors, and cannot therefore be raised here.

Mr. Delano, for defendants:

The points now made are the same, on the part of the defendants, as those insisted upon before the Court of Errors.

First. The Supreme Court commissioner, Center, had no authority to discharge the plaintiff in error. All the proceedings before him were without jurisdiction, and void.

*1. Because the plaintiff in error was [*33 convicted and punished by the Court of Chancery, as for a criminal contempt, the cause of his imprisonment being plainly and specially stated in the mittimus.

A contempt, in its legal acceptation, means the treating of a court of justice, or person invested with judicial authority, in a contumelious or disrespectful manner, or in violating rules or orders made by competent tribunals. (6 Petersdorff Abr., 106, 157.)

The contempt of which the plaintiff in error was convicted was a criminal contempt. This is defined, in the Revised Statutes of New York, to be the willful disobedience of any process or order lawfully issued or made by any court of record. (2 Rev. Stat., 278, 2d ed., 207, sec. 10.)

This species of contempt is also punishable, by indictment, by the laws of New York. (Rev. Stat., 692, sec. 14, 2d ed., 577.)

These enactments are merely declaratory of the common law, as it existed previous to the Revised Statutes; and the object of them is to define and limit the nature of the offense and the powers of the courts.

Blackstone enumerates, among the crimes for which punishment might be judicially inflicted, a contempt of the process of any of the superior courts of the king.

"A solid and obvious distinction exists between contempts, strictly such, and those offenses which go by that name, but which are punished as contempts only, for the purpose of enforcing some civil remedy." This distinction is clearly marked in the Revised Statutes of New York, and the note of the revisers shows such was their intention. The contempt of which the plaintiff in error was found guilty, was the willful disobedience of the process of injunction. He did not refrain from doing what he was enjoined not to do. The power to punish for a willful disobedience of process of this kind is essential to the administration of justice; without it, the writ of injunction in many cases would be entirely nugatory. When the process, which goes by the name of contempt, is merely to collect money which the party may not be able to pay, it is then properly deemed a mere civil remedy. (4 Black. Com., by Chitty, 122; 1 Hawkins's Pleas of the Crown, 149, 150; 1 Kent's Com., 300, *note*, 3d ed.; 3 Rev. Stat., 695, original note to sec. 10–15.)

If the contempt was a criminal contempt, it being clearly set out in the mittimus, the commissioner, Joseph Center, had no authority to discharge the plaintiff in error, nor had he any jurisdiction over the matter. But it was the duty of the commissioner to remand the party to the custody of the officer, if any contempt was plainly and specially charged in the com-

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mitment. The discharge of the commissioner could not, therefore, be any valid objection to 34*] *the issue of the second *alias* mittimus. It was not a subject over which the commissioner had jurisdiction.

2. Because the commissioner, not being a court of justice, as required by the bankrupt act, had no authority to try the fact, whether the discharge was duly granted or not.

The commissioner has merely the power of a judge of the Supreme Court at chambers. No issue could be made up or tried. The discharge might be impeached for fraud, &c., and no court can give effect to the discharge, which has not power to inquire into its validity. An issue was claimed, and the relator required an opportunity to try the question.

The act of Congress neither expressly nor by implication vests any such authority in a commissioner, and he is expressly prohibited from its exercise by the forty-second section of the Habeas Corpus Act.

3. No discharge could be granted if the Bankrupt Act released the plaintiff in error, except by application to the Court of Chancery.

A contrary course would lead to a conflict of jurisdiction between the several courts. The uniform practice in England and in this country is believed to have been to apply to the court where the judgment or decree is, or from which the process issued. (Act to amend the Law relating to Bankrupts, 6 Geo. IV., ch. 16, sec. 126.)

Second. The discharge under the act to establish a uniform system of bankruptcy did not release the plaintiff in error, although the Supreme Court commissioner had no jurisdiction; yet as the order appealed from was an application for a second *alias* mittimus, and the court held the discharge did not apply to the case, and was no answer to the application, the question in relation to the effect of the discharge in bankruptcy is presented by the case. The jurisdiction of the commissioner is not important, except as an answer to the point which may be made by the plaintiff in error, that there was a decision by a competent tribunal, not vacated or reversed, and that such decision could not be inquired into on the application to the Court of Chancery. The principal question remains, namely, the effect of the discharge of the plaintiff in error under the Bankrupt Act.

If this contempt was criminal, the power of Congress to grant a dispensation for crimes might well be questioned. It is not necessary to repeat what has been said under our first point. The act of Congress commonly called the Bankrupt Act, does not embrace this case. The fourth section of the act declares the effect of the discharge in these words: "And such discharge and certificate, when duly granted, shall, in all courts of justice, be deemed a full and complete discharge of all debts, contracts, and other engagements of such bankrupt 35*] which are provable under *this act, and shall and may be pleaded as a full and complete bar to all suits brought in any court of judicature whatever." The only debts discharged are those provable under the act. If the fine imposed upon the plaintiff in error was not a debt provable under the act, the discharge does not present a bar. The fine imposed was not a debt, contract, or engagement. The course of practice in such cases is, as was done in this case, to order the money paid into court to abide the final result of the cause. A creditor's bill had been filed, and an injunction obtained; and for the willful and voluntary breach of this injunction, the fine was imposed. Although the fine was imposed, in part, to indemnify the party, yet he had no claim to it until the result of the litigation should give it to him. It was to be paid into court, and there remain, to abide the final order of the court. It was not a debt provable under the act, for there was no one to prove it. In no way could it be proved as a debt. It was no more a debt than a fine for assault and battery, or any other fine or punishment which may have been imposed for violated law. It is contended, however, that the fine being imposed in part, to enforce a civil remedy, this takes away the criminal character of the contempt, and assimilates the proceeding to that class of cases where it is conceded that the process is merely to provide a remedy for the collection of money in those cases where an execution cannot issue. It is true, that aside from any injury to the aggrieved party, the fine is limited to $250, and the imprisonment to six months. The contempt is as criminal when it impedes and obstructs civil remedies, as when it does not. The crime consists, in this case, in the willful disobedience of the process or order of a court of record; and the remedy to the party is also given in such cases by statute. Where an actual loss or injury shall have been produced to any party by the misconduct alleged, a fine shall be imposed sufficient to indemnify, and to satisfy his costs and expenses, &c. (Sec. 22.) In all other cases the fine shall not exceed $250. Courts of record are, by the statute, authorized, and had power without it, to enforce remedies of parties by inflicting this punishment. The cases of attachments for nonpayment of costs, or for the nonpayment of any sum of money, nonperformance of an award where money is awarded, it is conceded, are merely remedies in nature of an execution. They require the performance of duties which may be beyond the ability of the party to discharge. This is not criminal. The crime consists in a willful, inexcusable, and unatoned-for disobedience of some lawful order or process. The definition implies the power to obey, but makes the *corpus delicti* consist in what is the essence of all crime, *mala fides*—a deliberate design to obstruct the course of justice, and contemn the requirements of the process. Of this contempt the plaintiff in *error was adjudged guilty, and a fine [*36 was imposed to compensate the party.

The cases cited, in the opinion of the vice-chancellor and chancellor, sustain these views. The following cases also illustrate our positions: *People* v. *Nevins* (1 Hill's Rep., 154), *Ex-parte Parker* (3 Ves., 554), *Rex* v. *Stokes* (1 Cowper, 136), 1 Atkyns, 262; *Rex* v. *Pixley* (Bunb., 202).

Third. The voluntary part of the Bankrupt Act is unconstitutional. It is not intended to present any argument on this point. The case does not probably require it; and if it did, the whole subject has been so frequently discussed, that it is not supposed we can add anything to the labor of others.

The relator, or defendant in error, claims that

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the writ of error in this cause was sued out for the purposes of delay only, and therefore asks that the judgment be affirmed, with the highest rate of damages and costs.

Mr. Chief Justice TANEY delivered the opinion of the court:

The court have considered this case, and have come to the conclusion that the judgment of the Court of the State of New York for the Correction of Errors must be affirmed. But there is some difference among the justices who concur in affirming the judgment as to the principles upon which the affirmance ought to be placed. No further opinion will therefore be delivered, than merely to pronounce the judgment of this court, affirming the judgment rendered by the State court.

Mr. Justice MCLEAN.

I dissent from the judgment of the court.

Mr. Justice WAYNE.

I do not concur with the majority of the court, and think that the judgment of the Court for the Trial of Impeachments and for the Correction of Errors should be reversed.

Aff'g 7 Hill, 301.

37*] *THOMAS BEALS, *Plaintiff*,

v.

FELICITE HALE, *Defendant*.

Michigan statutes—concerning deeds and conveyances—concerning mortgages—repugnancy—recording first, gives priority.

There were two statutes of the State of Michigan, both passed on the same day, namely, the 12th of April, 1827. One was "An Act concerning deeds and conveyances," which directed that such deeds or conveyances should be recorded in the office of register of probate for the county, or register for the city, where such lands, &c., were situated. This act became operative from its passage.

Another was "An Act concerning mortgages," which provided "that every mortgage being proven or acknowledged according to law, may be registered in the county in which the lands or tenements so mortgaged are situated." This act did not go into operation until several months after its passage.

In the case in question, there were two mortgages, both including the same property, in the city of Detroit, Wayne County, one of which was recorded in the city registry, and the other in the county registry.

These statutes are not so contrary or repugnant to each other as necessarily to imply a contradiction. Both can stand.

The recording of the prior mortgage in the county registry was sufficient to give it validity and priority.

Statutes which apparently conflict with each other are to be reconciled, as far as may be, on any fair hypothesis, and validity given to each if it can be and is necessary to conform to usages under them, or to preserve the titles to property undisturbed.

THIS case came up on a certificate of division in opinion between the judges of the Circuit Court of the United States for the District of Michigan.

It was an ejectment, brought by the plaintiff, Thomas Beals, a citizen of New York, against Felicite Hale, the defendant, a citizen of the State of Michigan. Nathaniel Weed, Harvey Weed, and Henry W. Barnes were, on application, permitted to defend their title to the premises, claiming that the said Felicite Hale was their tenant, and in possession under them.

The facts in the case are set forth in the special verdict of the jury, which was as follows:

"Issue being joined in this case, and the parties present by their respective attorneys, hereupon comes a jury, to wit: John C. Mundy, Alanson Sherwood, William P. Patrick, Albert Bennet, Robert Rumney, Austin Stocking, Sylvester Granger, Garry Spencer, John Bour, James Beaubien, Tunis S. Wendell, and James Cicotte, Senior, who, being impaneled and sworn to try the issue joined in this cause, and after having heard the evidence adduced therein, find specially the following facts, and say: That John Hale was, on the thirteenth day of November, in the year of our Lord one thousand eight hundred and twenty-eight, seized and possessed in his own right of said lots number sixteen, seventeen, and eighteen, in the city of Detroit, County of Wayne, and (then territory, now) State of Michigan.

"That, being so seized and possessed of the said premises, he, the said John Hale, and Felicite Hale, his wife, executed a mortgage, to secure the payment of a certain sum of money, to one James Lyon, bearing date the thirteenth day of November, in the year of our Lord one thousand eight hundred and twenty-eight, of the *said lots, together with other lands lying[*38 in the said County of Wayne, as well as of certain lands in the County of Monroe, in the territory of Michigan, which said mortgage was recorded in the office of the register of the said County of Wayne, where said lots and a part of said mortgaged premises were situated, on the thirteenth day of January, in the year eighteen hundred and twenty-nine, in liber 9 of mortgages, pp. 103, 104, 105, &c., and also in the County of Monroe, where the remainder of said lands and premises were situated, in the office of register for said county, in liber 9, folios 281 to 286. That said mortgage was afterwards, to wit, on the twenty-first day of November, in the year eighteen hundred and thirty-eight, foreclosed under the Statutes of the State of Michigan, and the said several lots sold at public auction, and struck off to said Lyon at the sale thereof, and that a sheriff's deed was afterwards, on the 6th day of April, A. D. 1842, executed to the said plaintiff, as assignee of the certificate of sale to said Lyon of the said lots, they not having been redeemed within two years from the time of sale, pursuant to statutes of said State in such case made and provided, which said deed was duly recorded.

"And the said jury further find, that the said John Hale, and Felicite, his wife, after the execution of the former mortgage, and before a foreclosure thereof, to wit, on the sixth day of June, in the year eighteen hundred and thirty-seven, for a good and valuable consideration, duly made, acknowledged, and delivered, under their respective hands and seals, to Nathaniel Weed, Harvey Weed, and Henry W. Barnes (who had no notice of said prior mortgage unless said record was notice), another or second mortgage on the said premises, lots sixteen, seventeen, and eighteen, in the city of Detroit, County of Wayne, and State of Michigan, which said mortgage, bearing date the said sixth day

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of June, in the year eighteen hundred and thirty-seven, was duly recorded in the appropriate registry, on the seventh day of June, in the year eighteen hundred and thirty-seven, in liber 8, folio 343, of mortgages, and which said mortgage was afterwards, on the thirty-first day of August, in the year eighteen hundred and thirty-nine, foreclosed under the statutes of said State, exposed to sale and struck off to said Weeds and Barnes at the said sale, and, not having been redeemed within two years therefrom, that a sheriff's deed of said premises was executed on the sixteenth day of August, eighteen hundred and forty-two, and delivered to said Nathaniel and Harvey Weed and Henry W. Barnes, of all and singular the said premises, which was duly recorded.

"That the plaintiff and defendant both claim under the respective mortgages above set forth, and the sheriff's deeds under the respective foreclosures aforesaid; and that Felicite Hale, the defendant, was, at the institution of this suit, and still is, a tenant in possession of said 39*] *premises, under a lease from said Weeds and Barnes, who are admitted under the statute to defend as her landlords.

"And the jurors aforesaid, on their oaths aforesaid, do further say, that if it shall appear to the said court, from the facts above found, that the recording of said prior mortgage from Hale to Lyon in the registry of Wayne County was sufficient record thereof to constitute notice of said mortgage under the laws of Michigan, in reference to mortgages of real estate situate in the County of Wayne, within the limits of the city of Detroit, then they find for the plaintiff.

"But should said court be of opinion that said record in the office of said registry for the County of Wayne was invalid and insufficient in law, so far as the said premises in the city of Detroit are concerned, to constitute notice thereof to the subsequent mortgagees, then they find for the defendants.

THOMAS BEALS
v.
FELICITE HALE.

On consideration of the said special verdict, the same being brought before the court on a motion for judgment on the verdict, the opinions of the judges were opposed on the point whether the recording of the mortgage from Hale to Lyon in the registry of Wayne County was a sufficient record thereof to constitute notice of said mortgage under the laws of Michigan, in reference to mortgages of real estate in the County of Wayne, within the limits of the city of Detroit; and it is ordered and directed, that this cause, with said point, be certified to the Supreme Court of the United States, in pursuance of the act of Congress in such case made and provided.

The cause was argued by *Mr. Henry N. Walker* for the plaintiff, and by *Mr. George C. Bates* and *Mr. Alexander D. Fraser* for the defendant.

Mr. Walker, for plaintiff:

The facts will appear from the special verdict. The question of law arises under two statutes passed on the same day. The first is entitled "An Act concerning deeds and conveyances," and will be found on p. 258 of Laws of Michigan for 1827. By this act it was declared that a city register's office should be established for the city of Detroit, in which "all deeds and other conveyances" relating to lands in the city should be recorded. The second act is entitled "An Act concerning mortgages," and will be found on pages 273, &c., of Laws of 1827. This was approved the same day as the act concerning "deeds and conveyances," but to take effect some months after. This last act does not allude to a city register's office, but directs where all mortgages of lands situated *in the respective counties in Michigan [*40 shall be recorded. The point of difference between the counsel, as well as the point certified by the court, is whether Lyon should have recorded his mortgage under which we claim in accordance with the act "concerning deeds and conveyances," in the city office; or in accordance with the provisions of the act "concerning mortgages," in the register's office of the County of Wayne. It was recorded in the register's office, for the county, and plaintiff contends this was a good and sufficient record, for these reasons, viz.:

First. The act of the territory of Michigan which governs this case, as we believe, is the one "concerning mortgages." It was passed on the 12th of April, 1827, to take effect on the first day of January, 1828. It is entitled "An Act concerning mortgages," and was the first law enacted concerning mortgages by the Legislative Council of the then Territory of Michigan. The first section directs, "that the registers of the respective counties of the territory, from time to time, shall provide fit and convenient books for the registering of all mortgages of any lands or tenements situated within their respective counties; in which books shall be entered the names of the mortgageors and mortgagees, the dates of the respective mortgages, the mortgage money, the time or times when payable, the description and boundaries of the lands and tenements mortgaged, the time when such mortgages are registered, and a minute of the certificate and acknowledgment thereof hereinafter mentioned, to which books of registry all persons whomsoever, at proper seasons, may have recourse; and it is hereby made the further duty of the said registers, when registering a mortgage, also to record at length the special power of sale, if any be contained therein; for which service the respective registers are hereby allowed to demand and receive the like rate of compensation which is allowed them for recording a deed; and if any register shall neglect or refuse to do the duty required of him by this act, he shall answer to the party injured all damages which shall happen by such neglect or refusal."

This section is general in its terms, and the language used is susceptible of but one construction. The command is positive, and the object of providing the books clear and certain. It is to record "all mortgages of any lands or tenements situated within their respective counties." Not only the instruments to be recorded are clearly pointed out, but the mode of registering, the compensation for the same, the penalty for neglect on the part of the register, and a provision that these records shall at all times be subject to inspection.

The second section of the same act is in the following words, viz.:

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Sec. 2. "That every mortgage, being proven or acknowledged according to law, and such proof or acknowledgment certified in like 41*] *manner, may be registered in the county in which the lands or tenements so mortgaged are situated; and in case of several mortgages of the same premises or any part thereof, the mortgage or mortgages which shall be first registered as aforesaid shall have the preference in all courts of law and equity, according to the times of the registering of such mortgages respectively: Provided, the mortgage or mortgages so to be preferred be made *bona fide*, and upon good and valuable consideration: and further, that no mortgage, or any deed, conveyance, or writing in the nature of a mortgage, shall defeat or prejudice the title of any *bona fide* purchaser of any lands or tenements unless the same shall have been duly registered as aforesaid."

There is as little doubt about the construction of this section as the first. The most comprehensive language possible is used. It declares "every mortgage" may be registered in the county where the lands and tenements mortgaged are situated, and the one first recorded shall have preference in all courts of law and equity. The jury in this case have found that the premises described in the declaration are in the County of Wayne, and that the mortgage to Lyon, under which we claim, was executed after the passage of this act, and was recorded in the register's office for the County of Wayne, as provided in this act. Where is there room for an argument against the validity of the record? Not from this act, for it is beyond a question, that, from the terms of the law, it includes this mortgage, as well as all other mortgages in the territory. There is no exception in the law; it is general, and applies to "every mortgage." It is not contended, we believe, that this law does not in terms reach this case, or that there is any ambiguity or uncertainty in the language used. But we are told that this statute is controlled and governed by another act of the territory of Michigan, and this renders it necessary to examine that act.

The counsel for the defendant have contended, and so will argue to the court, that the Act entitled "An Act concerning deeds and conveyances," found in the Laws of Michigan for 1827, page 258, approved April 12th, 1827, is the law of this case. It will be observed that the act "concerning mortgages," and the act "concerning deeds and conveyances," were approved on the same day. But the act concerning mortgages did not take effect until January, 1828, thus making it have the same operation and effect as though passed on a day subsequent. If the laws conflict, then the last one will govern. The act "concerning mortgages" appears from the statute book to have been acted upon by the Legislature subsequent to the one "concerning deeds and conveyances"; it is on a subsequent page of the statute book, and if both laws took effect at the same moment, we suppose they would be contracted (if thought to conflict in terms) like different sections of the same statute. The last one would stand, and the others fall. The 42*] application of *this well known principle would be conclusive, if the acts were thought to relate to the same subject matter. But we suppose the first law has no reference to mortgages whatever. One evidence of it is, that on the same day an act is passed relating to mortgages, and providing for the recording of them in a specific manner. The first three sections of the act concerning "deeds and other conveyances" are the only ones which it is pretended have any application to this case. These sections read as follows, viz.:

"Sec. 1. Be it enacted by the Legislative Council of the Territory of Michigan, That all deeds or other conveyances of any lands, tenements, or hereditaments lying in this teritory, signed and sealed by the parties granting the same, having good and lawful authority thereunto, and signed by two or more witnesses, and acknowledged by such grantor or grantors, or proved and recorded as is hereinafter provided, shall be good and valid to pass the same lands, tenements, or hereditaments to the grantee or grantees, without any other act or ceremony in law whatever.

"Sec. 2. That all such deeds or conveyances of or concerning any lands, tenements, or hereditaments lying within this teritory, or whereby the same may be in any wise affected in law or equity, shall be acknowledged by the party or parties executing the same, or proved by one or more of the judges of the Supreme Court, or before one of the justices of any county court, a notary public, or any justice of the peace in any county within this territory, and a certificate of such acknowledgment or proof being indorsed thereon, and signed by the person before whom the same was taken, such deed or conveyance shall be recorded in the office of register of probate for the county, or register for the city, where such lands, tenements, or hereditaments, respectively, are situated, lying, and being: and every such deed or conveyance that shall at any time after the publication hereof be made and executed, and which shall not be acknowledged, proved, and recorded as aforesaid, shall be adjudged fraudulent and void against any subsequent purchaser or mortgagee, for valuable consideration, unless such deed or conveyance be recorded as aforesaid, before the recording of the deed or conveyance under which such subsequent purchaser or mortgagee may claim.

"Sec. 3. That a suitable person shall be appointed register for recording deeds and other conveyances affecting in law or equity, or relating to real estate within the city of Detroit, who shall be sworn to the faithful performance of the duties of his office, and shall receive the same compensation as is or may be allowed for the same services to the register of probate in the several counties in this territory.

We think if there was no statute like the one "concerning mortgages," still this court would say the act relating "to deeds and conveyances" is not applicable. "Deeds and conveyances" are not the terms used to designate mortgages. An analysis of this *statute [*43 shows conclusively to our minds that the construction attempted by the counsel for the defendant is not the one which the Legislature contemplated. The latter part of the first section says, that a deed or conveyance within the meaning of this statute "shall be good and valid to pass the lands, &c., without any other act or ceremony whatever." Is this the way

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titles to lands are passed under mortgages? By no means. Before a perfect title exists under a mortgage, there must be a failure to pay. The property must be sold, and the equity of redemption which remains in the mortgageor cut off. Another statute declares how this is performed, and when these acts are to be done, and it is wholly different from the mode pointed out in this law. It is clear, then, the first section does not refer to or include mortgages. The second section declares that all such deeds, &c., referring back to the first section for a description of them, shall be acknowledged and executed in a certain manner, and "such deeds or conveyances shall be recorded in the office of the register of probate for the county, or register for the city where such lands, &c., respectively, are situated, lying, and being," and the penalty for not recording is, that all such deeds and conveyances shall be adjudged fraudulent and void against any subsequent purchase or mortgage for valuable consideration, unless such deed or conveyance be recorded as aforesaid before the recording of such subsequent deed, &c.

The counsel for the defendant insist that the mortgage under which we hold is void against them, for the reason that it was not recorded in the office of the registry of deeds for the city of Detroit; though it is admitted that it was recorded in the office of register of probate, or county register. The penalty for not recording a deed there is, that it shall be adjudged fraudulent and void, while the penalty in the act concerning mortgages declares it shall be postponed only. One act says that the deeds and other conveyances not recorded in pursuance of it shall be void, thereby rendering it necessary to record the deeds referred to in the city register's office, under this law; if applicable, we are not only not entitled to recover, but the mortgage under which we claim is void, whatever the value of the premises, while the second law, or the one relating to "mortgages," in terms declares that the mortgage first recorded shall have preference in all courts of law and equity whatever. It is conceded that the mortgage under which we claim was recorded first in the registry for Wayne County, where this last provision prevails, and if the act concerning mortgages govern this case, then the mortgage under which we claim is good, and we are entitled to recover in this suit. The different penalties in the two acts would, of itself, indicate that the act "concerning deeds and conveyances" was not intended to apply to mortgages, for we believe there is not a statute in existence in any country, nor is there a decision of any court, declaring the penalty for not re-
44*] cording a mortgage, as against *a second mortgage, is that it is void. It is always to postpone; never more. Any other law would be oppressive. Take this case, where the premises were worth, at the time the second mortgage was given, enough to pay both if the mortgage under which we claim is void, then we could not have redeemed from them, and our whole security would have been lost, while if it was only postponed by paying their mortgage, we could have protected our debt. We are by no means certain, that, even if we admit (which we do not) the first act to be applicable to mortgages, we were compelled to record in the city register's office. Where is the record of the Lyon mortgage, under which we claim, to be found? In the office of register of probate, or county register (they are the same) of the counties of Wayne and Monroe. Where are the lands and premises situated? Answer: In the counties of Wayne and Monroe. Ay, but say the counsel for the defense, they are partly in the city of Detroit also. True; but is not Detroit in Wayne County? Are not the lots in question just as much in Wayne County as though they were out of the city? Most unquestionably. The counsel for the defendant admit the record of the mortgage under which we claim is good for part of the lands in Wayne County, but contend it is bad for another part in the same county; this we do not believe can be maintained. Our conclusions formed from an examination of these statutes alone are—

1. That the first act on the statute book relates solely to "deeds and conveyances," and does not refer to or include mortgages.

2. That the second act, having been passed at the same time, to take effect subsequently, and relating solely to mortgages, applies to and governs this case, and if the provisions of the two acts are inconsistent with each other, the act concerning mortgages must be sustained.

3. But if the first act is sustained, then we say that a record of a mortgage in the probate or county register's office for Wayne County is good, though part of the lands may be within the limits of the city of Detroit. But,

Second. We say that this question has been decided. The present defendants in fact, Messrs. Weed and Barnes, filed a bill in chancery, before the Chancellor of the State of Michigan, against the present plaintiff, setting up the facts as found by the jury, except that the bill was filed before the day to redeem had expired. They asked the court to decide the same question now before this court, that is, the validity of the record of this mortgage to Lyon, under which we claim. The argument of the counsel then was the same as it will be here, that the mortgage to Lyon was, as against them, under the provision of the act "concerning deeds," &c., void, and they asked the court to compel us to release our title. They asked the Court of Chancery to decide this question; and after argument, the court did decide it, and the opinion of that court *fully[*45 sustained us in every respect. The Chancellor said there could be no doubt but that the first act did not apply, and that the second did apply; and that the Lyon mortgage, having been recorded in accordance with the provisions of the act "concerning mortgages," was entitled to a preference in all courts of law and equity whatever. We suppose this adjudication, being between the same parties and upon the same subject matter, is conclusive. This court will follow that decision.

It is unnecessary to refer this court to the numerous decisions establishing this rule. We believe it is without an exception that this court always follows the decisions of State tribunals, when the question turns on the construction of a State statute, where real estate is in controversy.

Mr Bates and *Mr. Fraser*, for the defendant:

The special verdict having found the real es-

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tate in controversy to be situated in the city of Detroit, the only question involved in this case is, whether the mortgage through which the plaintiff claims to derive title to the premises should, by the laws of Michigan, have been recorded in the registry kept for the County of Wayne, or in that established for the city of Detroit; if in the former, it is conceded that the plaintiff must prevail in this action; but if in the latter, then the defendant is entitled to judgment on the verdict.

It has been well remarked by Chancellor Kent, that "the policy of this country has been in favor of the certainty and security as well as convenience of a registry, both as to deeds and mortgages"; and it is believed that every State in the Union has some statutory provision on the subject. Congress deemed some temporary rule on this head indispensable for the new territories to be established northwest of the river Ohio, for in the Ordinance of 1787, a provision is incorporated, prescribing the manner in which conveyances were to be executed, and proved and acknowledged, and requiring them to "be recorded within one year after proper magistrates, courts, and registers shall be appointed for that purpose." Indeed, the security of title to real estate in a great measure depends on such registries; and it can scarcely be believed that the Local Legislature of Michigan should have been unmindful of the necessity of adopting adequate provisions on this subject. Yet if the reasoning of the plaintiff is correct, it would seem that the Legislature of Michigan have been sadly deficient in this respect, until the year 1827.

The plaintiff has contented himself with bringing into view two statutes adopted in that year, one on the subject of recording deeds and conveyances, and the other concerning mortgages; and he has merely referred to some of the provisions of those acts, to establish his position, that the mortgage under which he claims was recorded in the appropriate registry. These 46*] two acts ought not to be *considered by themselves, for it will be found to be essential as well to a correct understanding of the subject, as to enable the court to put a proper construction on the statutes alluded to, that we carefully examine the previous legislation of Michigan on this subject.

The earliest provision is a law of 1805, in the Woodward Code (so called), at page 52, which declares "that the clerks of every court shall record all deeds and writings, acknowledged or proved before such court, &c., together with the acknowledgments of married women, and all indorsements and papers thereto annexed, by entering them, word for word, in proper books, to be carefully preserved, and shall afterwards redeliver them to the parties entitled to them." The next enactment is in the Code of 1815, at page 80, which provides "that all deeds and conveyances, which shall be made and executed within this territory, of or concerning any lands, tenements, or hereditaments therein, or whereby the same may be in any way affected in law or equity, shall be recorded in the register's office of the district where such lands or hereditaments are lying and being, within six months after the date of such deed or conveyance; and every such deed or conveyance that shall at any time after the publication hereof be made and executed, and which shall not be proved and recorded as aforesaid, shall be adjudged fraudulent and void against any such subsequent purchaser or mortgagee, for a valuable consideration, unless such deed or conveyance be recorded as aforesaid, before the proving and recording of the deed or conveyance under which such subsequent purchaser or mortgagee may claim." Next follows an "Act concerning Deeds and Conveyances," to be found in the Code of 1820, at page 156, the first section of which prescribes the requirements of "all deeds or other conveyances of any lands," &c., the second section of which declares "that all such deeds or other conveyances of or concerning any lands, tenements, or hereditaments lying within his territory, or whereby the same may be in any wise affected in law or equity, shall be acknowledged, &c., in the office of the register of probate for the county, or register for the city, where such lands, &c., are situated, lying, and being, within six months after the execution of such deed or conveyance; and any such deed or conveyance, that shall at any time after the publication hereof be made and executed, and which shall not be acknowledged and proved and recorded as aforesaid, shall be adjudged fraudulent and void against any subsequent purchaser or mortgagee, for a valuable consideration, unless such deed or conveyance be recorded as aforesaid, before the recording of the deed or conveyance under which such purchaser or mortgagee may claim." The third section provides for the appointment of "a suitable person as register for recording deeds or other conveyances affecting in law or equity, or relating to real estate within the city of Detroit; who shall be sworn to the faithful performance of his office, and shall *receive the same [*47 compensation as is or may be allowed for the same services to the registers of probate in the several counties in this territory; and the seventh section provides, "that it shall not be lawful for any register of any city or county in this territory to record any deed, conveyance, or other writing, unless the same shall be acknowledged or proved as is directed by this act," &c., and the eighth section prescribes "that all deeds and conveyances of lands, &c., which shall hereafter be made and executed in any other territory, State, or county, whereby such lands shall be conveyed in whole or in part, or otherwise affected or encumbered in law, shall be acknowledged," &c., and recorded as aforesaid.

This comprises the whole legislation of Michigan, from the organization of the territory up to the year 1827, on the subject under consideration; and the similarity of the provisions in these various acts can hardly escape observation. Aside from these statutes, no allusion is to be found, in the whole legislation of Michigan, to the subject of mortgages, until the year 1827; nor any separate provision touching their execution, registry, or foreclosure; and if the mortgages which had been executed on real estate within the city of Detroit anterior to that time are not covered by these provisions, fearful indeed must be the condition of titles to city property, for it will be agreed on all hands, that these statutes have been universally held, as well by the profession as the community

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generally, as comprehending that class of deeds. It is equally certain, that ever since the establishment of a separate registry for the city of Detroit, mortgages, and other deeds affecting real estate in the city, have uniformly been recorded in that registry. Such has been the practical construction put on the law of 1820, and on that of 1827, referred to by the plaintiff, up to the year 1837, when an act was passed (Laws of 1837, p. 268) requiring the duties of the city register to be performed by the register of the County of Wayne. Up to that time, scarcely an instance can be pointed out of a mortgage of city property being recorded anywhere else than in the city registry, except the mortgage on which the plaintiff seeks to recover in this action. It will be perceived, that the law of 1827 is merely a re-enactment of the law of 1820, with this difference only, that the latter statute limited the time within which deeds should be recorded, and superadded a provision for the recording of deeds which had been previously executed "in the city or county registry, as the case might require, agreeably to the provisions of that act." And in the Revised Statutes of 1833, the act concerning deeds and conveyances of 1827 is again transcribed and adopted; and in both these acts the provision which requires "deeds and other conveyances affecting in law or equity, or relating to, real estate within the city of Detroit," to be recorded in the city registry is still preserved and incorporated.

Now, it is urged that the reason and neces-[*48] sity of these laws, no *less than the language employed and the context, manifestly show the intention of the Legislature to have been the establishment of a registry of every description of deeds which might affect real estate. The general object was to prevent frauds on purchasers, mortgagees, and perhaps creditors, by having a place to which all might resort for the necessary information.

The terms made use of are general. No particular description of deeds is to be found in any of the acts, but the language used is sufficiently comprehensive to include mortgages, else why introduce into these acts terms which would be inapplicable to the recording of conveyances merely; such as "all deeds, or other conveyances concerning any lands, or whereby the same may be in any way affected in law or equity"? And again, unless mortgages were in contemplation of the Legislature, why declare that every such deed or conveyance that should not be recorded as aforesaid should be judged fraudulent and void against subsequent purchasers or mortgagees, unless such deed or conveyance should be recorded before the recording of the deed or conveyance under which such purchaser or mortgagee might claim? And further, why should the 6th section of the Act of 1827 use the terms "deed, conveyance, or other writing"? and the seventh section require deeds whereby lands were sold, or "otherwise affected or encumbered in law," to be recorded?

This is the language employed in the several statutes that have been passed upon this subject anterior and subsequent to 1827; and at the very time, too, that the mortgage law of 1817, relied on by the plaintiff, formed a part of the revised code. To presume that these enactments did not apply to mortgages executed prior to 1827 is presuming that the Legislature overlooked a subject of the deepest importance to the rights of parties, and the securities of titles; but if it be conceded that they did so apply, then it is insisted that they are equally applicable to mortgages executed after that period of time, since the same laws continued to be operative until the year 1837, long after the execution of the plaintiff's mortgage, and we emphatically ask, if the plaintiff in this case, in the position he now occupies, does not come within the meaning, spirit and terms of those acts. Does he not claim rights in opposition to a subsequent mortgagee for a valuable consideration? Does not the "deed, conveyance, or writing" in virtue of which he makes this claim affect or encumber in law the premises in question? And if so, does not that statute affix the penalty of his own omission, by declaring that his deed shall be deemed fraudulent and void, unless registered in the city registry?

But independent of the manifest intention of the Legislature, in the various provisions above alluded to, to include mortgages, we might with confidence refer to the practical construction which they have uniformly received should any ambiguity be found in the terms in *which they are couched. Considering the [*49 purpose for which these acts were made, in order to attain them, they ought to have a liberal construction. The practice of recording mortgages of real estate, lying within this city, in the city registry has been sanctioned by a most extensive and continued usage, from the year 1820 to the year 1837, and it is apprehended that courts will take notice of such usage under a statute. If it is now to be condemned, few titles to city property will be secure. *Optimus legum interpres consuetudo.* The propriety of applying this maxim to this case is sufficiently apparent. Long usage has been allowed great weight in cases allied to this. In reference to a usage which had obtained, under a statute, concerning the acknowledgment of deeds, *Chief Justice* Tilghman, in the case of *M'Ferran* v. *Powers* (1 Serg. & Raw., 101, 107), says: "So extensive and deep rooted is the practice, that many titles depend upon it; and it would be unpardonable to disturb it now, by a critical examination of the words of the act." To the like effect is the opinion of *Chief Justice* Marshall, in the case of *M'Kee* v. *Delancy's Lessee* (5 Cranch, 22, 29, 32, 33). And Lord Mansfield, in 2 Eden, 74, says, in reference to the usage which had obtained under the statute of Hen. VIII., as to the jointures: "Consider also the usage and transactions of mankind upon it. The object of all laws in regard to real property is quiet and repose." Chancellor Sandford, in the case of *Troup* v. *Haight* (1 Hopk., 239, 268), in regard to the acknowledgment of a deed, held that the general usage, long and unquestioned, has great weight in the construction of the act, though such construction be not given upon adverse litigation.

But it would appear that the plaintiff's sole reliance for a recovery in this action is based on the act concerning mortgages, adopted for the first time in the year 1827. Now, let it be kept in view, that this is the first

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special act passed in reference to mortgages in terms; that it was adopted on the same day with the act concerning deeds and conveyances, though to take effect in January, 1828; and that both these statutes are incorporated in the Revised Statutes of 1833, at pages 279 and 283, as they originally stood, and we ask what is the inference to be drawn from this fact. Clearly, that no change was contemplated as to the particular registry in which these "deeds, conveyances, or other writings" were to be recorded. If not, it may be urged, why the necessity of adopting a special provision in regard to mortgages? We answer, that this law was introduced merely as a remedial law, to provide for a statutory foreclosure—a remedy unknown both to the common law and to our legislation; and the scope of the provisions of the act is conclusive on that head. The act appears to have been transcribed from the laws of New York, and the clause for the recording of mortgages was introduced without adverting to the previous legislation on the subject. These two statutes, then, relate to the same 50*] subject, so far as *they relate to the recording of deeds or mortgages; and "it is to be inferred that a code of statutes relating to one subject was governed by one spirit and policy, and was intended to be consistent and harmonious in its several parts and provisions." It is therefore an established rule of law, that all acts *in pari materia* are to be taken together, as if they were one law; and they are directed to be compared, in the construction of statutes, because they are considered as framed upon one system, and having one object in view. "Indeed, the latter act may be considered as incorporated in the former." (Dwarris on Statutes, 699, 700; 4 T. R., 447, 450; 5 T. R., 417, 419; Doug., 30.) "And the rule applies, though some of the statutes may have expired, or are not referred to in the other statutes. (Dwarris on Statutes, 700; 1 Burr., 445, 447; Bac. Abr., tit. Statutes, I, 3; 1 Ventris, 244, 246.)

If, then, as is most manifest, it was intended by the law of 1827 to record "deeds, conveyances, and other writings relating to real estate in the city of Detroit," in the separate record previously provided for that purpose, is it not fair to presume that the Legislature contemplated that mortgages should also be recorded in the same registry? It would be absurd to suppose that it was designed to record one class of deeds, affecting city property, in the city registry, and another in the county registry; and yet we must arrive at that result, if the construction contended for by the plaintiff is to obtain. The construction contended for by us can be adopted without doing violence to the mortgage law; nor is this view of the case weakened by the fact that that law was not to go into operation until sometime afterward. This merely shows that the law was adopted for the remedy provided to the creditor, without resorting to a suit in chancery, and that that remedy was limited to mortgages executed after its passage.

It has been said that this question has been decided in this State by the Chancellor. We are not called upon to consider the effect of a decision of the highest tribunal of our State on the question, directly presented for its adjudication, but that of a subordinate court, from which an appeal lies to the Supreme Court of the State (Revised Statutes of 1838, p. 379), in a case which was never argued, and between other parties than those to this record; and where an appeal, too, was taken to the Supreme Court, but the benefit of which was lost in consequence of an omission to file an appeal bond in due time. Surely such a decision, under such circumstances, cannot be considered as putting a settled construction on these statutes, nor prejudice the rights of parties. Besides, it is obvious from the opinion, that the Chancellor has taken too limited a view of this subject, for he considers the effect merely of the two acts of 1827, without the remotest allusion to previous legislation in connection with them.

Mr. Justice WOODBURY delivered the [*51 opinion of the court:

The sole question presented in this case is, whether a mortgage executed by the tenant and her husband to James Lyon, on the 13th of November, 1828, shall prevail over another mortgage executed by them to Nathaniel and Harvey Weed and Henry W. Barnes, on the 6th day of June, 1837. Being earlier in time, by nine years, the first mortgage ought of course to have precedence, and will entitle the demandant to recover, unless it was improperly recorded.

The facts important to be now noticed in connection with that question are, that, at the time of the execution of the first mortgage, there were two registries—one in the city of Detroit, and the other in the County of Wayne, within which that city was situated. The premises in dispute were within the limits of the city, and the first mortgage was recorded on the 30th of January, 1829, in the registry for the County of Wayne, but not in the registry for the city of Detroit, where the second mortgage was recorded June 7th, 1827. On these facts, whether the recording of the first mortgage was legal or void must depend upon the construction of two statutes of the State of Michigan, both passed April 12th, 1827.

The demandant relies upon one of them, as being the only statute for recording "mortgages," and as his registry was duly made under that, he claims to recover. While the tenant relies upon the other statute, as embracing the case of mortgages, and as his was the only one recorded in conformity with it, and others not so recorded are declared void, he asks for judgment in his favor. It seems hardly to have occurred to either side that a construction may be given to these statutes which will make them both operative on this subject, and sustain both of the mortgages according to their original rank and intent; and if no legal principle is opposed to such a course, it is certainly entitled to preference.

Because it is a well settled principle of construction, that conveyances are, if practicable on any reasonable view of the subject, to be sustained rather than pronounced void, and also, that statutes which apparently conflict with each other are to be reconciled, as far as may be on any fair hypothesis, and validity given to each, if it can be and is necessary to conform the usages under them, or to preserve

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the titles of property undisturbed. (*Cooper* v. *Telfair*, 4 Dall., 14; 1 Serg. & R., 105; 2 Cranch, 358; 5 Cranch, 25; Bac. Abr., Statute, I.)

The statute which passed on the 12th of April, 1827, and related to "deeds and other conveyances," went into effect immediately, and was the only law of the State in force as to recording mortgages as well as other deeds, till January, 1828.

It provided that all deeds should be recorded [*52 in the County of *Wayne or the city of Detroit, according as the land conveyed was situated in one or the other. (Laws of 1827, p. 258.)

Though the title to this act and its general language do not embrace mortgages *eo nomine*, we do not agree with the counsel for the demandant, that they are not included.

In the second section, the word "mortgagee" is twice used. In the third section, also, "conveyances effecting in law or equity," "real estates," are spoken of. And besides this, it is reasonable to construe it as including mortgages under the general words of "all deeds and other conveyances of any lands," &c. (sec. 1), because they are sufficiently broad for that purpose, and because a similar generality had existed in the expressions in former laws in the territory on this subject (Woodward's Code, p. 52; Code of 1820, p. 156), and was construed to include mortgages; and because, if these are not included, there were eight months, from April, 1827, to January, 1828, during which no law except the first one was in operation, and consequently when no provisions whatever existed in respect to the recording of that important species of conveyance. The law, then, for that eight months, as to recording mortgages, must be considered to have been, that those relating to lands in the city of Detroit should be recorded there, and those relating to lands in other parts of the County of Wayne should be recorded in the registry for the county. (See the second section.)

The prior mortgage in this case, however, was not executed within that period, but on the 13th of November, 1828; and in the mean time the other act, which passed on the same day with that we have just considered, had come into operation "concerning mortgages," and was made applicable to all executed after January 1st, 1828.

The next important question then is, What, if any, was the alteration made by it in respect to the recording of mortgages? And was the mortgage to Lyon, not having been registered as the first act required, recorded in the manner authorized by the last act?

That act purports to relate to "mortgages" alone; leaving other conveyances to be recorded as they had been under the other law during the eight months before it took effect. As to "mortgages," it provided that those executed after the 21st of January, 1828, "may be registered in the county in which the lands or tenements so mortgaged are situated," and that a subsequent one, recorded before a prior one, should be preferred. (Laws of the Territory of Michigan, p. 273.)

The mortgage under which the demandant claims, being executed about eleven months after these new provisions, was recorded in conformity to them.

After this literal compliance with that law, and a construction under it which seems to uphold, as should be done, if practicable, the early mortgage, it does not seem desirable, and it is hardly expedient, *unless on prin- [*53 ciple necessary, to resort to a different construction, which would render the first security void as to the second mortgagee, although recorded in strict conformity with the law last going into operation. And as little does it seem expedient, unless necessary under imperative principles or precedents, to push this construction so far as to avoid or postpone any mortgages recorded in conformity to the provisions of the act first going into operation. The statute as to "mortgages" does not profess, in so many words, to repeal any portion of the other statute; nor is it necessary so to construe it. Going into effect later, if not passed later, it is true that any of its provisions entirely inconsistent with the laws in force before it took effect, or repugnant to them, might, without words of repeal, be considered as changed or abrogated, and the first impression would naturally be, that the provisions of the second law, so far as regards mortgages of land situated in the city of Detroit, were irreconcilable with the former act, and hence to that extent repealed it. But such a construction, though sustaining the mortgage to Lyon, might avoid many others and disturb numerous titles, and hence is not to be adopted, unless clearly the proper one. (Ld. Raym., 371; Bac. Abr., Statute, C and G; *Stradling* v. *Morgan*, Plowd., 206.) We think it is not the proper one.

A second law on the same subject does not repeal a former one without a repealing clause or negative words, unless so clearly repugnant as to imply a negative. (1 Bl. Com., 89; 1 Gall., 153, in case of *Ship Argo*, "*leges posteriores priores contrarias abrogant.*" But if they be not so contrary or so repugnant that the last act expresses or implies a negative of the first, then they may continue to stand together. And, if such be the case here, a mortgage of city property recorded in conformity to either law would be valid. Such, in our opinion, is the case here, there being no words of repeal or negation in the act concerning mortgages. Many cases of this kind, very analogous, are cited in *Foster's* Case (11 Coke, 63, 64; see, also, 2 Roll. R., 410; 19 Viner's Abr., 525).

Among them is one where an act of Parliament made an offense punishable at the quarter sessions, and another passed making it punishable at the assizes, without any words of repeal. It was held that you may indict under either, or at either court. (11 Coke, 63.)

The same result is arrived at, if the two acts be considered as passing and taking effect, as one law, on the same day. In that view, the last one only says that "mortgages" executed after the 1st of January, 1828, "may be registered" in the county where the lands lie; while the first one provided that they "shall be recorded" in the registry of the city, if the lands lay within its limits. These provisions may stand well together, upholding under one *act, a recording of mortgages in the city [*54 registry, as good in all cases of property situated there; and, under the other, upholding a record of mortgages of like lands in the county registry as also good, whenever any persons

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prefer to resort to that. As either of these views does not avoid the second mortgage, but only gives it, as was intended by the maker of it, a rank second to the first one, and as they both give force or operation to both statutes, and do not endanger or disturb titles either in the city or county, when either statute has been complied with, they ought to settle the question.

It may not be amiss to notice, also, that the mortgage to Lyon contained land in the County of Monroe, as well as in the city of Detroit, and having been seasonably recorded in that county, would be valid for some purposes, if not for this, without any second registry whatever in another city or county. (*McKeen* v. *Delancy's Lessee*, 5 Cranch, 22; *Delancy's Lessee* v. *McKeen*, 1 Wash. C. C., 525.)

It is gratifying to find that our conclusion in this case accords with the result in the only decision which is supposed to have been made in the State of Michigan on this subject. (See *Weed et al.* v. *Lyon et al.*, in Harrington, 363.)

Had that decision been made by the highest judicial tribunal of the State, or been shown to accord with a settled usage and practice under these statutes affecting the titles to real estate, we should have felt bound to conform to it, as a part of the local law. (9 Cranch, 87; 2 Peters, 58, 85; 6 Wheat., 119; 10 Wheat., 152; 11 Wheat., 361; 1 Brockenbr. C. C., 539.)

But, though entitled to respect and weight, that case has not been treated as a precedent to control this, because the judgment was not in a court of the last resort, and is said to have been appealed from, but further proceedings defeated by some accident.

Let a certificate be sent down, that, in the opinion of this court, the recording of the mortgage from Hale to Lyon was sufficient to give it validity and priority under the laws of Michigan.

S. C., 6 Cranch, 87.
Cited—7 Otto, 543; 1 Wood. & M., 373.

55*] *THOMAS MANEY ET AL., *Plaintiffs in Error*,

v.

THOMAS J. PORTER, *Defendant*.

Jurisdiction under Judiciary Act of 1789, sec. 25—pleading.

The decision of a State court upon the merits of a controversy between two parties, one of whom had sold, and the other purchased, an interest in lands which, it was thought, could be acquired as Indian reservations under a treaty with the United States, cannot be reviewed by this court under the 25th section of the Judiciary Act.

The party against whom the State court decided, instead of setting up an interest under the treaty, expressly averred that no rights had been obtained.

In such a case, this court has no jurisdiction.

THIS case was brought up by writ of error to the Supreme Court of Errors and Appeals for the State of Tennessee, under the 25th section of the Judiciary Act.

The case was this: Thomas Maney, one of the plaintiffs in error, on the 4th of October, 1836, gave his note to the defendant in error for $5,000, payable eight months after date. Suit was afterwards brought on this note, and judgment recovered in the State Circuit Court, from which Maney appealed to the Supreme Court of Errors and Appeals, where the judgment was affirmed against him.

He then filed his bill in the Chancery Court, and obtained an injunction. The defendant in error answered, and upon the hearing, the injunction was dissolved and the bill dismissed; and this decree was affirmed in the Supreme Court of Errors and Appeals against the said Maney and the other plaintiffs in error, who were his securities in the appeal bond. It is from the last mentioned decree that the present writ of error was brought.

In order to understand the character of the controversy in the State court, and the points in issue between parties, it is proper to state that by the 14th article of the treaty with the Choctaw Indians, made at Dancing Rabbit Creek on the 27th of September, 1830, it was stipulated that each Choctaw head of a family, being desirous to remain and become a citizen of the States, should be permitted to do so by signifying his intention to the agent of the United States within six months from the ratification of the treaty; and should thereupon become entitled to a reservation of one section of 640 acres, to be bounded by sectional lines—one half that quantity for each unmarried child living with him over ten years of age, and a quarter section for each child under ten; to adjoin the location of the parent. And if they resided on such land intending to become citizens five years after the ratification of the treaty, a grant in fee-simple was to issue; the reservation to include the improvement held by the head of the family at the time of the treaty, or a portion of it.

The bill filed by Maney stated, that in December, 1835, the defendant informed him that many Indians had within the time prescribed *signified to the agent of the government [*56 their intention to remain under the above article of the treaty, whose names he had neglected to register and certify; and that in consequence of his neglect, the lands to which they were entitled, with the improvements, had in many instances been sold, and had passed into the possession of the purchaser; and those who still retained possession of their reservation had become much alarmed; that Gwinn and Fisher had undertaken to secure these reservations to the Indians entitled, or to obtain for them an equivalent; and had made contracts by which the Indians were to give them one half (and in some cases more), if they succeeded; that Gwinn and Fisher had employed the defendant in error to assist them in the business; that he held their obligation for twenty-five sections of these claims; that he had no doubt of success: that the matter had already been before Congress, and it had been ascertained that a majority of both Houses were in favor of it; that he was confident a law would pass authorizing commissioners to be appointed to investigate and decide upon these claims, and that the reservations would be made good to the persons entitled; and that if Congress did not pass the law, the rights could be enforced in the courts of justice; that the defendant in error represented these Indian claims as of great value, and said that they had been already located on good

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lands, which were worth ten dollars per acre, and proposed, as a matter of favor, to sell a portion of his interest to Maney; and that he (Maney), having himself no knowledge upon the subject, and relying altogether on the statements of the defendant in error, purchased from him one undivided half part of his claim to the twenty-five sections above mentioned for $10,000; and thereupon gave two notes of $5,000 each for the purchase money, and received from the defendant a covenant to convey.

The bill further stated, that for reasons therein set forth the complainant became dissatisfied with his purchase, and thought he had been deceived; and in March, 1836, he applied to the defendant to rescind it, who refused; but that afterwards, in October, 1836, he agreed to take back the one half of these claims; and thereupon the two notes before mentioned were cancelled, and the note on which the judgment was rendered was given by Maney, and a covenant made by the defendant to convey, according to this contract; that at the time the last mentioned agreement was made, as well as before, the defendant had agreed that he would take back the lands and rescind the whole contract if the complainant desired it, in case Congress should pass a law authorizing a commission to examine into and decide upon these claims; that he and Gwinn and Fisher would continue their exertions to secure the titles, and that a law authorizing a commission to inquire into their validity would place them beyond reasonable doubt.

The bill further states, that the law proposed 57*] was passed by Congress; *but that the defendant had refused to rescind the contract, and had not continued to give his attention to the business as he promised; that he had sold out the residue of his interest; that Gwinn and Fisher, as the complainant understood, had likewise sold out their interest, or nearly all of it; that none of the claims had been secured, and the complainant did not think it probable that they would be obtained by the assignees of the Indians; that he had never received anything in land or money, and apprehended that he never would; and prayed an injunction to restrain the defendant in error from suing out execution on the judgment at law, and that the contract might be rescinded and set aside.

This is the substance of the bill, which is a very long one, going into much detail, and stating conversations which Maney alleges he held with the defendant in error, and with others, upon the subject; but which it is unnecessary to set out at length, as they are not material to the point upon wich the case was disposed of in the Supreme Court.

The defendant put in his answer, denying and putting in issue all the material allegations in the bill; and it was upon this bill and answer, and the proofs taken upon the matters thus in issue, that the decree was made upon which this writ of error is brought.

The case was argued by *Mr. Brinley* for the plaintiffs in error, and by the Attorney-General for the defendant.

As the decision of the court rested entirely on the question of jurisdiction, all those parts of the argument which involved the merits of the case are omitted in the report.

Mr. Brinley rested his argument in favor of the jurisdiction of the court upon the proposition that the contracts of the Indians were held to be valid because they had a right or authority to make them under the State laws of 1829 and 1830; and that the authority exercised under those laws was repugnant to the treaty of 1830, and to the laws of the United States; and that the decision of the State court was in favor of the authority thus set up.

Mr. Mason, Attorney-General, contended that the facts in this case were not sufficient to sustain jurisdiction.

Mr. Chief Justice TANEY delivered the opinion of the court:

Upon examining the bill in this case, it is not easy to determine, from the loose manner in which it is drawn, whether the complainant claimed the relief he asked for on the ground that the representations made to him by the defendant were false and fraudulent, or on the ground that the consideration for which the note was given had failed, because the defendant was unable to convey him a title to the Indian reservations.

It is evident, however, that the suit was not brought to uphold *any title or right which [*58 the complainant claimed under the Choctaw treaty, or under the law of Congress which he states to have been passed upon the subject. For he does not ask for a conveyance of the reservations, nor of the Indian title to them And he does not even aver that these claims are valid, or that he has any title to them; but, on the contrary, charges that none of the claims had been secured, and states that he did not think it probable that they would be obtained by the assignees of the Indians. And as the case has been removed here from the decision of a State court, we have no right to review it unless the complainant claimed some right under the treaty with the Choctaws or the act of Congress, and the decision of the State court had been against the right, title, or privilege specially set up by him; and even in that case, the power of revision given to this court extends no further than to the particular question thus raised and decided against the party. In the case before us, no such title, right, or privilege was claimed by the bill, and of course no decision was made against it in the State court. We therefore can exercise no jurisdiction in the case, and are not authorized to examine any questions of fraud or failure of consideration, or breach of contract, which the bill may be supposed to present, and upon which the court of the State of Tennessee may now decide.

Upon referring to the reports of this court, it will be seen that the 25th section of the Act of Congress of 1789, under which this writ of error is brought, has been often the subject of examination and comment in this court, and the construction of the section and the practice under it well settled by many decisions. It is unnecessary to repeat here what the court have said upon former occasions.

It is very clear that this case is not within the provisions of the section, and the writ of error must therefore be dismissed for want of jurisdiction.

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JAMES ERWIN'S LESSEE, *Plaintiff in Error,*

v.

JAMES DUNDAS ET AL.

Levy and sale of land under execution against two defendants bearing date after death of one gives no title to purchaser.

Although, by the law of Alabama, where an execution has issued during the lifetime of a defendant, but has not been actually levied, an *alias* or *pluries* may go after his death, and the personal estate of the deceased levied upon and sold to satisfy the judgment, yet this is not so with respect to the real estate.

By the common law, the writ of *fieri facias* had relation back to its teste, and if the execution was tested during the lifetime of a deceased defendant, it might be taken out and levied upon his goods and chattels after his death.

But if an execution issues and bears teste after the death of the defendant, it is irregular and void, and cannot be enforced against either the real or personal property of the defendant. The judgment must first be revived against the heirs or devisees in the one case, or personal representatives in the other.

Such is the settled law where there is but one defendant.

Where there are two defendants, one of whom 59*] has died, the judgment cannot be *enforced by execution against the real estate of the survivor alone; and as it has to issue against the real estate of both, the real estate of the deceased is protected by the same law which would govern the case if he had been the sole defendant. The judgment must be revived by *scire facias*.

Before and since the Statute of Westminster 2d (which subjected lands to an *elegit*), a judgment against two defendants survived against the personal estate of the survivor, and execution could be taken out against him, within a year, without a *scire facias*.

But before the real estate of the deceased can be subjected to execution, the judgment, which does not survive as to the real estate, must be revived against the surviving defendant, and against the heirs, devisees, and terre-tenants of the deceased.

The interest of new parties would otherwise be liable to be suddenly devested without notice.

In these views the highest court of the State of Alabama concurs. (See 6 Alabama Rep., 657.)

THIS case came up by writ of error from the Circuit Court of the United States for the Southern District of Alabama.

It was an action of ejectment brought by Erwin, the plaintiff in error, to recover a lot in the city of Mobile, known as Hitchcock's cotton-press, bounded on the north by Main Street, on the east by Water Street, on the south by Massachusetts Street, and on the west by Royal Street, under the following state of facts:

Prior to November, 1836, Henry Hitchcock was seized and possessed of the above lot, and on the 2d of November, 1836, a judgment was recovered against him in the Circuit Court of Alabama for Mobile County, by William McGehee, to the use of Abner McGehee.

By the laws of Alabama, this judgment was a lien upon the defendants' real estate.

On the 21st of December, 1836, Hitchcock sued out a writ of error to the Supreme Court of Alabama, giving the usual bond, with Robert D. James as surety, whereby the judgment was superseded.

On the 23d of June, 1838, the judgment of the Circuit Court was affirmed in the Supreme Court, which affirmance, by the laws of Alabama, operated as a judgment on the bond in error, against both parties obligors.

On the 14th of July, 1838, Hitchcock executed a mortgage of the lot in question to Cowperthwaite, Dunlap, and Cope, to secure the payment of a debt due to them.

On the 18th of August, 1838, a *fi fa.* issued from the Circuit Court clerk's office, on the affirmed judgment against H. Hitchcock, and Robert D. James, his security; which writ came to the hands of the sheriff of Mobile County, being for the amount of the debt, besides the ten per cent. damages. The sheriff indorsed that he received this execution on the 20th of August, and levied the same on certain lots in Mobile, as the property of Robert D. James, and returned it to the fall term.

On the 10th of October, 1838, Hitchcock, with the consent of *the mortgagees, [*60 leased the property to Mansoney and Hurtell for a term of five years.

On the 29th of November, 1838, a *venditioni exponas* issued to the sheriff, commanding him to sell the property, on which he had levied, as shown by his return. To this *venditioni exponas*, he returned that he had advertised the property for sale, and that on the 2d day of March, 1839, all further proceedings had been stopped by an injunction.

On the 2d of March, 1839, Henry Hitchcock filed in chancery a bill against McGehee, praying, for causes shown in the bill, relief against the judgment at law, and that the same should be enjoined. On this bill, an order was made for an injunction in the following words:

"On the complainant's executing bond, with good and sufficient security, in double the amount of the judgment at law, let an injunction issue agreeably to the prayer of the bill.

"P. T. HARRIS.

"28th February, 1839.

"To the Clerk of the Circuit Court of Mobile County, Alabama."

The complainant, Hitchcock, filed a bond by himself and William Crawford, as his security, in the penal sum of $8,404, payable to McGehee, dated the 2d of March, 1839, with a condition which, after reciting the rendition of the judgment, the filing the bill, and granting of the injunction, &c., ran in these words:

"Now, therefore, if the said Henry Hitchcock shall pay and satisfy all damages that the defendant McGehee may sustain by the wrongful exhibition of said bill, and in all things abide by and perform the ultimate decree which may be rendered in the cause, then this obligation to be void and of no effect; otherwise to be and remain in full force and virtue."

A writ of injunction issued on the 2d of March, 1839, commanding the sheriff to stay proceedings on the execution; on which he returned, that on the same day he desisted from all further proceedings, and returned the execution as enjoined.

On the 12th of August, 1839, Hitchcock died.

At the fall term of the Chancery Court, on the 25th of November, 1839, the following order was made in the cause:

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"This day came the defendant, by his solicitor, and suggests to the court, that the complainant has died since the last term of this court;

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and thereupon it is ordered, on motion of defendant's counsel, that the representatives of the complainant revise the proceedings by bill against the defendant, by the 1st day of April 61*] next, or *the injunction shall be from thence dissolved, and the defendant have leave to proceed at law."

At the Spring Term, 1840, the 22d of May, 1840, the following order was made:

"At the last term of this court, an order was made suggesting the death of the complainant, and that unless the suit be revived on or before the first day of the next term of said court that the injunction be dissolved, and no party complainant being made, it is ordered that the suit abate, and that the complainant's administrator, and heirs, and security on the injunction bond, pay the costs."

Hitchcook by his will bequeathed all his real and personal property to his wife, as trustee, with authority to make public or private sales and conveyances for payment of debts, and constituted her executrix.

On the 8th of July, 1840, Mrs. Hitchcock, without having taken out letters testamentary on the will, made an absolute sale and conveyance of the lot in question to Cowperthwaite, &c., subject to the lease above mentioned.

On the 10th of July, 1840, an *alias fi. fa.* issued on the affirmed judgment at law against Henry Hitchcock and Robert D. James, for the amount of the debt, and ten per cent. damages, given on affirmance, which came to the hands of the sheriff of Mobile County; on which he returned. that he had levied on the land (now the subject of this action of ejectment), as the property of Henry Hitchcock, pointed out to him by Isaac H. Erwin, executor of Henry Hitchcock, deceased; and that, on the first Monday of November, 1840, he had sold the said land to James Erwin, who was the highest bidder, for four thousand five hundred dollars.

On the 10th of February, 1841, the tenants attorned to Cowperthwaite, &c., as landlords.

On the 3d of March, 1841, Erwin brought this suit against the tenants, who thereupon attorned to him, and agreed to hold under him as landlord.

On the 8th of September, 1841, Cowperthwaite, &c., conveyed all their estate and interest in the premises to Dundas and others, the present defendants in error, who, on the 22d of March, 1842, applied to the court to be admitted into the consent rule, and to defend the action as landlords, on filing certain affidavits. This motion was resisted by the plaintiff Erwin and also by the tenants; but in March, 1843, the court admitted them to defend the suit. Whereupon the cause went to trial. and, under the instructions of the court, the jury found a verdict for the defendants.

The plaintiff took the two following bills of exceptions:

First Exception. "Be it remembered, that at the Spring Term, 1834, of this court, James Dundas, Mordecai D. Lewis, Robert L. Pitt-
62*] field, *Samuel W. Jones, and Robert Howell, appeared before the court by their counsel, and filed the affidavit of H. Barney, which is made part of this bill of exceptions, and moved the court to be admitted to appear and defend the action against the plaintiff by entering into the consent rule, and pleading. The tenants in possession, Hurtell, Mansoney, and Griffiths, resisted the said motion, and showed cause on oath against the same, which showing, which is on file, is made a part of this bill of exceptions, together with the documents thereto appertaining and referred to, and the said motion was also resisted by the plaintiff. Whereupon, the said motion coming on to be heard, the same was argued, and the hearing of said motion was continued from term to term till at this term, when the said motion was argued, and upon argument had, the said motion of the said applicants, claiming to be landlords, was granted, and the objections of the said plaintiffs, and of the tenants thereto, were overruled. And the said parties, admitted by the court to defend against the will of the said plaintiff and tenants, and the said tenants thereupon, refused to plead. For all which decisions of the court allowing said motion, the plaintiff excepts, and prays this to be sealed as a bill of exceptions, which is done accordingly. (Signed) J. MCKINLEY. [SEAL.]"

Second Exception. "Be it remembered, that on the trial of this cause, on the issue joined between the said plaintiff and the said James Dundas, Mordecai D. Lewis, Robert L. Pitfield, Samuel W. Jones, and Robert Howell, who have appeared as landlords, and entered into the consent rule, and pleaded not guilty; the plaintiff, to maintain the title, on his part, produced and gave in evidence the proceedings had in the Circuit Court of Mobile County, in the State of Alabama, in an action wherein William McGehee, use of, &c., was plaintiff, and Henry Hitchcock was defendant, together with the judgment, executions, sheriff's returns, &c., copies of all which are hereto annexed, marked A. Also, the proceedings of the Supreme Court of Alabama on the affirmance of said judgment, a copy of which is hereto annexed, marked B. Also, the record of the proceedings in a chancery suit, wherein the said judgment was enjoined, the injunction, &c., a copy of which is herewith, marked C. And the sheriff's deed on the sale of the property in controversy by the sheriff of Mobile County, under the said judgment, after the injunction was dissolved, a copy of which is herewith, marked D, showing that the same was purchased by James Erwin.

"It further appeared that Henry Hitchcock died on the 13th of August, 1839, that at and before the time of the rendition of the judgments, he owned in fee-simple and was in the possession of the property sued for and sold by the sheriff, and continued so till his *death, [*63 except that he executed a mortgage on the 14th of August, 1838, by which he conveyed the said land to Messrs. Dunlap, Cope and Cowperthwaite, under whom the defendants claim title.

"Upon the evidence offered by the plaintiff, the court instructed the jury that the sale by the sheriff was irregular and void, and that by such purchase at the sheriff's sale, under the said judgments, and the executions aforesaid, and the injunction proceedings, the sale and conveyance by the sheriff could convey no title to the plaintiff, and that therefore he was not entitled to recover in this action; to which the plaintiff excepts, and prays the court to seal

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this as a bill of exceptions, which is done accordingly.

(Signed) "J. MCKINLEY. [SEAL.]"

Upon these two exceptions the case came up to this court.

The case was argued by *Mr. George S. Yerger* (in a printed argument) and *Mr. Crittenden* for the plaintiff in error, and *Mr. Clement Cox* and *Mr. Sergeant* for the defendants.

Mr. Crittenden, after stating the case for the plaintiff in error, read the following opening argument by *Mr. Yerger*, viz.:

The record in this case presents for the determination of the court two questions. First, whether the sheriff's sale to the lessor of the plaintiff, under and by virtue of the execution issued after the death of *Judge* Hitchcock, but founded on a judgment obtained against him in his lifetime, is void. Second, whether the injunction obtained by *Judge* Hitchcock in his lifetime destroyed the lien of the judgment, or only suspended it.

I think the law upon both questions is in favor of the plaintiff in error.

By the law of Alabama, the judgment, not the execution, creates the lien upon lands. By the common law, an execution on a judgment may issue at any time within a year, without a *scire facias*. A sale made by or under such execution relates to the judgment, and passes the title from that time, as against the judgment debtor, and all who claim under him. If he had sold or assigned the property, no *scire facias* was necessary to make his vendees parties before execution issued, because the land was bound by the judgment, and his alienees took it *cum onere*. Upon his death, his interest, by operation of law, is transmitted to his heirs, or is vested by his will in his devisees; they, like the vendee or alienee, take it subject to the judgment. Be this, however, as it may, I believe, upon principle, it is clear, that, if an execution issues on a judgment within a year from the rendition of the judgment, though after the death of the defendant, if it is not superseded or avoided by the heir or terretenant, or by the guardian of the heir, before a sale is made under it, it passes the title of the ancestor from the date of the judgment. The execution in such case is not void, but is only 64*] *voidable, and if not avoided before the sale, the purchaser takes the title. The question has been repeatedly so decided. (*Speer* v. *Sample*, 4 Watts' Rep., 367; *Collingsworth* v. *Horn*, 4 Stewart & Porter, 237; *Mills* v. *Williams*, 2 Stewart & Porter, 390; *Preston* v. *Surgoine*, Peck's Tenn. Rep., 72; *Drake* v. *Collins*, 5 Howard's Mississippi Reports; Opinion of Chancellor Kent in *Jackson* v. *DeLancy*, 13 Johns. Rep., 537; and the principle seems to be recognized in the case of ——— v. ———, 13 Peters, 15, 16.) The court, in the case of *Speer* v. *Sample* (4 Watt's Rep., 367), reviewed all the English and American cases upon the subject. The opinion there delivered is not only a masterly exposition of the law, but is, as I think, unanswerable. All the objections that have been urged against the validity of such a sale are there met and conclusively refuted. The argument of the court is supported by the authorities referred to in the opinion so fully, that the point decided seems to be demonstrated.

The case of *Collingsworth* v. *Horn*, decided by the Supreme Court of Alabama (4 Stewart's Rep.), although a case of personal property, in principle decides this question. The court there decide, that in regard to personalty, the delivery of the execution creates the lien, and that if an execution is issued in the lifetime of the party, the lien is created, and the property thus bound may be sold under a subsequent execution, without revival against the executors, provided the executions have been regularly and successively issued, so as to continue the lien upon the property. In that case, the execution under which the property was sold issued, and was tested after the death of the judgment debtor, but the sale under it related to the lien acquired by the first execution; hence, there was no necessity to issue a *scire facias*. If the judgment creates the lien, and if a sale made under it relates to the judgment, as it unquestionably does, the principle which was asserted in *Collingsworth* v. *Horn* must necessarily and inevitably apply; and if, in the one case, there was no necessity for a *scire facias*, or if the execution without it was only voidable, there cannot be, upon principle, any reason why it should be required in the other.

I am aware there are a few cases which hold the contrary doctrine, and decide that the sale is utterly void. Some of these cases will be found, upon examination, to be based upon statutory provisions; others profess to be founded on the principles of the common law, which principles, however, I will respectfully attempt to show, were misapplied by the judges who decided those cases.

The cases relied on, as establishing the position that the sale in this case is void, are *Woodcock* v. *Bennett* (1 Cowen's Rep., 711), 9 Wendell, 452; 10 Wendell, 211; 1 Yerger's Rep., 40; 10 Yerger's Rep., 320; 16 Mass. Rep., 191; 20 Johns. Rep., 106; Taylor's North Carolina Reports, 261.

The cases in 9 and 10 Wendell are founded upon the authority *of *Woodcock* v. *Ben-* [*65 *nett* (1 Cowen). The latter case settled the law in New York, and the subsequent decisions were governed by its authority. If the case in 1 Cowen cannot be sustained, it must fall, and consequently those which are founded on it must fall with it.

The case of *Woodcock* v. *Bennett* contains all the supposed principles of the common law relied on to sustain the position that the sale in this case is void; hence, if it cannot be supported, neither of the other cases can be.

In that case, a judgment was rendered against two persons; after the death of one of them, an execution was issued and was levied on the lands of both, and the lands of both were sold. The court decided that the judgment was a charge on the realty and did not survive, as it would have done if the execution had been against the personalty, and they decide, as the execution issued against and was levied on the land of the deceased after his death without revival, the sale was void.

The court, in the outset, assumes the position that the execution was void because it issued after his death. They say (see page 783): "The question here will be whether the execution was not necessarily void at the time it issued, inasmuch as it directs a sale of a de-

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fendant's property who was not then in existence, without first calling on the representatives to whom the property, if he had any, must have passed, and who, being strangers to both judgment and execution, had no day in court, to show that the process was either void or voidable."

The principle assumed here is, that an execution which issues after the death of a party is void, because it directs the property of a dead man to be sold, and because the representatives ought to have a day in court to contest it. I think this is not so, where either the execution or the judgment binds the property in the hands of the heir or executor. *In extenso*, it overturns a series of adjudged cases, from the time of Lord Coke to this time. By the common law, personal property is bound by the test of the execution, and it is settled that an execution which issues after a man's death, but tested before, may be executed and the property sold without making the personal representatives parties. (See *Fleetwood's* case, 8 Coke's Rep., 171; *Audley* v. *Halsey*, Cro. Car., 148; 4 Watts, 369, and authorities cited.) The ground upon which these cases were decided was, that the goods were bound, and the sheriff had a right to seize them in the hands of a purchaser or administrator; and yet, the reason given by the court, in the case in Cowen —to wit, "that it issued after his death, without revival against the representatives, and directs the sale of a defendant's property who was not then in existence"—would equally apply, and defeat this execution. Why does it not defeat it? Because the property was bound by it before the death, and the death, 66*] *therefore, cannot be noticed; *a fortiori*, if the real property is bound by the judgment before his death, it may be sold, although the execution issued afterwards.

Again, the court says (same page): "The general rule is, that, where any new person is to be better or worse by the execution, there must be a *scire facias*." Although this is a general rule, it does not apply where the property in the hands of the new person is bound, either by the judgment or the execution. If a judgment debtor aliens the property bound by the judgment or the execution, must his alienee be made a party by *scire facias?* Surely not. Yet he is a new person, and his interest is affected by the execution. Why is it not necessary? Because the judgment bound the property. So, where an execution is tested before the death, but issued afterwards, the executor is a new party; he is affected by the execution, yet it need not be revived against him, because the property in his hands is bound by a lien which existed prior to the death of his testator. The truth is, new parties are only required to be proceeded against where neither the judgment nor the execution binds the property in their hands, but which property nevertheless must be appropriated to the payment of the judgment or execution. For instance, assets in the hands of an executor must be appropriated to pay the testator's debts. If there is a judgment, but no execution issued and tested in the lifetime of the testator, the goods are not bound; a sale by the executor would pass the title; in such cases a *scire facias* is necessary to have execution of the judgment. Not so where the execution is tested in the lifetime of the testator; there the goods are bound without any direct proceeding against the executor.

But, it is again said, the *scire facias* is necessary, because the new party may show the judgment had been paid or released, or satisfied. The same reason would apply where execution issued after the death, but was tested before. The judgment in the latter case might have been paid, as well as in the former. If the judgment has been paid, the remedy in such case for the executor or heir is to supersede the execution and stop the sale; yet, if this was not done, the sale itself would be absolutely void, even as to a *bona fide* purchaser, because the judgment being paid, the sheriff had no authority to sell. (2 Hill's Rep., 566; *Wood* v. *Colvin*, and cases cited in page 567.)

In cases where a *scire facias* is necessary, if it does not issue, the execution is only erroneous. It is as necessary to issue a *sci. fa.* if there has been no execution issued within a year, as where the party has died. Yet if it does issue without a *sci. fa.*, it is not void, but voidable.

The court, 1 Cowen, 739, says, the reason of this is, that in the former case there is a party alive who can avoid it—in the latter case there is not; and say the court in the former case, the law permits *the plaintiff to issue it, subject [*67 to be defeated on the application of the defendant, but in the latter case the act of issuing the execution is not warranted by law.

The court here take for granted the very thing in dispute. It is as much against law to issue an execution without a *sci. fa.*, after the year and day, as it is to issue it after the death of the party. In both cases, the execution may be avoided; in the first case by the party himself —in the latter, if levied on the goods, by the executor, or on the land, by the heir or his guardian, or by the terre-tenant. The levy in both cases notifies them of the proceeding. The court is mistaken, I apprehend, in supposing there is a party to avoid in the first case and not in the last. For surely the executor, heir, and terre-tenant are privies in law and may avoid it. The distinction taken by the court is therefore unsound.

The court cite 2 Saunders, 6, N. 1, and advert to many cases to show that, where heirs or terre-tenants are proceeded against, *scire facias* is necessary. But these cases do not decide that the execution is void, if issued without it, for the question arose upon writs of error, or motions to quash. The books also say, a *sci. fa.* is necessary where no execution has issued within a year from the rendition of the judgment, yet if it does issue, they also say it is only erroneous, not void. In all or nearly all the cases cited by the court, where it is said a *sci. fa.* may or must issue, the question was not whether it was void if the execution did issue without it, but merely whether the process should be avoided or set aside.

The court cite the Bill of Rights of New York, "that no person shall be put out of his freehold or lose his goods unless he be brought to answer," &c., &c. And they think this provision requires in all instances a *sci. fa.*

This might be true if the goods or lands belonged absolutely to the assignee or representative of the judgment debtor, but as they take

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the land or goods, subject to the judgment lien, which lien takes effect not from the sale, but from the rendition of the judgment, the goods never were in contemplation of law, after the sale, their goods or lands. The same argument would defeat a sale of land or goods actually levied on before the parties' death, but not sold; so it would compel a *sci. fa.* to issue if the judgment debtor sold the land after the rendition of the judgment, but before a sale under it, for the land is as much the property of the alienee, in such case, as it is of the heir, after the ancestor's death.

The court then proceed to show that the New York act, which gives a remedy to the purchaser of lands who is evicted on account of irregularity, &c., in the judgment, sustains the view previously taken by the court. This it is not necessary to examine.

This case from 1 Cowen was cited upon the 68*] argument of the *case in 4 Watts' Rep., 367, and I think the opinion of the court in that case is a complete answer to it.

The case relied upon, from 20 Johns. Rep., 106, presented merely the question whether it was erroneous to proceed by *sci. fa.* against some of the terre-tenants, without joining all. The court decided it was necessary to proceed against all. It was the case of a writ of error prosecuted by some of the defendants, and the observations of the court only apply to the case before them. The case simply decides it to be erroneous. The question, whether, if a sale had been made without *scire facias*, it would be void, was not raised by the record.

The cases in 9 and 10 Wendell follow the authority in 1 Cowen, and such, no doubt, is now the law of New York, but these decisions, as I have shown, not being founded on principle, and being partly founded on a statute of New York, are no controlling authority for other courts.

The cases cited from Tennessee and North Carolina have no application. The lien of the judgment obtained against the ancestor, in both those States, is qualified by the Act of 1784, or by the construction put on it by the courts. It is held, under this act, that the lien of the judgment, or rather the judgment itself, cannot be enforced after the death of the ancestor, until the personal estate is proceeded against and the plea of fully administered found in favor of the personal representative. (*Boyd* v. *Armstrong's Heirs*, 1 Yerger, 40; *Gilmer* v. *Tisdale*, 1 Yerger, 285; *Peck* v. *Wheaton*, M. & Yerger's Rep., 353.)

The case of *Boyd* v. *Armstrong's Heirs* admits, if the sale passed the right before the death of the ancestor, it would be valid. *Judge* Haywood dissented in that case, notwithstanding the Act of 1784. And afterwards, in the case of *Preston* v. *Surgoine*, in Peck's Reports, the court decided (*Judge* White dissenting), that if an execution issued after the death of the ancestor, but within a year from the rendition of the judgment, the lands were bound and might be sold without a *sci. fa.* against the heirs.

In the case of *Overton* v. *Perkins* (10 Yerger's Rep., 328) the execution did not issue for several years after the judgment. The land, in the mean time, had been sold by the judgment debtor, in his lifetime, to Perkins, and by the Tennessee Act of 1799, the lien of the judgment, as to purchasers, only exists for a year.

The case from Taylor's North Carolina Reports seems not to have been examined, and in North Carolina it has been decided (see 2 Murphy, 45) that if a *fi. fa.* is issued, instead of an *elegit*, the lands are only bound as goods and chattels are bound by the common law.

The case cited from 16 Mass. was decided upon the principle that, in Massachusetts, an extent or sale did not relate by fiction to the time of the judgment.

*In the case cited by me from 13 Pe- [*69 ters, the party died after a decree ordering the land to be sold, but before sale. The sale was made without revival, and it was held to be valid. This case, and those previously cited by me, completely overturn the reasoning of the court in 16 Mass. Rep., 191, and the other cases relied on.

I conclude, therefore, as the judgment was rendered against *Judge* Hitchcock by the Supreme Court of Alabama, in June, 1838, and as the mortgage to Cowperthwaite and others was made in July, 1838, the sale under the judgment vested the title in the lessor of the plaintiff, and he is entitled to recover.

The next question is, whether the injunction obtained by *Judge* Hitchcock, which was afterwards dissolved, destroyed the lien.

It is a general principle, that a lien once created continues until actual payment, unless forfeited by some act of the party in whose favor it is created. (*Rankin* v. *Scott*, 12 Wheaton's Rep., 177; *Darrington* v. *Borland*, 3 Porter's Rep., 35; *Overton* v. *Perkins*, Martin & Yerger's Rep., 367.)

An act which merely suspends proceedings on a judgment does not destroy the lien of the judgment. (*Taylor* v. *Thomson*, 5 Peters's Rep., 358.)

It seems to be a settled rule, that the act of the opposite party, or the act of the law, shall never affect the right of a third person. (5 Co. Rep., 87; 1 Co. Rep., 102, *a*, 105, *b*, 106, *b*; *Lusk* v. *Ramsey*, 3 Mumford's Rep., 417; 18 Johns. Rep., 311, 363.)

The rights of the plantiff at law, after a dissolution of the injunction, stand upon the same ground they did when it issued. (Martin and Yerger's Rep., 373, and cases cited by *Judge* Catron, in delivering the opinion of the court in that case; see, also, the argument of *Judge* Haywood, 1 Haywood's Rep., 60, 61, 62.)

The precise point was ably investigated & decided by *Judge* Catron in *Overton* v. *Perkins*, (Martin & Yerger's Rep., 370.)

The case cited by the defendants in error from 1 Miner's Alabama Reports, was not a decision of the court; it was a mere *dictum*. Besides, it was a case of personal property, which was not bound by the judgment, but was only bound from delivery of the execution to the sheriff. It may be that, on account of the perishable nature of personal property, the lien may be destroyed by the injunction. In the case of land, it is the judgment which binds and creates the lien in Alabama, and in such case the injunction suspends, but cannot destroy, the lien. (See 3 Porter's Rep., 35.)

The case of *Winston* v. *Rives* (4 Stewart & Porter, 269) is also cited to show that the lien is destroyed. This case does not decide the

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point. The judge, *arguendo*, takes it for granted that the law is so. It was also a case where personal property was levied on. The case in fact only decides that a second writ of error bond discharged the sureties in the first, be-
70*] cause they, as sureties, were *prevented by the *supersedeas* from asserting a right the law gave them, to wit, to have the judgment against their principal executed. The sureties might for this have been discharged and the lien of the judgment remain unimpaired as to the principal.

The law is settled, that a judgment lien, which is a mere security of record for the debt, is not merged or extinguished by another security which is not of a higher character. A judgment founded on a judgment does not extinguish the first judgment. If a judgment were obtained on the unjunction bond, it would not extinguish the original judgment. (*Andrews* v. *Smith*, 9 Wendell, 53; *Jackson* v. *Shaffer*, 11 Johns. Rep., 513; *Taylor* v. *Thomson*, 5 Peters, 358.)

But what is the ground of the *dictum* in the case in 3 Porter, 145, and 4 Stewart & Porter, 260? It is that the injunction bond is given to pay and satisfy the debt or judgment according to law. If there is no bond, or it is a forgery, or if it is conditioned for the payment of costs and damages only, and not for the payment of the judgment, or if the injunction issues without a bond, then and in either of these cases the lien of the judgment is not discharged, even if the law should be as stated by the judge in these cases, because he has not got the substitute for the lien, to wit, a bond and security to pay his judgment. The condition of the injunction bond executed in this case by *Judge* Hitchcock and his surety is only to pay the damages, &c., not the judgment: consequently, according to these cases, the lien is not discharged.

The levy of the execution on the land of James, the surety of *Judge* Hitchcock in the writ of error, does not affect the lien of the judgment, because the levy, being on real estate, was no satisfaction of the judgment. (*Hogshead* v. *Carruth*, 5 Yerger's Rep., 227; *Shepperd* v. *Rowe*, 14 Wendell, 260.) And because, if the principal had property, it was the duty of the sheriff to abandon that levy, and levy on the property of the principal. (Aiken's Digest, 164.) The surety, in fact, could have stopped the sale, or, if the land was sold to satisfy the judgment, he still could, according to the Alabama law, have issued an execution on the judgment for his own benefit and sold the property of the principal. (3 Stewart & Porter, 345; 4 *Ibid.*, 277.) Moreover, the injunction prevented it from being sold, and after the injunction was dissolved, it was the duty of the sheriff to levy on the property of the principal.

For the above reasons, and upon the above authorities, it is confidently believed the judgment of the court above ought to be reversed.

Mr. Crittenden, after reading the above argument, proceeded with his own.

The question is, as to the validity of the sheriff's sale. If it was erroneous, it can only be set aside upon a direct motion to that effect,
71*] *and not tried in a collateral action. Was it void, conveying no title whatever? The authorities show, that if execution issues after a year and a day, it is only voidable. What essential difference is there between that case and where it issues after death? In neither are the parties precluded from showing payment. It is said that injustice may be done; but how can a loss by forced sales occur any more when execution issues after the death of a defendant than when it issues after a year and a day? Sufficient notice is given in both cases by the sheriff's going upon the property, taking possession, and advertising. Is hardship a sufficient reason for setting aside a legal process? Must the law guard against possibilities, and is not an injury done to creditors by annulling the sale? Are sales, fairly made, to be declared null and void upon the bare suspicion that a wrong may be done? When a lien is created by the judgment, it is as if public proclamation were made that the property is bound by that judgment. If so, to pursue it after the death of the defendant is only to adopt the analogous practice of a court of chancery, and consider it a proceeding *in rem*. This court has gone further than any other in giving effect to sales made under judicial authority. When a judge has declared what shall be done, ought not courts to enforce it? Bidders are encouraged to purchase at sales thus made, and the principle promotes the public benefit. A purchaser ought not to be bound to know whether a party is dead or not. It is an extrinsic fact. The sheriff may not know it himself; the party may have gone abroad. If the question were a new one, no good reason can be given why the law should be so. The heirs of the party have not come forward to set the execution aside, but the question has arisen in a collateral action. Injustice must certainly be done by deciding in one way, and in the other there exists a possibility of its happening in some manner which is untold and uncomplained of. The case of *Speer* v. *Semple*, (4 Watts, 367) is directly in point, and so is that of *Collingsworth* v. *Horn* (4 Stewart & Porter, 237).

But it is said by the other side that the lien of the judgment was destroyed by the injunction bond. On the dissolution of an injunction, the party stands exactly where he did before it was issued. Supposing the bond to be perfectly good, yet there is great delay in suing upon it, and in this case it is only to cover damages.

An injunction does not annul a judgment, but only restrains a party from proceeding. It is only a *supersedeas*, a temporary suspension of the rights of the party. (1 Martin & Yerger, 367.)

Mr. Clement Cox, for defendants in error:

The points raised in the first bill of exceptions, relating to the admission of the present parties to the suit, have not been argued by the learned counsel, and are therefore presumed to be abandoned. [*Mr. Crittenden* remarked that he did not formally abandon *the points [*72 but did not argue them.] *Mr. Cox* said, in such case, he would not argue them either.

The remaining point in the case was this: That the sheriff's sale, under which the plaintiff claimed, and the deed from the sheriff, and the writs and proceedings upon which they were founded, were irregular and void,

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and conveyed no title, and the plaintiff was not entitled to recover in the action.

The sheriff's sale was void for two reasons.

1st. The injunction bond destroyed the lien of the judgment.

2d. The execution was wrongfully issued without a previous *scire facias*.

1. The record shows how the injunction was granted and bond given. We have a right to presume that they followed the statute. There were three judgments against Hitchcock, one in the court below, one in the Supreme Court, and one in chancery; and two judgments against his sureties; namely, one against James and one against Crawford. All five of these were alive at once, according to the doctrine contended for by the other side. But it is against the policy of the law to countenance multiplied securities for a single debt. The law does not favor dormant liens, which tie up property. These are the principles of the common law and of the statutes of Alabama. The Legislature and courts of that State have adopted them. A lien of a judgment upon lands arises from the Statute of Westminster 2d. giving an *elegit*.

1 Brock., 170, establishes that where there is a senior judgment with a stay and a junior judgment without a stay, the latter is preferred. (See, also, 2 Brock, 252; 4 Peters, 124; 3 Ala. Rep., 560; 4 Ala. Rep., 735–739.)

This policy runs through many of the laws of Alabama. Thus, where a senior creditor has the debtor in execution under a *ca. sa.*, the debtor may dispose of his property to a junior creditor, and this without the *ca. sa.*, superseding the lien. (Aiken's Digest, 159, 160.)

Also, if there be doubt in the mind of the sheriff, he may require a bond of indemnity. If a junior creditor gives such a bond, and the senior creditor refuses, the sheriff may legally sell and satisfy the junior creditor. (Aiken's Digest, 166, 167.)

So, where a senior creditor lays by for a long time, the junior creditor may enforce his lien. (4 Ala. Rep., 543, 750; 1 Haywood, 72.)

So, a junior creditor is preferred if he sells before a senior, although the latter takes out a series of executions. (Aiken's Dig., 156, and a corresponding principle at 162.) A lien of an execution was held to be destroyed by an injunction. (Miner's Ala. Rep., 373.)

Where there is a series of appeals, each one acts as a merger of the preceding ones. (4 Stewart & Porter, 269.)

73*] *The sureties in an appeal bond are discharged by new sureties being given in a higher court. (4 Stewart & Porter, 275; 3 Porter, 138, 153; *Wiswell* v. *Monroe*, 4 Ala. Rep., 9; 4 Ala. Rep., 543, 735.)

2. The execution was wrongfully issued.

Erroneous executions are voidable where there is a party in court to avoid them; but where there is no such party, they are void. There are numerous authorities for this: Fitzherbert, N. B., 267, 597, where an *elegit* was said to be void, when issued after the death of the party, without a *sci. fa.*; Orlando Bridgman's Rep., 464; 7 Bac. Abr., 138, tit. *Scire Facias*, C. 4; 1 Salkeld, 319; 2 Ld. Raym., 768; 2 Saunders, 6, *note*; 6 T. R., 368; Bingham on Ex. 121; Chitty's General Practice, 522. American decisions: 1 Cowen, 711, 739; 10 Wend., 206; 20 Johns., 156; 16 Mass. Rep., 191, 193; 10 Yerger, 328; 1 Yerger, 40.

Personal estate is held to be the fund first applicable to debts, and real estate is only to be reached in the mode therein pointed out. (Aiken's Dig., 151, 154, 156; Clay's Digest, 191.)

The case in 4 Stewart & Porter, 237, has been cited on the other side, in which it is said that such an execution is only voidable. But it is an *obiter dictum*, and relies on 18 Johnson, which has been overruled by the cases in Cowen and Wendell; and even the case in 4 Stewart & Porter says, at page 249, that it would be different if third parties were involved. (4 Comyn's Dig., 250, tit. Execution, F; 3 Ala. Rep., 254.)

Mr. Sergeant, on the same side:

This is a question to be settled by authority. What is the law of Alabama on the subject? Many cases have been cited, but the latest of all has not, namely, 6 Ala. Rep., 657. The case in 4 Watts was decided upon principles peculiar to Pennsylvania law. [*Mr. S.* here commented upon this case.] But what is the law of Alabama? The case in 4 Ala. Rep., 735, was decided in January, 1843, and the present case was tried in the Circuit Court in the following March. The same counsel who were employed in the case in 4 Ala. Rep., were engaged in this one, and even the title was the same in both, for it was Erwin's title, though in another form. The subject of controversy was this very title, and all the cases were quoted.

It is difficult, if not impossible, to see how the court could have decided as they did without deciding the precise point that the lien of the judgment was destroyed. It is a strictly local law. The judge who tried this case in the court below had before him, in manuscript, the decision of the highest court in the State, and it was, in effect, an appeal from that court to the Circuit Court of the United States. The defect in the argument of Mr. Yerger is, that it does not inquire what the law of Alabama actually is, but what *it ought to be according to the principles of the common law. [*74 We need not follow the distinction between a levy upon real and personal property, although it is obvious. When a levy is made on personal property, the sheriff becomes the owner, and it is hard to say when he may not sell it. But in land he acquires no ownership.

Was the execution wrongfully issued? The general rule of law is, that there must be two parties. In 1 Howard, 282, 286, this court said that an execution was void which had been issued under a decree. That case came up from Alabama, and the decision was, therefore, upon the law of Alabama. Why should a sheriff sell the property of a dead man without giving notice to those concerned? What a chance for roguery and fraud? It is said on the other side that the execution is only voidable. But who is to avoid it?

Mr. Crittenden, for plaintiff in error, in reply:

We insist that the execution is not void, but only voidable. It is admitted that the judgment was a lien. Some cases say that where an execution is begun, and then the party dies, the execution goes on; that the property is in

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the custody of the law. That is reasonable doctrine, and avoids litigation. A *sci. fa.* is often more troublesome than the original suit. It is possible that some new defense may be drawn forth. But is the possibility of this to overbalance certain wrong on the other side? No good reason can be given for the distinction between real and personal property; and yet it is admitted that a sale of personal property would be good. Such distinctions, without reason, are discreditable to law and to science. The law of Alabama makes real estate responsible for debts equally with chattels. The case of *Collingsworth* v. *Horn* covers all the ground of this case, and has not been overturned. In 4 Ala. Rep., 752, the court say they "are willing to leave it open to be settled when it shall arise," and yet in 6 Ala., the court say that the preceding case settles the point. They seem to have overlooked the fact that in 4 Ala., the court were willing to leave it open. Is this court precluded, in such a state of things, from examining a question upon which there has been such vibration? In all the cases, the point is made to rest upon the common law, and not upon the statutes of Alabama.

Mr. Justice NELSON delivered the opinion of the court:

The first execution issued upon the judgment, in this case, was issued on the 18th of August, 1838, during the lifetime of both the defendants, and was therefore regular and valid; but, according to the return of the sheriff, a levy was made only upon the property of James, the surety, and was abandoned when the proceedings at law were enjoined by the 75*] bill in chancery. We may therefore *lay this execution out of the case. For, although, according to the law of Alabama, when an execution has been issued during the lifetime of a defendant, but not executed, an *alias* or *pluries* may go after his death, and the personal estate of the deceased be levied on and sold to satisfy the judgment, for the reason that the lien, thus regularly acquired under the first, is continued by the succeeding writs, down to the time of the sale; yet it appears to be well settled there, that the practice has no application to the enforcement of executions against the real estate of the deceased. (*Lucas* v. *Doe, ex dem. Price*, 4 Ala. R., 679, N. S.; *Masony et al.* v. *The U. S. Bank, lb.*, 735; and *Abercrombie* v. *Hall*, 6 *lb.*, 657.)

The validity of the plaintiffs title, therefore, must depend altogether upon the execution issued on the 10th of July, 1840, nearly one year after the death of Hitchcock, under and by virtue of which the premises in question were sold and conveyed to him.

At common law, the writ of *fieri facias* had relation to its teste, though in fact issued subsequently, and bound the goods of the defendant from that date. The Act of 29 Car. II. (re-enacted in most of the States) took away this relation as respected the rights of *bona fide* purchasers, and confined its binding effect upon the goods as to them to the time of the delivery of the writ to the sheriff; but as between the parties, it remained as it stood at common law.

One consequence of this relation has been, that if the execution can be regularly tested in the lifetime of a deceased defendant, it may be taken out and executed against his goods and chattels after his death, the same as if that event had not intervened.

The theory or fiction upon which this result is arrived at is, that the execution is taken in judgment of law to have been issued at the time it bears date, however the fact may have been, and that being prior to the death of the defendant, and the goods being bound from the teste, or presumed issuing, execution upon them is deemed to have commenced in the lifetime of the party, and being an entire thing, may be completed notwithstanding his death.

It is regarded in the same light as if delivered into the hands of the sheriff and the goods bound in the lifetime of the defendant, for the reason the officer being entitled to seize them at any time after the teste, the death of the party could not alter the right; and therefore, though the execution came to the sheriff after, still if tested before his death, the goods may be seized, in whose hands soever they may be found.

In illustration of the extent to which this doctrine of relation is carried, we may add, it has been frequently held, that if a judgment is entered in vacation against a defendant who died the preceding term, an execution tested on a day in the said term prior to the defendant's death may be sued out without a *scire facias;* for, as the judgment signed in vacation relates to and *is considered as a judgment of the first [*76 day of the preceding term, and as the execution relates to the judgment, it may, in point of form, be considered as having commenced before the death of the defendant, on account of the date or teste, and, of course, upon the ground above stated, being an entire thing, be completed afterwards.

There are numerous authorities establishing this view of the case in respect to the enforcement of judgments and executions against the goods or other personal estate of the defendant. (Gilb. on Ex., 14, 15; Bing. on Ex., 135, 136, 190; 2 Tidd's Pr., 1000, 9th Lond. ed.; 7 T. R., 24; 6 *Ibid.*, 368.)

This doctrine of relation is resorted to with a view of meeting and avoiding the objection, which might otherwise be alleged, that the rights of new parties, to wit, the personal representatives of the deceased, would be affected by the issuing and enforcement of the writ upon the goods after the death of the defendant who should be called in and made parties to the record for the purpose of enabling them to interpose a defense, if any, to the judgment. For upon the construction given, the writ is regarded as having been issued in the lifetime of the defendant himself, and, inasmuch as he had not taken any steps to arrest it before his death, no good reason could be given for the interposition of his representatives. They, upon the view taken, were not new parties, nor parties at all to the proceedings, as the last step in the appropriation of the goods to the satisfaction of the judgment had been taken in the lifetime of their intestate.

The same doctrine, it seems, has been held to be equally applicable to executions against the lands and tenements of a deceased defendant, and therefore an *elegit* bearing teste before may be issued after his death, for the reasons

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given in the case of executions against the goods and chattels. (2 Tidd's Pr., 1034, 9th Lond. ed.)

It is otherwise as respects the writ of extent issued against the king's debtor; for, as that cannot be antedated, but must bear teste on the day it issues, it can only be issued against the lands and goods in the lifetime of the defendant. Another writ issues in case of his death to the sheriff to inquire into the special circumstances before execution is enforced. (2 Tidd's Pr., 1049, 1053, 1057.)

This series of cases, coming down from the earliest history of the law on the subject, and the reasons assigned in support of them, necessarily lead to the result—and which has also been confirmed by express decision in all courts where the authority of the common law prevails—that an execution issued and bearing teste after the death of the defendant is irregular and void, and cannot be enforced either against the real or personal property of the defendant, until the judgment is revived against the heirs or devisees in the one case, or personal 77*]representatives in the other. *(Fitz. N. B. 266; *Harwood* v. *Phillips*, O. Bridgman's R., 473; Dyer's R., 766; Pl., 31; 2 Wms. Saund., 6, *n;* 2 Ld. Raym., 849; Archb. Pr., 282; 2 *Ib.*, 88; *Woodcock* v. *Bennett*, 1 Cow., 711; 10 Wend., 212; *Hildreth* v. *Thompson*, 16 Mass., 191.)

Mr. Williams, in his note to the case of *Jefferson* v. *Morton* (2 Wms. Saund., 6, *n*), says, that if the defendant dies within the year, the plaintiff cannot have an *elegit* under the statute of Westm. 2 against his lands in the hands of his heirs or terre-tenants, or generally any other execution, without a *scire facias* against his heirs and terre-tenants, or personal representatives, although he may in some cases have a *fieri facias* against his goods in the hands of the executors, referring to the exception to the general rule, when issued in the lifetime of the defendant. So if the connusee dies within the year, his executor cannot have an *elegit* at common law without a *scire facias*, nor, if the connusor dies within that time, can the connusee have an *elegit* against his heir or terre-tenant without such writ. The rule being, he says, that where a new person who was not a party to the judgment or recognizance derives a benefit or becomes chargeable to the execution, there must be a *scire facias* to make him a party to the judgment or recognizance. (*Penoyer* v. *Brace*, 1 Ld. Raym., 245; S. C., 1 Salk., 319, 320; S. C., Carth., 404.)

Such is, we apprehend, the settled law of the case, where the judgment is against one defendant, and the execution issued and tested after his death.

In the case before us, the judgment upon which the execution was issued and the lands sold had been rendered against two defendants, one of whom was living at the time, but the lands sold belonged to the estate of the deceased. And it is material to inquire, whether, in this aspect of the case, a different rule can be applied to the sale.

At common law, a judgment or recognizance in the nature of a judgment did not bind the lands of the defendant, nor did the execution disturb the possession, as it went only against the goods and chattels. The Statute of Westm. 2, ch. 18 (13 Ed., I.), first subjected the lands of the debtor to execution on a judgment recovered against him, and gave the plaintiff the writ of *elegit* by virtue of which the sheriff seized and delivered a moiety of the lands until the debt was levied out of the rents and profits. Under this statute, a moiety of the land is deemed bound from the rendition of the judgment. (2 Bac. Abr., tit. Execution, 685; 3 Bl. Com., 418; 3 Co, 12; *The People* v. *Haskins* 7 Wend., 466.)

Before the statute, a judgment was considered a charge only upon the personal estate of the defendant; since, a charge upon both the real and personal estate.

Before and since the statute, in case of a judgment against two defendants, and the death of one, the charge of the judgment survived against the personal estate of the survivor; and execution *could be taken out against [*78 him within the year without a *scire facias*, and the debt levied. (2 Tidd, 1120; 1 Salk., 320; Bing. on Ex., 136; *Norton* v. *Lady Harvey*, 2 Wms. Saund., 50, 51, *n.* 4, and 72, *n.* 3; 16 Mass., 193, *n.* 2; 1 Cow., 738.)

The writ, however, must be in form against both, to correspond with the record, but it could be executed against the goods of the survivor only; or, on making a suggestion of the death upon the record, the writ could be against the survivor alone. (*Ibid.*)

And if the judgment against both defendants is founded upon contract, the surviving defendant is entitled to contribution out of the estate of the deceased (Bing. on Ex., 137, and cases cited); if upon tort, it would be otherwise.

But since the statute, if the plaintiff seeks to enforce the judgment against the real estate of the defendants in the case put, he must revive it by *scire facias* against the surviving defendant, and the heirs, devisees, and terre-tenants of the deceased, before execution can regularly issue. For, as to the real estate of the defendants, the charge of the judgment does not survive; and the execution must go against the lands of both; and as it cannot be regularly issued against the deceased codefendant, nor be allowed to charge the estate in the hands of his heirs, devisees, or terre-tenants, until they have notice, and an opportunity to set up a defense, if any, to the judgment, a *scire facias* is indispensable to the regularity of the execution. (2 Wms. Saund., 51, *n.* 4; Bing. on Ex., 137, and cases cited; 4 Mod., 316; 2 Co., 14, *a;* 1 Ld. Raym., 244; S. C., 1 Salk., 320; S. C., Carth., 404; 16 Mass., 193, *n.;* 1 Cow., 711.)

It will be seen, therefore, upon these authorities, that the same objection exist, both in principle and in reason, as it respects the enforcement of a judgment against two by a sale of the real estate on execution after the death of one, which have been shown to exist against the enforcement of a judgment against a single defendant after his death. For as the charge of the judgment against the lands does not survive, but continues upon the lands of both after the death of one, the same as before, and cannot be enforced against the real estate of the survivor alone, as in the case of the personalty, and the execution must therefore be issued against both if issued at all, it is obvious the lands of the deceased, in that event, are as liable to be sold by the sheriff as the lands of the survivor. The rights of the heirs and devisees,

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and the reasons for protecting them by the *scire facias*, are the same in the one case as in the other; and when the law disables the plaintiff from suing out execution against the real estate on a judgment against one defendant after his death, it must equally disable him from suing it out on a judgment against two, after the death of one. Otherwise, in both cases, the interest of new parties, upon whom the estate has fallen, or to whom it may have passed, is liable to be suddenly and without notice devested by the silent, and till then dormant, power of the law; 79*] *parties, too, who from their age and situation in life will not unfrequently be the least qualified to understand and protect these interests, being the children of the deceased defendant.

This writ of *scire facias* is also made necessary in order to secure the judgment in cases where the plaintiff has neglected to take out execution within the year. And yet it has always been held, that, if taken out after the year, the sale under it is valid, and the title of the purchaser protected. The execution is not void, but voidable, and may be regularly enforced unless set aside on motion.

In analogy to this course of decision, it has been argued that an execution issued after the death of the party should not be considered void, and the sale under it a nullity, and that the only remedy should be on a motion to set it aside.

Before the Statute Westm. 2, already referred to (ch. 45), if the plaintiff had neglected to take out execution within the year, his only remedy was an action of debt on the judgment. The law presumed it had been satisfied, and therefore drove the plaintiff to a new original. (2 Tidd, 1102; 1 Bing. on Ex., 128, *n.*) This statute extended to him the writ of *scire facias*, by means of which the judgment could be enforced after the year by execution, and as the writ could thus be issued after the year by *scire facias*, the judges held, if issued without, and the defendant did not interpose and set it aside, it was an implied admission that the judgment was unsatisfied and existed in full force. The issuing, under the circumstances, was regarded simply as an irregularity which it was competent for the party defendant to waive.

It is apparent that the analogy between this class of cases and the one under consideration is exceedingly remote and feeble, and that they stand upon different and distinct grounds, and the conclusions arrived at upon substantially different and distinct considerations.

Another ground has been urged in support of the sale in this case which deserves notice.

It has been argued that the grantees of lands sold on a judgment against the grantor, or previous owner, through whom the title was derived, where the sale confessedly would be valid, stand upon the same footing as the heirs or devisees in the case of a sale after the death of the defendant.

But the distinction between the two cases is manifest.

In the first place, the grantee, in making the purchase, is presumed to have made the proper inquiry into the nature and validity of his title, and therefore to have known of the existence of the incumbrance, and to have taken the necessary precautionary measures against it.

The sale on the execution cannot take him by surprise, with ordinary attention to his rights.

And in the second place, the defendant in the execution, not the *grantee, is the party [*80 most deeply interested in the proceeding; for if his grantee, or any succeeding grantee under the title, should be dispossessed by reason of a sale on a prior incumbrance by judgment, he, the defendant in the execution, would be answerable over upon his covenants of title.

The grantee, therefore, is neither exposed to a sale under the judgment by surprise, nor is he the party usually interested in the sale. Upon the whole, without pursuing the examination farther, we are satisfied, that, according to the settled principles of the common law, and which are founded upon the most cogent and satisfactory grounds, the execution having issued and bearing teste in this case after the death of one of the defendants, the judgment was irregular and void; and that the sale and conveyance of the real estate of the deceased under it to the plaintiff was a nullity.

We may further add, that since this suit was commenced, and while it was pending in the Circuit Court of the United States, the highest court in the State of Alabama, have had the same question before them, and have arrived at a similar result. (6 Ala. Rep., 657.)

Judgment of the Circuit Court affirmed.

Cited—9 How., 96; 13 How., 287; 2 Wall., 37; 4 Wall., 243.

CHARLES GRATIOT, *Plaintiff in Error*,
v.
THE UNITED STATES.

Superintending engineer on military works liable to be required to act in disbursing public money —cannot charge commissions upon such sums —evidence of official duties—extra compensation for extra services not allowed on error in absence of proof of services—army regulations.

The 67th article of the General Regulations of the Army, published in 1821, recognizes two disbursing officers upon fortifications; namely, the agent of fortifications and the superintending engineer. Where there is no agent, the superintending engineer can be required to perform his duty for a compensation which is fixed by the army regulations. The receipt of a sum of money by the superintending engineer, and custody of it until it could be turned over to the agent, will not justify a charge of two and one half per cent. commission. And in case of such charge, there is no foundation for a question of usage to be left to the jury.

In this particular case, the charges made by General Gratiot for collecting money (as stated in the sixth, seventh, and eighth items of his account), were already included in his charge for disbursing, contained in the second item, because when disbursing these sums he was acting as agent for fortifications as well as superintending engineer, which duty the department had a right to require him to perform at a fixed compensation, which had already been allowed. The court below were right in refusing to permit evidence in support of these charges to go to the jury, because the only evidence was the transcript, which was not sufficient in law.

The charge of two and one half per cent., as contained in the second item of the account, was unauthorized by law, because it consisted either of

NOTE.—*As to extra compensation to public officers*, see note to United States v. Macdaniel, 7 Pet., 1.

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charges of commission upon money which had come into his hands for stoppages, or for remittances made to him as disbursing agent, as above described.

The charge of a commission of two and one half per cent. for disbursements other than those on forts Monroe and Calhoun, as contained in the third item of his account, was a charge for disbursing in the character of superintending engineer, acting also as agent for fortifications, and is not allowed by law.

The charge for extra official services, as contained in the fourteenth item of the account, is the same which this court substantially rejected when this case was formerly under consideration, reported in 15 Peters, except the charge for superintendence relative to the northern boundary of Ohio. Excepting this, the other services were within the ordinary special duties of chief engineer: and there 81*] being *no proof of what these extra official services had been except the account itself, the court below did not err in excluding it from the jury.

The charge for extra official services was against law, because the duties performed necessarily belonged to the office of chief engineer, and if any services were performed beyond the duties of that office, it was necessary that evidence should be introduced to show what had been the chief engineer's personal as well as official agency.

It was the province of the court below to decide, as matter of law, what were the duties of the chief engineers, and to judge whether any evidence had been induced tending to show that General Gratiot had performed any services not appertaining to his station as chief engineer.

The army regulations under which General Gratiot was removed from West Point to Washington were authorized by law, and his brevet rank did not release him from discharging the duties of his commission proper.

THIS case was brought up by writ of error from the Circuit Court of the United States for the District of Missouri.

It was the same case which was before this court at January Term, 1841, which is reported in 15 Peters, 336. Being sent back to the Circuit Court, it came up for trial, after sundry preliminary proceedings, which it is not important to state, on the 25th of April, 1843. On the trial, the United States produced and gave in evidence to the jury two transcripts from the books and proceedings of the Treasury Department, which were the same as those produced upon the former trial. The plaintiff also gave in evidence an original account, rendered by the defendant Gratiot to the plaintiff, signed by the defendant, showing a balance in his hands of $35,000 due on account of the appropriation for a fort at Grand Terre, Louisiana.

The plaintiff's case being here closed, the defendant produced his account against the United States, and proved, by a transcript from the books and proceedings of the Treasury Department, that each and every item of his account had been duly presented to the accounting officers of the Treasury Department for allowance against the United States, and had been by the said officers disallowed; which account was in the words and figures following, to wit:

Report of Auditor on General Gratiot's Account.

Report of the Third Auditor of the Treasury on the accounts and claims of General Charles Gratiot, late chief engineer, transmitted to him by the Solicitor of the Treasury on the 25th of March, 1841; for the decision of the accounting officers thereon.

No. 1. For the safe keeping of and responsibility for the following sums placed in

Statement A.

the custody of Charles Gratiot, from the 27th of August up to the 7th and 20th of September, 1821, the dates of their being turned over to James Maurice, as shown on the credit side of the treasury transcript admitted in evidence in the Circuit Court of Missouri, in the case of *The United States* v. *Charles Gratiot*, *during the April Term of 1840, this [*82 during a period of time that he was not a disbursing agent, viz:

On account of Fort Calhoun,	$19,500.00
" " of Fort Monroe,	26,550.00
Making the aggregate sum of	$46,050.00

Commission on $46,050, according to usage in like cases, at 2½ per cent., - $1,151.25

2. For disbursing, from the 20th of May, 1822, to the 30th of September, 1829, both inclusive, $84,325.58, on account of the appropriations for fortifications, other than those on forts Monroe and Calhoun, for which a separate and distinct accountability was imposed by law, and, according to the decision of the Supreme Court of the United States, as also that of the Secretary of War of the 26th of May, 1831, in the case of *Tuttle*, constituted a separate agency. *Vide* opinion of the Supreme Court of 1841, on the subject, and accounts of Tuttle, on file in the third auditor's office, by which latter it is shown, that although he (Tuttle) received compensation for the construction or repairs of a fort, he was entitled to, and did receive, an additional compensation for disbursing, at the same time and place, the funds for other and distinct appropriations, and that he also received at the same time, a like compensation for disbursing the funds of each separate appropriation for piers at New Castle and Marcus Hook.

Commission on $84,325.58, at 2½ per cent., as allowed by general regulations of the army, - - - - - $2,108.14

3. For disbursing $30,531.60, on account of the appropriation for the repairs and contingencies of fortifications, from the 1st of November, 1823, to the 30th of September, 1829, both days included, as shown by treasury transcript referred to above, which disbursements were other than those on forts Monroe and Calhoun, it having been the usage of the department to make the like compensation for disbursements under the like circumstances.

Commissions on $30,531.60, at 2½ per cent., being less than $2 per day, - $763.29

4. For disbursing $591,089.00, on account of the appropriations for Fort Calhoun, from the 18th of November, 1821, to the 30th of September, 1829, both days included, 2,879 days, at $2 per day, being less than 2½ per cent., as allowed by general regulations of the army.

Account before rendered, - $5,758.00

5. For disbursing $819,677.64, on account of the appropriations for Fort Monroe, from the 18th of November, 1821, to the 30th of September, 1829, both days included, 2,879 days, at $2 per day, as allowed by general regulations of the army.

Account before rendered, - $5,758.00

*6. For collections of money made for [*83 the United States from Jacob Lewis & Co., as per accompanying abstract, marked A, which serv-

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ice did not, under the regulations, enter into or form any part of the duties of a "disbursing agent."

Commissions on the sums collected, viz., $24,385.81, at 2½ per cent., according to usage in similar cases, - - - - - $608,39

7. For ditto, ditto, from Samuel Cooper, as per accompanying abstract, marked B.

Commissions on the same collected, viz., $3,233.62, at 2½ per cent., - - $80.84

8. For ditto, ditto, for sales of public property, &c., as per accompanying abstract, marked C.

Commissions on sums collected, viz., $16,150.81, at 2½ per cent., - - $403. 77

9. For 480 barrels cement, account rendered and admitted to his credit in former settlement, - - - - - - $1,404.00

10. For quarters furnished Lieuts. Dutten and Mordecai, on account of forts Monroe and Calhoun.

Accounts heretofore rendered, - $40.00

11. For this amount paid to Robert Archer, for medical attendance on persons employed at forts Monroe and Calhoun.

Accounts before rendered, - $552.00

12. For this amount expended on account of repairs and contingencies of fortifications, $345.59. Account before rendered and passed to the credit of General Gratiot in former settlement.

13. For the following sums withheld by the treasury officers, viz.:

Pay and emoluments from the 1st of April, 1836, to the 6th of December, 1838, both days included, - - - - - $10,763.99

Allowance for fuel and quarters for same period, - - - 905.80

Transportation of officers' baggage, 618.67

$12,284.46

14. For certain extra official services, as more fully set forth in the accompanying account marked D, viz.: for his extra official services in conducting the affairs connected with the civil works of the internal improvement carried on by the United States; and in conducting also the affairs connected with the execution of the Act of Congress of July 14, 1832, "to provide for the taking of certain observations preparatory to the adjustment of the northern boundary line of the State of Ohio," referred to the engineer bureau for execution by the executive of the United States, and other extra official services connected with the aforesaid items of charge, and which did not constitute any part of his duties as a military officer, but which properly appertained to the duties and functions of civil engineering, and were performed under an understood or implied *contract with the War Department, under the sanction and authority of the President of the United States, to be compensated therefor, over and above my official pay and emoluments, at a reasonable rate of compensation according to the established usage of the department in analogous cases, from the 30th of July, 1828, to the 6th of December, 1838, both days included, 10 years and 130 days, at $3,600 per annum, that being the pay granted to John S. Sullivan, David Shriver, James Geddes, and Nathan S. Roberts, Esqrs., civil engineers employed under the Act of the 30th of April, 1824, entitled "An Act to procure the necessary surveys, plans, and estimates upon the subject of roads and canals," and less than the extra pay of Captain Andrew Talcott, of the corps of engineers, while he was employed under the orders of the engineer bureau, in executing the Act of the 14th of July, 1832, above referred to, - - - $37,282.19

15. For certain extra official services, specified in the items of charge contained in accompanying account marked E, none of which services constituted any part or parcel of the duties or services appertaining to the office or functions of any engineer, civil or military, nor of the proper business of civil or military engineering, nor of any of the legal or prescribed duties or functions of my office of chief engineer, or colonel of engineers, nor in any manner included in my official compensation as chief engineer, colonel of engineers, or brigade-general by brevet in the army of the United States; but all of which services were extra official in relation to each and every of my said official capacities, and were performed under an understood or implied contract with the War Department, under the sanction and authority of the President of the United States, to be compensated therefor over and above my official pay and emoluments at a reasonable rate of compensation, according to the established usage of the department in analogous cases. For the specification of all which services, I refer to the items in my said account E, all of which I am prepared to show, and prove, were in fact such extra official services, and entitled me, under such understood or implied contract, to such reasonable compensation over and above my official pay and emoluments as aforesaid, viz:

The United States to Charles Gratiot, Dr.

Items:

No. 1. For his extra official services at one of the desks or bureaux of the War Department, from the 30th of July, 1828, to the 6th of December, 1838, both days included, 10 years and 130 days, in receiving, acting on, and causing to be filed for safe keeping, in the archives of said desk or bureau, 23,408 letters and other papers (not accounts), 10 years and 130 days.

2. For his entire official services at one of the desks or bureaux of the War Department, from the 30th of July, 1828, to the 6th *of De- [*85
cember, 1838, both days included, responding to the letters or other communications addressed to, or referred by, the Secretary of War to said desk on business pertaining properly to the administrative branch of the War Department, which responses have in the aggregate filled 10,003 pages of folio post record, 10 years and 130 days.

3. For ditto, ditto, ditto, during the same period of time as the preceding, in examining and causing to be filed, and preservation of the returns of property received from the agents acting under the orders of said desk of bureau, say about 100 agents in number, on an average, 10 years and 130 days.

4. For ditto, ditto, ditto, during the same period, as the preceding, in examining the estimates for funds yearly, quarterly, and monthly, from the disbursing agents in correspond-

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ence with said desk or bureau, about 100 agents on an average; making requisitions on the Secretary of War, for the funds to be remitted to said agents by the Treasury Department; directing the mode of applying and accounting for the funds so remitted; keeping the account with the treasury for such remittances; examining the vouchers rendered by the said disbursing agents in reference to price and application of the articles and labor paid for, and finally transmitting the said accounts to the auditor for settlement, 10 years and 130 days.

NOTE. The amount disbursed by said agents, and accounted for to the treasury during the time specified, was:

For fortifications, - - -	$7,899,571.75
" internal improvement, -	10,242,425.42
" light-houses and beacons, -	91,842.77
" Military Academy, - -	344,411.75
" lithographic presses, - - -	2,057.20
" N. W. executive building, -	3,120.59
" northern boundary of Ohio, -	25,674.63
	$18,609,104.11

5. For his extra official services at one of the desks or bureaux of the War Department, from the 30th of July, 1828, to the 6th of December, 1838, both days included, in making weekly reports to the Secretary of War of the proceedings in said bureau in relation to each letter or other paper referred from him, or written by direction of the War Department, 10 years and 130 days, per annum.

6. For ditto, ditto, ditto, in causing all letters and other papers prepared at said desk or bureau to be recorded in books procured for that purpose. Term of service, from the 30th of July, 1828, to the 6th of December, 1838, both days included, 10 years and 130 days.

86*] *7. For his extra official services at one of the desks or bureaux of the War Department, from 30th July, 1828, to 6th December, 1838, both days included, in examination and approval, or return to the agent or party to the contract; for correction or alteration of all contracts appertaining to works to be executed under the direction of the said desk or bureau, and their (the contract) subsequent transmission to the Second Comptroller of the Treasury for file, 10 years and 130 days.

8. For his extra official services at one of the desks or bureaux of the War Department, from 30th July, 1828, to 6th December, 1838, both days included, in examination of, and reporting upon, all doubtful or disputed claims under contracts executed under the supervision of said desk or bureau; and in making special reports on cases of claims referred to the War Department, by resolution of either branch of National Legislature, or in reply to calls from committees, or individual members of Congress, governors of States and Secretary of War, on application made to Secretary of War, or directly to said desk or bureau, or in obedience to legislative enactment. Of these the following may be cited in part, viz.:

(Then followed a specification of twenty-two reports made on various subjects.)

9. For his extra official services at one of the desks or bureaux of the War Department, from the 30th July, 1828, to 6th December, 1838, both days included, in causing to be registered, in appropriate books of record procured for the purpose, the letters and all other papers relating to the current business of said desk or bureau; to accountability generally, and to other matters, &c.,—10 years and 130 days.

10. For his extra official services at one of the desks or bureaux of the War Department, from the 30th July, 1828, to 6th December, 1838, both days included, in making quarter yearly reports to the proper accounting officer of the treasury of the agents connected with said desk or bureau who had rendered their accounts, and of those who had failed to do so. —10 years and 130 days.

11. For his extra official services at one of the desks or bureaux of the War Department, from 30th July, 1828, to 6th December, 1838, both days included, in carrying on the correspondence in relation to the Military Academy, and forwarding to parents and guardians of the cadets circulars, numbering monthly on an average 338 communications, inclusive of the correspondence of the desks or bureaux before charged, item 2.—10 years and 130 days.

12. For his extra official services at one of the desks or bureaux of the War Department, from 25th November, 1832, to 30th June, 1835, both days included, in causing to be executed, by executive order, the provision of the Act of 14th July, 1832, entitled, "An Act to provide for the taking of certain observations preparatory *to the adjustment of the northern [*87 boundary of the State of Ohio."—948 days, or 2 years and 218 days.

For all which extra official services,
I charge in the aggregate, - - $37,127.42

PETER HAGNER, Auditor.

Treasury Department,
Third Auditor's Office, April 5, 1841.

To ALBION K. PARRIS, Esq.,
Second Comptroller of the Treasury.

TREASURY DEPARTMENT,
SECOND COMPTROLLER'S OFFICE,
19 April, 1841.

I have examined the several claims of General Charles Gratiot against the United States, as particularly set forth and described in the foregoing report, together with all the evidence, and am of opinion that the said claims are not admissible against the treasury.

ALBION K. PARRIS, Comptroller.

The defendant, Gratiot, then gave in evidence sundry depositions, which occupy nearly one hundred pages of the printed record, and of which it is impossible to give any other than a condensed and summary account.

Benjamin Fowler, clerk in the Engineer's Department. He testified that the services mentioned in the above account were rendered by Gratiot; that the office styled the Engineer Department was always considered as a bureau of the Department of War, to which were referred letters, memorials, petitions, and other papers, to be replied to directly from the Engineer Department or reported on to the Secretary of War for his action; that from July 30, 1828, to December 6, 1838, the number of disbursing agents whose accounts passed through, and were examined in conformity to regulations in, said Department was two hundred and five, whose disbursements involved the keeping of

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three hundred and seventy-nine separate and distinct accounts.

J. G. Swift, who was an officer of the corps of engineers from the year 1802 to 1818, and colonel and chief engineer from July, 1812, to November, 1818. He testified, that the usage of the government had been to compensate officers of engineers, over and above their pay and emoluments, for services, mentioning his own case and two others.

Major William Gibbs McNeill, who was an officer in the army of the United States from 1814 to within the preceding four years, during which last four years he was a civil engineer. He stated, that whilst an officer of the army he received extra compensation when put on extraordinary duty or service; that the services charged in Gratiot's account did not belong to the duties of the engineer, either civil or military.

88*] *Captain Talcott, who held a commission in the United States corps of engineers from August, 1818, to September, 1836, and in that interval was advanced from the rank of second lieutenant to that of captain of said corps. Afterwards he became a civil engineer. He stated that he had received from the United States extra allowances for extra services, specifying the cases, and that the services charged for by Gratiot in his account did not appertain to either military or civil engineering.

Thomas L. Smith, Register of the Treasury, who furnished certified copies of certain accounts in which officers had extra allowances.

Major J. D. Graham, a major of topographical engineers since August, 1840, and Commissioner for the survey and exploration of the northeastern boundary of the United States, stating the amount of his pay and emoluments.

Colonel Cross, assistant quartermaster-general in the army of the United States, with the rank of colonel, also stating the amount of pay which he had received at sundry times.

Colonel Joseph G. Totten, colonel of the corps of engineers and chief engineer. His deposition contained, amongst other matters, the following interrogatory and answer, viz.:

Interrogatory 2. Examine the records and other documents belonging to, and now on file or otherwise in, the Engineer Department, and state therefrom, as nearly as you can, what were the affairs or business committed by executive authority, or otherwise, to the said Engineer Department, to be ministered and administered by Charles Gratiot, then the colonel of the corps of engineers, and brigadier-general by brevet in the army of the United States, from the 30th July, 1828, on the 6th December, 1838, inclusive.

Answer. It appears from the records of the Engineer Department, that the affairs or business committed to the general direction, supervision, and management of the said deparment, during the period stated in the interrogatory, were the following, namely:

1. *Military Engineering.*—Reconnoitering and surveying for military purposes, with the collection and preservation of topographical and geographical memoirs and drawings referring to those objects; the selection of sites; the formation of plans and estimates; and the construction, repairs, and inspection of fortifications, constituted affairs and business committed to the general direction, supervision, and management of the said Engineer Department, and there appears to have been disbursed for the fulfillment of those objects, and to have been accounted for to the Treasury Department, through the said Engineer Department, during the period the said Gratiot was chief engineer, about $7,587,675.

II. *Civil Engineering.*—First, reconnoitering and surveying, &c., under the provisions of the Act of the 30th April, 1824, entitled, "An Act to procure the necessary surveys, plans, and estimates *upon the subject of roads [*89 and canals," constituted affairs and business committed to the same general direction, supervision, and management; for the fulfillment of these objects, there appears to have been disbursed and accounted for to the treasury, through the said Engineer Department, during and for the period stated above, about $67,980.

Second. The superintendence of the execution of the acts of Congress in relation to internal improvements, by roads, canals, the navigation of rivers, and repairs and improvements connected with the harbors of the United States, or the entrance into the same, with the execution of which the War Department was charged, and the inspection of the operation for the execution thereof constituted affairs and business committed to the same general direction, supervision, and management, and for the fulfillment of these objects there appears to have been disbursed and accounted for to the treasury, through the Engineer Department, during and for the period stated above, about $10,032,870.

Third. Construction of light-houses and beacons constituted affairs and business committed in the same way, and for which objects there appears to have been expended and accounted for to the treasury, through the said Engineer Department, during the period stated in the interrogatory, the sum of about $96,625.

III. *Military Academy.*—During the period stated above, the then colonel of the corps of engineers was the inspector of said academy, and was charged, by executive order, with the correspondence relating to it. There appears to have been expended for the support of that institution, and accounted for to the treasury, through the Engineer Department, and for the same period, the sum of about $323,263.

IV. *Lithographic Press of the War Department.*—This establishment was placed, during the period of its existence, under the control of the Engineer Department; the sum which appears to have been expended in its support, and accounted for to the Treasury Department, through the Engineer Department, amounted to about $2,057.

V. *Northwest Executive Building.*—The execution of the work "for fitting up the basement rooms of the executive building, occupied by the War Department," was also placed under the direction of the Engineer Department. The amount expended and accounted for to the treasury, through said department, appears to have amounted to about $3,190.

VI. *Northern Boundary of the State of Ohio.*—The operations in fulfillment of the provisions of the Act of the 14th of July, 1832, entitled, "An Act to provide for the taking of certain observations preparatory to the adjust-

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ment of the northern boundary of the State of Ohio," were under the general direction of this 90*] department. *The amount expended in this service, and accounted for to the treasury, through the Engineer Department, appears to have been about $35,474.

VII. *Ministerial and Administrative Duties.*—Receiving, acting on, and causing to be filed in the archives of the Engineer Department, all the letters and other papers, not accounts, thereto referred or received at said department. Responding to the letters or other communications addressed directly to it, or referred to it by the Secretary of War; examining and causing to be filed all returns of property transmitted by the subordinate agents; examining the estimates, yearly, quarterly, and monthly, transmitted by the disbursing agents of the department; making requisitions on the Secretary of War for the funds to be remitted in fulfillment of said estimates when approved; directing the mode of applying and accounting for such remittances; keeping an account with the Secretary for said remittances; examining the vouchers rendered by said treasury disbursing agents for settlement through the Engineer Department, and finally transmitting the said accounts to the Auditor of the Treasury for settlement, constituted affairs and business committed to the general direction, supervision, and management of the said Engineer Department. These disbursements appear to have amounted, during the period stated in the interrogatory, to about $18,069,067. Making for a portion of the time weekly reports to the Secretary of War of the proceedings in said department, in relation to each letter or paper referred to or written by direction of the War Department; causing all letters and other papers prepared in said department to be duly recorded; examining and approving, or returning for correction or amendment, contracts for works or supplies required for the prosecution or operations carried on under the superintendence of the said department, and transmitting said contracts subsequently to the second comptroller for file; examining and reporting upon doubtful or disputed claims or contracts executed under the superintendence of said department; making, when required, special reports on cases of claims referred to the War Department by resolution of either branch of the National Legislature, or in replies to calls from committees, or members of Congress, or Secretary of War, or on applications made to the Secretary of War, or directly to said department; causing to be recorded the substance of the letters and other papers received at the Engineer Department which related to its current business; and making quarterly reports, to the proper accounting officer of the treasury, of such disbursing agents of said department as had rendered their accounts for settlement, and of those who had failed in that particular, constituted affairs and business committed to the same general direction, supervision, and management.

This witness also stated, that in 1838 all the works of internal improvement, with the exception of the Cumberland road, were 91*] *transferred to the topographical bureau, and furnished a list of sixty-eight works which were thus transferred.

The defendant, Gratiot, also gave in evidence a printed document of Congress, being document number six of the House of Representatives, of the third session of the twenty-seventh Congress, which it was agreed might be used in all courts in which this cause might be pending, as if spread upon the record.

The defendant, Gratiot, further gave in evidence the depositions of witnesses and documents, spread upon the record of the former case.

James C. Wilson, a clerk in the Engineer Department. He testified that Gratiot performed the services presented in the twelve items of the account.

John C. Spencer, then Secretary of War, who testified that the Engineer Department was a bureau of the War Department, charged with such ministerial and administrative duties as might be assigned to it by the Secretary of War. He also furnished certified copies of the following papers, viz.:

1. A Regulation dated 10th of August, 1818.
2. A Regulation dated 27th of July, 1821.
3. Letters from the War Department to Colonel McRee and to Major Thayer, allowing them to go to Europe, with extra pay and rations.
4. The decision of President Monroe, allowing brevet pay to General Macomb, the predecessor of General Gratiot.
5. An order of the War Department, fixing the Engineer Department at the seat of government.
6. An order from the War Department, dated April 7, 1818, prescribing the duties of the Engineer Department, and also one dated on the 1st of August, 1828, allowing double rations to each officer of the corps of engineers charged with the construction of a fortification, or having a separate command.

Mr. Spencer also stated in his evidence, that he had directed the records and files of the Department of War to be searched for any evidence of any contract, express or implied, that General Gratiot was to receive extra compensation for the services charged by him, and that the proper officers reported that no such evidence was to be found except what might be derived from the papers furnished above, which report he (Spencer) believed to be true, and adopted as his answer to the interrogatory.

William B. Lewis, then Second Auditor of the Treasury, who furnished copies of Gratiot's accounts, with the accounts of other officers of the engineer corps who had received extra allowances.

Albion K. Parris, then Second Comptroller of the Treasury, who testified that the number of contracts transmitted from the Engineer Department to the office of the second comptroller between *July 30, 1828, and Decem- [*92 ber 6, 1838, amounted to about two thousand eight hundred and thirty.

General Towson, paymaster-general of the army, who testified as to the time when Gratiot received the pay of his brevet rank, and when it was stopped.

Asbury Dickens, Secretary of the Senate, who furnished a copy of a report made by Gratiot to the Secretary of War, upon a claim pending before the Senate.

Many of the witnesses above mentioned were cross-questioned on the part of the United States.

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The defendant, Gratiot, further gave in evidence the following printed papers, which, it was agreed, might be used as if spread upon the record, viz:

1. Congressional Document No. 78, of the 2d session, 23d Congress.

2. Reports No. 449, 455, 456, 1st session, 23d Congress.

3. Extracts from the Army Regulations revised conformably to the Act of 24th April, 1816. War Office, September, 1816, pages 96, 97, 98.

The defendant, Gratiot, having here closed his evidence, the counsel on the part of the United States gave in evidence to the jury—

1. The deposition of John C. Calhoun, formerly Secretary of War, who testified that he established what is known as the present bureau system of the War Department, of which the Engineer Department constituted a part; and that he had no recollection of any intention or expectation, in establishing the bureau system, that the chief of the corps of engineers should receive for his services, as the officer in charge of that bureau, any compensation over and above his pay and emoluments as an officer of the army.

2. Colonel J. J. Abert, colonel of the corps of topogragraphical engineers, who testified that he had never received or claimed any extra compensation for official services at one of the desks or bureaux of the War Department, while at the head of said bureau; that he had received extra compensation, but was not, during the time, in the direction of the bureau; that in his opinion, any duties of an engineer character, assigned by the regulations or by direction of the War Department, to either corps of engineers, become the proper and legitimate duties of that corps.

3. Thomas S. Jesup, major-general by brevet, and quarter-master-general of the army, who explained why the colonel of engineers and other officers, stationed at the seat of government, were allowed double rations, and testified that he considered the services charged for in Gratiot's accounts as the legitimate and proper duties of the chief engineer.

4. John H. Eaton, formerly Secretary of War, who testified that he was in office during a part of the time mentioned in Gratiot's ac-
93*] counts, *and that no contract or engagement was ever entered into by him with General Gratiot as to the services to be performed by Gratiot.

The evidence being closed on both sides, the following agreement was filed:

Facts admitted by parties.—It is admitted by the parties, that the account referred to in the depositions of Colonel J. J. Abert and General Jesup is the same attached to the deposition of Benjamin Fowler.

The United States, by the district attorney, admitted that the defendant should receive credit for the sum of $5,758, being the fifth item of his account, to be deducted from the balance found due from him to the United States on the treasury transcripts given in evidence; and also that the sum of $276, being one half of the eleventh item in his account, should, in like manner, be credited to him against the balance on said transcripts.

The defendant withdrew his claim for the fourth, ninth, tenth, twelfth, and thirteenth, and one half of the eleventh items in his account, the same having been allowed him in former settlements.

Whereupon the court instructed the jury, on the part of the United States, as follows:

Instructions given.—1st. That the defendant is not entitled to any commission on the sums by him turned over to James Maurice, charged by him on account of Fort Calhoun and Fort Monroe, and rejected by the accounting officers of the treasury; (1) because defendant received four dollars each day for his attendance upon the above works, by a former allowance, and by the one now ordered; (2) because the only evidence is what the transcript introduced by the plaintiff furnishes; and such evidence is not sufficient to authorize any commission to be allowed merely for turning over to an accounting officer the moneys.

2d. Nor is the defendant entitled to any credit for commissions or disbursements on account of appropriations for fortifications as charged by him. Of this item, the only evidence in the cause is that furnished by the transcript introduced by the United States, as the principal evidence on which the defendant is charged, and the evidence thereby furnished is not sufficient to authorize the jury to allow the defendant the credit claimed.

3d. Nor is the defendant entitled to commissions for disbursements on account of contingencies and repairs of fortifications as charged by him, there being no evidence on this item of charge except the above named transcript, which evidence is not sufficient to authorize the jury to allow any credit for this item.

4th. Nor is the defendant entitled to any credit for commissions as charged, upon any moneys collected of Jacob Lewis & Co. and *Samuel Cooper, or either of them; because [*94 the above named transcript is the only evidence in the cause to establish this charge against the United States, and such evidence is not sufficient.

5th. Nor is the defendant entitled to commissions as charged by him on account of sales of public property, there being no evidence but the foregoing transcript to establish the charge, which evidence is not sufficient.

In the five cases above, there is no evidence to warrant the credit claimed in either case.

6th. The services of the defendant, while chief engineer, charged with the duties of the Engineer Department, in conducting the affairs connected with the civil works of internal improvement carried on by the United States, are not extra official services for which he is entitled to credit in this action.

7th. There is no evidence that the defendant performed any extra official service in conducting the affairs connected with the execution of the Act of Congress of 14th July, 1832, to provide for the taking of certain observations preparatory to the adjustment of the northern boundary line of the State of Ohio.

8th. The services alleged to have been performed by the defendant at one of the desks or bureaux of the War Department, the claims to which are specified in an account dated March 23, 1841, and appended to Benjamin Fowler's deposition, taken March 16, 1842, if such services

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were performed at the bureau of the chief engineer, and professedly in that capacity, they were among the duties appertaining to the office, and such as the defendant was bound to perform as chief engineer, without being entitled to any extra compensation above his pay and emoluments as a brigadier-general in the army of the United States. And as to items numbered from one to twenty-two, in the same account, for examining and reporting on various subjects, for which the defendant claims extra official compensation, his evidence, and the evidence of the United States, show them to have been examinations and reports on matters appertaining to the office of chief engineer. So are the reports on their face, so far as they have been given in evidence, nor is there any evidence in any degree to the contrary. To sustain some of them, no evidence whatever is offered; neither for making those in regard to which evidence has been offered, nor for such in regard to which no evidence has been offered, can the defendant claim extra compensation.

Exceptions.—To the giving of the eight instructions above set forth, and to the giving of each of them, the defendant, by his counsel, excepted.

The defendant, by his counsel, then prayed the court to instruct the jury as follows:

1. That under the first count of the declara-
95*] tion, the plaintiff is *not entitled to recover against the defendant for any money received by him in any office or capacity other than chief engineer. Which instruction was given by the court.

Instructions refused.—2. That under the second count of the declaration, the plaintiff is not entitled to recover against the defendant for any money received by him in any office or capacity not mentioned in the bill of particulars of demands, furnished and filed by the plaintiff under that count, nor for any money which may have been received by the defendant at any other time than that mentioned in said bill of particulars, that is, the year 1839.

This last instruction was refused by the court, because there was no order made by the court on the plaintiff to furnish a bill of particulars, and on the memorandum furnished voluntarily to the defendant's counsel the court did not act, and might not have acted, if required to do so, under the circumstances, this being a matter of discretion.

3. That if the jury find, from the evidence, that the defendant performed any of the services for which he has charged in the last item of his account under the direction of the President or Secretary of War, and that such services were neither military nor civil engineering, he is entitled to compensation for such services as a set-off in this action. This last instruction was refused by the court.

4. That if the jury find, from the evidence, that the defendant performed any of the services in the item of his account appended to Benjamin Fowler's deposition under the direction of the President or Secretary of War, and that such services were not enjoined by the army regulations, the defendant is entitled to compensation for such services as a set-off in this action.

This last instruction was refused by the court, and the refusal reduced to writing in the following words:

"This instruction is refused, and the eighth instruction, given on the part of the United States, is referred to as embracing the whole subject matter. The court is furthermore of opinion that the President or Secretary could well refer to the chief engineer any matter for report, &c., which appertained to the particular service devolving on the Engineer Department, in cases where Congress, or either House, by law or resolution, required information from the President on that particular subject, aside from any injunction by the army regulations, and therefore the instruction cannot be given in the terms it is asked."

5. That if the jury find, from the evidence, that the defendant, by the direction of the President or of the Secretary of War, performed any of the services charged for in the last item of his account, being the said item attached to Fowler's deposition, and that the services so rendered were out of the limits of his official *duties as chief engineer, he is entitled to [*96 compensation for such extra services, as a set-off in this action.

This last instruction was refused by the court, and the refusal was reduced to writing, in the following words:

"The court refuses this instruction, because the whole evidence in the cause, without any exception, is written evidence, which the court is called on to construe and apply, and not the jury, and from such evidence to ascertain, as matter of law, what were the defendant's duties and acts; and taking all the evidence, and construing it the most favorably for the defendant, none is adduced showing, or tending to show, the defendant performed any service not appertaining to his station as chief engineer; and for the proper instruction on the item referred to, the eighth instruction on part of the United States, on this item, is to govern the jury.

"If for no other reason, this instruction would be refused, because the said eighth instruction concludes the whole matter. There is no fact, therefore, to which this instruction could apply, and it again refers the matters of law to the jury—what the chief engineer's official duties were—assuming to withdraw their decision from the court, and out of the previous instruction."

To all which decisions and opinions of the court in giving the instructions on the part of the United States, and in refusing the instructions which were prayed for by the defendant, and by the court refused, the defendant, by his counsel, excepts, and prays the court to sign and seal this his bill of exceptions, and that the same be made part of the record, which is done. J. CATRON. [L. S.]

To review these instructions and refusals, this writ of error was sued out.

The cause was argued by *Mr. Jones* and *Mr. Coxe* for the plaintiff in error, and by *Mr. Mason*, Attorney-General, for the United States. There was presented also, by General Gratiot, a brief containing detailed references to such of the laws, military regulations, usages of the War Department, &c., as tended to illustrate the two following general heads, viz.:

1. The history, progressive organization, and proper functions, military and civil, of the en-

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gineer corps, and of the chief or colonel of engineers.

2. The effect of the brevet of brigadier-general, when it happens to be conferred on the colonel of engineers, and whenever any of the contingencies happen upon which he takes place according to his brevet commission.

These illustrations were intended to explain the following propositions:

1. That when General Gratiot was detached from his original station of chief or colonol of 97*] engineers at West Point, to take *actual rank and command according to his brevet commission, with the pay and emoluments of a brigadier-general in the army of the United States, he was completely detached from the line of the engineers, and took a distinct station, rank, and command in the line of the army; indeed, that he could, by no possibility, according to existing laws and regulations, have assumed such station, rank, and command, and been allowed such pay and emoluments, as brigadier-general, without relinquishing, for the time being, his station and command in the line of the engineers, and all the peculiar functions and duties of engineer; in short, that he was as completely detached from the engineer line as if he had been ordered (and he might just as regularly have been ordered) to take command in the field of a brigade composed of different detachments.

2. That the pay and emoluments received by him, whilst in such command, as brigadier-general, were exclusively appropriated by law to his services in that rank alone, and had no more connection with or reference to any duties or services of engineering, than the like pay and emoluments received by any other officer of the like rank in the line of the army.

3. That, even if General Gratiot, in his then actual rank of brigadier-general, had been liable to be officially called on to perform engineer duties or services, still the particular services performed by him, and for which he claimed distinct compensation, as for extra official services, did not, in fact, appertain to the line, business, or science of engineering, in any of its branches.

4. That, even if those services had been (and, in fact, they were not) within the sphere of any branch of civil engineering, in which any act of Congress had authorized the employment of the engineer corps, still there was no provision in the law to prohibit extra compensation (over and above the stated and official pay and emoluments) to the officers of the engineer corps so employed; and their title (as by an implied contract) to such compensation has been acknowledged and established by a numerous train of precedents and long usage.

5. But it is thought quite clear, that whilst stationed at the seat of government, in the actual rank and command of brigadier-general, according to his brevet commission, he was not liable to be called on, *ex officio*, for the performance of any of the peculiar duties or services of an engineer, whether military or civil.

Mr. Jones, for the plaintiff in error, contended that the instructions given by the court below were erroneous, because they undertook to judge of a fact which was proper for the jury. The circumstance that the evidence was reduced to writing made no difference, and did not authorize the transfer of the question from the jury to the court. All evidence taken under a commission is written, and yet goes, of course, to the jury. Usage is a fact, *and [*98 the determination of it cannot be withdrawn from that tribunal which is the exclusive judge of facts.

The claim of General Gratiot was for services beyond the line of his official duty. It is no new principal on his part. If his time and labor have been tasked beyond his office, he is entitled to compensation. This question has been frequently examined by this court, which has decided that there is no necessity for an express contract to establish such a claim. An implied contract is sufficient. The set-off is claimed under the Act of 1794. (1 Litt. & Brown's ed., 366.) The claim need not be a legal one; if it is an equitable one, it is sufficient. The cases which illustrate this are *United States* v. *Macdaniel* (7 Peters, 1); *United States* v. *Ripley* (7 Peters, 18); *United States* v. *Fillebrown* (7 Peters, 28).

The last mentioned case was analogous to this in some respects. Fillebrown was a clerk with a fixed salary, and was moreover employed by a board to take charge of their books, at an additional salary of $250 per annum. A part of his set-off was for services prior to his appointment by the board, and this raised the question whether an emplied contract was sufficient. This case of Fillebrown is understood to establish the five following propositions, viz.:

1. That an equitable claim for an unascertained balance, to be fixed by the jury, was admitted.

That it was competent to show, by parol evidence, what were the extra services beyond the line of official duty, and that the whole question, whether or not such services were extra, was a fact for the jury, to be established by parol evidence.

3. That parol evidence was admissible to show the measure of compensation for extra services in all officers of the government.

4. That the board had authority to employ a person who rendered the services charged for, and that the law will imply a promise to pay for them.

5. That the Secretary of the Navy could not disallowand annul the right to compensation.

Mr. Jones then explained the account of General Gratiot, as set forth in the preceding statement.

The situation of General Gratiot may be considered in three points of view.

1. As millitary engineer, being lieutenant-colonel from 1821.

2. As chief engineer, being full colonel.

3. As a brigadier-general in the army of the United States. When he was detached from the proper headquarters of the corps, at West Point, he took rank as brigadier-general in the line of the army.

1. As military engineer.

The laws of May 9, 1794 (1 Litt. & Brown's ed., 366), July 16, 1798 (1 *Ibid.*, 604), March 3, 1799 (*Ibid.*, 749), March 16, 1802, (2 *Ibid.*, 132), show that the corps of [*99 engineers was entirely a military corps, and bound to do no other species of duty.

The 63d article of the Rules and Articles of

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War, established by the Act of April 10, 1806 (2 L. & B.'s ed., 359), is as follows:

"Art. 63. The functions of the engineers being generally confined to the most elevated branch of military science, they are not to assume nor are they subject to be ordered on any duty beyond the line of their immediate profession, except by the special order of the President of the United States; but they are to receive every mark of respect to which their rank in the army may entitle them respectively."

And this article is quoted in the general regulations for the army issued in 1816, 1821 and 1825.

In the regulations of 1825, there is the following paragraph:

Par. 888. "The duties of the Engineer Department comprise reconnoitering and surveying for military purposes and for internal improvements, together with the collection and preservation of topographical and geographical memoirs and drawings referring to those objects: the selection of sites; the formation of plans and estimates; the construction, repair, and inspection of fortifications; and the disbursement of the sums appropriated for the fulfillment of those objects, severally, comprising those of the Military Academy; also the superintendence of the execution of the acts of Congress in relation to internal improvements, by roads, canals, the navigation of rivers, and the repairs and improvements connected with the harbors of the United States, or the entrance into the same, which may be authorized by acts of Congress, with the execution of which the War Department may be charged."

What right had the Secretary of War to change the destination of the corps, and divert it from the duties which the law had prescribed as legitimate?

But, at all events, this regulation does not require their attention to be bestowed upon any other works than those "with which the War Department may be charged." [*Mr. Jones* here referred to such acts of Congress as charged the execution of certain specific works upon the War Department.]

2. As chief engineer, being full colonel.

By the provisions of other enactments, but particularly in those of the last branch of the 27th section of the Act of 1802, last of the 63d article of war, and the general regulations of the President under them, the officer of the corps of engineers is subject to be ordered upon other duties, which, although not lodged in his office or line of profession, are nevertheless, like those named above, governed by the rules and articles of war. They are staff services generally, and which by law are designated, when performed by a detached officer, as extra official, and always compensated in addition to line pay and emoluments.

100*] *Mr. *Jones* then referred to several acts of Congress, to show that where officers were detached for staff duty, they were paid in addition. But the fact that General Gratiot performed staff duties is admitted by the United States in the account.

3. As a brigadier-general in the army.

"The chief of the corps of engineers shall be stationed at the seat of government, and shall direct and regulate the duties of the corps of engineers, and those also of such of the topographical engineers as may be attached to the Engineer Department, and shall also be the inspector of the Military Academy, and be charged with its correspondence." — General Regulations of 1821, p. 165, par. 1; or of 1825, p. 167, par. 887.

It is clear that this order or executive regulation detaches the colonel of the corps of engineers from the permanent headquarters of his corps, and places him in position to command "detachments composed of different corps," viz.:

1. Corps of engineers at headquarters.
2. Officers of the corps of engineers on detached service.
3. Topographical engineers attached to the Engineer Department.
4. Cadets of artillery, cavalry, riflemen, or infantry, attached to the Military Academy by the 3d section of the Act of April 29, 1812, "making further provision for the corps of engineers" (3 Story, 1241, ch. 72); and
5. Post of West Point.

Mr. Jones then went on to show that by the 61st article of the General Regulations of 1816, and the acts of 1812 and 1818, General Gratiot was entitled to the pay and emoluments of a brigadier-general in the army, as claimed in his account.

Mr. Mason, Attorney-General, for the United States:

The history of the case is this:

On the 2d of March, 1819, the plaintiff in error, then an officer of engineers in the army of the United States, was ordered to Old Point Comfort to take charge of the works there building at the two fortifications, Fortress Monroe and Fort Calhoun.

On the 8th of November, 1821, the disbursing agent then at the post was removed, and the plaintiff was directed to take upon himself the disbursements of the public money, agreeably to the regulations for the government of the Engineer Department; which he did.

On the 1st of August, 1828, he became chief engineer, and removed to Washington, but continued in charge till the 30th of September, 1829. In his final account there rendered, the entire amount of his claims which were disallowed was, for a second per diem and other items, $8,958.91.

On the 26th of March, 1833, the plaintiff presented a new account "as agent for fortifications at forts Monroe and Calhoun." In *this he charged a commission of one [*101 per cent. from November, 1821, to September, 1829.

On the 30th of June, 1834, Congress made an appropriation for a "Fort at Grand Terre." The whole amount appropriated was drawn from the treasury by General Gratiot, as chief engineer, in November and December, 1835. On the 6th of October, 1836, he repaid into the treasury $15,000 thereof, and retained $35,000, in addition to a balance of $8,958.91 charged against him for disbursements at Old Point Comfort, previously to the 30th of September, 1829.

On the 1st of April, 1836, the pay and allowances of General Gratiot were stopped, and the amount directed to be appropriated to the extinguishment of his debt.

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On the 15th of December, 1838, his accounts were again adjusted, and credits allowed him which reduced the balance against him to $29,292.13.

As an offset to this balance, General Gratiot, on the 11th of January, 1839, presented a new account at the treasury, in which he renewed his claim for a double per diem, and added a claim for a commission of 2½ per cent. on disbursements made by him of "contingencies for fortifications." And also a claim of $37,262.44 as compensation for extra services in conducting works of civil engineering, from his appointment in 1828 to his dismissal in 1838.

In February, 1839, a suit was brought against him by the United States, in the Circuit Court of Missouri. It was tried in April, 1840, and judgment rendered in favor of the United States for $31,056.33.

On a writ of error, this court, at January Term, 1841, received that decision, and, deciding several important principles in regard to the items of the set-off, reversed the judgment, on the ground that the defendant's evidence was excluded

At April term of the Circuit Court of Mississippi, the cause was again tried, and the district attorney admitted the credits which are specified in the statements, and the defendant exhibited a new claim of set-off. The several items are enumerated from 1 to 15. Numbers 4, 9, 10, 12, and 13 were admitted or withdrawn, and the others were insisted. Numbers 1, 2, 3, 6, 7, and 8 arise out of transactions anterior to the plaintiff's becoming chief engineer. No. 14 is substantially the same charge for extra official service which was passed on by this court, 15 Peters, as No. 3, p. 376.

No. 15 is a new demand, claiming $37,127.42 for extra official services in the daily and current business of the chief engineer in his intercourse with the War Department, and asserts the principle, that the regulation of 1821, requiring the chief engineer to perform his functions at Washington, detached him from his regular duty, and made all his office busi-
102*] ness extraordinary service, for *which he demands extra compensation. The details of this item are very minute, and the principle on which the charge is ascertained does not appear; if allowed, it would have more than liquidated the balance in favor of the government.

In the opinion of the court in the case in 15 Peters, 373, it was deemed right, for the purpose of bringing this protracted controversy within narrower limits, upon the new trial in the Circuit Court, to state some of the views entertained by the court upon points which had been argued as fully as if the evidence had been admitted. And it was held, that by the regulations the plaintiff in error was not entitled to a commission on disbursements, but the per diem was in full of all extra compensation.

That as to a charge for disbursements of contingencies of fortifications, he was at liberty to show it by evidence.

That as to his charge of $37,262.46 for extra services in conducting the affairs of the civil works of internal improvement of the government, upon its face, this item has no foundation in law, and therefore that the evidence which was offered in support of it, if admitted, would not have maintained it, and the ground of this opinion was, that the services alleged to be performed were the ordinary special duties appertaining to the office of chief engineer, on a review of the laws and regulations, &c.

On the new trial, it appeared that, instead of contracting, the subjects of inquiry were enlarged.

But it is submitted, that the principles involved are few and simple, and had been decided by this court.

The court on the trial gave the eight instruction asked by the counsel of the United States, and overruled the third, fourth, and fifth instructions moved by the counsel of the plaintiff in error. And this opinion of the court involves the important inquiry on which the case turns.

The court instructed the jury, that there was no sufficient evidence to justify them in giving the defendant the credits claimed.

The inquiry was, what were the lawful duties of an officer holding his commission and receiving a salary for his services from the United States. Was this a question for the court or the jury?

It is submitted, that it was peculiarly a question for the decision of the court. It cannot be determined what was extra official, without previously determining what is the official duty. And this is necessarily a question of law.

It is in the nature of a *quo warranto*, in which the question of the sufficiency of legal authority is always decided by the court.

In the case of *Kendall* v. *Stokes* (3 How., 87), it was held that a motion to charge on the proofs was equivalent to a demurrer to the evidence, and such is the practice in Missouri.

In *Toland* v. *Sprague* (12 Peters, 300) it was held that where *the evidence was in [*103 writing it was not error for the court to charge the jury as to its effect. And the court clearly recognized the same principle in the case of *Gratiot* v. *United States* (15 Peters, 376). The learned judge who delivered the opinion of the court says: "The court are of opinion that upon its face this item has no just foundation in law, and therefore that the evidence which was offered in support of it, if admitted, would not have maintained it. The ground of this opinion is, that upon a review of the laws and regulations of the government applicable to the subject, it is apparent that the services therein alleged to be performed were the ordinary special duties appertaining to the office of chief engineer; and such as the defendant was bound to perform as chief engineer, without any extra compensation over and above his salary and emoluments as a brigadier-general of the army of the United States, on account of such services. In this view of the matter, the Circuit Court acted correctly in rejecting the evidence applicable to this item."

Thus having the sanction of this court, the Circuit Court was authorized, on the second trial, in charging the jury that the written evidence adduced was not sufficient to maintain the items of his account of offset.

Since the former hearing of this cause here, the case of *The United States* v. *Ellicott* has been heard and decided. It is reported in 16 Peters, 291, 302, and the court there held, that

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by the regulation of March, 18, 1835, no extra compensation could be allowed to an officer of the army from the 3d of March of that year. Credit was disallowed to Captain Eliason under circumstances similar to those of the plaintiff in error, and his must share the same fate. Assuming, then, as I have endeavored to prove, that the Circuit Court did not err in instructing the jury on the sufficiency of the evidence, did the court err as to its opinion of its legal effect?

1. As to the first item of two and a half per cent. commissions, for safe keeping of and responsibility for $19,500, from the 27th of August to 7th of September, 1821, and for $26,500, from 27th of August to 20th of September. There is no proof touching this item, except the treasury transcript. Colonel Gratiot was the commanding officer in charge of the works at Old Point Comfort. Major Maurice was the contractor. These funds were remitted to Colonel Gratiot, and by him paid over to the contractor. There is no law, and there is no proof of usage, to sustain the charge. If he had been subjected to the trouble of disbursing it, as agent, he was entitled to no commission.

2. For disbursing contingents, from 20th of May, 1822, to 30th of September, 1829, &c., there is no additional proof, and he has been allowed a credit of four dollars per diem, which is exclusive of all extra compensation for disbursement.

3. Same answer.

104*] *6. For collections of money made of Jacob Lewis & Co., &c.

7. For collections of money made of Samuel Cooper.

These were moneys of the United States paid to the disbursing agent, and carried into his accounts for disbursement. He was no more entitled to commission on these receipts than on remittances to him from the treasury. (Old printed record, p. 14.)

8. Major Whiting, under orders, sold public property and paid proceeds to the disbursing agent, who carried them into account to his debit. The same reason applies.

These claims have been presented for the first time since this court decided that the plaintiff was not entitled to commission on disbursements, with the exception of a part of that for commissions on contingencies. On the former trial, that charge was $836, now it is $2,871.43.

14. This item is substantially the third item on which this court, at the former hearing, passed so emphatic an opinion. In amount it is somewhat larger; but whatever change has been made in the words, the principle is the same.

For services in conducting the affairs connected with the civil works of internal improvement, and in conducting the affairs connected with the execution of the Act of Congress of 1824, for taking observations, &c., he claims compensation over and above the pay and emoluments of a brigadier-general, at the rate of $3,600 per annum.

The legal duties of the engineer corps were so fully discussed on the former hearing that I am unwilling to occupy the time of the court in recapitulating them.

By no act of Congress have these duties been defined. In the Act of 1794 (1 L. & B.'s ed., 366), no specific duties are assigned, but places it generally under the orders of the President. By the Act of 1802, it was re-organized, "to do such service as the President shall direct." This general power has never been superseded. Every successive Act of Congress and of the executive, and, I may add, the silence of the plaintiff in error for a long period that he was in office, show that there was never any just foundation for any such implied contract as must exist to sustain the charge.

The colonel of engineers was bound to perform any military or other duty, not incompatible with the character of an officer and gentleman, that the service may require, and the President direct.

The regulations of 1821 and of 1825 (see 15 Peters, 378, 374) require the chief of the corps of engineers to be stationed at Washington, and charges him with the superintendence of the corps of engineers, to which the topographical engineers is attached, and makes his duties comprise reconnoitering and surveying, for military purposes and for internal improvement, with formation of plans and estimates in detail for fortifications, &c.; also the superintendence *of the execution [*105 of acts of Congress in relation to internal improvements, by roads, canals, the navigation of rivers, and the repairs and improvements connected with the harbors of the United States, with which the War Department may be charged by Congress. And in the case of *The United States* v. *Eliason* (16 Peters, 302), the court hold this language: "The Secretary of War is the regular constitutional organ for the administration of the military establishment of the nation; and rules and orders publicly promulged through him must be received as the acts of the executive, and as such be binding on all within the sphere of his legal and constitutional authority." "Such regulations cannot be questioned or defied, because they may be thought unwise or mistaken." To maintain his offset, the plaintiff must establish a contract, express or implied, and the daily established current business of his office, performed without any claim for extra compensation by his predecessor, himself, and his successor, for more than twenty years, it is now argued was extra official, and that the law implies a contract to pay an extra compensation.

The plaintiff has taken many depositions. They certainly establish no usage in the Engineer Department, nor in any of the bureaux, as they are called, established in the War Department for a more regular and systematic despatch of business. The President had the authority to require the services of the chief engineer at any place, and the regulation of 1821 stationed him at Washington. The nature of his duties of superintendence, and of preparing plans and estimates, in subordination to the Secretary of War, necessarily devolved on him those duties, for which, in his fifteenth item, he has now, for the first time, asserted a claim to the amount of $37,127.42. The items will speak for themselves. On what principle the charge is made, I am unable to

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comprehend. The position is taken, that when he entered on the duties of the Engineer Department, at Washington, he received the pay of brigadier-general, he ceased to act as colonel of engineers, and was acting only as a brigadier-general of the army of the United States. He held the brevet rank of brigadier-general. Mr. Monroe had allowed to General Macomb, while performing the duties of chief engineer, the pay and emoluments of his brigadier's commission. The reasons for that order are not very favorable to the position now taken. (See record.)

The brevet pay was allowed because he was performing the duties of the colonel of engineers; whenever he cased to perform those duties, his brevet pay ceased with it. In reference to the instances of extra pay allowed, without examining them in detail, I will remark—

1. That the President had a discretion, by the Act of , to increase rations.

2. That neither the regulation of 1835, nor **106*]** the law of 1835 *or of 1838, forbid extra allowances, where an appropriation was made by Congress for the object. (See the opinion of Mr. Grundy in 1839.)

3. That for duties taking the officer from his regular place of duty, subjecting him to increased expense, allowances have been made, by express assurance at the time. (See Regulations of 1818. p. 67, Record.)

That abuses have existed is well known; they form no basis on which the court will imply an undertaking to pay an extra compensation. These abuses produced the proviso of 1835, the Act of 1838, and the stringent and conclusive Act of 1843. None of the cases which have been decided by this court conflict with the positions I have taken. In *Macdaniel* v. *The United States*, and in *Fillebrown* v. *The United States*, there were express agreements made by the Secretary of the Navy to pay for services out of the range of their regular official duties. In *Ripley* v. *The United States*, the services must be without the range of official duties. And I may, with some confidence, insist, that the court will not be inclined to relieve the plaintiff in error from the burden which the law throws on him. His claim cannot be regarded with favor. Congress appropriated money for an important national work. It went into his hands as a public officer, charged with its application to that object. He diverted it to his own uses, on a claim which was disallowed at the treasury. Indulgence to such a course of conduct may defeat military or naval operations of the utmost importance to the country.

Mr. Coxe, for the plaintiff in error, in reply and conclusion:

The case ought to be considered as if an action had been brought by General Gratiot for a settlement of accounts. The history of the case given by the Attorney-General might be correct, but it was not in the record, and he had forgotten to state a fact in it, which was, that when General Gratiot was dismissed, there was no ascertained balance against him. His account had been for five years before the proper accounting officers of the government, and was then unsettled. He asked that a balance might be struck, but was refused. It seemed as if in his case the old practice had been renewed, namely, *castigat audit que*. Gratiot was required to pay a large sum by a certain day, and, not doing so, the harsh measure of dismissal was resorted to. Already $20,000 of the claim against him has been extinguished, and we hope that more will be by the event of this suit. The Attorney-General has represented the danger of large sums being drawn from the treasury, but we ask for the establishment of no new principle. All that we claim is the impartial application of the same rule which has been extended to others. And if the apprehended danger did exist, is this the tribunal which ought to interpose *to prevent [*107 it? The answer has been already furnished by the Attorney-General, when he said that the Legislature, by interfering, had put a stop to the supposed evil. This must therefore be the last case. The treasury doors are closed by legislative action, not by judicial decision. The Attorney-General has asked, if all the officers who have been brought to Washington by former secretaries are to have extra pay. Whatever may be the consequence, it was not our doing, and we are not responsible. In some of the departments, when boards of commissioners were established, post captains in the navy were placed there, and received salaries for their administrative functions. They could not be placed on courts-martial, which shows that they were detached from the performance of their regular duties in the service, and yet they have never been obliged to ask for their pay. Since the time when General Gratiot was dismissed, and even now, there are four post captains at the head of bureaux, entirely detached from military duty. They receive the salaries fixed by law. If this course had been taken formerly, when other officers were placed at the head of bureaux, there would have been no difficulty. If, therefore, the consequences apprehended by the Attorney-General should follow, it will be the government that will cause them, and they cannot be attributed to us. So, also, the commander-in-chief of the army has been appointed a commissioner to negotiate with the Indians, and paid with extra compensation. So, also, the quartermaster-general (Jesup) has been sent to Florida in command of an army. These arguments, therefore, ought not to have any effect. This case, like all other cases, is simply a question of legal right.

The Attorney-General has said that the instruction of the court below amounts only to a demurrer to evidence. I am willing to regard it so, as if a motion for nonsuit had been made. But if General Gratiot had been the plaintiff, it was not a proper case for a motion for a nonsuit or a demurrer to evidence, because evidence had been given on both sides. Gratiot's witnesses were all cross-examined by the United States, and the whole evidence was offered which had been thus taken. This is a mere question of law. The amount is of no consequence. "No nation was ever impoverished by liberally rewarding services." If General Gratiot's services were really important, and beyond the line of his official duty, it is no matter what the amount involved may be.

General Gratiot was lieutenant-colonel of engineers when the colonel was promoted, and entitled to a brevet for meritorious services.

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He received it, bearing a character without exception, and even now there is no imputation on his personal honor and integrity. He was advised that he had rights, and asked no more than the department had been in the habit of allowing. He presented claims for services 108* beyond his official duties. Were they *so? That is the question which this court has to decide. They were for keeping several hundred accounts, paying money, and other things of an administrative nature. When this case was before the court in 1841, the following language was held, which is found in 15 Peters, 371: "It is true that the Act of the 16th of March, 1802," &c., &c. "But however broad this enactment is in its language, it never has been supposed to authorize the President to employ the corps of engineers upon any other duty, except such as belongs either to military engineering or to civil engineering. It is apparent, also, from the whole history of the legislation of Congress upon this subject, that, for many years after the enactment, works of internal improvement and mere civil engineering were not, ordinarily, devolved upon the corps of engineers. But, assuming the President possessed the fullest power, under this enactment, from time to time to employ any officers of the corps in the business of civil engineering, still it must be obvious, that as their pay and emoluments were, or would be, regulated with reference to their ordinary military and other duties, the power of the President to detach them upon other civil services would not preclude him from contracting to allow such detached officers a proper compensation for any extra services. Such a contract may not only be established by proof of some positive regulation, but may also be inferred from the known practice and usage of the War Department in similar cases, acting in obedience to the presumed orders of the President," &c., &c., &c.

The Attorney-General has said that we must either admit or deny the authority of the "Regulations," and that we are on the horns of a dilemma. But not so. If the President had the power to detach officers for other services than those within the strict line of their duty, it has nothing to do with his power to contract with them for extra compensation for these services. The court said so in the former case, and added, that they had no right to say whether the implied contract was established by evidence or not. Why? Because it was not a question of law, but a question of fact, for the jury. It is true that, at page 376, the court say that one of the charges "has no just foundation in law; and therefore, that the evidence which was offered in support of it, if admitted, would not have maintained it." But this is merely an *obiter dictum*, not a point decided; and it is not easy to see how the two passages can be reconciled with each other. It would seem as if the court thought that civil engineering was a part of the regular duty of the corps. This is an open question. The Attorney-General thinks that we require a reversal of the former opinion of the court. But not so. We only wish that the same rule should be extended to us which has been extended to others. The case of *The United States* v. *Freeman* (3 How., 556) has been referred to as expressing the opinion which we *wish to reverse. [*109 But in that case, double rations were allowed under Regulation 1125, at the discretion of the President, and this was said to be done by him by authority of law; and this is just the proposition for which we now contend. It was said on the other side, that the authority of the President does not rest upon acts of Congress. I take issue upon this proposition. The Constitution says, "Congress shall provide rules for the government of the army and navy." What right has the President to do it? The first act passed was in 1806, the 63d article of which was a prohibition against employing the corps of engineers on any other duty, and the same is subsequently repeated. [*Mr. Coxe* here went into an examination of the laws and army regulations.]

Until 1824, no branch of engineering was taught except military engineering. Congress has thus exercised its constitutional power, and granted certain restricted powers to the department. Whence does the Attorney-General derive an unrestrained power in the President, because he is commander-in-chief? It is true that he is so, but his orders, to be legal, must be confined to military duty. For example, he has no right to command an officer of the army to attend to his (the President's) private business. There is no authority, either, to order a military man to keep accounts, or attend to administrative duties. The President has a general superintending power of seeing all laws executed, but that is altogether a distinct and separate head of authority. This is not in virtue of his being commander-in-chief of the army, but of being President of the United States. Under this, he can employ agents; he may choose anywhere; may select civil engineers, or officers of the army proper, to carry on diplomatic arrangements or negotiate with the Indians. But, then, is not the person so employed to be renumerated for his services? He must be, unless some law forbids such pay, and the President has the power to contract that such pay shall be given. The only claim which the United States had upon General Gratiot was to employ him in civil engineering. The 67th article of the Regulations of 1825, paragraph 888, confines the services of the corps to such works as were authorized by Congress, and whose execution was charged upon the War Department. But many works have been attended to, which were neither specifically charged upon the War Department, nor had any natural affinity with it; such, for example, as dredging the Mississippi. The language of the regulation implies that the execution of these works must be charged, by Congress, upon the War Department, at the same time that the appropriation is made. If this is not the case, then their execution falls under the general power of the President to see the laws executed, and he may employ anybody for this purpose. The account which we have before us is for the performance of *such extra [*110 official duties. Did they properly belong to the office of an engineer? [*Mr. Coxe* here referred to the following works to show that they did not: 1. *Dictionnaire de l'Académie Francaise.* 2. Campbell's Military Dictionary. 3. Dobson's Encyclopædia. 4. Encyclopædia Britannica. 5. Brande's Dictionary of Science, Literature,

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and Art. 6. Rees's Cyclopædia.] We have also the testimony of practical engineers to the same point. We have, in addition, much evidence where officers of all corps have done other duty and been compensated; and even where Congress has especially charged the execution of works upon the War Department, such as the Cumberland road, officers have been paid extra. General Gratiot was not allowed to give evidence of his services, to establish an express or implied contract. Such evidence was put in, and counter evidence taken, and then the whole ruled out. It is, no doubt, the duty of a court to construe written documents. But if a witness is sick and examined under a commission, does this evidence thereby change its character, and become a written document? If the decision of the court below is assimilated to a demurrer to evidence, then every fact, and every inference from it, must be taken to be true. For these reasons, we think that the court below erred.

Mr. Justice WAYNE delivered the opinion of the court:

This case is now before us upon exceptions, taken upon its trial in the Circuit Court, to the instructions which were given by the court, and such as it refused to give to the jury. We do not think them well founded. When the instructions were given and refused, the only matters in controversy were items 1, 2, 3, 6, 7, 8, 14, 15, in General Gratiot's set-off. The 4th, 9th, 10th, 12th items, and one half of the 11th, had been withdrawn, having been allowed in former settlements. The other half of 11, and the entire 5th item, were admitted by the district attorney, in the course of the trial, to be audits against the demand of the United States. The instructions, then, are to be considered in reference to the disputed items 1, 2, 3, 6, 7, 8, 14, 15.

The first instruction was given upon item number 1, the second upon item 2, the third upon item 3, the fourth upon items 6 and 7, the fifth upon the 8th item, the sixth and seventh upon item 14, and the eighth instruction upon item 15, comprehending under the last all the particulars in the account attached to Mr. Benjamin Fowler's deposition.

The instructions were intended by the court to be legal conclusions from all the evidence in the cause. Our inquiries will be, Are they so? And, as legal conclusions, were they given in such terms as in no way to encroach upon the province of the jury to weigh the evidence as to the facts in the case?

The first instruction denies the right to com-
111*] missions upon the *amount turned over to James Maurice. After another reason, in no way material to be here noticed, the court gives as a final reason for rejecting the charge, that the only evidence in support of it was the transcript, and that such evidence was not sufficient to authorize any commission to be allowed for turning over the money to an accounting officer.

The transcript alluded to is the account of General Gratiot with the United States. It was a part of the record in the case reported in 15 Peters, 336, and was used again as evidence upon the trial of the cause in the Circuit Court, with the consent of General Gratiot.

We learn from it, that between the 27th August and the 20th September, 1821, $46,050 had been remitted to General Gratiot, then a major in the corps of engineers and the superintending engineer of fortifications at Old Point Comfort: and that he, within the dates just mentioned, turned over the money to James Maurice, agent of fortifications, on account of forts Calhoun and Monroe. This is the only evidence bearing upon the item. It is a charge of a commission of 2½ per cent. upon the amount, as it is expressed in the set-off, for safe keeping and the responsibility incurred in receiving and turning it over to the agent, when General Gratiot was not a disbursing agent. It is then established, that the money was received and turned over to Maurice, when he was the agent; and also what were the relations of General Gratiot and of Maurice to the government at Old Point Comfort. Those relations arose from the 67th article of the General Regulations of the Army, published in orders from the War Department in July, 1821. From the detail in that article, particularly that paragraph of it directing in what kind of money the agent should make payments, and in what banks it was to be kept by him, there is no doubt it was intended that he should disburse from remittances made to himself by the government. Such was to be the ordinary nature of remittance. But by another paragraph, the superintending engineer had a general superintendence of the agents' disbursements, and none could be made without his signature. And by a third paragraph in the same article, he could be required to perform the duties of agent, when there was no agent of fortifications, for which service a particular compensation is allowed. Is it not obvious, then, with such a power in the Engineer Department, in the contingency mentioned, to call upon the superintending engineer to perform the duties of agent, that remittances could be made to him to be disbursed by himself, when at the time of the remittance there was no qualified agent to receive it, or to be turned over to an agent when one became qualified? The exact state of the case in that respect we do not know—the transcript does not show it, but it is because it does not show it, and because the money was not disbursed by General Gratiot, but was paid over by him to the agent *in so short a time after it was received, [*112 that we are bound to presume there was not an agent at Old Point qualified to receive the remittances made to General Gratiot, and that intermediately, before the money was turned over, the agent who did receive and disburse it became qualified. There were only two officers to whom remittances could be made and by whom they could be disbursed—the superintending engineer and the agent for fortifications. Such, then, must be the inference, as we have stated it, unless we come to the overstrained conclusion that the money was remitted to General Gratiot for some other purpose than for disbursement, and that the department was experimenting in a third way, as to the manner of making remittances and of disbursement, contrary to the regulations giving to it the direction of fortifications. The money was clearly sent to be disbursed by General Gratiot, or by an agent. If not for such purpose, it would not have been remitted. But having

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been remitted to the superintendent of fortifications, and not having been disbursed by him, it could alone have been prevented by the supervention of an agent whose duty it became to do it, the regulation not permitting it to be done by the superintendent, except when there was no agent for fortifications. It is not necessary for us to go out of this course of reasoning for the purpose of confirming it, but it is confirmed by the manner in which the charge is made. It is "for the safe keeping of and responsibility for the following sums, placed in the custody of C. Gratiot, from the 27th August up to the 7th and 20th September, 1821, the dates of their being turned over to James Maurice, as shown on the credit side of the transcript, &c., &c., when General Gratiot was not a disbursing agent." Why for safe keeping, if at the time the money was remitted James Maurice was a qualified agent to whom the remittance could have been made? Why paid over to him, if between the 27th August and the 7th and 20th September Maurice had not become so? The terms in which the charge is made disclose the fact to have been as we have inferred it was; and the error in making it has arisen from its having been supposed that the superintending engineer could be the custodian of government money in any other character or purpose than that in which it could be remitted to him by the Engineer Department, under the 67th article of the Army Regulations of 1821. In this view of the claim, no case of compensation by way of usage can apply to it. Here is a case of an officer with certain duties, absolute and contingent, well ascertained, with a fixed and equally well ascertained compensation for any and every service which he could be called on to render. Compensation by way of usage has never been sanctioned by the court in any case, except for extra official service, which was within the equity of the Act of 1797, ch. 74, as that act was originally construed and applied in the case of the *United States* v. *Wilkins* (6 Wheaton, 113*] 135), and subsequently in *the cases of *Macdaniel*, *Ripley*, and *Fillebrown*, in 7 Peters, 1. 18, 28. The instance of commissions having been allowed to General J. G. Swift, for money remitted to him and paid over by him to the military agents, certainly does not apply to the case now under consideration. That was done under a very different state of the law and of army regulations—when there was neither law nor regulation for making an engineer officer a receiving or disbursing agent, when there was no military agent to receive and disburse government funds. We think, then, that the court did not err in instructing the jury, that the only evidence in support of the first item was the transcript, and that such evidence was not sufficient to authorize any commission to be allowed merely for turning over the money to an accounting officer.

The 2d, 6th, 7th, and 8th items in the set-off, and the instructions given upon them, will be considered in connection, because the transcript proves that the 6th, 7th, and 8th items, upon which commissions are a second time charged, though stated for a different service, are parts of the aggregate of $84,325.58 upon which commissions are charged in the 2d item. The charge is a commission of 2½ per cent. upon that amount, for disbursing it "from the 20th May, 1822, to the 30th of September, 1829, on account of the appropriations for fortifications other than those on forts Monroe and Calhoun." The 6th, 7th, and 8th items are for collections of money made for the United States, from Lewis & Co., Samuel Cooper, and for sales of public property. The first observation which we make here is, that the transcript shows that, within two months at furthest after General Gatriot had paid over the sum mentioned in his first item to Maurice, he had been directed, in addition to his duties as superintending engineer, to perform those also of agent for fortifications, and thus became the disbursing officer of all money applied by the Engineer Department to forts Calhoun and Monroe. For this agency, a specific compensation is given by the 14th paragraph of the 67th article of Army Regulations, and charged by General Gatriot accordingly, in the 4th and 5th items of the set-off, both of which have been allowed to him; the 4th in a former settlement, and the 5th having been admitted, as has been already said, by the district attorney, upon the trial of the cause, as a proper credit against the United States. Our second observation is, that the transcript proves that the expenditure of $84,325.58 was disbursed upon the fortifications of which General Gatriot was the superintending engineer and disbursing agent, and not upon other fortifications, as might be inferred from the manner in which the charge is made. The whole sum, except $16,150.81, was remitted to General Gatriot on account of the fortification of which he was the superintending engineer and disbursing agent, and that amount was turned over to him by the quartermaster to be re-expended upon forts Calhoun and Monroe, upon each in proportion *to the relation which the sales of pub- [*114 lic property bore to the sums expended for it out of the specific appropriations made by Congress for those forts distinctly. Or in other words, the property sold had been bought and paid for out of the specific appropriations for each fort—was resold on account of each of them respectively—the amount of sales of the property of each fort being kept separately, and were so handed over to General Gratiot to be disbursed again. The transcript shows it was so disbursed. This sum is the amount upon which a commission is charged in the 8th item of the set-off, and which the court said in its fifth instruction could not be allowed, "there being no evidence but the transcript to establish it, which was not sufficient." The transcript also shows that $27,699.43 of the amount of the 2d item in the set-off, denominated in the 6th and 7th items collections from Lewis & Co., and from Cooper, were stoppages out of money remitted to General Gatiot, from payments to be made to those persons, on account of advances which the government had made them on their contracts to supply materials for forts Calhoun and Monroe. Neither the 6th, nor the 7th, nor the 8th items of the set-off were collections of money by General Gatriot, in the proper sense of that term. The 6th and 7th items were money returned by him out of money remitted to be disbursed by him as agent, and the amount of the 8th item was handed over to him in the same character, and for the same purpose. Thus, the manner in

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which General Gatriot received more than the half of the 2d item of his set-off, upon which a commission is charged for disbursing and afterwards for receiving, has been shown from the transcript itself. It also shows that the residue of the $84,325.58 were also remittances which had been made to him in his official relation of agent of fortifications. And that the source from which the entire sum was derived was from general appropriations made by Congress for fortifications, which the Engineer Department directed, as it had a right to do, to be applied to forts Calhoun and Monroe, in addition to the sums expended upon each of them out of specific appropriations which had been made for each. The manner of making appropriations had been general, without particularizing the fortification to which the sum was to be applied, and also appropriations for designated fortifications. A specific appropriation could not be diverted from its object, but general appropriations necessarily implied an application according to the discretion of the department which had the direction of fortifications. A remittance, then, to General Gratiot from a general appropriation, to be applied to the fortifications of which he was superintending engineer and disbursing agent, falls directly within that paragraph of the 67th article by which he was charged with the latter duty. For which, in addition to his pay and other emoluments, he was entitled to receive two dollars a day for each fortification [*115] for the construction *of which he disbursed funds, provided his per diem did not exceed two and a half per cent. on the sum expended. That sum, as a per diem, amounting to more than $11,000, has been allowed. From this detailed examination of the transcript (and this 2d item is nowhere besides mentioned in the record), it must be obvious that the court did not err in the second, fourth, or fifth instructions which it gave to the jury, by which the 2d, 6th, 7th, and 8th items of the set-off were disallowed. In making the charge, the opinion given by this court in 15 Peters has been misconceived. The case of Lieutenant Tuttle does not apply. That was disbursing moneys of separate appropriations upon works so distant from each other that the allowance was considered no more that an equitable remuneration for extra official services, which involved personal expenditure in getting to places remote from each other and remote from the locality where he had been detailed for duty.

The third instruction of the court upon the 3d item in the set-off may be briefly disposed of. It will be remembered that, besides general and specific appropriations for fortifications, Congress made appropriations for the repairs and contingencies of fortifications, and it is for the disbursement of such an appropriation that a commission is charged in the 8d item. It is only necessary to look at the transcript again to see that the remittances which were made to General Gratiot out of the appropriation for repairs and contingencies were to be disbursed by him, and were disbursed by him under that head upon forts Calhoun and Monroe. We confess our inability to disconnect such incidents from the general duty of the superintending engineer of a fortification, so as to make the service in any way extra official. The disbursement of the money is shown by the transcript, and by the manner in which the charge is made, to have been done in General Gratriot's character of agent of fortifications. In the long list of compensation by way of usage furnished to the court by General Gratiot, we can find no instance of any allowance to an agent of fortifications for paying out such an appropriation, and we will not refrain from saying, if it has ever happened it has been carelessly or inconsiderately made. We think that the court did not err in the instruction which it gave upon this item of the set-off.

The sixth and seventh instructions will now be considered. They relate to the 14th item in the set-off; substantially the same charge which this court has said, in 15 Peters, had no just foundation in law. It differs from it only in phraseology, and from compensation being claimed for services under the Act of the 14th of July, 1832, "to provide for taking certain observations preparatory to the adjustment of the northern boundary line of Ohio." It is not necessary to repeat what the court then said upon this charge. But we must say, further examination into the laws and regulations applicable to the subject has strengthened the opinion that all the services for which compensation *is asked in the 14th item, except [*116 that relating to the northern boundary line of Ohio, were the ordinary special duties appertaining to the office of chief engineer. And with respect to this exception the court did not err in charging the jury that there was no evidence in the cause showing that the defendant had performed any such extra official service. The correctness of every instruction, that there is no evidence to prove a fact, whether such an instruction is asked for or has been voluntarily given by the court, must depend upon the correctness of the assertion. The court did not say in this case such services might not have been a proper subject for compensation, but as there was no proof of what they were, none could be given. We think the court did not err either in the sixth or seventh instruction.

The eighth general instruction relates to the 15th and last item in the set-off, and was referred to by the court as an answer to all of the instructions which were asked except the first and second. The first was given and the second was rightly refused, not only for the reason given by the court, but because the defendant consented to the introduction of the transcript as evidence, which was a detailed statement of moneys received by General Gratiot before 1839, and could not therefore have been surprised by any item against him or by the proof in support of it. The 8th item is a round charge of $37,127.42 for what are termed extra official services, from the 30th of July, 1828, to the 6th of December, 1838, being the whole time General Gratiot acted as chief of the corps of engineers at Washington. It is not necessary, and we refrain from making any one of the particulars in this item a subject of remark. General Gratiot came to Washington as chief of the corps of engineers, with a bureau already organized, in which, by the regulations of the army, his predecessors had performed every service for which an extra compensation

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is now asked, except those mentioned in the deposition of Colonel Totten, relating to the direction of the lithographic press, repairs on the northwest executive building, and determining the northern boundary line of the State of Ohio. The sums expended for those purposes were made under the control of the Engineer Department, and necessarily involved some superintendence by the chief engineer. But supposing it did so, and that such services cannot be included within any of the regulations by which the Engineer Department was organized, or which determines the official duties of the chief engineer, inasmuch as they are not the subjects of a legal charge, it was necessary, before any compensation could be allowed for them under the equity of the Act of 1797, ch. 20, that proofs should have been given of what had been the chief engineer's personal as well as official agency in those matters. Merely the amounts expended could afford no rule by which compensation could be graduated. That such services were not liable to be charged for by a commission upon the amounts expended, or 117*] *by a per diem allowance, the defendant himself admits by the way in which he has claimed compensation, the largest expenditure being introduced as one of those particulars in his set-off of extra official services, for all of which he made an aggregate charge of $87,127.42. But in truth, with the exceptions just spoken of, all of the enumerated services in the 15th item of the set-off called extra official were the proper business of the Engineer Department, to be done by the chief engineer and his assistants in his bureau.

The jury were so instructed by the court.

But it was urged in the argument, that the court used expressions, in refusing to give the fifth instruction, which had the effect to take from the jury the consideration of the evidence. If, however, the language complained of is taken in connection with the sentence of which it forms a part, and the whole is viewed with reference to the instruction as that is expressed, it will be found to be only introductory to a denial by the court of what counsel had assumed in the instruction, that it was the province of the jury to expound the law applicable to the facts. The instruction asked is, if from the evidence the jury found, &c., &c., that the services "rendered were out of the limits of the official duties of the chief engineer, that he was entitled to compensation for such extra services." The court answered, that it was its duty to construe and apply the evidence, to ascertain, as matter of law, what were the defendant's duties, &c., and, taking all the evidence and construing it, &c.; none is adduced showing or tending to show that the defendant performed any service not appertaining to his station as chief engineer; and then concludes that the eighth instruction, which it had before given on the 15th item of the set-off, was to govern the jury. In all this we think that the court did not err.

We observe, in conclusion, that there was much ingenious and able argument to maintain General Gratiot's right to claim compensation for extra services by considering the relations which he had borne to the army in three points of view. First as engineer, then as chief engineer, detached from duty at West Point, for service at Washington, and lastly as a brigadier general in the army of the United States in the line of the army. The whole of the argument, however, was rested upon two misapprehensions. One, that the regulations of the army by which General Gratiot sustained to it the first two relations, and particularly those which had been applied to the second relation, were unauthorized by law. The other misapprehension was, that brevet rank of itself gave a right to additional pay and command, and translated the officer receiving a brevet from the duties of his commission to those of his brevet rank. As to the army regulations, this court has too repeatedly said, that they have the force of law, to make it proper to discuss that point anew, and such of them as were assailed in the case by *counsel, as not war- [*118 ranted by law, the court think are as obligatory as any of the rest. In respect to the promotion of General Gratiot by brevet, it is only necessary for us to say, that it did not release him from any duty or service attached by the regulations and by the usages of the office to his place of chief of the corps of engineers at Washington.

We order the judgment of the court below to be affirmed.

Mr. Justice McLEAN dissented.

When the decision in this case was announced, I did not intend to file a written dissent; but as the case is important to the plaintiff in error, beyond the damages recovered, and as the counsel desire the views of all the members of the court on the points ruled, I shall, in a very few words, state the ground of my dissent.

Many depositions were read in this case to show the usage of the government in regard to pay, in the military service, for extra services performed; and also as to what constituted the appropriate duties of the chief of the Engineer Department. A great variety of facts were thus proved having a direct bearing upon the duties of the plaintiff and the services stated by him as extra, as not appertaining to his office, and for which he claimed a compensation. A number of instances were referred to where pay had been allowed for extra services under the decisions of this court, and a much greater number under the general usage of the government. Among other instructions, General Gratiot's counsel asked the court to instruct the jury, "that if they find from the evidence, that the defendant, by the direction of the President or Secretary at War, performed any of the services charged for in the last item of his account, being the said item attached to Fowler's deposition, and that the services so rendered were out of the limits of his official duties as chief engineer, he is entitled to compensation for such extra services as a set-off in this action."

"The court refused this instruction, because the whole evidence in the cause, without any exception, is written evidence, which the court is called on to construe and apply, and not the jury; and from such evidence to ascertain, as matter of law, what were the defendant's duties and acts; and taking all the evidence and construing it the most favorably for the defendant, none is adduced showing or tending to show the defendant performed any service not ap-

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pertaining to his duties as chief engineer; and for the proper instruction on the item referred to, the eighth instruction is to govern the jury."

The eighth instruction need not be repeated, as it asserts the same principles contained above, in which the court left nothing for the jury. When this case was before this court (15 Peters, 871), the court, in referring to the Act of 1802, which provided for the organization of the engineer corps, cited the 27th section, which 119*] declares,*" that the said corps when so organized shall be established at West Point, in the State of New York, and shall constitute a military academy; and the engineers, assistant engineers, and cadets of the said corps shall be subject, at all times, to do duty in such places, and on such service, as the President of the United States shall direct." The court observe: "However broad this enactment is in its language, it never has been supposed to authorize the President to employ the corps of engineers upon any other duty, except such as belongs either to military engineering, or to civil engineering." "But assuming the President possessed the fullest power, under this enactment, from time to time to employ any officers of the corps in the business of civil engineering, still it must be obvious, that, as their pay and emoluments were or would be regulated with reference to their ordinary military and other duties, the power of the President to detach them upon other civil services would not preclude him from contracting to allow such detached officers a proper compensation for any extra services. Such a contract may not only be established by proof of some positive regulation, but may also be inferred from the known practice and usage of the War Department."

Gen. J. G. Swift, who was formerly at the head of the engineer corps, in his deposition, which was read as evidence, said: "I have looked over the account hereto attached, amounting to $37,127.42, and am of opinion that the business or functions therein charged do not pertain to the functions of a civil engineer, nor do they pertain to the functions of a military engineer." And he states, that while chief of the engineer corps he received additional compensation for extra services.

Major McNeil, a witness, and who is a civil engineer, states, on being requested "to look at the account of Charles Gratiot, hereto annexed or appended, and state whether the services therein charged belong to civil engineering or military engineering, or to either," answered, "I should say that they would be classed under neither. They do not belong to the duties of the engineer, either civil or military."

Captain Talcott held a commission in the engineer corps, from August, 1818, to September, 1836, and he states, that while in the corps, for extra services he received extra allowances. And he also says: "I have examined the account" (of General Gratiot) "appended, and am of opinion that the several items of services charged for do not appertain to either military or civil engineering." And further, "I do not consider them the appropriate duties of the chief engineer, or of any other engineer."

It is admitted, that so far as the duties of the chief of engineers were regulated by law, or by regulations of the War Department, they may be considered as matter of law for the court, but much parol evidence was heard as to the appropriate duties of that officer, *and to ascertain what part of the [*120 services charged for came within such duties. Now, these were matters of fact for the jury, and not for the court. The claim was to be allowed or rejected, according to the usage of the department, and that usage, like every other fact not established by judicial decision, is a subject of proof.

The depositions above referred to were only a part of those which were read in evidence. Other witnesses differed with those I have cited, as to some of the material facts stated, and to determine this conflict was the peculiar province of the jury. But the whole evidence was ruled by the court, and not permitted to be weighed by the jury. On this ground, I think the judgment should be reversed.

This ruling is attempted to be sustained by the view of the court in the case in 15 Peters, above cited.

The third item charged by General Gratiot, in the account then relied on, was as follows: "For extra services, in conducting the affairs connected with the civil works of internal improvement carried on by the United States, and referred to the Engineer Department for execution, and which did not constitute any part of his duties as a military officer, from the 1st day of August, 1828, to the 6th day of December, 1838, inclusive, ten years and one hundred and twenty-eight days, at $3,600 per annum, $37,262.46." And in their opinion in that case, the court did say: "As to the 3d item, constituting a charge of $37,262.46, for extra services, in conducting the affairs connected with the civil works of internal improvement, very different considerations may apply. The court are of opinion that this item has no just foundation in law; and therefore, that the evidence which was offered in support of it, if admitted, would not have maintained it." The reason assigned by the court was, that the services specified came within the official and ordinary duties of the office.

Now, the account rendered at the last trial differed in amount, though the difference is small, from the one charged in the first account, and to which the above remarks of the court are applicable. But there is a much greater difference.

The items of service are specified in the last account, spreading over several pages, instead of the general charge cited. And the depositions which I have referred to, and others not named, were taken in the cause subsequently to the delivery of the above opinion. The facts thus thrown into the case gave it a new aspect. They particularized the service, and showed, by distinguished engineers, what did and what did not belong to the duties of General Gratiot, as chief of engineers.

In the opinion of the court, the service, as generalized in the first account, being connected with internal improvements, came within the general regulations of the War Department, and might, therefore, *in their opinion, [*121 be decided as matter of law. However this may be, I hold that the new and numerous facts proved as to usage and the extra duties of

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General Gratiot were matters for the jury and not for the court; consequently, that there was error in withholding them from the jury.

In his account, General Gratiot charged the government for the disbursement of upwards of eighteen millions of dollars for "fortifications, internal improvement, light-houses and beacons, Military Academy, lithographic press, northwest executive buildings, and northern boundary of Ohio."

The transcript containing the above charge was regularly certified by the Treasury Department as having been presented by General Gratiot, and disallowed, "as not admissible against the treasury." That the services charged for were rendered was not disputed.

Benjamin Fowler, a clerk in the Engineer Department, testified that the services, as charged by General Gratiot, had been performed.

In their second instruction, the court informed the jury that the defendant was not entitled to any credit for commissions on disbursements on account of appropriations for fortifications, as charged by him. Of this item, the only evidence in the cause is that furnished by the transcript introduced by the United States, as the principal evidence on which the defendant is charged, and the evidence thereby furnished, is not sufficient to authorize the jury to allow the defendant the credit claimed. The same instruction was substantially given in regard to disbursements for fortifications, and for other objects, as charged.

Now, it would seem that the transcript above stated, certified by the Treasury as containing General Gratiot's account disallowed, proved the services charged were rendered; and they were also proved by Fowler, whose deposition was taken in 1842, since this case was before us on the former writ of error. And whatever part of those disbursements did not appropriately belong to the office of General Gratiot, under the usage of the War Department and the opinion of this court in the former case, would constitute a fair ground for compensation.

Some of the other instructions might be commented on, in reference to the evidence, but I deem it unnecessary to do so, as in my opinion the judgment should be reversed on the grounds already stated.

S. C., 15 Pet., 336.
Cited—8 How., 102, 104; 9 How., 500; 10 Otto, 23.

122*] *JOHN C. PAIGE, *Plaintiff in Error*, MARTHA A. SESSIONS.

The decision of this court in the case of Price v. Sessions (3 Howard, 624), reviewed and confirmed.

THIS case was brought up by writ of error from the Circuit Court of the United States for the Southern District of Mississippi.

The facts in the case bringing it within the principles of the case of *Price* v. *Sessions*, decided at the last term of this court, *Mr. Crittenden*, on behalf of the defendant in error, submitted it without argument.

Mr. Justice McLEAN delivered the opinion of the court:

This writ of error brings before us a case from the Circuit Court for the Southern District of Mississippi.

At May Term, 1840, a judgment was obtained by the plaintiff against J. R. Brown, James Magee, and E. J. Sessions, for two thousand two hundred and sixty-three dollars, on which judgment an execution was issued the 12th January, 1842, which was levied on a large amount of personal property, supposed, as stated in the return of the marshal, to belong to E. J. Sessions. A part of this property was claimed by Martha A. Sessions, the wife of E. J. Sessions, as devisee of Russel Smith, deceased. A bond being given by the claimant, and pleadings being filed, under the statute of Mississippi, the right of property was submitted to a jury, who found the title to it in the said Martha, and that it was not subject to the above execution; on which verdict judgment was entered. On the trial, a bill of exceptions was filed by the plaintiff, in which was set out the record of the original judgment and execution, the will of Russel Smith, and the probate of the same, the inventory and appraisement of the property of the deceased, and other evidence. It is unnecessary to state this evidence in detail, or to consider the legal questions which were raised in the case, as, on the same state of facts, the same legal questions were considered and decided at the last term of this court, in the case of *Price* v. *Sessions* (3 Howard, 624).

The rulings of the court in that case were sustained, and the judgment was affirmed; and the judgment in this case is also affirmed, with costs.

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*DANIEL GARRARD, *Plaintiff in Error*, [*123
v.
LESSEE OF HENRY REYNOLDS ET AL.

The question whether there was any evidence to be submitted to the jury will be considered in this court only on exception regularly taken—instructions to jury, when not erroneous.

In an action of ejectment, where two of the plaintiff's lessors were married woman, and the demise was laid in the declaration to have been on the 1st of January, 1815, it was necessary to establish to the satisfaction of the jury that the marriage took place before that day, inasmuch as their husbands were stated to have joined in the demise.

Two depositions, taken in 1818, were given in evidence, one of which stated the death of the father of the women to have taken place "upwards of twenty years ago," and the other "about twenty-eight years ago." Both of the depositions, when enumerating the children of the deceased, mentioned the fact of the marriage, without saying when such marriage took place.

In giving its instructions to the jury, the court remarked that "the depositions should be favorably construed." After retiring, the jury returned into court and inquired what was meant by the instruction that the "depositions should be favorably construed," when the court informed them, that "where a suit was brought by A and B, as man and wife, and a witness proved them man and wife shortly after the suit was brought, without proving the time at which they were intermarried, it might well be inferred that they were man and wife when the suit was instituted; and if there was an ambiguity in the deposition of William Rawle (the witness), it was in the power of the jury to find that the two *femes covert* had intermarried before the 1st of January, 1815."

The jury were further told, that "the depositions

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had been referred to the court, on a motion, on the part of the defendant, for a nonsuit, for want of proof of heirship and intermarriage of the daughters of Reynolds, at the date of the demise, 1 January, 1815; and that it seemed to the court that William Rawle (the witness) referred to the persons who where the heirs of Reynolds at the time of his ceath, and not at the time the deposition was taken, and refused the nonsuit; but the jury were not bound by the construction given by the court, and could give the deposition any construction they saw proper.

No exception having been taken to the opinion of the court overruling the motion for a nonsuit, the question whether, as a matter of law, there was any evidence to be submitted to the jury, going to establish the intermarriage at or before the time of the demise laid in the declaration, was not before this court.

And in the submission to the jury of the question of fact, whether or not the evidence proved the marriage before that time, there was no interference with the province of the jury, or violation of any rule of law, the question having been left open for their finding.

There was, therefore, no error in the proceedings of the court below.

THE facts in this case are set forth in the opinion of the court.

The case was argued by *Mr. Crittenden* for the plaintiff in error, and *Mr. Morehead* for the defendants.

Mr. Justice NELSON delivered the opinion of the court:

This is a writ of error to the Circuit Court of the United States for the District of Kentucky, bringing up for review certain instructions given to the jury on the trial of an action of ejectment, brought by the defendant in error against the plaintiff in error, and in which the former obtained a verdict.

The action was brought to recover possession of a large tract of land situate and lying in the State of Kentucky, to which the lessors of the plaintiff claimed title as the heirs of James Reynolds, the original patentee of the tract.

124*] *Two of them were daughters of the patentee and *femes covert*, with whom their husbands, Cutbush and Reese, had joined in the action, and the demises in the several counts in the declaration were laid jointly and not severally, and were of the date of 1 January, 1815.

Several questions of law were raised by the counsel for the defendant below, in the course of the trial, and were disposed of by the court, and exceptions taken, but as they have not been relied on here as grounds of error, it is unimportant to notice them more particularly.

The suit was commenced in the latter part of December, 1815, and continued from term to term, until the November Term of the court in 1842, when it was tried, and a verdict found for the plaintiff.

Among other testimony introduced on the part of the lessors of the plaintiff to establish their title to the tract, and right to recover the possession, were the depositions of William Rawle and Thompson Cumpston, both of the city of Philadelphia, duly taken before a competent officer, in May, 1818, the material parts of which are as follows:

William Rawle deposed, "That he was well acquainted with James Reynolds, late of the city of Philadelphia, carver and gilder, who lived many years in a house belonging to the wife of this affiant, as a tenant, in the city of Philadelphia; that, to the best of this affiant's recollection and belief, the said James Reynolds left five children at the time of his death, which was upwards of twenty years ago. The names of the children living at the time of his death were James, Henry, Anne, and Elizabeth, one of whom married Edward Cutbush, and the other James Reese, and Sarah, who, as far as affiant's knowledge extends, was not married; and this deponent believes the said James, Henry, Anne, Elizabeth, and Sarah, were the heirs-at-law of the said James Reynolds, deceased."

Thomas Cumpston deposed, "That he was acquainted with James Reynolds, late of the city of Philadelphia; that he died about twenty eight years ago; that he left two sons, to wit, James Reynolds and Henry Reynolds, and three daughters, to wit, Anne Reynolds, now married to Edward Cutbush, Elizabeth, now married to James Reese, and Sarah Reynolds, whom this deponent believes to be the heirs-at-law."

When the testimony closed, the following among other instructions were prayed for by the counsel for the defendant, namely: "That the plaintiff cannot recover on the demise of Cutbush, unless the jury shall find from the evidence that he was married to the daughter of the said patentee, Reynolds, on or before the date of his demise, to wit, the 1st January, 1815; nor can the plaintiff recover on the demise of Reese, unless they shall find he was *married to another daughter of the [*125 said patentee, at or before the same day; nor can the plaintiff recover on any of the demises in the declaration, unless the jury shall find from the evidence that the lessor, James Reese, was married as aforesaid, on or before 1 January, 1815 (he having joined in the demise as laid in each of the several counts in the declaration)."

The record further states, that the instructions thus prayed for on the part of the defendant were given, "but the court remarked to the jury, that the depositions should be favorably construed."

After the cause was thus submitted upon this branch of it, the jury returned into court, and inquired "what was meant by the instruction, 'but the depositions should be favorably construed,'" when the court informed them, "that where a suit was brought by A and B, as man and wife, and a witness proved them man and wife shortly after the suit was brought, without proving the time at which they were intermarried, it might well be inferred that they were man and wife when the suit was instituted; and if there was an ambiguity in the deposition of William Rawle (the witness), it was in the power of the jury to find that the two *femes covert* had intermarried before the 1st January, 1815."

The jury were further told, "that the depositions had been referred to the court, on a motion on the part of the defendant for a nonsuit for want of proof of heirship and intermarriage of the daughters of Reynolds at the date of the demise, 1 January, 1815; and that it seemed to the court that William Rawle, the witness, referred to persons who were the heirs of Reynolds at the time of his death, and not at the time the deposition was taken, and refused the nonsuit; but that the jury were not bound by the construction given by the court, and could

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give the deposition any construction they saw proper."

This is the substance of the case, as presented on the record, so far as the questions before us are involved, and upon which we are called upon to decide.

The counsel for the plaintiff in error contends, that the testimony of Rawle and Cumpston, as detailed in their depositions, and which is alone relied on by the defendants in error as proving the intermarriage of Anne and Elizabeth, two of the heirs of the patentee, with Cutbush and Reese, refers, and upon a fair construction should be limited, to the time when they were taken, to wit, the 4th and 2d May, 1818, and cannot be properly regarded as referring to the time of the demise laid in the declaration, to wit, the 1st January, 1815; and that if so, then the testimony did not lay a sufficient foundation to warrant the inference or presumption by the jury of the fact of intermarriage at the latter date, which fact is essential to maintain the action.

Whereas, the counsel [for the defendant in 126*] error insisted that one *or both the depositions are open to a construction that affords direct proof of the intermarriage as far back as the time of the death of the patentee, and, of course, before the date of the demise; or, if not direct proof, that the testimony, at least, is sufficiently full and comprehensive to authorize the jury in finding the intermarriage as a conclusion of fact as early as that date.

These are substantially the adverse positions held and maintained by the respective counsel upon the point in question between them.

This court is not called upon to express an opinion, whether, as matter of law, there was any evidence to be submitted to the jury, going to establish the intermarriage at or before the time mentioned; because, although this ground was taken by the counsel in the course of the trial below, on a motion for a nonsuit, and was overruled, no exception was taken to the decision. The point, therefore, is not before us.

Both parties there assumed, that the inference or presumption of intermarriage or not at the date of the demise was one of fact, depending upon the weight of the evidence, such as it was, and belonged properly to the province of the jury, and should be submitted to them. And the only question, therefore, here is, whether the court, in their instruction on the submission of the case to the jury, violated any rule of law, for which error will lie.

We have, accordingly, examined the instructions given on this aspect of the case with attention, and are satisfied that, upon the strictest analysis, to which they may be properly subjected, there is no well founded objection to them.

It is true, after advising the jury in accordance with the prayer of the defendant below, that it was necessary for the plaintiff to establish the intermarriage at the time of the demise, in order to entitle him to the verdict, the court added, that the depositions given in evidence for this purpose should be favorably construed. But if we were to concede anything exceptionable in this mode of construing the depositions, the error was sufficiently explained and corrected when the inquiry was made by the jury as to the force and effect to be given to the observation of the court. In effect, they were then told that the depositions, especially Rawle's, left the question at issue open for their consideration, depending upon the weight to be given to the facts therein testified to, and upon which it was competent for them to find for the plaintiff; which, in judgment of law, was nothing more than the assertion of a right in the jury that had already been virtually implied in the case from the concession of both parties, that the question belonged to that tribunal to determine, according to their view of the evidence.

Indeed, instead of improperly interfering with the province of the jury, the court seems to have been particularly guarded against leaving *any undue impression upon their [*127 minds as to the weight and effect of the evidence from opinions that had fallen from it in the course of the trial. For, after referring to the view taken in their hearing on the motion for a nonsuit, in which the court were obliged to express an opinion as to the tendency of the evidence on the depositions, the jury were expressly advised, that they were not bound by the construction given by the court, but could give such construction as, in their judgments, the facts would warrant.

Even if an opinion had been expressed, in the course of submitting the case, more pointedly, as to the bearing and tendency of the evidence, than is to be found in this case in the record, after the jury were advised that they were not intended as instructions, or to be binding upon them—that the question was one of fact and construction, which they must consider and determine for themselves—we are not aware of any ground of reason or authority upon which error could be predicated for an interference with the rights of the jury, but the contrary.

The cases of *Evans* v. *Eaton* (7 Wheat., 426) and *Carver* v. *Jackson, ex dem. Astor et al.* (4 Peters, 80, 81), need only be referred to in confirmation of the position.

We are of opinion, therefore, that the judgment of the Circuit Court should be affirmed.

GERARD C. BRANDON, *Plaintiff in Error.*

v.

RALPH W. LOFTUS AND FLOYD WHITEHEAD, *Defendants.*

Mississippi statute—evidence—certificate of notary public.

Under the statute of Mississippi, providing for the admission of the evidence of a notary public with regard to a protested note, directing the form of proceeding which the notary shall pursue, and providing further that justices of the peace may, in certain cases, perform the duties of notaries public, it was proper to read in evidence the original paper of the acting notary, although the record was made out at a time subsequent to that when the protest was actually made.

THIS case was brought up by writ of error from the Circuit Court of the United States for the Southern District of Mississippi.

It was an action brought by the indorsee

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against the indorser of a promissory note, under the following circumstances:

On the 12th of December, 1838, the following note was executed:

FORT ADAMS, December 12th, 1838.

On the first day of January, A. D. 1841, we jointly and severally promise to pay Gerard C. Brandon, or order, the sum of two thousand six hundred and sixty-seven dollars, value received, without plea or offset, payable and negotiable at the Planters' Bank of the State of Mississippi, at Natchez.

(Signed) WILLIAM C. COLLINS,
JOHN C. COLLINS.

(Indorsed) "Gerard C. Brandon." "Loftus & Whitehead."

128*] *The note was passed by the indorser, Brandon, to Loftus & Whitehead, who were citizens of Virginia. It fell due upon the 4th of January, 1841, and was not paid. In February, 1841, Loftus & Whitehead brought a suit against Brandon, and the cause came on for trial in June, 1842. Upon the trial, the plaintiffs offered in evidence the following paper, which was objected to by the defendant; but being admitted, the defendant took a bill of exceptions, which is the only one in the record, viz.:

The plaintiff then, without any further proof, offered to read to the jury, as evidence of the protest of said note, and to show notice, a certificate of James K. Cook, which was contained in a loose, detached piece of paper, partly written and partly printed, which certificate is in the words and figures following, to wit:

STATE OF MISSISSIPPI, Adams County:

I, James K. Cook, justice of the peace and *ex officio* notary public in and for said county, residing in the city of Natchez, qualified according to law, do hereby certify that, on the 4th day of January, in the year 1841, I went to the Planters' Bank of the State of Mississippi, in Natchez, and then and there presented for payment the original note, of which the following is a true copy, together with the indorsements on the back of said note:

FORT ADAMS, December 12th, 1838.

On the first day of January, A. D. 1841, we jointly and severally promise to pay Gerard C. Brandon, or order, the sum of two thousand six hundred and sixty-seven dollars, value received, without plea or offset, payable and negotiable at the Planters' Bank of the State of Mississippi, at Natchez.

WILLIAM C. COLLINS,
JOHN C. COLLINS.

(Indorsed) "Gerard C. Brandon," "Loftus & Whitehead."

And I then and there demanded payment of the said note according to its tenor and effect, and was answered by the teller of the said bank that the said note would not be paid, and that no funds were deposited in said bank for that purpose; and the said note was not paid by any person when payment thereof was demanded as aforesaid. Whereupon I protested said note for nonpayment, and notified the parties thereto of said demand, nonpayment, and protest, and that the holder of said note looked to them for payment thereof, which notices were given at the times, and addressed to and directed in the manner following, to wit: Gerard C. Brandon, at Fort Adams, Miss. To Gerard C. Brandon, at Pinckneyville, Miss. To Gerard C. Brandon, at Woodville, Miss. To W. C. and J. C. Collins, at Concordia, Louisiana.

All of which notices, directed to the parties respectively as aforesaid, were placed by me in the postoffice at Natchez in time to go out by *the first mail of the day next succeed- [*129
ing that on which said note was protested as aforesaid.

Which facts constitute, as herein set forth, a full and true record of all that was done by me in the premises.

In testimony whereof I have hereunto set my hand and affixed my official seal this 27th day of January, 1841.

[L. S.] JAMES K. COOK, J. P. Notary.

STATE OF MISSISSIPPI, Adams County:

Personally appeared before the undersigned justice of the peace for the county aforesaid, James K. Cook, a justice of the peace and *ex officio* notary public, whose name is signed to the foregoing, and made oath that the same is a true statement, in substance and in fact, of his official acts and doings altogether in relation to the premises. JAMES K. COOK.

Sworn to and subscribed before me, this 27th day of January, 1841.

M. ROBETAILLE, J. P.

To the admission of which as evidence to the jury the counsel of defendant objected, but the court overruled the objection, and permitted said certificate to go to the jury as evidence of its contents; to which decision of the court, in then and there admitting said certificate, and permitting it to be read in evidence, the counsel for the defendant excepted, and reserved his exception. He therefore prays that this his bill of exceptions may be signed, sealed, and made a part of the record; which is done accordingly. J. MCKINLEY. [SEAL.]

To review this decision of the Circuit Court, a writ of error brought the case up to this court.

It was argued by *Mr. Mason*, Attorney-General, for the plaintiff in error, and *Mr. Robert J. Brent* for defendants.

Mr. Justice CATRON delivered the opinion of the court:

The only question in this case is, whether a notarial act of protest was properly admitted in evidence to fix an indorser on a negotiable note payable in bank.

The statute of Mississippi (H. & H. Digest, 609, sec. 33) provides, that in all cases where it may be necessary to have the testimony of a notary public in any suit touching a protested note, bill of exchange, or other instrument, the official act of such notary, certified under his handand attested by his notarial seal, shall be deemed, held, and taken to be conclusive evidence of the protest of such note, bill, or other writing on the day it purports to have been made; and the notary shall not be required to go beyond the limits of the county of his residence to give evidence of the facts. The foregoing provision declares the force and effect of the instrument.

*And then, the statute prescribes its [*130
form. When a notary shall protest an instrument, "he shall make and certify on oath a full and true record of what shall have been

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done thereon by him in relation thereto, according to the facts, by noting thereon whether demand for the sum of money mentioned in the same was made, of whom, and where; when the requisite notice or notices were served, and on whom; where the same were mailed, if such be the case, when mailed, to whom and where directed; and every other fact in any manner touching the same shall be distinctly and plainly set forth in the notarial record; and when so made out and certified, it shall have the same validity, force and effect in all courts of record in that State, as if the notary were personally present and interrogated in court."

Justices of the peace are authorized to perform the duties of notaries, in particular instances, by another statute of Mississippi; and this notarial act was made by a justice of the peace.

The note on which the protest was founded was due the 4th of January, 1841, payable and negotiable at the Planters' Bank, at Natchez; made by William C. and John C. Collins, to Gerard C. Brandon, and indorsed by him; and who is the plantiff in error, and was the defendant below. Three duplicates of notice are stated to have been sent by mail to Brandon to different places. An objection was made in the Circuit Court to receiving the notarial act in evidence for any purpose, because it purports to be a record, original and of itself; and not a copy of a record from the notary's book; which, it is insisted, it ought to be, and could only be.

After setting forth the facts of demand at the bank, and the answer of the teller, that the note would not be paid, because no funds had been deposited for such purpose, and that a formal protest for nonpayment had been made, and also the fact of forwarding the notices, the notary says: "Which facts constitute, as herein set forth, a full and true record of all that was done by me in the premises." To this is affixed the notarial seal, signature, and affidavit of the notary. It was done on a separate paper, partly printed and partly written; and offered in evidence as a record of the notarial act within the meaning of the statute above recited.

In our opinion, the legislation of Mississippi is distinct and certain; it had reference to the usage of notaries public generally, when making protests and giving notices; that usage we understand to be, for the notary to make the demand and give the notice, and after doing so, to write out the facts in his memorandum book, or to preserve them otherwise; and from these facts the record contemplated by the statutes is made up; and so it was done in this instance, both in substance and form. To the paper having the official seal and affidavit of the notary attached, the Legislature refers; and not to any previous writing.

It is supposed the case of *Fleming* v. *Fulton* (6 131*] Sto. Miss. Rep., *473) gives a different construction to the statute. The objection to the record of protest there was, that it had not been made out and sworn to at the time the protest was made; and such is the fact in the case before us; but the court held that the record might well be made subsequently, and this for reasons, as we think, too obvious to require explanation. Nor do we understand either of the remarks made by the High Court of Errors and Appeals of Mississippi in any degree impugned by our construction of the statute.

The judgment is therefore ordered to be affirmed, with costs.

Cited—6 How., 6.

HUGH A. GARLAND, *Plaintiff in Error.*

v.

GEORGE M. DAVIS, *Defendant*

Practice—material defects in pleadings not cured by verdict.

This was an action on the case, brought by Davis against Garland, the former clerk of the House of Representatives. The declaration set out, by way of inducement, a contract between Davis and Franklin, the predecessor in office of Garland, and then charged upon Garland a wrongful and injurious neglect and refusal to furnish a copy of certain laws to Davis, as had been agreed by Franklin.

The plea was *non assumpsit*, and the issue and verdict followed the plea.

This court can notice a material and incurable defect in the pleadings and verdict, as they are represented in the record to have existed in the court below, although such defect is not noticed in the bill of exceptions, nor suggested by the counsel in argument here.

When a declaration sounds in tort and the plea is *non assumpsit*, such a plea would be bad, on demurrer. If not demurred to, and the case goes to trial (the issue and verdict following the plea), the defect is so material that it is not cured by verdict, under the statute of jeofails.

Bad pleas, which are cured by verdict, are those which, although they would be bad on demurrer because wrong in form, yet still contain enough of substance to put in issue all the material parts of the declaration.

The privision by Congress, in relation to amendments, which is found in the 32d section of the Judiciary Act of 1789, is similar to that of 32 Hen. VIII., but certainly not broader.

The issue was an immaterial issue.

The opinion of this court in Patterson v. The United States (2 Wheaton, 221) reviewed and reaffirmed, namely, "Whether the jury find a general or a special verdict, it is their duty to decide the very point in issue, and although the court in which it is tried may give form to a general finding, so as to make it harmonize with the issue, yet if it appear to that court, or to the appellate court, that the finding is different from the issue, or is confined only to a part of the matter in issue, no judgment can be rendered on the verdict."

This principle applies equally to a plea varying from the substance of the declaration.

In this case, the verdict does not find any of the misfeasance charged upon the defendant.

If the merits of the case were passed upon in the court below, it was illegally done, because no evidence was competent except such as related to the promise described in the declaration.

This court abstains from awarding a repleader, for the reasons stated in the opinion, but remands the case so that the pleadings may be amended.

THIS case was brought up by writ of error from the Circuit Court of the United States for the District of Columbia, holden in and for the County of Washington.

*It was an action on the case, brought [*132 by Davis, the defendant in error, against Garland, the clerk of the House of Representatives.

The circumstances under which the suit was brought are thus set forth in the plaintiff's declaration, which was filed on the 16th of September, 1839:

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"DISTRICT OF COLUMBIA,
Washington County, to wit:

"Hugh A. Garland, late of said county, was attached to answer to George M. Davis, in a plea of trespass on the case, and so forth. And whereupon the said Davis, by H. M. Morfit, his attorney, complains, that whereas the House of Representatives of the United States had, at the first session of the 25th Congress, which was before the committing of the grievances herein complained of, passed a resolution that the clerk of said House be, among other things, directed to cause to be printed a ninth volume of the laws of the United States, after the manner of the eighth volume thereof; and being so directed, in pursuance of such resolution the then clerk of said House, to wit, Walter S. Franklin, in the month of July of the year 1838, at the county aforesaid, had employed the said plaintiff, and, in his capacity of clerk of said House, had agreed and contracted with said plaintiff to print a ninth volume of said laws in the manner as resolved, and to deliver from his office, as clerk of the House aforesaid, a copy of said laws to said plaintiff, to enable him to print the same, and had directed the chief clerk in the office of said clerk of the House of Representatives to prepare the said copy, and deliver the same to said plaintiff; he, the said plaintiff, in consideration thereof, had made ample arrangements and employed the means to print the said ninth volume of said laws, and was in all respects ready and willing to print the same, after the manner as directed in said resolution, when the said Walter S. Franklin departed this life, and the said Hugh A. Garland was elected his successor as clerk of the House of Representatives aforesaid, and had charge of the laws aforesaid, from which the said ninth volume was to be printed. And the said plaintiff having the contract aforesaid, and in consideration thereof having prepared for the faithful execution of the terms thereof, according to said resolution, and having also, soon after the election of said defendant as clerk aforesaid, to wit, on or about the month of December, in the year 1838, at the county aforesaid, and before the committing of the grievances herein complained of, the said defendant was notified of said subsisting contract, and of plaintiff's readiness and willingness, and preparation to comply with the same, according to the said resolution: all of which notification of contract and preparation, as given aforesaid, the said plaintiff avers, and the said defendant was in duty bound, as clerk aforesaid, to deliver a 133*] copy of said *laws to said plaintiff, in consequence and by reason of the said resolution of Congress and the said contract of said plaintiff. And he the said plaintiff afterwards, to wit, on or about the 1st day of February, 1839, at the county aforesaid, asked and demanded of said defendant, who had charge of said laws from which the said ninth volume was to be printed, as clerk of the House of Representatives aforesaid, a copy of said laws under his charge, for the purpose of printing the same according to said contract, and in the manner as directed in said resolution, and without which copy from the office of said clerk the said plaintiff could not print the said laws as directed in said resolution; that the said defendant, contriving and wrongfully and injuriously intending to injure the said plaintiff, and to deprive him of the profits, and emoluments, and advantages which he might and otherwise would have derived and acquired from the printing of said ninth volume of the laws of the United States, and of the profits, emoluments, and advantages of the said subsisting contract, well knowing that, without a copy of said laws from his said office, the plaintiff could not print the same as directed in said resolution; and the said defendant being in duty bound to deliver a copy of said laws, as clerk aforesaid, to said plaintiff, to comply with said resolution of Congress, and with plaintiff's contract aforesaid, afterwards, to wit, on or about the 1st day of February, 1839, at the county aforesaid, and on divers other days and times between that day and the day of the issuing the writ in this behalf, did wrongfully and injuriously refuse to deliver, or furnish or permit to be delivered from said office, or furnished therefrom to said plaintiff, a copy of the laws of the United States for printing the said ninth volume of said laws, as resolved in said resolution; and did also wrongfully and injuriously refuse to allow the said plaintiff to print the said ninth volume of said laws in the manner directed in said resolution, and did prevent and hinder him from printing the same. By means whereof the said George M. Davis lost the printing of said ninth volume of said laws, and the benefit of said contract; and hath been hindered and prevented from making, deriving and having the profits, emoluments, and advantages of such printing, and of the compliance, upon his part, with the said contract, and hath also lost his time, trouble, and money, in preparations for complying with said contract; which profits, emoluments, and advantages [he] hath been so hindered from making, and time, trouble and money he hath so lost in said preparations, were of great value, to wit, of the value of two thousand five hundred dollars, current money, and which profits and money he, the said plaintiff, might and would have had and received, but for the wrongful conduct of said defendant."

There was another count in the declaration, setting forth the same circumstances in a different manner.

*The plea was *non assumpsit*, upon [*134 which issue was joined, and the cause went on to trial. The record, after mentioning the names of the jury, proceeded thus:

"Who, being impaneled and sworn to say the truth in the premises, upon their oath do say, that the said defendant did assume upon himself in manner and form as the aforesaid plaintiff above against him hath complained, and they assess the damages of the said plaintiff, sustained by reason of the nonperformance of the promise and assumption aforesaid, to the sum of nineteen hundred dollars current money."

A motion was then made in arrest of judgment for the following reasons, viz.:

"Because there is no cause of action stated in the first count of the plaintiff's declaration.

"2. Ditto, as to the second count.

"3. Because there is a general verdict, and one count is bad.

"F. S. KEY, for defendant."

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This motion was overruled, and judgment entered upon the verdict.

In the course of the trial, two bills of exceptions were taken on the part of the defendant, which were as follows:

1st Exception. "In the trial of this cause, the plaintiff, having offered the resolution of Congress of 14th October, 1837, proved that in July, 1838, a verbal contract was made between the plaintiff and Walter Franklin, then clerk of the House of Representatives of the United States, for the printing of the ninth volume of the laws of Congress, in which it was agreed that the plaintiff should do the printing thereof, on the same terms as had been previously agreed with plaintiff's father, who had died some short time before, and had been paid to said plaintiff's father for the eighth volume of the laws of the United States, and was to be paid for the same at the usual Congress prices—the printing to be executed under the superintendence and direction of Samuel Burche, chief clerk of said House of Representatives; that no minute or entry of said agreement was made in writing, among the books and papers of said Franklin's office; that it is usual and customary for the contracts made on the authority of the House to be made verbally, and the same have always been received by the House and paid for; and that the said plaintiff frequently, after the making of the said agreement, called on said Burche for the work, stating his readiness to proceed with the work, and did not receive the same, because the said Burche had not prepared the laws for publication.

"And then further proved, that the said Walter Franklin died in September, 1838, and the defendant was elected clerk of the House on the first Monday of December, 1838; that some time afterwards, in December, 1839, the [135*] said Burche, not having yet *prepared the said laws for said publication, and the said plaintiff waiting as before for the same, the said Garland was informed, about the 1st of January, 1839, of the contract so as aforesaid verbally made between the said Franklin and the plaintiff, and observed that he had understood such a resolution was passed, and that such work was to be given out for printing, and that he considered that as the agreement was a verbal one it was not binding, and that he had the right to give the contract to whom he pleased; that afterwards, in about two months from the beginning of December, 1838, he was again called upon and informed of the said contract, verbally made with the plaintiff by the said Franklin, when he said he had made an agreement or a contract with one Langtree; and that he said Garland did make such agreement with said Langtree, and ordered the work not to be given to the said plaintiff, but to be given to said Langtree to be printed, which was done accordingly, and the plaintiff thereby prevented from doing the work.

"And further proved, that said plaintiff had made considerable preparations for the work, and had engaged Mr. Gideon to do the printing of the work, and had transferred to said Gideon his office and press, valued at $1,000, to be paid for by the profits of the work—of which the defendant was informed before he made the contract with Langtree; and that plaintiff suffered considerable loss by the taking away said contract; and that said Gideon, in the prosecution of his preparations for said work, had expended $600 or $700 for paper for that very work.

"And further, that at the time of making said verbal contract with said Franklin, the plaintiff asked him if it was necessary it should be reduced to writing, and was answered that it was not necessary, and was not usual; and also proved that there was no written contract in the office of the clerk for the printing of the eighth volume of the laws of the United States. And that said Franklin knew and assented to the plaintiff's engaging said Gideon to do the said printing at the time of said contract; and that the defendant was advised by the clerks, before he made the contract with said Langtree, to be cautious and not get into difficulties by giving the work to another. And that no written contract with said Langtree, nor any memorandum thereof, appears in the office of said clerk.

"And upon the evidence aforesaid of the said plaintiff, the defendant, by his counsel, prayed the court to instruct the jury, that if the same was believed by the jury to be true, the plaintiff was not entitled to recover, which the court refused; to which refusal defendant excepts, and prays the court to sign and seal this bill of exceptions, which is done this 14th day of April, 1842.

"W. CRANCH, [SEAL.]
"B. THURSTON, [SEAL.]
"JAS. S. MORSELL, [SEAL.]"

*2d Exception. "And thereupon [*136 the defendant, on the said evidence, prayed the court to instruct the jury as follows:

"If the jury believe from the evidence that the defendant, in making the subsequent contract with Langtree, and causing the compilation to be delivered to him to be printed, acted officially and *bona fide*, and not with corrupt motives, and verily believed that the prior contract made verbally with the plaintiff was not obligatory, then he is not liable to damages in this action upon the evidence aforesaid; which also the court refused to give; to which refusal defendant excepts, and prays the court to sign and seal this bill of exceptions, which is done accordingly, this 14th day of April, 1842.

W. CRANCH, [SEAL.]
"B. THURSTON, [SEAL.]
"JAS. S. MORSELL, [SEAL.]"

Upon these two exceptions the case came up to this court.

It was argued by *Mr. Robert J. Brent* for the plaintiff in error, and *Mr. Coxe* for defendant.

Mr. Brent, for plaintiff:

The first count is defective in this:

1st. It does not show any authority in the former clerk (Franklin) to make the contract on which Davis founds his claim, for the averment, that Franklin was "directed to cause to be printed a ninth volume of the laws, &c., after the manner of the eighth volume thereof," does not necessarily imply an authority to contract, inasmuch as that power could be executed by causing the volume to be printed by the regular printer of Congress, who might be entitled to all its printing.

All the facts stated in this count may be true, and yet Franklin have no power to make a

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contract. (See, as part of this argument, the Reports of House Committee in volume of Reports of Committees, 1840–41, No. 16, Rep. No. 101 and 215.) Therefore I conclude that Franklin's authority as a public officer to make the contract with Davis does not sufficiently appear, and if so, it results as a corollary that it was his own unauthorized contract, and not binding on his official successor.

*2d. If, however, it was Franklin's official contract, binding on his successor, then it was only binding on the appellant, as the agent of the House of Representatives, and the appellee's remedy should be against the House of Representatives, by appeal to its justice. (See on this, 1 D. & E., 674–678; *Hodgson* v. *Dexter*, 1 Cranch, 362; 7 Wendell, 254; 12 Wendell, 179; 18 Johns, 125; *Chisolm* v. *Georgia*, 2 Dallas, 419, 444; 1 D. & E., 172; 2 Cowen, 583.)

3d. If binding on Garland as clerk, yet this 137*] count shows no act *of his tending to establish any liability on his part to Davis, but a repudiation of the contract utterly.

4th. This count shows no consideration for the contract, for it is nowhere averred that Davis was to be compensated, nor is it sufficiently shown that Davis entered on the performance of this contract. (See *Coggs* v. *Bernard*, 2 Ld. Raym., 919, 920; and *Elsee* v. *Gatward*, 5 D. & E., 143.) Merely stating that Davis was prepared to execute the contract does not make a sufficient consideration.

5th. The contract, as herein shown, was to print after the manner of the eighth volume, and the count omits to show the manner of printing the eighth volume, and thus a material term of the contract is not shown.

Again, the second count is, in addition to the above objections made to the first count, liable to the further objections: 1st, that it shows by way of recital a contract with Franklin as clerk (the consideration or terms of which are not given), and then sets forth no other ground for Garland's liability, except his being the successor to Franklin, and refusing to give the copy.

Now, it is obvious that Franklin may have made a private or unauthorized contract as clerk, and it will not be contended that a clerk's contracts are *ipso facto* binding on his successor, without showing something more than his naked contract, as a ministerial officer is not supposed *ex officio* to be capable of making any contract he may choose.

2d. This count does not show that by the contract the clerk was to furnish the copy, but merely a subsequent promise by Franklin to furnish the copy, and yet the gravamen of it is the refusal of Garland to furnish a copy.

Again, it is manifest, on the face of both these counts, that no liability in defendant is shown, and that the declaration is in material respects uncertain and unmeaning according to the rules of pleading.

If either count is defective, the judgment should have been arrested. (5 D. & E., 143.)

The first exception sets forth all the evidence, and I contend its prayer should be granted, because,

1st. The contract as proved was variant in this, that the printing was to be on the same terms as plaintiff's father had agreed for (8th vol.), and the declaration does not show any such terms in the contract.

2d. The declaration does not set forth the material qualification in the contract, that the printing was to be under the direction of Burche. (See the statement of evidence.)

3d. The proof is, that payment was to be at usual Congress prices, and they are not averred in the declaration, nor shown in evidence.

*4th. The proof is, that the printing [*138 was to be done under direction of Sam. Burche, and that Burche was the party in default in not preparing the laws; how, then, could defendant give a copy until Burche's compilation was completed, which is nowhere shown in the evidence?

Again, the evidence sets forth as the basis of Franklin's authority the resolution of 14th of October, 1837 (which see in House Journal, 14th October, 1837, Extra Session, p. 191). It appears from the plaintiff's own evidence thus offered, that Franklin's power was *in limine* referable to another resolution which should govern and control his power, and which resolution was not given in evidence, but can be seen in House Journal, 30th June, 1834, page 903; and also see House Journal, 25th June, 1836, page 1096.

Now, the whole evidence either shows a complete authority in Franklin to make the contract, or it does not. If it shows his authority, then could Franklin be sued for nonperformance? (See 1 Durn. & East, 172, and 2 Cowen, 583.) If he could not be sued, how can his successor in office? And if his contract was unauthorized, his official successor cannot be bound by it.

Again, here is a public officer bound, we will suppose, to have the laws printed; he finds that his predecessor had never executed his power, and he feels the obligation to discharge his official duty. Is he to be obstructed in that duty by *caveats* and notices from A, B, and C, that, as clerk, he must comply with contracts of his predecessor, of which he has no proof but an assertion or an unsworn statement of a witness? Has he even a discretion to determine whether his predecessor made a contract or not? He finds the duty unexecuted by his predecessor, and he is bound to select either the public printer, if there be one, or to take the matter into his own hands, and perform it with his own agents. How dangerous it would be to suffer a clerk to be intimidated and delayed in matters of such high importance by the notices of every man who might set himself up as entitled by a verbal contract with his predecessor.

Again, it is to be regretted that the record does not contain the fact that there was, at the time of Franklin's contract, a regular printer, duly elected by Congress, and entitled to all its printing (see Report of Committee, *supra*, 1st point); but though the fact is not in the record, yet the resolution of 14th October, 1837, does not on its face imply any power to the clerk to make contracts for the printing, but only to cause a volume to be printed after the manner of the eighth volume and under a previous resolution, which, if incorporated as it ought to be as part of plaintiff's case, might have shown that the manner of printing the eighth

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volume was by the public printer, and not by such person as the clerk might select.

139*] *Again, the former resolution ought to be produced as part of the plaintiff's case, and to fix the terms of the contract, and it is material, as, if shown, it might appear that the contract was not to be executed within a year, and therefore void under statute of frauds. (See *Boydell* v. *Drummond*, 11 East, 142.)

It does not appear from the record that Garland ever received any money to pay for such a contract, or that he acted with fraud or deceit.

On the second exception, I refer to *Stockton and Stokes* v. *Kendall* (3 Howard's Rep., 97, 98).

Mr. Coxe, for defendant in error.

The first count in the declaration sets forth the resolution of the House of Representatives, directing the clerk to cause to be compiled a ninth volume of the laws, &c.; that being so directed, the then clerk, Franklin, employed the plaintiff, and agreed and contracted with him in pursuance of said resolution. This being an action for a tort, and the contract referred to being mere inducement, not the gist of the action, such statement of the authority to contract, and of the actual contract, is in accordance with the strictest rules of pleading. Particularly after verdict such averments are sufficient.

The second, third, and fourth objections are founded upon a misapprehension of the nature of the action. It is not a suit brought upon a contract for the purpose of compelling its performance. In this case, Franklin acted as agent of the House in making the contract, and could not be held responsible for its execution. The suit is brought against Garland for an illegal, unauthorized act of his own, individually, in preventing the execution of the contract, and depriving plaintiff of the benefits which were to result to him from it, and remuneration for the expenditures he had made towards its performance. The main grounds of defense now urged were taken in the case of *Freeman* v. *Otis* (9 Mass., 272.)

Another case (*Shepherd* v. *Lincoln*, 17 Wend., 250) illustrates the distinction. That was a suit brought against defendant as superintendent of repairs of canal, and he was held responsible for an act of negligence or misfeasance.

Franklin made the contract as a public agent, and therefore never could have been made personally responsible for its non-execution by the House. Garland does not pretend that he was instructed or directed by the House to annul that contract; his interference was unauthorized, and therefore he is answerable.

The general principle is, that when an agent acts within the scope of his authority he is not personally responsible—recourse must be had to the principal; but if he transcend his authority, he is personally liable.

The declaration is sufficient in averring the

140*] actual existence of *a contract. The terms of the contract are unimportant in this suit, and need not be averred. Even in an action brought on the contract itself, it is sufficient to aver it according to its legal effect, and it is unnecessary to set out more of it than suffices to show a cause of action. (2 Wend., 579; 8 Cow., 33, 39; 13 Johns., 224.)

2d. The same answer may be given to the objections urged against the second count.

In an action brought for misfeasance, it is unnecessary to aver or prove any consideration for the contract. (20 Johns., 379.)

3d. Upon the bills of exceptions. It is a sufficient answer to these exceptions to say that they do not profess to be founded on all the evidence in the case. The first bill, after stating certain evidence as given by plaintiff on the trial, says (p. 14), "upon the evidence aforesaid of the said plaintiff, defendant prays," &c. It does not allege that this was the whole evidence given. This is a fatal and incurable defect in the case. For aught that appears, other and sufficient evidence may have been given, and the omission of it may have been the very reason why the instruction prayed was refused by the court. Plaintiff in error must establish the error in the judgment complained of; every reasonable intendment should be in favor of the judgment. (*Ventress* v. *Smith*, 10 Peters, 161.)

2d. The only evidence stated in the bill of exceptions is such as was adduced by plaintiff. The prayer is, then, substantially a demurrer to the evidence. Every fact which it conduced to prove, and every conclusion inferable from those facts, is admitted; *mala fides* and oppression are fairly deducible from the facts proved. The jury has passed upon all the allegations in the declaration; and if they went beyond the testimony, the proper remedy was by motion for a new trial. The jury took the case without any instruction whatever from the court.

The four specific objections now made imply that all the evidence is embodied in the record, which does not appear; and they are founded upon the misapprehension already adverted to, in supposing this action to be brought upon a contract against a party to it to compel its performance. This has been shown to be an error.

The subsequent exceptions are all fully answered in what has been before said.

After the argument was closed, the court intimated to the counsel the difficulty arising from the irregular plea, issue, and verdict, compared with the declaration, upon which *Mr. Coxe* filed the following supplementary argument.

The difficulty now suggested by the court is understood to be this: The action is brought as for a tort, the plea is *non assumpsit*. Issue *being joined on this plea, verdict for [*141 plaintiff and judgment entered accordingly. Can this judgment be sustained upon these pleadings?

1. The entry of the pleas is, in the Circuit Court, the act of the clerk, the defendant being at liberty to abide by the plea thus entered, or to plead *de novo*. If he does not amend, he adopts and abides by the plea filed by the clerk.

In this case, the plea of *non assumpsit*, if entirely wrong, is a mere clerical error, which would have been amended had it been brought to the notice of the court. If defendant had refused to amend, the plea would have been regarded as a nullity, and judgment entered for want of a plea. This plea was adopted by defendant, and is therefore to be regarded as his. The fault, if any, is his.

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2. The action, though sounding in tort, is founded upon a contract. The existence of this contract was traversable, and on the trial it was necessary for plaintiff to prove it. The plea of *non assumpsit* may be so moulded as to make it a denial of the contract made between plaintiff and Franklin. As in covenant, the plea of *non est factum* is a good plea, though it merely puts in issue the actual execution of the instrument declared on, and neither denies the breach nor the alleged consequences. A special plea, putting in issue the contract which lies at the foundation of this action, would, therefore, not be an immaterial plea.

3. As a general rule, a party shall not be permitted to derive benefit from his own error. If there is fault, it is the defendant's fault, and, at this stage of the case, it would be in violation of this principle to allow him to assign it for error.

4. Defendant has not assigned this defect for error—he has not asked for a reversal on this ground.

5. If the error is fatal, it should have been brought before this court in another form. The Circuit Court should have been moved for a repleader; had they refused, such refusal is assignable for error. No such application was made, and consequently there is no error cognizable by the Supreme Court.

6. Had the Circuit Court refused to award a repleader, and such judgment been reversed as erroneous, the judgment of the Supreme Court would have remanded the cause, with its mandate directing such repleader. But can a court of errors in any other way award a repleader? (Gould on Pleading, 518, sec. 47.)

7. If the Circuit Court might lawfully have refused to award a repleader, then there is no error.

Gould on Pl., 509, sec. 32: A repleader for the immateriality of the issue is never awarded, it seems, for that party who tendered the issue. (Cites Dougl., 749, per Buller.) There can be no ground for a repleader, for the plea **142*]** is substantially bad; there is *no fact alleged in it which it could serve any purpose to deny, or to go to issue upon.

1 Ld. Raym., 170: It was argued, that if the verdict passes against him who made the first fault in pleading, no repleader shall be granted, but it is otherwise if it passes for him. The court refused to award a repleader, for the issue was not wholly immaterial, and after verdict court will intend that the matter put in issue was material.

1 H. Bl., 644: In *assumpsit*, declaration had five counts. Defendant pleaded *nil debet* to the first, and left the others unanswered. Judgment for plaintiff. Court held the defect cured by the verdict, and defendant should not take advantage of his own mispleading to defeat plaintiff's suit, when jury had found he owed the debt.

Cowp., 510: Court will not grant a repleader but where complete justice may be answered.

Gould, 510, sec. 32: Therefore, if verdict is against him who tendered the issue, judgment must also regularly go against him. For, as the fault in the issue commenced on his part, his traverse being bad in law, and it being moreover found to be false in fact, it is deemed unreasonable to grant him the indulgence of a repleader. Yet if the verdict were for the same party, a repleader would regularly be awarded. (Secs. 33–36.)

Ibid., sec. 37: Courts ought never to award a repleader, or arrest the judgment for faults in the issue, when it is apparent that no useful end can be attained in so doing. Citing 1 Str., 198, where Powys, *J.*, said: "I am of the same opinion, for if we should grant a repleader, I do not see how we can have any new light in the case."

Gould, secs. 38, 45: Judgment ought never to be given for, or arrested in behalf of, that party in whose pleading the first substantial defect is found. (*Ibid.*, sec. 49.)

After verdict for the plaintiff, the defendant shall not take advantage of his own mispleading. (*Harvey* v. *Richards*, 1 H. Black. 644.)

The plea of "not guilty" in *assumpsit* is cured by verdict. The error assigned was, that issue was joined on the plea of not guilty. Verdict cured that. (8 Serg. & Rawle, 441; 2 Stra., 1022.)

A right defectively alleged is cured by verdict. (6 Vt. Rep., 496; 2 Marshall, 254.)

A defective statement in the declaration for want of date of the *assumpsit*, also failure to state the consideration, is cured by verdict. (1 Watts, 428; 1 Day, 186, *note*.)

After verdict in an action by an administrator, a defective allegation in the declaration of the promise to the administrator and the death of the intestate, and an omission to make profert of the letters of administration, cannot be taken advantage of, *though they [***143** have furnished good causes of demurrer. (1 Harris & Gill, 14.)

It was held, that in an action of *assumpsit* and not guilty pleaded, and issue, the judgment may be entered, for it is only mispleading, and the real merits may as well be tried on that issue as on any other. (4 Bac. Abr., 84.)

The omission to join in issue to some of the replications is healed after verdict. (3 Harris & Johns., 109.)

Departure is cured by verdict. (Conn. Rep., 252.)

Mr. Justice WOODBURY delivered the opinion of the court:

In the examination of this case, a defect has been discovered in the pleadings and verdict, which was not noticed in the court below, nor suggested by the counsel here.

And the first question is, whether, under these circumstances, it can be considered by us; and if it can be, and is a material defect, not cured or otherwise capable of being overcome, whether it ought to be made a ground for reversing the judgment, and sending the case back for amendment and further proceedings.

There can be no doubt that exceptions to the opinions given by courts below must all be taken at the time the opinions are pronounced.

But it is equally clear that when the whole record is before the court above, as in this case, any exception appearing on it can be taken by counsel which could have been taken below. (*Roach* v. *Hulings*, 16 Peters, 319.)

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So it is the duty of the court to give judgment on the whole record, and not merely on the points stated by counsel. (*Slacum* v. *Pomery*, 6 Cranch., 221; *Baird & Co.* v. *Mattox*, 1 Call, 257; 16 Peters, 319.)

In *United States* v. *Burnham* (1 Mason, 62) the court alone took notice of the defect, which was the sole ground of its opinion.

In Patterson v. *United States* (2 Wheat., 222) it is stated, that "the points made were not considered by the court, and judgment was pronounced on other grounds," and *Justice* Washington says (p. 24), "The court considers it to be unnecessary to decide the questions which were argued at the bar, as the verdict is so defective that no judgment can be rendered upon it;" and on that account the proceedings below were reversed. (See, also, *Harrison et al.* v *Nixon*, 9 Peters, 483, 535.)

I proceed, then, to consider the nature and character of the difficulty in this case, appearing on the record.

Since discovering it, an opportunity has been given to the counsel for the original plaintiff, which has been improved, to attempt to remove it by argument and authorities. But it still remains, and consists in this:

The declaration is an action on the case, 144*] sounding in tort. It *sets out no contract except one by way of inducement, made by Mr. Franklin, the predecessor in office of the defendant, and it then proceeds to make the gist of its complaint a wrongful and injurious neglect and refusal by the defendant to furnish a copy of certain laws to the plaintiff, as had been agreed by Franklin. We are required to take this view of the declaration, not only by the averments in it, but by both the present and past positions of the counsel for the plaintiff, that it was intended to be founded on a misfeasance. The plea, however, instead of being "not guilty," as was proper in such case (Com. Dig., Pleader) is *non assumpsit*, and the plaintiff below, not demurring thereto, not moving for judgment notwithstanding such a plea, joined issue upon it, and the verdict of the jury conforms to the plea and issue, and merely finds, "that the defendant did not assume upon himself in manner and form," &c., and assesses damages, "sustained by reason of the nonperformance of the promise and assumption aforesaid"

Besides the general reasoning in the books, that pleas amounting to the general issue should traverse the material averments in the declaration, and, where the action is one on the case for a tort, should deny the tort by pleading "not guilty," it is laid down in most elementary treatises that "not guilty" is the proper general issue in such cases. (See Com. Dig., Pleader.)

Beyond this, it has been actually adjudged in an action on the case, after full hearing, that *non assumpsit* was a bad plea. (*Noble* v. *Lancaster*, Barnes, 125.)

That action was trover, but being still an action on the case, the same principle applied.

Nor is the difference merely formal or technical between actions founded in tort and in contract. (1 Chit. Plead, 418, 229.)

Because, when in tort or *ex delictu*, a set-off is not admissible, nor can infancy be pleaded as to one *ex contractu*, nor can a plea in abatement be sustained, that all concerned in the wrong are not joined, as it may be in counts on contracts, and a writ of inquiry must issue to ascertain the damages, which is often unnecessary in suits on contracts. A declaration is bad which unites a count in tort with one in contract. (2 Chit., 229, 230; 1 Chitty's Rep., 625, *note;* 4 D. & E., 794; 8 D. & E., 33.)

Various other cases analogous to this might be cited, which tend to show that the present plea is improper, but it is not deemed necessary, in this stage of the inquiry, to enlarge on that point; and I proceed to the next and more difficult question, whether such a plea, though bad on demurrer, should not be considered as good after verdict, and cured by the statute of jeofails.

As a general rule, all informality in a good plea is held to be cured by a verdict, and ought to be, in order not to delay, through a defect of mere form, what may seem to be just. (1 Levinz, 32; 6 Mod., 1; Com. Dig., Pleader, R., 18; 6 Johns. R., 1.)

*Here, however, there appears to be [*145 no informality in a good plea; on the contrary, it looks more like formality in a bad one. And if it be asked, whether there are no cases of bad pleas which are cured by a verdict, we answer, that several exist, but that they are cases where the pleas, though bad on demurrer, because wrong in form, yet still contain enough of substance to put in issue the material parts of the declaration. That is the test.

In the opinion of a majority of the court, the plea under consideration does not contain enough for that purpose; and my apology for examining this point somewhat more in detail must be found in the circumstance that the court are divided upon it.

The provision by Congress in relation to amendments is to be found in the 32d section of the Judiciary Act of September 24th, 1789, and is similar to that in the 32 Henry VIII., but certainly not broader. (See the former, in 1 Lit. & Brown's ed., 91, and the latter in 1 Bac. Abr., Amendment and Jeofail, B.)

Under both of these statutes, it has frequently been adjudged, that defects in substance are not cured by a verdict; "for this," says Bacon (Abr., before quoted, E), "would have ruined all proceedings in the courts of justice"; and a defect in substance, in a plea or verdict, is conceded, in all the books, to exist when they do not cover "whatever is essential to the gist of the action."

The present plea, if tried by this test, seems not to be remedied by the verdict, because, so far from traversing all that is essential, nothing is denied, unless it be the inducement. Thus it traverses a promise simply; but the only promise set out in the declaration is one introductory to those material averments, which, as before stated, are the wrongful and injurious acts of the defendant. So far from denying those acts, the plea entirely passes them by, and they are neither put in issue, nor a verdict returned upon them one way or the other. It is true, that, in some actions for a tort, a promise may be referred to in the declaration, which sometimes will constitute one material fact among several others. But it is only one, and not the whole, nor is it the most material fact; that being, in such cases, the misfeasance of

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the defendant. Nor does the verdict here find this one fact or promise such as averred in the inducement. There it is stated to be made by Mr. Franklin; but, on the contrary, the verdict finds a promise made by the defendant.

On recurring to precedents, several are found which confirm these conclusions. In respect to pleas they show that, when so imperfect and immaterial as this, they are not cured by a verdict. And the reason generally assigned, and which pervades the whole, is that before mentioned, namely, that they do not cover or traverse all the *gravamen* of the declaration. (*Staple* v. *Hayden*, 6 Mod., 10; Willes, 532; Tidd's Prac., 827; Gilb. C. P., 146.)

Hence it has been decided that a plea of *non* **146*** *assumpsit* to an *action of debt is not thus cured (*Brennan* v. *Egan*, 4 Taunt., 164; *Penfold* v. *Hawkins*, 2 Maule & Selw., 606), because it covers too little or is irrelevant. While, in pursuance of the same rule, it has been held that *nil debet* to *assumpsit* (1 H. Bl., 664) and "not guilty" either to *assumpsit* (Cro. El., 470, and 8 Serg. & Rawle, 441), or to covenant (1 Hen. & Mun., 153), or to debt for a penalty (*Coppin* v. *Carter*, 1 D. & E., 462, *note*), are cured by a verdict, because they contain enough to put in issue all which is important in the declaration.

In the present case, the issue manifestly reaches only a part of the case, and is therefore incurable (Hardres, 33); and it comes expressly within the definition of an immaterial issue, which is also incurable. (Carth., 371; Bac. Abr., Verdict, K; 2 Levinz, 12; 2 Saund., 319; 2 Mod., 137; Gould's Pl., 506, 509.)

This is undoubted, from Williams's definition in *Bennett* v. *Holbech* (2 Saunders, 319, *a*). He says: "An immaterial issue is where a material allegation in the pleadings is not answered, but an issue is taken on some point which will not determine the merits of the case, and the court is often at a loss for which of the parties to give judgment."

So in *Benden* v. *Manning* (2 N. H. R., 291), it is laid down, on circumstances like the present, that "if, instead of *assumpsit*, a special action on the case had been brought for misfeasance, it is very clear that no consideration need have been alleged or proved. The gist of such an action would have been the misfeasance, and it would have been wholly immaterial whether the contract was a valid one or not." (5 D. & E., 143; 2 Wils., 359; 1 Saund., 312, *note*.)

If we should next compare this plea and issue in their substance with a few others less general, that have been solemnly adjudged to be bad, and not cured by verdict, though found for the plaintiff, the result will be the same.

It may be seen in *Tryon* v. *Carter* (2 Strange, 994) that, in debt on bond, payable on or before the 5th of December, the defendant pleaded payment on the 5th of December, an issue being joined and found against him, the court still awarded a repleader, as it could not be inferred from these pleadings that payment may not have been made before the 5th.

See another in *Enys* v. *Mohun* (2 Strange, 847), where to covenant on a lease to C, averred to come by assignment to the defendant, the plea was that C did not assign to him, and verdict was for plaintiff. But the court awarded a repleader, as the issue found does not cover all the important parts of the declaration; namely, that the lease may have come to the defendant not from C direct, but by mesne assignments. (Same case, in 1 Barnardiston, 182, 220; see, also, other cases, Yelv., 154; *Peck* v. *Hill*, 2 Mod., 137; *Read* v. *Dawson*, *Ibid.*, 139; *Stafford* v. *Mayor of Albany*, 6 Johns., 1; Com. Dig., *Pleader, R., 1 [*147 and 2, V. 5; 1 Chit. Pl., 625, 695; 6 D. & E., 462; 1 Saund., 319, *n*.)

In *Patterson* v. *United States* (2 Wheat., 224) *Judge* Washington lays down the whole law precisely as we view it, in respect to a verdict varying materially from the issue, and which principle applies equally well to a plea varying from the substance of a declaration. He says: "Whether the jury find a general or a special verdict, it is their duty to decide the very point in issue, and although the court in which it is tried may give form to a general finding, so as to make it harmonize with the issue, yet if it appear to that court or to the appellate court that the finding is different from the issue, or is confined only to a part of the matter in issue, no judgment can be rendered on the verdict." And on error the proceedings below were reversed.

After all this, it is hardly necessary to state further, by way of precedent, that in *Noble* v. *Lancaster* (Barnes's Notes, 125), before cited, this very point was decided. *Non assumpsit* was pleaded to an action on the case (*e. g.*, trover), and was held not to be cured by a verdict, but was bad in arrest of judgment.

Looking, then, to many precedents, as well as correct principles in pleading, the issue presented and tried here is not only an improper one for the case, but, not containing enough to cover all that is material in the declaration and being thus imperfect in substance, it "does not determine the rights between the parties," and is not cured by the verdict or the statute of jeofails.

A moment as to the defects in the verdict. It is difficult to see how an immaterial and bad plea can be cured by a verdict, which, as in this case, is quite as immaterial as the plea. Indeed, in some respects, the verdict here, compared with the declaration, is more defective and irremediable than the plea.

It is laid down in Comyn's Dig., Pleader, S. 24, that a verdict is even void if it be "variant from the declaration," and he gives as one illustration from 2 Roll., 703, l. 35, "in *assumpsit*, if it finds a different promise."

In the present case the promise is found not only different from that laid in the declaration as inducement, but the verdict varies in other essential respects from the declaration, finding nothing of any of the misfeasance charged in it on the defendant.

The defect here, then, is in the verdict as well as plea, and though a mere informality in the former is cured by the act of Congress as to amendments (16 Peters, 319), yet the defect here is similar in both, and as just shown, being on principle in both a defect in substance no less than form, is uncured. (*Stearns* v. *Barrett*, 1 Mason's R., 170, and 2 Mason's R., 31.)

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But several arguments have been offered against a reversal of the judgment and further proceedings, and in favor of rendering judgment for the plaintiff on this record, though the 148*] plea, issue, and *verdict are all defective in substance, and do not show which party is entitled to recover, on the real merits in dispute, or that they have been legally tried.

These arguments it is our duty to examine. One is, that the whole merits, according to the evidence reported, may have actually been considered and passed upon in the court below under this plea and issue. But it is a sufficient answer to this, that if so done it was illegally done, no evidence being competent under that issue except the promise described in it, and no opinion of the jury or the court being regular or proper under it, except as to that promise alone. (*Harrison et al.* v. *Nixon*, 9 Peters, 484.)

There are many cases showing that the evidence must be limited to the plea. (*Mar. Ins. Co.* v. *Hodgson*, 6 Cranch, 206; 4 Wheat., 64, in case of *The Divina Pastora*.) The court say you must "not admit the introduction of evidence varying from the facts alleged." (9 Peters, 484.) The *probata* should conform to the *allegata*. (*Boone* v. *Chiles*, 10 Peters, 177.)

In *Barnes* v. *Williams* (11 Wheat., 416) it is said: "Upon inspecting the record, it had been discovered that the special verdict found in the case was too imperfect to enable the court to render judgment upon it." A certain fact was important to the recovery. "Although in the opinion of the court there was sufficient evidence in the special verdict from which the jury might have found the fact, yet they have not found it, and the court could not, upon a special verdict, intend it."

These illustrations and cases tend to show the difficulties in forming an opinion on anything not found or apparent on the record; and the impropriety of conjecturing and pronouncing upon the real merits, when both the issue and verdict are defective in substance in relation to them. But, in this case, if the promise averred to have been made by Franklin was treated at the trials as one made by Garland, so far as regarded its operation and his duty—which has been the argument of the original plaintiff's counsel before us, and which may, for aught we now decide, be correct—then we should be called upon to render judgment against Garland merely on such promise and a breach of it.

That is everything which the verdict finds or the issue presents, in the most favorable view.

But that being a promise confessedly on the whole evidence made by the original defendant, or his predecessor, as a public agent, if now rendering final judgment, we should probably, in that view of the record (no tort having been put in issue or found by the verdict), be obliged to decide against the original plaintiff on the merits, because public agents are not usually liable on mere contracts or promises made in behalf of their principals. (See on this *Hodgson* v. *Dexter*, 1 Cranch, 345; *Macbeath* v. *Haldimand*, 1 D. & E., 172; *Fox* v. *Drake et al.*, 149*] 8 Cowen, *191; 2 Dall., 444; *Osborne* v. *Kerr*, 12 Wend., 179; Story on Agency, secs. 302–308; *Lord Palmerston's* case, 3 Brod. & Bing., 275; *Freeman* v. *Otis*, 9 Mass. R., 272, *quære* in part.)

On the contrary, however, if the action is to be considered as brought, not on any promise except as inducement, but on a wrongful act or misfeasance, as the plaintiff sets out his case in his declaration and still contends to be the truth, then it seems manifest that—nothing on that misfeasance, the essential point of the action, having been either traversed in the plea or found by the verdict—there is nothing upon which judgment can legally be rendered for either party on the merits. It will be seen that we come to this conclusion, not because cases are wanting which hold that officers not judicial, nor having any discretion to exercise on a subject (*Wheeler* v. *Patterson*, 1 New Hamp. R., 88; *Kendall* v. *Stokes*, 3 Howard, 98; 11 Johns., 114; 2 Ld. Raym., 938), are liable in tort for misfeasances, whenever they are violations of public laws or official duties (*Shepherd* v. *Lincoln*, 17 Wendell, 250; 5 Burr., 2709; 6 D. & E., 445; *Gidley, Ex. of Holland*, v. *Lord Palmerston*, 7 J. B. Moore, 91; 15 East, 384; 9 Clark & Fin., 251; 1 Bos. & Pull., 229; *Little et al.* v. *Barreme et al.*, 2 Cranch, 170; 13 Johns., 141; *Tracy et al.* v. *Swartwout*, 10 Peters, 95), though others consist of unsuccessful attempts to charge persons in tort for matters which originated and existed in fact only as contracts (*Bristow et al.* v. *Eastman*, 1 Esp. *N. P.* Rep., 172; *Jennings* v. *Rundall*, 8 D. & E., 335), or which were mere nonfeasances (20 Johns., 379; 12 Mod., 488; 1 Ld. Raym., 466; 4 Maule & Selw., 27; Story on Agency, sec. 308); but because the issue and verdict present nothing in relation to any such misfeasance, and our opinion is intended to be confined to the questions on the pleadings, without any decision upon the merits. Indeed, it would be difficult to express one on them where we have been unable to agree on one, and where a majority of the court think the pleadings are not in a proper state to enable us to give one satisfactorily.

In this state of things, the most obvious course to assist us to "reach the law and justice of the case" would be to reverse the judgment below and award a repleader. This would not deprive either party of any merits they may have, and may be able hereafter to show on proper pleadings, and costs would indemnify the party who has been delayed by any bad pleading, so far as he ought to be indemnified considering his own fault in this case, in joining and trying an issue immaterial or radically insufficient to settle the cause of action, rather than demurring to the plea seasonably. But such a course is objected to on certain grounds not yet considered, and which it is our duty to notice. One of them is, that when a plea or verdict is radically defective, judgment ought to be rendered, notwithstanding the verdict, for the party* whose pleadings are right; [*150 and another, a branch of this, is, that a court ought in no case to permit the party who commits the first error to have the judgment reversed and be allowed a repleader, unless, perhaps, when the verdict is in his favor.

Though several of the text books lay down rules like these in broad terms, it is first to be noticed that some state them with a *quære* or doubt. (1 Chit. Pl., *note*, 522, 633, and Com.

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Dig., Pleader.) In others the cited authorities do not support them, as Gilbert, quoted in Tidd, 828. In others, the counsel, rather than the court, recognize them. (*Kempe* v. *Crews*, 1 Ld. Raym., 170; *Taylor* v. *Whitehead*, Doug., 749.) In others, the court refer to them, but do not appear to have founded their decision on them, as *Webster* v. *Bannister* (Doug., 396), where the issue covered the merits (3 Hen. & Mun., 388), and in others, matters still different existed, which justified the judgment given, independent of these rules.

Thus, if a plea be bad, but still confesses the cause of action without setting out a sufficient avoidance, judgment can with propriety be rendered for the plaintiff on such confession, if the declaration be good. (*Rex* v. *Philips*, 1 Str., 397; *Jones* v. *Bodingham*, 1 Salk., 178; Gould on Pl., 509; *Simonton* v. *Winter et al.*, 5 Peters, 141; *Kirtley* v. *Deck*, 3 Hen. & Mun., 388; 6 Mod., 10; Tidd, 827.)

So, if the plea be a mere nullity—putting nothing imaterial in issue—judgment is at times allowed to be signed as for want of a plea, as if *nil dicit*, provided the declaration be good. (4 Taunt., 164; 2 Maule & Selw., 606.)

So, if the plea be evidently a sham plea, or fictitious, a like course is warranted. (10 East, 237; Tidd, 831.)

Or if the plea, though neither of these, still be defective, but sets out such facts as demonstrate that the party has no merits, and that no amendment could be made which would avail him anything, or, in other words, nothing is left in the case that can be mended. (Gould on Pl., 514, sec. 39; Tidd, 831; *Henderson* v. *Foote*, 3 Call, 248.)

It is incidental circumstances like these, affecting the merits and not adverted to always in decisions or elementary treatises, which have governed most of the opposing cases, rather than a mere technical, and in some degree arbitrary rule, without reference to the merits, and which would bar a party claiming to possess them from having them tried on a repleader or amendment, on complying with equitable terms.

In the case now under consideration, the plea comes under neither of these categories, neither confessing a cause of action, nor appearing to be a sham or fictitious plea, nor disclosing enough to show the defendant to be without any good defense. On the contrary, a defense appears, which the original defendant seems al-
151*] ways *to have urged with great confidence as being good. Under these circumstances, then, repleading or something equivalent would seem proper to do justice between the parties, and to carry out the principle of the statutes of jeofails, so as not to prevent a judgment on the merits, because some "slip," as Lord Mansfield calls it, has happened on the part of the defendant in his plea. (*Rex* v. *Philips*, 1 Burr., 295; Tidd, 828; Gould on Pl., 508, secs. 31, 40.) If the right be not put in issue and may be, a ruling to permit it seems reasonable. (*Staple* v. *Heyden*, 6 Mod., 2.)

The true meaning of these technical rules can be made rational and consistent, if they are held to apply to cases where good grounds are apparent for rendering final judgment. Then it may well be rendered against him who committed the first material fault in the pleadings, and which fault has not afterwards in any way been cured.

But if no such grounds appear, in consequence of the imperfections of the pleas and verdict, final judgment cannot properly be rendered; and the rules are inapplicable; and the judgment below should be reversed, so as to furnish an opportunity to remove those imperfections and reach the justice of the case by amendments or repleaders. And so far from the party not being permitted to enjoy this indulgence who committed the first fault, he is the only one who needs it, and in whose behalf, under the liberal spirit of modern times, all statutes of jeofails are passed. Nor can the opposite party suffer by this course in respect to the merits, as they are left open. Or in respect to cost and delay, as he should be indemnified for them, in the manner before mentioned, by equitable terms, for allowing any amendments.

In this view of the subject, it is of no consequence for which party the defective verdict was found, except at times the fact in it may be an indication of merits in that party who has the *postea*, so far as that fact can effect the merits. But in this case the fact found was immaterial in relation to the merits, as already shown; and the object now is, to prevent such immaterialities from making a final disposal of the case—to prevent substance from being sacrified to form—and where merits may exist, to adopt such a course as will present them to the court intelligibly, for a final adjudication of the real justice of the case.

To all this, in an advanced era of jurisprudence, it will hardly do to repeat from some of the old books, that a party is forever to be barred either for the badness or the falsity of his plea, if it happens to be imperfect and is found against him, though he has not confessed the declaration, nor stated any facts in his plea inconsistent with merits.

Much more, too, is it proper, if not indispensable, in a case like this, so defective on the record as not to justify any decision about the merits, to adopt a course which shall not bar the due consideration *of them in the [*152
end, and which shall be for the benefit and guide of the court even more than a party, so as to prevent a leap in the dark, and which for these and other reasons shall let the cause be re-opened, and prepared and tried in a manner to bring the whole of the merits legally before both the court and the jury. (Cro. Eliz., 245; 5 Hen. & Mun., 393; *Baird & Co.* v. *Mattar*, 1 Call, 257.)

Considering the character and position of this tribunal, as one of the last resort in administering justice, and considering the increased disposition of the age in which we live to eviscerate the truth, and decide ultimately only on the real merits in controversy between parties, or in the words of *Justice* Story (1 Story, 152, in *Bottomly* v. *The United States*), as to "technicals nicetles," considering "the days for such subtilties in a great measure passed away," it seems a duty of our own motion to give all reasonable facility to get the record in an intelligible and proper shape before we render final judgment.

As proof that such a course is sometimes deemed proper, to aid a court as well as a party,

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notwithstanding the technical rules before mentioned, it is stated in Gould on Pl., 507, sec. 28, that judgment may be arrested after verdict, "if the issue is immaterial, so that the court cannot discover, from the finding upon it, for which party judgment ought to be given." (Secs. 23 and 22.)

So, though Gould lays down these rules before named, he says (p. 514, sec. 40), if a special plea show there may be a good justification, though it has been badly pleaded, judgment must be arrested, and a repleader awarded, as it appears a good issue might be formed; and when this is the case, "the ends of justice require that an opportunity for forming such an issue should be afforded." And in respect to objections in such cases to indulgence to a party whose plea is bad, Gould, 508, says in a note: "The true answer to this inquiry appears to be, that the awarding a repleader in such case was originally rather an act of indulgence to a party, who tendered an improper issue, than a matter of strict right. An indulgence grounded on the presumption that the issue was misjoined through the inadvertence and oversight of the pleaders, and that a further opportunity to plead would probably result in a material issue decisive of the merits of the cause," &c.

There are also some very high precedents against the application of these technical rules in cases and circumstances like those now under consideration. Such was the case of *Rex* v. *Philips* (1 Burr., 302). The reasoning of Lord Mansfield on this whole subject is directly in point, as well as the case itself, and contains that beautiful correction by him of a much abused maxim, in which he says it is the duty of a good judge to amplify justice rather than his jurisdiction, "*boni judicis est ampliare justitiam, non jurisdictionem.*" There, after verdict for the plaintiff, he allowed an amendment of 153*] *the plea on payment of costs, being satisfied that "the ends of justice require that an opportunity for forming a proper issue be allowed.

There are many other cases, some ancient and some modern, which fully support the same conclusion. (See *Enys* v. *Mohun*, 2 Strange, 847, and S. C., Barnardiston, 182, 220; *Tryon* v. *Carter*, 2 Strange, 994; *Love* v. *Wotton*, Cro. Eliz., 245.)

In *Serjeant* v. *Fairfax* (1 Levinz, 32), the plea was defective as not taking issue on enough, though it denied part of what was material in the declaration. Verdict was found for the plaintiff. This is in substance the very case now under consideration. Counsel contended: "When the issue is found against the pleader, judgment shall be for the plaintiff; but if for him (the pleader), not. But *Justice* Twysden said, that if an improper issue is taken, and verdict given thereon, judgment shall be given thereupon, be it for the plaintiff or defendant. (2 Cro., 575.) But an immaterial issue is where, upon the verdict, the court cannot know for whom to give judgment, whether for the plaintiff or for the defendant, as in Hob., 175, and with him the Chief Justice and Wyndham wholly agreed, and awarded a repleader.

In *Simonton* v. *Winter et al.* (5 Peters, 141), the verdict was for the plaintiff, and yet, the plea being bad, the court reversed the judgment, as the cause of action was not confessed in the plea, and remanded the case with an order for a *venire de novo*.

(See, also, in point, *Green* v. *Baily*, 5 Mumford, 246, and *Baird & Co.* v. *Mattox*, 1 Call, 257.)

And in 9 Wheaton, 729, the pleadings are not given, but *Justice* Story said there was great irregularity and laxity in them, and "it is impossible, without breaking down the best settled principles of law, not to perceive that the very errors in the pleadings are of themselves sufficient to justify a reversal of the judgment and an award of a repleader," and without "appropriate pleas," "it would be difficult to ascertain what was to be tried or not tried."

(See, also, *Harrison et al.* v. *Nixon*, 9 Peters, 483.)

All that remains is to consider the best form of carrying these conclusions into effect.

In some of the cases before cited, the court have not only reversed the judgment, but ordered a repleader. But in others, it is said that this cannot be done after a writ of error. (6 Mod., 102; 2 Keb., 769; Com. Dig., Pleader and Verdict.)

Such, probably, has always been the practice in relation to not ordering it by the court below, after a writ of error is sued out, till the case is again re-opened; but it was once not the practice in the higher courts of error in England. (See 2 Saund., 319; *Holbech* v. *Bennett*, 2 Levinz, 12.)

Nor is it the practice now in some of the higher courts in this country. In *Green* v. *Baily* (5 Mumford, 251), judgment was reversed *on the writ of error, the pleadings set [*154 aside after the plea, and a repleader awarded.

The 32d section of the Judiciary Act, before referred to, expressly empowers "any court of the United States" "at any time to permit either of the parties to amend any defect in the process or pleadings." (Lit. & Brown's ed., 91.)

All know that a repleader is little more in substance than permitting an amendment.

But most of the precedents in this court allowing amendments after a writ of error are in maritime or admiralty proceedings, and I have found none of those in the form of repleaders. In 4 Wheat., 64 (though one in admiralty, where less strictness prevails in pleading than at common law), *Chief Justice* Marshall said, "The pleadings in this case are too informal and defective to pronounce a final decree on the merits;" and the judgment was therefore reversed, and the cause remanded, with directions to permit the pleadings to be amended.

(See, also, a like order in *The Divina Pastora*, 4 Wheat., 63, and in case of *The Edward*, 1 Wheat., 264, and case of *The Samuel*, 1 Wheat., 13; *Harrison et al.* v. *Nixon*, 9 Peters, 483.)

In cases at common law, the form is usually somewhat different. In 5 Peters, 141, the form was suited to the case, and judgment not only reversed, but a *venire de novo* ordered, and in *United States* v. *Hawkins* (10 Peters, 125), *Justice* Wayne says, "A *venire de novo* is frequently awarded in a court of error, upon a bill of exceptions to enable parties to amend," and "amendments may, in the sound discretion of the court, upon a new trial, be permitted."

(See, further, 2 Wheat., 226; *Barnes* v. *Williams*, 11 Wheat., 416; *Bellows* v. *Hallowell &*

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Augusta Bank, 2 Mason, 31; *Peterson* v. *United States*, 2 Wash. C. C., 36.)

See the form in England. (*Parker* v. *Wells*, 1 D. & E., 783, and *Grant* v. *Astle*, Doug., 922.)

In *Pollard* v. *Dwight* (4 Cranch, 432), the court said, let judgment "be reversed and the cause remanded for a new trial."

Mr. Lee prayed "with leave for the defendants below to amend their pleadings."

The court said "that the court below had the power to grant leave to amend, and this court could not doubt but it would do what was right in that respect." Similar to this was the course in *Day* v. *Chism* (10 Wheat., 404).

And in *United States* v. *Kirkpatrick* (9 Wheat., 738), the court not only reversed the judgment, and awarded a *venire de novo*, but gave "directions also to allow the parties liberty to amend their pleadings." (So 9 Wheat., 540.)

(See on this further, *Mar. Ins. Co.* v. *Hodgson*, 6 Cranch, 218; 7 *Ibid.*, 47, 497; 9 *Ibid.*, 244; 1 *Ibid.*, 261, 13; 10 *Ibid.*, 449; 4 *Ibid.*, 52; 16 Peters, 319; *Moody* v. *Keener*, 9 Porter, 252.)

155*] *In conclusion, then, as by several cases in England the allowance of a repleader in courts of error seems to have gone into disuse in modern times, and as the practice in common law cases in this tribunal, though otherwise in some of the States, has usually been, not to direct either amendments or repleaders in cases like these, but to reverse the judgment and remand the cause to the court below for further proceedings there, we shall conform to that practice in the present instance.

Let the judgment below be reversed, and the cause remanded for further proceedings.

Cited—5 How., 228, 277; 6 How., 430, 434; 8 How., 105; 9 How., 370; 20 How., 433; 1 Wall., 600; 3 Wall., 661; 10 Wall., 261; 12 Wall., 403; 16 Wall., 386; 1 Otto, 130, 656; 4 Otto, 81; 1 Wood. & M., 375, 383, 387; 3 Wood. & M., 339, 406.

LUCIUS W. STOCKTON AND DANIEL MOORE, *Plaintiffs in Error*,

v.

HARRIET BISHOP.

Defective pleading—record—sufficiency of allegations—pleading.

Where a count in a declaration is defective on account of dates being left blank, but the party has pleaded and gone to trial, the presumption is that the proof supplied the defect.

In an action on the case for injury sustained by the oversetting of a stage coach, although the declaration does not set out the payment of any passage money, nor any promise or undertaking on the part of the defendants to carry the plaintiff safely, yet if it states that the plaintiff became a passenger for certain rewards to the defendants, and thereupon it was their duty to use due and proper care that the plaintiff should be safely conveyed, and if the breach was well assigned, and the cause went on to plea, issue, trial, and verdict, the defect in the declaration is cured by the 32d section of the Judiciary Act of 1789.

The "right of the cause and matter in law" being with the plaintiff in the court below, the judgment of that court must be affirmed.

THIS case was brought up by writ of error from the Circuit Court of the United States for West Pennsylvania.

There was no bill of exceptions signed by the judge, and the record presented the following appearance:

Among the rolls, records, and judicial proceedings of the Circuit Court of the United States, in and for the Western District of Pennsylvania, in the third circuit, may be found the following words and figures, to wit:

Copy of Docket Entries.

McCandless, and McClure & Biddle.	HARRIET BISHOP, a citizen of the State of Ohio,	18
	v.	
Darragh, Loomis, Mahon & Washington.	LUCIUS W. STOCKTON AND DANIEL MOORE, citizens of Penn.	

Summons case, exit September 17th, 1842.

1842, November 4th, returned. Served by leaving a copy at the dwelling-house of D. Moore, November 1st, 1842, and personally on L. W. Stockton, November 2d, 1842.

*1843. Jan. 12th. *Narr.* filed. [*156

1843, February 6th. On motion of *Mr. Darragh*, rule for security for costs.

1843, February 7th. Rule for security for costs returned, "Served on Mr. McClure, February 7th, 1843."

1843, April 5th. Consent of attorney for defendants, that a commission issue forthwith to take testimony on part of plaintiff, and declension to file cross-interrogatories. (See paper filed.)

1843, April 5th. Interrogatories on part of plaintiff filed, and commission issued to Albert G. Westgate, Esq., of McConnellsville, Morgan County, Ohio, commissioner named by plaintiff.

1843, April 10th. Stipulation of John Sarber, as security for costs, filed.

1843, April 18th. Commission, with depositions taken before Albert G. Westgate, Esq., returned and filed.

1843, May 10th. Plea of defendants filed.

1843, May 10th. Agreement of attorneys filed.

1843, May 17th. Continued.

1843, October 5th. Subpœna on part of defendants to Dr. Kennedy.

1843, October 28th. Subpœna on part of defendants to Dr. Campbell.

1843, October 30th and 31st. Subpœnas on part of plaintiff to Dr. A. H. Campbell, James Corbin, James Smith, James Snyder, and Daniel Brown.

1843, November 20th. Above subpœnas returned.

1843, November 22d, 23d, 24th, and 25th. Tried by jury, and, 25th, verdict for plaintiff for six thousand five hundred dollars ($6,500), with costs of suit.

1843, November 24th. Defendants' points filed.

1843, November 25th. Motion in arrest of judgment, and for a new trial.

1843, November 27th. Plaintiff's bill of costs filed.

1843, November 30th. Reasons in arrest of judgment, and for a new trial, filed.

1843, December 1st. Argument for a new trial commenced.

1843, December 7th. Argument of motion for new trial continued and concluded by

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Messrs. Mahon and *Loomis* for defendants, and *Mr. Biddle*, contra, for plaintiff.

Same day. Affidavit of Jacob Murphy filed.

Same day. After argument, defendants' points overruled, and judgment on the verdict; stay of execution for thirty days.

Same day. Plaintiff's counsel desired the sanction of the court to the following amendment to the verdict, objected to by defendants' counsel. Objections filed by order of the court; after argument, objections overruled, and verdict amended as follows, viz.: "And now, to wit, December 7th, 1843, inasmuch as the 157*] plaintiff, *on the trial of the cause, offered proof of but a single disaster, and its injurious consequences, as set forth in the second count of the declaration, the verdict is amended accordingly, and judgment entered for the plaintiff on the said second count, and for the defendants on the first count."

1843, December 15th. Defendants enter into a bond, which is approved by *Judge* Irwin, in the sum of thirteen thousand dollars, and sue out their writ of error.

1843, December 15th. Citation issued.

1843, December 15th. Writ of error allowed and issued.

1843, December 16th. Citation returned; served by copy on *R. Biddle Esq.*, attorney of defendants.

Copy of Declaration.

In the Circuit Court of the United States for the Western District of Pennsylvania.

Lucias W. Stockton, a citizen of Pennsylvania, and Daniel Moore, also a citizen of Pennsylvania, were summoned to answer Harriet Bishop, a citizen of Ohio, in an action on the case. Whereupon the said Harriet Bishop, by McCandless & McClure, her attorneys, complains for that whereas the said defendants, before and after the time of committing the grievance hereinafter mentioned, were owners and proprietors of a certain line of stage coaches for the carriage and conveyance of passengers from Baltimore, in the State of Maryland, to Wheeling, in the State of Virginia, for hire and reward, to the said defendants in that behalf; and the said defendants being such owners and proprietors of the said line of coaches so as aforesaid, thereupon heretofore, to wit, at the special instance and request of the said defendants, became and was a passenger in the said line of coaches, to be safely and securely carried and conveyed thereby on a certain journey, to wit, from Baltimore aforesaid to Wheeling aforesaid, for a certain fare and reward to the said defendants in that behalf; and the said defendants then and there received the said plaintiff as such passenger as aforesaid; and thereupon it then and there became and was the duty of the said defendants to use due and proper care that the said plaintiff should be carefully and securely carried and conveyed by and upon the said line of coaches on the said journey; yet the said defendants, not regarding their duty in that behalf, did not use due and proper care that the said plaintiff should be safely and securely carried and conveyed by and upon the said stage coach, on the said journey from Baltimore aforesaid to Wheeling aforesaid, to the damage of the plaintiff twenty thousand dollars.

And whereas also, heretofore, to wit, on the day and year aforesaid, at Baltimore aforesaid, the said plaintiff, at the said special instance and request of the said defendants, became and was a passenger *by a certain other [*158 coach, to be safely and securely carried and conveyed thereby on a certain journey, to wit, from Baltimore aforesaid to Wheeling aforesaid, for certain rewards to the said defendants in that behalf; and thereupon it then and there became and was the duty of the said defendants to use due and proper care that the said plaintiff should be safely and securely carried and conveyed, by the said line of coaches, on the said journey, from Baltimore aforesaid to Wheeling aforesaid; yet the said defendants, not regarding their duty in this behalf, did not use due and proper care that the said plaintiff should be safely and securely carried and conveyed, by the last mentioned coach, on the said journey from Baltimore aforesaid to Wheeling aforesaid; but wholly neglected to do so, and by reason whereof one of the legs, one of the arms, two of the ribs, [and] the collar-bone of the said plaintiff then and there became and were fractured and broken, and the said plaintiff was then and there otherwise greatly bruised, wounded and injured; and also by means of the premises the said plaintiff became and was sick, sore, lame, and disordered, and so remained and continued for a long space of time, to wit, hitherto; during all which time the said plaintiff suffered, and underwent, and endured great pain, and was hindered and prevented from transacting and attending her necessary and lawful affairs and business by her during all that time to be performed and transacted, and lost and was deprived of divers great gains, and advantages, and profits, which she might, and otherwise would, have derived and acquired from the same; and thereby also the said plaintiff was forced and obliged to pay, lay out, and expend divers other large sums of money, amounting, in the whole, to the sum of one thousand dollars, in and about the endeavoring to be cured of the last mentioned bruises, fractures, and injuries received as last aforesaid, to the damage of the said plaintiff twenty thousand dollars; and therefore she brings suit.

McCANDLESS & McCLURE,
Plaintiff's attorneys.

[Then followed a summons, and a commission to take testimony, under which several witnesses were examined, and the record proceeded.]

Copy of Plea.

BISHOP *v.* STOCKTON ET AL. Circuit Court of the United States for the Western District of Pennsylvania.

The defendants, by *Cornelius Darragh*, their attorney, come and defend the wrong, when, &c., and for plea say, that they are not guilty of the matters and things alleged against them in the plaintiff's declaration, and of this they put themselves upon the country.

May 10, 1843. C. DARRAGH,
for defendants.

**Copy of Defendants' Points.* [*159

HARRIET BISHOP
v.
STOCKTON & MOORE.

The counsel of the defendants respectfully

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request the court to instruct the jury as follows:

1st. That the proprietors of a stage coach do not warrant the safety of their passengers, in the character of common carriers; and that they are not responsible for mere accidents to the persons of passengers, but only for the want of due care. (Given.)

2d. That they do not warrant the safety of passengers; their undertaking, as to them, goes no further than this: that as far as human wisdom and vigilance can go, they will provide for the safe conveyance of their passengers. (Given.)

3d. That if the jury believe that the accident in this case was caused by the intoxication of James Corbin, the driver, but that he was not only not in the habit of drinking intoxicating liquors, but was intoxicated, on this occasion, for the first time in his life; that, in this event, the defendants will have exercised due care in the selection and employment of James Corbin as a driver, and will not be liable in this action. (Refused.)

4th. That if the jury believe that the accident was caused by the intoxication of James Corbin, yet if they also believe that a long course of previous habitual good conduct through a series of years, from his boyhood to the time of this accident in question, had satisfied the defendants, the tavern keeper with whom James Corbin boarded, and his associates, that he was a temperate and an abstemious man, that then the defendants, as far as ordinary wisdom and vigilance could go, did provide for the safety of their passengers in the selection and employment of James Corbin as a driver, and that they are not liable in this action. (Refused.)

5th. If the jury believe that, at the time of the accident, the coach was on the upper and safer portion of the road, and that the accident occurred in the effort of Corbin to take up his horses after descending the hill, that the defendants are not liable in this action. (Refused.)

6th. That although the jury may believe that Corbin was, at the time of the accident, partially intoxicated, still, if he was not so much intoxicated as to be incapable of the management and control of this team, and the accident did not arise from that cause, but from the state of the weather, obscurity of the night, and the condition of the roads, that the defendants are not liable in this action, especially if the jury believe that the said Corbin had heretofore sustained an unexceptionable character for skill, care, and sobriety. (Refused.)

7th. If the jury believe that the driver was a person of competent skill, of good habits, and in every respect qualified and suitably prepared for the business in which he was en-
160*] gaged, plaintiff *cannot recover unless they were clearly satisfied that, on this occasion, the disaster was attributable to the fault of the driver, and not to the darkness of the night, or other accidental cause, and that said accident would not have occurred but for the fault of the driver. (Given.)

Defendants' Exceptions.

HARRIET BISHOP v. STOCKTON & MOORE. In the Circuit Court of the United States.

The counsel for defendants respectfully except to the refusal of the court to instruct the jury as prayed for on all the points presented by them, except the first, second, and seventh.

MAHON & WASHINGTON,
METCALF & LOOMIS,
Attorneys for defendants.

25th November, 1843.

Copy of Reasons for a New Trial, and in Arrest of Judgment.

HARRIET BISHOP
v.
STOCKTON & MOORE.

The counsel for defendants move the court for a new trial, for the following reasons, viz.:

1. The verdict is against the weight of evidence.

2. It is rendered for vindictive damages.

3. It is not the result of the deliberate opinions of the jurors, or of comparison of their several opinions, but the amount was fixed and determined by the average of different sums named by the jurors.

They move in arrest of judgment, because—

1. No sufficient cause of action is set forth in plaintiff's first count of *narr.*, and the verdict is general on both counts.

2. No sufficient cause of action is set forth in either count; there being no allegation that the amount charged for fare, or passage money, had in fact been paid by plaintiff.

3. General errors.

MAHON & WASHINGTON,
Attorneys for defendants.

November 27th, 1843.

Copy of Affidavit of Jacob Murphy.

Personally appeared before me, a justice of the peace in and for the County of Fayette, Jacob Murphy, who, being sworn, doth depose and say, that he was a juror in the Circuit Court of the United [States] for the Western District of Pennsylvania, for November Term, 1843, and that he was one of the panel who tried the case of *Harriet Bishop* v. *L. W. Stockton and Daniel Moore*, for damages accruing from the upsetting of a stage coach, and that the method adopted by the jury by which they settled on the amount *of the verdict [*161 was this: it was agreed that each juror should mark the sum he found, and that the total amount, divided by twelve, should, without alteration, be the amount of the verdict; in accordance with their agreement, each juryman put down the amount he thought proper; they then added the whole together, and divided the amount by twelve, and the product was six thousand five hundred dollars, which was reported as the verdict of the jury.

JACOB MURPHY.

Sworn and subscribed before me, the 5th December, 1843. CLEMENT WOOD, J. P.

The verdict as ordered to [be] entered by the Court.

And now, to wit, December 7th, 1843, inasmuch as the plaintiff, on the trial of the cause, offered proof of but a single disaster, and its injurious consequences, as set forth in the second count of the declaration, the verdict is amended accordingly, and judgment entered for the plaintiff on the said second count, and for the defendants on the first count.

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Copy of Defendants' Objections.

In the Circuit Court of the United States, Western District of Pennsylvania.

HARRIET BISHOP
v.
L. W. STOCKTON ET AL.

The counsel for the plaintiff having moved the court to make the following entry of record in the cause, to wit: "And now, to wit, November, 1843, inasmuch as the plaintiff, on the trial of the cause, offered proof of but a single disaster, and its injurious consequences, as set forth in the second count of the declaration, the verdict is amended accordingly, and judgment entered for the plaintiff, on said second count, and for the defendant on the first count."

The defendants, by their counsel, now, to wit, November 7th, 1843, appear in court, and object to the allowance of said motion by the court, and to any permission by the court that such entry as is above indicated should be made in the cause, and in support of their objection assign the following causes, to wit: that the issue, if any, joined by the pleadings between the parties, was upon the whole declaration; that the jury were sworn to try the issue, if any, joined upon the whole declaration; that the jury returned their verdict in writing in the following words:

HARRIET BISHOP
v.
STOCKTON, MOORE & Co.

We, the jurors sworn and impaneled in this cause, do find for the plaintiff six thousand five hundred dollars, with costs of suit, this 25th day of November, A. D. 1843.

Which said verdict was received by the court; **162*]** and thereupon an *entry was made of record in the cause, in the following words, to wit:

"HARRIET BISHOP
v.
"STOCKTON & MOORE.

"Jury find for the plaintiff six thousand five hundred dollars, with costs of suit."

That the verdict so found by the jury was found by them upon the entire issue or issues, if any, between the parties, and upon the whole declaration, embracing both the first and second counts thereof; that said verdict is general; that the testimony given in the cause was as applicable to the first as to the second count of the declaration; that the defendants have as good a right to claim that the verdict of the jury should be amended, by entering it upon the first count of the declaration for the plaintiff, and judgment thereon for the plaintiff, and judgment on the second count for the defendants, as the plaintiff has to claim that the proposed entry should be made. That the jury having given a general verdict for entire damages on both counts of the declaration, which verdict was received by the court, and entered of record without objection from the plaintiff, and the jury having separated, the court have not the legal right, and if they possess the legal right, ought not, in the exercise of a sound discretion, to modify the verdict of the jury in the manner proposed by the plaintiff's counsel; which objections, and reasons in support thereof, are respectfully submitted by the defendants, to be filed and entered of record in the cause.

METCALF & LOOMIS,
MAHON & WASHINGTON,
Attorneys for defendants.

United States, Western District of Pennsylvania, *ss.*:

I, Edward J. Roberts, clerk of the Circuit Court of the United States in and for the Western District of Pennsylvania, do hereby certify that the foregoing is a full, true, and complete exemplification of the record in the case of Harriet Bishop, a citizen of the State of Ohio, against Lucius W. Stockton and Daniel Moore, citizens of Pennsylvania.

In testimony whereof, I have hereunto set my hand, and affixed the seal of the said court, at Pittsburg, this twentieth [L. S.] day of December, A. D. 1843, and in the sixty-eighth year of the independence of the said United States.

E. J. ROBERTS, Clerk.

A writ of error, sued out on behalf of Stockton & Moore, brought up the record in the form in which it is stated above.

The case was argued by *Mr. Bledsoe* and *Mr. Coxe* for the plaintiffs in error, and *Mr. Richard Biddle* (in a printed argument) for the defendant in error.

Mr. Bledsoe, for plaintiffs in error: [***163**

Perhaps no record ever came up to this court in such an imperfect state. There appears to be no issue, no *venire*, no jury impaneled or sworn, no verdict, except where it is incidentally mentioned, no bill of exceptions signed, no judgment of the court for a specific sum. It is true that there is a verdict spoken of in the docket entries, but these are only to refresh the memory of the clerk. (10 Ohio Rep., 200.)

Nothing is a part of the record except the pleadings, or what is referred to in the opinion of the court. (5 Peters, 254.)

There is no regular judgment of the court for a specific sum. How could an action of debt or a *scire facias* be maintained upon such a record? (5 Dane's Abr., 221; 1 Arkansas Rep., 346, 347; 2 Arkansas Rep., 390; 1 Robinson's Practice, 390; 6 Randolph, 30–32; 4 Munford, 262; Yelverton, 107; 4 Leonard, 61; 1 Chitty's Plead., 356.)

The declaration is radically defective. The first count was abandoned, and judgment entered on the second count. This must therefore stand alone, and, taken by itself, it discloses no cause of action. Two reasons exist for this. 1. There is nothing stated from which an implied undertaking can be inferred to carry safely. 2. There is no such express undertaking averred.

1. In order to raise the implication, the fact must be averred, that the other party were common carriers. This is necessary, as a foundation for the implied *assumpsit*. (1 Wendell, 272; 6 J. B. Moore, 158; 2 Chitty's Plead., 356, *note;* see, also, Story on Bailments, 374, 591.)

The declaration was designed to be in tort. It is not avered that any reward was to be paid by the plaintiff, or that there was any promise at all. (Laws on Pleading, under the head of "Promise.")

Mr. Biddle, for defendant in error:

Under the 40th rule of court, the following

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remarks are respectfully submitted on behalf of the defendant in error:

No specification of errors having been filed, the points which will be pressed are left to be inferred from what took place in the court below.

First. As to the declaration. It may be alleged that the first count is bad, and that the verdict, being general on both counts, is thereby vitiated. The reply is: 1. The count is not bad. It provides for the event of no special damage being made out. It would, at least, justify nominal damages. It alleges that the defendants were engaged in a duty to the public as carriers of passengers; that they undertook to carry the plaintiff safely, and failed to do so.

Further, it is to be remembered that there was no demurrer to the count, and the objection therefore comes after verdict. Now, it **164*]** *is a familiar rule, that a cause of action defectively or inaccurately set forth is cured by the verdict, because, to entitle the plaintiff to recover, all circumstances necessary, in form or in substance, to make out his cause of action, so imperfectly stated, must be proved at the trial. (9 Wheat., 595; 1 Peters's C. C. R., 482.) But, 2. This inquiry is unnecessary, as the judgment is entered on the second count. The recent case of *Matthewson's Administrators* v. *Grant's Administrator*, in this court (2 Howard, 263), renders superfluous any argument as to the right and the duty of the court to permit the amendment prayed for. The second count is the familiar one in case, not requiring any averment of the payment of money, found in 2 Chitty's Pleadings, 647 (ed. of 1840), and in 2 Chitty's Precedents, 506, *a* (ed. of 1839), and was pursued in *Curtis* v. *Drinkwater* (2 Barn. and Adolph., 169; 22 English C. L. Rep., 51). Had such averment been necessary, the omission would be cured after verdict, on the principle heretofore noticed.

Second. As to any irregularities committed by the jury in making up their verdict, they are not examinable in a court of error. (1 Peters's C. C. R., 159.) All these matters are referred to the sound discretion of the court below. The refusal to grant a new trial is not the subject of a writ of error. (4 Wheat., 223; 6 Wheat., 547.)

Nothing, however, can be better settled, than that the Circuit Court was right in refusing to act upon the affidavit of a juror. (2 Tidd's Pr., 709; *Vaise* v. *Delaval*, 1 T. R., 11; *Owen* v. *Warburton*, 4 Bos. & Pull., 326; 4 Wash. C. C. R., 32; 4 Binn., 150; 5 Conn. R., 348; 3 Gill. & Johns., 478; 2 Greenleaf, 41; 2 Tyler's Vt. R., 13.)

That the process resorted to by the jury is not open to just exception, even if established by unexceptionable evidence, see *Grinnell* v. *Phillips* (1 Mass. R., 541). *Commonwealth* v. *Drew* (4 Mass. R., 399), *Goodwin* v. *Philips* (Lofft, 71), *Lawrence* v. *Boswell* (Sayer, 100).

Third. As to the instructions prayed for by the counsel of the defendants below, and refused by the court. The late lamented *Judge* Baldwin delivered in this case an elaborate and comprehensive charge to the jury, in which the law, as settled by this court in *Stokes* v. *Saltonstall* (13 Peters, 181), was clearly laid down and enforced. Unfortunately it cannot now be found. To this charge no exception was taken. It covered the whole ground, and the learned judge might well, therefore, have refused to notice any of the points submitted by defendants' counsel. This course was pursued by the circuit judge in the trial of *Stokes* v. *Saltonstall* (see 13 Peters, 185). *Judge* Baldwin, however, thought proper to yield his assent to the points submitted, so far as he could do so with propriety. His answers to these points, apart from the *general charge, established [*165 the following rules for the guidance of the jury:

1. That the proprietors of a stage coach do not warrant the safety of their passengers in the character of common carriers; and that they are not responsible for mere accidents to the persons of passengers, but only for the want of due care. (Jury so instructed in conformity to the first proposition submitted by the defendants below.)

2. That they do not warrant the safety of passengers; their undertaking as to them goes no further than this, that as far as human wisdom and vigilance can go, they will provide for the safe conveyance of their passengers. (Jury so instructed in conformity to the second proposition submitted by defendants below.)

3. If the jury believe that the driver was a person of competent skill, of good habits, and in every respect qualified and suitably prepared for the business in which he was engaged, plaintiff cannot recover unless they were clearly satisfied that, on this occasion the disaster was attributable to the fault of the driver, and not to the darkness of the night or other accidental cause, and that said accident would not have occurred but for the fault of the driver. (Jury so instructed in conformity to the seventh proposition submitted by the defendants below.)

The other propositions submitted are either inconsistent with what was conceded by the defendants themselves to be correct doctrine, or present parts of the subject in a detached, isolated form, calculated to mislead rather than enlighten the jury. Thus the third and fourth propositions ask the court to declare, that although the grossest negligence and incapacity existed on this particular occasion, yet if the driver's past conduct and character had been good, the proprietors were not liable. To have so held would have been in defiance of the decision of the Supreme Court in *Stokes* v. *Saltonstall* (13 Peters, 181), and would have been inconsistent with the court's assent to the defendant's seventh proposition, where good conduct on the particular occasion is conceded to be indispensable.

The fifth proposition presents a hypothetical statement of facts, and asks the court to instruct the jury that their existence would free the defendants from liability. It is denied that any right exists to force upon the court teasing and endless repetition of points favorable to one or the other side, where the law has been once correctly stated. But here, to have answered the question affirmatively would have been palpably wrong, for all the circumstances mentioned might be true, and yet the disaster have been occasioned by the intoxication of the driver.

So of the sixth proposition. It is to be borne in mind that the court instructed the

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jury that plaintiff could not recover, "unless they were clearly satisfied that on this occasion the disaster was attributable *to the fault of the driver, and not to the darkness of the night, or other accidental cause, and that said accident would not have occurred but for the fault of the driver." The question, therefore, was fully answered, without entering into an idle and unseemingly dissertation on the several stages of drunkenness. [*166]

Mr. Coxe, for plaintiffs in error, in reply and conclusion:

As to the errors in pleading which will lead to a reversal, see 9 Wheat., 720.

In this case there is no plea, and of course no replication; docket entries are no part of record. (10 Ohio Rep., 200; 5 Peters, 254; 12 Wheat., 118, 119.)

[*Mr. Coxe* then went into a critical examination of the record.]

Whatever would be fatal in the court below is also fatal in the court above. (6 Cranch, 221; 15 Johns., 403.)

If the first count be taken away, the second, standing by itself, does not afford sufficient foundation for the judgment. For example, it speaks of a "day and year aforesaid," but no day is named. It speaks of "passengers in a coach," but it is not averred to be a public coach. If the contract is to be implied, the fact that the stages were public must be averred. The declaration says that the defendants did not perform their duty. How? Was the plaintiff left behind? Or was the driver negligent? The second count does not say.

When the cause of action is inaccurately set out, the defect is cured by verdict; but a mere allegation of omission of duty is not enough. The case must show the facts. (2 Cranch, 389.)

Title to property must be alleged. (Stephens, 304; 2 Fenwick, 134.)

The allegation in this case should have been, that the defendants were common carriers; there is none of a contract for hire. (2 Wash., 187; 2 New Hamp. R., 289.)

Mutual promises must be averred. (1 Cai., 583; 5 Serg. & Rawle, 358.)

Every material fact must be averred with precision. (9 Johns., 291.)

Will the verdict cure these defects of pleading? The general rule is, that nothing is to be presumed after verdict, except what is stated in the declaration, or necessarily implied. (1 T. R., 145; 7 T. R., 521; 2 Tidd's Prac., 82.)

It is not alleged here that the defendants were owners of the coach, nor that it was a public coach. (Douglas, 679.)

Whatever the law will not imply must be stated in the declaration. (1 Chitty, 365, 368.)

The declaration must aver a consideration, and here there is no averment of any contract whatever. (5 T. R., 150; Latch's Rep., 177.)

[*167] *Mr. Justice* CATRON delivered the opinion of the court:

This cause comes here by a writ of error to the Circuit Court of the District of Western Pennsylvania. There is no bill of exceptions in the record; although instructions said to have been given by the court to the jury are certified up as part of the proceedings. These, of course, we cannot notice. Other supposed errors are therefore relied on as sufficient to reverse the judgment.

1. That the judgment below was rendered for the plaintiff, on the second count of the declaration; and it is insisted that this count is so defective that no judgment could be rendered on it; and therefore on error the judgment must be reversed. If the assumption be true, the consequence must follow.

The second count refers to the first for the dates of the circumstances, and the injury complained of, and as no time is given in the first count, neither has this any.

The plaintiff in error having pleaded not guilty and gone to trial, the presumption is that the proof supplied the defective statement. Such, we suppose, is the uniform rule, where material dates are left blank.

2. It is insisted that the declaration does not set out the payment of any passage money; nor any promise or undertaking on the part of the defendants below to carry the plaintiff safely. The allegation is, that the plaintiff, at the special instance and request of the defendants, became and was a passenger in a certain coach, to be carried safely, &c., for certain rewards to the defendants; and thereupon it was their duty to use due and proper care that the plaintiff should be safely conveyed. The breach is well assigned, as it shows the neglect and consequent injury sustained. No demurrer was interposed, for want of form; and this brings the 32d section of the Judiciary Act of 1789 to bear on the proceeding. Not guilty was pleaded; a trial had on the issue, on which the jury returned a verdict in these words: *Harriet Bishop* v. *Stockton, Moore & Co.* We, the jurors sworn and impaneled in this cause, do find for the plaintiff six thousand five hundred dollars, with costs of suit, this 25th day of November, A. D. 1843." The verdict was received by the court, and stands recorded as found; and afterwards, on motion, it was amended so as to apply to the second count only.

Who the jurors were, or how many found the verdict, does not appear; nor does it appear that they were sworn to try the issue, further than the jury say in their verdict. Still we are bound to presume in favor of proceedings in a court having jurisdiction of the parties and subject matter, that justice was administered in the ordinary form, when so much appears as is found in this imperfect record.

The declaration, plea, and finding must be taken together; and *from these, we [*168 are bound, by the 32d section, above cited, to ascertain whether, according to the right of "the cause and matter in law," the plaintiff is entitled to her damages; and in so doing, defects of form must be disregarded. Why Congress so provided, in 1789, is obvious. No modes of proceeding were prescribed by the act, in civil causes, at common law, and the modes observed in the English courts left to apply as general rules. These were formal and technical; and forasmuch as by the 35th section all parties to causes in courts of the United States might plead and manage their own causes personally, if they saw proper, technicalities could not be required. That the practice under this privilege has not corresponded to the theory tolerating it may be conceded;

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yet we cannot for this reason disregard the clause covering joefails, intended for its protection; and if proceedings, as recorded, in the courts in any part of the Union were as loose in 1789 as this record indicates them yet to be, in one circuit court at least, where the two acts of 1789 continue to govern, it must be admitted that Congress acted wisely in declaring that no litigant party should lose his right in law for want of form; and in going one step further, as Congress unquestionably has done, by declaring that to save the party's rights the substance should be infringed on to some extent, when contrasted with modes of proceeding in the English courts, and with their ideas of what is substance.

According to "the right of the cause and matter of law" appearing to us on the pleadings and verdict, we think the plaintiff is entitled to her damages, and that judgment below ought to have been rendered for her.

But the judgment there given is also assailed, and justly, as being less formal than what precedes it. It is either no judgment, or binding. If it amounts to nothing, then, by the 22d section of the Judiciary Act, no writ of error lay (as one can only be prosecuted on a final judgment), and the case must be dismissed for want of jurisdiction, and the plaintiffs in error be sent to the court below, to quash the execution. We think, however, there was a judgment on the verdict that warranted an execution for the damages found; and consequently the prosecution of a writ of error.

And this being so, for the reasons above stated, such judgment must be affirmed.

S. C., 2 How., 74.
Cited—7 How., 718, 719, 721; 13 How., 215; 7 Wall., 508; 16 Otto, 656.

169*] *NOEL JOURDAN AND JOSEPH LANDRY, *Plaintiffs in Error*,

v.

THOMAS BARRETT ET AL.

Louisiana lands fronting on Mississippi River—protection of side lines—review of statutes relating to—Spanish regulations—prescriptive rights.

Under the former government of Louisiana, the regulations of O'Reilly, Gayoso, and Morales recognized the equitable claim of the owners of tracts of land fronting on rivers, &c., to a portion of the public lands which were back of them, and after the cession, the United States did so also.

The Act of Congress passed on the 3d of March, 1811 (2 Lit. & Brown's ed., 662), extended to the front owner a preference to enter the land behind him. That act also provided, that where, owing to a bend in the river, each claimant could not obtain a tract equal in quantity to the tract already owned by him, the principal deputy-surveyor of each district, under the superintendence of the surveyor of the public lands south of the State of Tennessee, should divide the vacant land amongst the claimants in such a manner as to him might seem most equitable.

The Act of March 2d, 1805, had extended the power of the surveyor of lands south of Tennessee over the territory of Orleans, and the Act of April 27th, 1806, had directed him to appoint two principal deputies, one for each district of the Territory of Orleans.

The Act of March 3d, 1831, directed the appointment of a surveyor-general of public lands in Louisiana, after the 1st of May, 1831.

In March, 1832, therefore, the surveyor of public lands south of Tennessee had no power to approve a survey.

The Act of 1811 reserved for the public all such back lands as were not correctly taken up under that act by the proprietors of river fronts; and those who did not enter their claims in time did not lose whatever equity they may have had before the passage of the act.

An unauthorized survey by one of the claimants did not confer upon him any additional rights.

In executing the acts of 1820 and 1832, claimants were allowed to pay for the largest amount which they claimed, but the precise amount due on the exact quantity of land to which they were entitled could not appear until the final survey.

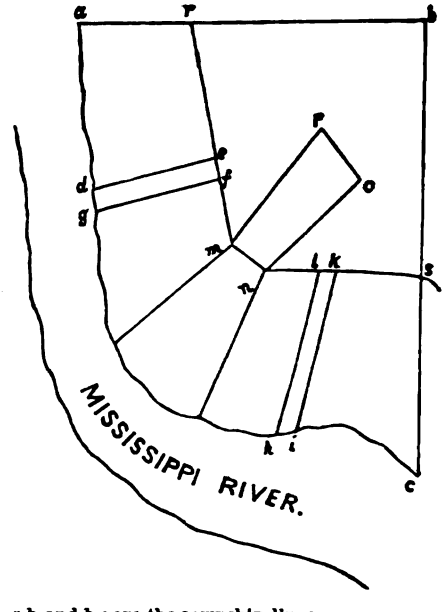
When the land was laid out into ranges, townships, &c., the survey of township No. 11, approved by H. S. Williams, Surveyor-General of Louisiana, settled the rights of parties in that township.

A possession of any part of these back lands anterior to this survey, cannot be set up as a defense under the laws of Louisiana, because the lands belonged to the United States, and those persons in possession were trespassers.

THIS case was brought up from the Supreme Court of Louisiana for the Eastern District, by a writ of error, issued under the 25th section of the Judiciary Act.

They were petitory actions, according to the practice of Louisiana, brought by the plaintiffs in error against Barrett, to recover some land, and as they involved the same questions of law, they were consolidated in the courts of that State.

By referring to the diagram herewith presented, it will be seen that Jourdan and Landry were the owners of land fronting on the Missis-



a b and *b c* are the township lines.
d e f g, land fronting on the river, belonging to Landry.
h i k l, land fronting on the river, belonging to Jourdan.
r e f m n l k s, the boundary line of all the original grants, showing how far back they extended from the river.
m n o p, the land claimed by Barrett, under Bringier.
By running the lines of Jourdan's and Landry's grants back from the river, it is easy to see how they would respectively clash with Barrett's claim.

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sippi River, and running back about forty arpents. There were nearly forty other proprietors similarly situated, between *a* and *c*, whose location it is not necessary to insert. Their lands were all bounded in the rear by a line running nearly parallel with the river, so as to include the quantity called for in their respective grants.

170*] *The facts in the case were these:

On the 3d of March, 1811, Congress passed an act, entitled "An Act providing for the final adjustment of claims to lands, and for the sale of the public lands, in the territories of Orleans and Louisiana, and to repeal the act passed for the same purpose, and approved February 16, 1811. (2 Lit. & Brown's ed., 662.)

171*] *The fifth section was as follows:

5th. "That every person who, either by virtue of a French or Spanish grant recognized by the laws of the United States, or under a claim confirmed by the commissioners appointed for the purpose of ascertaining the rights of persons claiming lands in the Territory of Orleans, owns a tract of land, bordering on any river, creek, bayou, or water-course, in the said territory, and not exceeding in depth forty arpents, French measure, shall be entitled to a preference in becoming the purchaser of any vacant tract of land adjacent to, and back of, his own tract, not exceeding forty arpents, French measure, in depth, nor in quantity of land that which is contained in his own tract, at the same price, and on the same terms and conditions as are or may be provided by law for the other public lands in the said territory. And the principal deputy-surveyor of each district, respectively, shall be, and he is hereby authorized, under the superintendence of the surveyor of the pulic lands south of the State of Tennessee, to cause to be surveyed the tracts claimed by virtue of this section; and in all cases where, by reason of bends in the river, lake, creek, bayou, or water-course bordering on the tract, and of adjacent claims of a similar nature, each claimant cannot obtain a tract equal in quantity to the adjacent tract already owned by him, to divide the vacant land applicable to that object between the several claimants, in such manner as to him may appear most equitable. Provided, however, that the right of pre-emption granted by this section shall not extend so far in depth as to include lands fit for cultivation bordering on another river, creek, bayou, or water-course. And every person entitled to the benefit of this section shall, within three years after the date of this act, deliver, to the register of the proper land office, a notice in writing, stating the situation and extent of the tract of land he wishes to purchase, and shall also make the payment and payments for the same at the time and times which are or may be prescribed by law for the disposal of the other public lands in the same territory; the time of his delivering the notice aforesaid being considered as the date of the purchase. And if any such person shall fail to deliver such notice within the said period of three years, or to make such payment or payments at the time above mentioned, his right of pre-emption shall cease and become void; and the land may thereafter be purchased by any other person in the same manner and on the same terms as are or may be provided by law for the sale of other public lands in the said territory."

On the 11th of May, 1820, Congress passed another act (3 Lit. & Brown's ed., 573), entitled, "An Act supplementary to the several acts for the adjustment of land claims in the State of Louisiana," the seventh section of which was as follows:

"That the fifth section of the Act of the 3d day of March, *1811, entitled, 'An Act [*172 providing for the final adjustment,' &c., &c., be, and the same is hereby revived and continued for the term of two years from and after the passing of this act."

On the 12th of April, 1822, Bringier, under whom Barrett, the defendant, claimed, filed the following application:

To the Register of the Land Office for the Eastern District of Louisiana, at New Orleans.

SIR:—In virtue of an act of Congress, dated 11th May, 1820, I apply to become the purchaser of a tract of land adjacent to and back of a front tract already owned by me, which said front tract contains 27 arpents 13 toises and 2 feet front, and forty arpents in depth, bounded as follows, viz., front on the left bank of Mississippi, on the upper side by land of Baptiste Loviere, and below by lands of Paul Le Blanc. This land, composed of four tracts, confirmed in the name of Alexis Cesar Bonremy, and in the name of James Melançon. Two arpents, on the lower side, have been sold. The said back land, now claimed by right of pre-emption, extends in depth ——— arpents, beginning at the rear of the said front tract, and contains five hundred and ten superficial acres, not being a greater quantity than is contained in my front tract, and does not extend so far back as to include any land fit for cultivation, bordering on any river, creek, bayou, or water-course.

(Signed) ML. DORADON BRINGIER.

New Orleans, April 12th, 1822.

On the 18th of April, 1822, Bringier paid to the receiver $637.50, as the price of the land.

On the 17th of May, 1822, Harper, the register, issued the following certificate:

I certify, that from the records in my office, expressing the quantity of land contained in the applicant's front tract (the surveys in this district not having been executed), and in virtue of the laws in this case made and provided, it appears the said applicant is entitled to the quantity of land for which he has applied, viz., five hundred and ten superficial acres, on paying the price of one dollar and twenty-five cents per acre.

(Signed) SAMUEL H. HARPER, Register.

On the 17th of December, 1822, John Wilson, subscribing himself principal deputy-surveyor for that district, surveyed the tract of land at the request of Bringier, who took possession of it. It is unnecessary to state the mesne conveyances by which the title was passed, through sundry persons, from Bringier to Barrett, who was in possession at the institution of the present suits.

In 1829, the township and sectional lines were run, for the first *time, over this district, [*173 in the mode pursued in running out other public lands of the United States.

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On the 10th of June, 1830, a survey was completed, under the authority and with the approbation of A. T. Rightor, principal deputy-surveyor of the exterior boundaries of the township and of the lands in question, together with others, which survey was re-examined and approved by Gideon Fitz, surveyor of public lands south of Tennessee, on the 9th of March, 1832. This survey differed in some degree from the one previously made by Wilson, although agreeing with it in substance; and being adopted by Bringier and his grantees as the basis of their title, has been followed in the preceding diagram.

On the 15th of June, 1832, Congress passed another act (4 Lit. & Brown's ed., 539), entitled, "An Act to authorize the inhabitants of the State of Louisiana to enter the back lands." It did not refer to either of the two preceding acts, but in substance, and nearly in the same words, re-enacted the fifth section of the Act of 1811, limiting the time of making application to three years from the date of the act.

On the 9th of August, 1834, Jourdan, one of the plaintiffs in error, obtained from the receiver the following certificate:

RECEIVER'S OFFICE, SO. EAST. DIST. LA.
New Orleans, August 9th, 1834.

Received from Noel Jourdan, of the parish of St. James, the sum of three hundred and thirty-six dollars and eighty cents, being in full of the purchase money of his pre-emption right by virtue of an act of Congress authorizing the inhabitants of Louisiana to enter their back lands, approved 15th June, 1832, to a tract of land adjacent to and back of his front tract, situate in township No. 11, range No. 3 east, and containing two hundred and sixty-nine and forty-four hundredth superficial acres, at one dollar and twenty-five cents, as per register's certificate, numbered No. 9.

(Signed) MAURICE CANNON,
Receiver of Public Moneys.

On the 8th of March, 1836, Landry, the other plaintiff in error, obtained the following certificate:

No. 520. RECEIVER'S OFFICE, SO. EAST. DIST. LA.
New Orleans, 8th March, 1836.

Received from Joseph Landry, of the parish of St. James, the sum of one hundred and ninety-two dollars and seventy-six cents, being in full of the purchase money of his pre-emption rights, by virtue of an act of Congress, authorizing the inhabitant of Louisiana to enter their back lands, approved 15th June, 1832, to a tract of land adjacent to and back of his front tract, situate in township No. 11, range No. 3 174*] *east, and containing one hundred and fifty-four and twenty-one hundredth superficial acres, at one dollar and twenty-five cents, as per register's certificate, numbered 520, and being described as section No. 19.

(Signed) MAURICE CANNON,
Receiver of Public Moneys.

In February, 1838, Jourdan and Landry filed separate petitions in the District Court for the First Judicial District of the State of Louisiana, claiming their respective back lands. Barrett, who was then in possession of the tract surveyed for Bringier, answered the petition and called in warranty, according to the Louisiana practice, all the intermediate grantors between Bringier and himself and Bringier also. They all responded to the call, and various evidence was taken and filed in the causes, which, as has been already mentioned, were consolidated and prosecuted together.

On the 22d of March, 1838, the court adjudged and decreed that judgment should be entered for Barrett, the defendant; an appeal being made to the Supreme Court of Louisiana, that court, on the 21st of January, 1839, affirmed the judgment, to review which a writ of error brought the case up to this court.

The case was argued by *Mr. Coxe* for the plaintiffs in error, and *Mr. Crittenden* for the defendant.

Mr. Coxe referred to the Act of 3 March, 1811, chap. 46, 2 Lit. & Brown's ed., 662; 1 Land Laws, 196; the Act of 11 May, 1820, chap. 87, 3 Lit. & Brown's ed., 573; Land Laws, 331; the Act of 15 June, 1832; Land Laws, 499; and the Act of February 24, 1835, and contended that the title claimed by the plaintiffs was not so far forfeited by nonclaim, under the first two statutes, as to become incapable of confirmation under the subsequent legislation of Congress.

Mr. Crittenden, for defendant in error:

This is a suit for land in the State of Louisiana. The controversy arises out of interfering claims, which originate in the acts of Congress granting to the proprietors of lands fronting on the Mississippi River, &c., a right of pre-emption of the lands lying back of and adjoining their original or front tracts, and not exceeding the quantity thereof.

The acts of Congress, so far as they affect this case, are three in number; namely, an act of the 3d of March, 1811 (2 Lit. & Brown's ed., 662); an act of the 11th of May, 1820 (3 Lit. & Brown's ed., 573), and an act of the 15th of June, 1832 (4 Lit. & Brown's ed., 534).

The 5th section of the Act of 1811, having expired by its own limitation of three years, was revived and continued in force for two *years by the Act of the 11th of May, [*175 1820. M. D. Bringier, being of that class of proprietors embraced by the above acts, and owning land bordering on the Mississippi River, and not exceeding in depth forty arpents, French measure, was entitled to the right of pre-emption granted thereby; and, intending to avail himself of the preference and privilege given to him, he did, on the 12th day of April, 1822, and within the two years allowed by the said Act of 1820, deliver to the register of the proper land office a notice, in writing, of the situation and extent of the land he wished to purchase, and did make payment for the same, as required by law, and did thereby become the purchaser of the land, namely, 510 acres.

The land so purchased by Bringier was surveyed for him on the 17th of December, 1822, by John Wilson, principal deputy-surveyor for that district. Afterwards, on the 10th of June, 1830, M. F. Rightor, then principal deputy-surveyor for Louisiana, undertook to make, and did make, another survey of Bringier's claim, variant but little from the survey of Wilson. This survey of Rightor's was approved by the surveyor-general of the public lands south of Tennessee, on the 9th of March, 1832. And to this later survey, Bringier and those claiming

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under him have submitted, and limited his claim and possession, and the land in contest lies within its boundaries. Bringier took possession of the land at the period of his purchase, and the possession has ever since been continued in him and those claiming under him. Bringier sold and conveyed his plantation, called Whitehall, including the land aforesaid, to the late General Wade Hampton, on the 9th of February, 1825; who, on the 6th of April, 1829, sold and conveyed the same to Leroy Pope, who, on the 18th of March, 1833, sold and conveyed the same to the defendant, Thomas Barrett. At the time of Bringier's purchase aforesaid, no survey had been made of the land, nor was any general survey made of the public lands in that district till long after.

Barrett was thus entitled and in possession under Bringier, and the Act of 1820, under which his claim was derived, had long since expired, when the Congress passed the said Act of the 15th of June, 1832, re-enacting, in substance, the 5th section of the Act of 1811, and extended its operation as well to all purchasers from the United States as to French and Spanish claimants, to whom all the previous acts had been confined. Under this act of 1832, Noel Jourdan and Joseph Landry, claiming severally and respectively, under French or Spanish claims confirmed by the United States, lands bordering and fronting on the Mississippi River, and lying contiguous to the aforesaid claim of Bringier, asserted their right of pre-emption to the lands back of their original tracts, and purchased, Noel Jourdan 269.44 acres, on the 9th of August, 1834, and Joseph Landry 154.21 acres, on the 8th of March, 1836.

176*] *In his general survey and township map of the litigated and circumjacent lands, made in 1834, Mr. Williams, the surveyor-general for Louisiana, has undertaken to survey and apportion out to the plaintiffs and defendant, respectively, who are all contiguous and front proprietors, the lands lying back of them; and this he does by a prolongation of the side lines of each front tract to the depth of forty arpents from the back line of the front tracts.

These side lines are all perpendicular to the river, and converge as they recede from it, owing, perhaps, to their being situated within a bend.

This mode of surveying and settling the claims of these pre-emptioners, by a prolongation of the side lines of their original tracts, was adopted and acted upon by the surveyor (Williams) in his survey of 1834, and seems to have been approved of by the Surveying Department. The effect of it is, that the claim of Bringier (now held by Barrett) is curtailed, and the subsequent claims of Landry and Jourdan are made to interfere, the former to the extent of 31 acres, the latter of 33 acres, with the prior claim and survey of Bringier.

For these interferences, Landry and Jourdan respectively brought suit against Barrett, in the District Court for the First Judicial District of Louisiana. Pope, the heirs of Hampton, and Bringier, were, in the progress of the suit, cited in warranty, and made defendants.

By consent of parties, the suits of *Jourdan* v. *Barrett* and *Landry* v. *Barrett* were consolidated, and were tried and decided together.

The above statement contains the material and leading facts on which the rights of the parties depend.

Upon the trial in the District Court, judgment was rendered in favor of Barrett; and, upon appeal by the plaintiffs to the Supreme Court of Louisiana, that judgment was affirmed. And the plaintiffs now prosecute their writ of error in the Supreme Court of the United States.

The reasoning of the District and Supreme Courts of Louisiana, on which their judgment was founded, appears to me to be entirely satisfactory and unanswerable.

If the conflicting claims of the parties litigant had been contemporaneous, and connected by having a common origin from the same act of Congress, such an apportionment as that made by the last survey (the survey of Williams), and now insisted on by the plaintiffs, might have been proper. But such a rule can have no application to a case like the present. Bringier had made a legal appropriation of the land under the Act of 1820. From the expiration of that act, which gave the right of pre-emption for two years only, until the passage of the Act of the 15th of June, 1832, there was no right or title of any description conflicting with that *of Bringier. It was not the intention [*177 or within the competency of Congress to impair, diminish, or take away, by this latter act, the previously acquired or vested rights of Bringier.

The land appropriated by him under the Act of 1820 was not "vacant" at the passage of the Act of 1832; and this latter act gives no more than the pre-emptive right to lands "vacant" at the time of its passage.

It is therefore insisted, on the part of Barrett, that the judgment ought to be affirmed.

Mr. Justice CATRON delivered the opinion of the court:

The record brings before us two petitory actions; one of Landry against Barrett; and the other of Jourdan against the same defendant. The State District Court of Louisiana adjudged the title of Barrett the better, and for this reason decided in his favor in both actions; but in that of Landry it was also held that the title to the land he claimed was invalid, because he produced no other evidence of claim than the receipt of the receiver above set forth, dated 8th March, 1836; that the Act of June 15, 1832, limited his right to purchase to three years; and not having filed his notice of claim, and paid his money, until the 8th of March, 1836, he came too late, and for this reason, also, the petition must be dismissed. The judgment being affirmed generally by the Supreme Court of Louisiana, and being opposed to the authority exercised by the officers of the United States, acting in virtue of acts of Congress, it becomes our duty to examine whether the judgment below was proper on this ground. We find the District Court overlooked the Act of February 24, 1835, which extended the time to the 15th of June, 1836, to owners of front tracts to become purchasers by preference of the back tracts adjacent to those owned by them; so that the purchase made by Landry on the 8th of March, 1836, was in time. It follows, the claims of Landry and Jourdan are alike; and the oppos-

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ing claim of Barrett, being the same as to each of the petitioners, the controversy may be treated as one suit. It depends on mixed questions of law and fact; both having been submitted to the courts below for their judgment, without the aid of a jury; and as the facts giving rise to the controversy call for construction of acts of Congress to give the facts effect, they come before this court for its action under the 25th section of the Judiciary Act. This is the settled doctrine here, as will be seen by the cases of *Pollard's Heirs* v. *Kibbe* (14 Peters, 353), *The City of Mobile* v. *Eslava* (16 Peters, 234), and *Chouteau* v. *Eckhart* (2 How., 372).

Neither party has a patent; and each comes before us asserting a superior equity to the lands in dispute. Barrett insists that the entry under which he claims title, dated April 12, 1822, was made for a specific quantity of 510 **178*** superficial acres, and designated by *survey and side lines ten years and more before the opposing claims originated, and therefore his possession cannot be disturbed by their assertions.

On the other hand, it is insisted that Bringier, under whom Barrett claims title, had no preference extended to him by the Act of May 11, 1820, to enter so much as 510 acres as back land to the Whitehall tract; that it fronted on the inside of a bend of the Mississippi River, and conformed to Spanish and French forty arpent concessions made on fronts, in concave bends, in the extension of side lines; which uniformly converged in proportion to the greater or less circle of the bend; that the Whitehall tract was much narrower on the back than on the front side; that the act of Congress did not permit Bringier to enter any other back land than that within his direct side lines, produced from the river eighty arpents deep; and that Barrett's equity is limited to the "back land," in quantity to forty arpents deep within these lines, although much less than 510 acres. And that, as this mode of surveying the double concession will not include the land entered by either of the petitioners, they are entitled to recover; furthermore, that in this form has Barrett's claim been surveyed by public authority, and in no other.

In December, 1832, Bringier caused Wilson, a surveyor, to run out his claim of 510 acres, in the same form of the front tract; that is, he began at the back terminus of each side line of the old tract, and ran diverging lines so as to make the opposite side of his new survey of the same width with the front on the river, thus making a tract of 1,020 acres, little more than half as wide in the middle as it is at either end. This survey was neither returned to, nor recorded in, the surveyor-general's office; nor recognized by the officers of the United States as a public survey. Bringier, and those claiming under him, however, took and held possession of the land surveyed, and improved the same, assuming that it covered the land entered in 1832, and that it was lawfully made; at least, as against any claim the petitioners can be permitted to set up. This we suppose mainly to depend on the true construction of the Act of 1811, which was renewed from time to time.

The surveys of township No. 11, including the lands in dispute, were not made until the fall of 1829 and spring of 1830, and then only in part, both as to the ordinary extension lines, and as regarded the private grants and back lands subject to be attached by preference of entry to front grants. Until these latter were surveyed, they could not be acted on as to specific quantity. By the Act of March 2, 1805, section 7, the powers of the surveyor of lands south of Tennessee were extended over the territory of Orleans. And by the 9th section of the Act of April 21, 1806, he was directed to appoint two principal deputies, one *for each of the [*179 districts into which the Orleans territory was divided; who were to keep separate offices of their own, and to execute public surveys in their respective districts, in conformity to the regulations and instructions of their principal.

By the Act of March 3, 1831, a surveyor-general of public lands lying in the State of Louisiana was ordered to be appointed; and on whom, within that State, were devolved the duties formerly imposed on the surveyor of lands south of Tennessee; that is, after the first of May, 1831; and also the duties of the two principle deputies authorized by the Act of 1806. The latter offices were abolished, and the duties appertaining to them merged in the surveyor-general's office of Louisiana. That officer took charge of the official records and papers; and on him was imposed the duty of doing equity among those entitled to back concessions under the acts of 1820 and 1832, where it had not been previously done. His own deputies did the field work not done on his coming into office; and in his time were the surveys in township No. 11 completed; and by him were the first approved after their completion. This the government recognizes as the legal survey of the township, by which the United States are bound, and on extracts from which patents and certificates can be founded; and to this end the approved plan of it was filed in the register's office of the Southeastern District of Louisiana, on the 8th of August, 1834; by it all those purchasing from the United States, either by preference of entry, or otherwise, are bound to abide, unless legal alterations have been made, or there were existing legal and sanctioned surveys, laying off back lands to particular front owners, independent of the general survey. None such was made for the Whitehall tract, as we think, and its back land, as to extent and form, is governed by the general plan above named. The one made by Rightor's direction, approved by Gideon Fitz, surveyor of public lands south of Tennessee (March 9, 1832), received no additional value from such approval, as the Act of 1831 superseded his authority in this respect. Rightor deposes, that at no time had the surveyor south of Tennessee any power of approval or supervision of the surveys made by him, Rightor, as principal deputy; and that the surveys made by Foster and Walker in the spring of 1830, and approved by Rightor, as principal deputy, June 10th, 1830, in his judgment bound the United States, as to the form and extent of the land attached to the Whitehall tract. The commissioner of the general land office thought the survey on its face an unwarrantable proceeding, as it cut off the back lands of Bringier's neighbors, and violated the Act of 1811. (2 Land Laws, No. 950.) And we think the commissioner was right in his conclusion.

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Claims of double concessions in Louisiana were not new in practice; surveys of such claims were common, and the direct extension of the side lines of the front tract was the equity, 180*] *as a general rule, accorded to them, as we apprehend; and so gross a violation of it as is found in Bringier's survey could not be sanctioned.

In April, 1822, when Bringier's entry was made, there can be no fair pretense to say he acquired by the entry an equity to the extent of Wilson's or Rightor's survey, as against others having at that time equal rights to enter back land, which rights the survey assumed to defeat. By his entry Bringier acquired an equity to certain land, to be laid off in a form not to interfere with his neighbors having equal rights under the law. They did not enter, probably because his unjust, pretended claim deterred them; and failing to do so until the time expired, Bringier assumed that his equity might be enlarged, and was enlarged, to the extent that Rightor's or Wilson's survey goes.

We think this assumption cannot be sustained; what equity Bringier acquired took date with his entry, and his survey ought to have been the same, had no one claiming front lands interfered, as the act of Congress reserved for future sale all the back lands not entered in time; a provision that would have been altogether defeated in this instance, if the assumption was true. For nearly twenty years after the Act of 1811 was passed, the government failed to survey the back lands, so as to afford an opportunity to front owners to acquire woodland in the rear (most necessary in a sugar-growing country), and it would be strange had the power to make back concessions been parted with, in so plain a case, by permitting sweeping surveys like that of Bringier.

We say above, claims for double concessions were not new. O'Reilly's regulations of 1770 provide for narrow front grants on rivers, by forty arpents in depth; for embankments in front for the exclusion of high water; for ditches to carry off the water; for roads and bridges. The 17th article of Gayoso's regulations confirms those of O'Reilly. These were made by governors-general, who had the distribution of lands from 1770 to October, 1798; then the authority was restored to the General Intendant of Louisiana and West Florida, Morales; and in this officer the power remained up to the change of governments in 1804. All the regulations will be found in 2 White's Recopilacion, 228, 244. In article 3d of Morale's, special duties are prescribed to the owners of front grants, but nearly the same of O'Reilly's. The syndics were bound to enforce the making of such embankments, ditches, roads, and bridges, and the clearing in the three first years, in addition, a certain quantity of land, and putting it into cultivation. The grants were not to exceed six or eight arpents in front; usually not so much was granted; and the lands were to adjoin. Annually the Mississippi overflows, and to prevent an inundation of the country, heavy and expensive embankments are required, and they must be continuous; and are so, for hundreds of miles, on the banks of 181*] *the river. The country would be worthless without them. It had been reclaimed from the water by this means and the ditches, by the French and Spanish front proprietors; and on the keeping up of the levees the value of the back lands depended; the great expense, and constant watchings, during a part of the year, to guard against inundation, and that of the whole country, by a break in the levee at any one place, involve public considerations to Louisiana of the highest magnitude; and those whose duty and interest it was to prevent it—the front owners—had extended to them, by the Spanish government, peculiar privileges, and which the United States at an early day recognized.

A board of commissioners was established by the Act of March 2, 1805, whose duty it was to examine and report to Congress on French and Spanish claims to lands in that section of country: and by the supplementary Act of April 21, 1806, section 5, it was made their further duty, among other things, "to inquire into the nature and extent of claims which may arise from a right to a double or additional concession on the back of grants or concessions heretofore made," "and to make a special report thereon to the Secretary of the Treasury, which report shall be by him laid before Congress at their next session. And the lands which may be embraced in such report shall not be otherwise disposed of until a decision of Congress shall have been had thereupon."

The commissioners were engaged for some six years in the Orleans territory in pursuing their investigations, and their reports were laid before Congress by the Secretary of the Treasury early in 1812. But in the mean time it was well known what course had been pursued by the board in regard to all descriptions of claims, and among others of back concessions. Instances in the report will be found in 2 Am. State Papers, 297, 337. Of claim (p. 297) No. 101, the board says: "Benj. Babin claims a second depth of forty arpents, lying immediately back of a front or first depth, which we have already confirmed to him among the confirmed claims."

"The claimant has no other foundation for his title to the second depth than having occupied the front and first depth, and having occasionally supplied himself with timber from this second depth."

"According to the laws, customs, and usages of the Spanish government, no front proprietor, by any act of his own, could acquire a right to lands further back than the ordinary depth of forty arpents; and although the Spanish government has invariably refused to grant the second depth to any other than the front proprietor, yet nothing short of a grant or warrant of survey from the governor could confer a title or right to the land; wherefore we reject the claim." We give this as an instance of many similar ones reported.

The statement applies to all front tracts, where only the first *forty arpents had [*182 been granted by France or Spain. Instead of granting the back lands as a donation, the government of the United States extended to the front owner a preference of entry, by the Act of 1811; and if the entry was not made, the land was reserved, as above stated. No ques-

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tion affecting the titles to lands in Louisiana was more interesting to the old inhabitants than the one concerning the back lands; and, although the former government had granted them in probably but few instances, yet this was quite immaterial to front owners at that time, as they had the privilege of getting wood and timber from them, and the lands were in no danger of being granted to another. That back lands at all times meant those in the rear between the extended front lines in the rear, to the distance of forty arpents (each line being a straight one throughout), we suppose to be undoubted, as a general rule, although there may have been exceptions to it.

Many tracts had no doubt been surveyed for the purpose of having them acted on by boards of commissioners; but the record does not show that any of the front tracts in township No. 11 had been surveyed by public authority; which could only be done, after the passing of the Act of February 28, 1800, under the superintendence of the Surveyor-General—and all other surveys were, by the third section of that act, declared to be private surveys, on which no patent could issue for an incomplete claim, after it was confirmed by Congress. And this law applied equally to confirmations by the commissioners, under the Act of March 3, 1807, whose adjudications were final, and authorized a patent to issue thereon.

When the first two acts of 1811 and 1820 were passed, it was known that no township surveys had been made in much the greater portion of the country to which the acts applied; in reference to this state of the country Congress legislated, and therefore it was provided by the fifth section of the Act of 1811, that the principal deputy-surveyor of each district should be, and was authorized, "under the superintendence of the surveyor of the public lands south of the State of Tennessee," to cause to be surveyed the tracts claimed by virtue of that section, that is, preference rights; and in all cases where there were bends in rivers (as in the case before us), on which the granted tract bordered, and there were adjacent claims of a similar nature, and each claimant could not obtain a tract of equal quantity with the original front tract, then it should be the duty of the surveyor to divide the vacant land between the several claimants, in such manner as to him might appear most equitable.

Three years were allowed from the date of the act for those entitled to give notice in writing, stating the situation and extent of the tract each wished to purchase; and for which he was to make payment according to the then credit system. But if he failed in either, the right to pre emption should cease and become 183*] void; and *the land might be purchased thereafter by any person, as other public lands. As no public surveys existed, from which it could be ascertained at the register's offices what the back lands of the numerous tracts were; and as entries were contemplated in advance of the public township surveys, some mode of ascertaining the quantity and form each front owner was entitled to was indispensable. And the mode adopted by Congress was to make the principal deputy-surveyor of the particular district the judge of form and quantity; subject, however, to the superintendence of his principal, the surveyor-in-chief of the lands south of Tennessee.

This officer (as well as the principal deputy) was by the acts of 1812 (April 25th) and 1836 (July 4), subject to the direct control, and bound by the instructions, of the commissioner of the general land office; and so was the commissioner subject to the control of the President, through the Secretary of the Treasury, as will be seen by the opinion of the Attorney-General of July 4, 1836. (2 Public Lands, Laws, Opinions, &c., 103.) So that, in the end, it devolved on the President, by aid of the secretary, as in other instances, to see the acts of Congress above set forth duly executed; and this was done through the commissioner of the general land office.

On the 18th of March, 1833 (2 Land Laws, 573, No. 516), the commissioner, by an instruction to the registers and receivers of Louisiana, gave a construction to the Act of June 15th, 1832: 1. That where the back lands had been offered for sale and sold, after the passing of the act, still the front owner was to be permitted to enter them. 2. Where the back tracts had not been surveyed and connected with the adjoining public lands, and the quantity could not be ascertained at the time of payment, the party claiming should be required to pay for the maximum quantity to which he could be entitled under the law; and any excess of payment found on actual survey should thereafter be refunded to the party, on instructions to that effect, to be given from the general land office.

The form of the receiver's receipt for the payment is there given; showing the land had not yet been surveyed. And the register was instructed not to transmit the certificate of purchase until the survey was completed, whereby the quantity would be ascertained. The commissioner also informed the registers and receivers that the surveyor-general had been directed to advise them as to the course to be pursued by the claimants in cases where the back tracts remained to be surveyed.

In executing the Act of 1832, the foregoing instructions were of course pursued, and entries received on such notices of claim as parties saw proper to file, subject to the risk of being curtailed by the proper public surveys, approved by the surveyor-general. And Mr. Harper proves that on these terms notices of claim were received, under the Act of 1820, in 1822, when Bringier's claim was *entered. Harper was then the register at New Orleans. It is manifest that in no other way could the acts of 1820 or 1832 be executed, than by general surveys of the back lands, whereby the portion of each claimant was marked out. Nor could any survey in township No. 11 be recognized by the register after the appointment of the Surveyor-General of Louisiana, and the extinguishment of the offices of the principal deputies (May 1st, 1831) other than such as were approved by the surveyor general. None was made of Bringier's claim, so far as we are informed, before that time, which received the sanction of any department of the general land office, and on which a patent certificate and patent could issue. Of Rightor's survey, we have already spoken. Wilson's was a mere private act, at

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the instance of Bringier, and not recorded anywhere. The instruction of July 25th, 1838 (2 Land Laws, No. 1009), applies to Bringier's case as well as others; the register and receiver are there directed to issue the certificate of purchase in cases where an overpayment has been made for back lands, by "describing each tract by section, township, range, and area, as returned by the Surveyor-General," assuming the plan approved by him to have settled the equities of parties claiming under the pre-emption laws, as to extent and boundary. And our opinion is, that the survey of township No. 11, approved by H. S. Williams, Surveyor-General of Louisiana, on the 5th of August, 1834, was made in execution of the acts of Congress, and governs the rights of the parties before this court; that to the land there designated as "back land" of the Whitehall tract, Bringier's equity attached, by his notice of claim and the payment of his money, in 1822, and to none other. And that, by the same survey, the equities of Landry and Jourdan, acquired by their entries, are established as the better title to the extent of "back land" attached to their respective tracts by the survey. And to that extent they are respectively entitled to recover, as against the claim of the defendant, set forth in the answers.

Some stress, in the argument, was laid on the fact that possession had been held of the land in dispute, under Bringier's claim, for more than ten years before the suits of Landry and Jourdan were brought, and therefore the petioners were barred by prescription and limitation in Louisiana. Prescription of ten years' possession is relied on in defense by a direct plea, and made up part of the defense.

To this ground of defense, it is a sufficient answer to say, that Jourdan first acquired his interest in 1834, and Landry his in 1836; up to that time the lands they claim belonged to the United States, as part of the public domain, and on which the defendant, Barrett, and those under whom he claims, were trespassers: and that no trespass of the kind can give title to the trespasser, as against the United States, or bar the right of recovery; nor had the opera-**185***] tion *of time any effect as against Landry and Jourdan, until they respectively purchased.

By the Constitution, Congress is given "power to dispose of and make all needful rules and regulations respecting the territory or other property of the United States;" for the disposal of the public lands, therefore, in the new States, where such lands lie, Congress may provide by law; and having the constitutional power to pass the law, it is supreme; so Congress may prohibit and punish trespassers on the public lands. Having the power of disposal and of protection, Congress alone can deal with the title, and no State law, whether of limitations or otherwise, can defeat such title.

For the foregoing reasons, we order the judgment of the Supreme Court of Louisiana to be reversed, and that the cause be remanded, &c.

Rev'g 13 La., 24.
Cited—4 How., 448; 8 How., 340; 1 Wood. & M., 85.

JEREMIAH CARPENTER, *Appellant*,

v.

THE PROVIDENCE WASHINGTON INSURANCE COMPANY.

Insurance—notice subsequent insurance—required to be indorsed on policy—notice denied—proof—weight of evidence—parol evidence.

A policy of insurance contained a stipulation, that if the insured then had, or thereafter should have, any other insurance upon the same property, notice thereof should be given to the company, and the same indorsed upon the policy, or otherwise acknowledged by the company in writing; in default of which the policy should cease.

A bill was filed in equity by the insured, alleging that notice was given to the insurance company, and praying that the company might be compelled to indorse the notice upon the policy, or otherwise acknowledge the same in writing.

When the answer of the company, sworn to by the then president, denies the reception of the notice, to the best of his knowledge and belief, the question becomes one of fact and of law; of fact, whether the evidence offered by the complainant is sufficient to sustain the allegation; and of law, whether, if so, this court can compel the company to acknowledge it.

The answer being responsive to the bill, and denying the allegation, under oath, the general rule is, that the allegation must be proved, not only by the testimony of one witness, but by some additional evidence.

Several qualifications and limitations of this rule examined.

The circumstances of this case are such that the general rule applies.

Two witnesses are produced by the complainant to prove the notice, but neither of them swears positively to it, and the circumstances of the case do not strengthen their testimony.

The rules by which parties are sometimes allowed to introduce parol evidence with reference to a written contract do not apply to this case, where the parol proof is offered by the complainant, seeking to show a fact which, if true, would establish a breach of duty in the defendants, happening after the original contract was made.

The question of law which would arise if the notice were sufficiently proved by the complainant need not be decided in this case.

THIS case was brought up by appeal from the Circuit Court of the United States for the District of Rhode Island, sitting as a *court of equity. The bill was filed [***186** by Carpenter against the insurance company, and referred to an action at law, which he brought against said company in 1839, and which was brought, by writ of error, to the Supreme Court of the United States. It is reported in 16 Peters, 495. The opinion of the court sets forth the facts in the case, and they need not be repeated.

The present bill averred that the Providence Washington Insurance Company did receive notice of the existence of an insurance made at the office of the American Insurance Company, which said notice was given under the terms of the policy, and that it was the duty of said Providence Washington Insurance Company to have indorsed said notice upon said policy, at their office, or otherwise acknowledged the same in writing, by reason of which neglect the complainant lost his right at common law to claim the amount of the insurance, viz., fifteen thousand dollars. It then prayed for a

NOTE.—*That verified answer of defendant is evidence in his behalf, in equity cases, to overcome which more than one witness is required*, see note to Hughes v. Blake, 6 Wheat., 453.

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decree to compel the said company to indorse said notice on said policy, or otherwise acknowledge the same in writing, according to the terms of their policy, as they long since ought to have done, and further to compel the said company to pay the said sum of fifteen thousand dollars, with interest, &c., &c.

By referring to the record in the former suit, it will be seen that Carpenter and his assignors obtained policies of insurance from two companies, as follows:

Providence Wash. Ins. Co.	American Ins. Co.
1835. September 27.	1836. December 12.
1836. September 20.	1837. December 14.
1837. September 27.	1838. December 11.
1838. September 27.	

Prior to the policy of December 12th, 1836, the then owner of the property insured made an erroneous representation of the value of the property proposed to be insured, which vitiated the policy, and a suit brought upon it was abandoned.

The policy of September 27th, 1838, upon which the suit at law and the present proceeding in chancery were founded, contained, amongst other provisions, the following:

"And if the said insured, or their assigns, shall hereafter make any other insurance on the same property, and shall not, with all reasonable diligence, give notice thereof to this corporation, and have the same indorsed on this instrument, or otherwise acknowledged by them in writing, this policy shall cease and be of no further effect."

"And provided further, that in case the insured shall have already any other insurance against loss by fire on the property hereby insured, not notified to this corporation, nor mentioned in nor indorsed upon this policy, then this insurance shall be void and of no effect."

187*] *Annexed to the policy were the proposals and conditions on which the policy was asserted to be made, one of which was as follows:

"V. Notice of all previous insurances upon property insured by this company shall be given to them, and indorsed on this policy, or otherwise acknowledged by the company in writing, at or before the time of their making insurance thereon; otherwise the policy made by this company shall be of no effect. And in case of subsequent insurances on property insured by this company, notice thereof must also, with all reasonable diligence, be given to them, to the end that such subsequent insurance may be indorsed on the policy made by this company, or otherwise acknowledged in writing; in default whereof, such policy shall thenceforth cease and be of no effect. And in case of loss, this company shall be liable for such ratable proportion of loss or damage happening to the subject insured, as the amount insured by this company shall bear to the whole amount insured thereon, without reference to the dates of the different policies."

In the suit at law, the court decided—

1. That the circumstance of the early policies being held by mortgages did not, of itself, dispense with the necessity of a notice by Carpenter.

2. That the misrepresentation to the American Insurance Company did not, of itself, make the policy absolutely void, so as to dispense with the necessity of notice.

3. That, at law, whatever might be the case in equity, mere parol notice of the insurance made in the American Insurance Company was not, of itself, sufficient to comply with the requirements of the policy declared on; but that it was necessary, in case of any such prior policy, that the same should not only be notified to the company, but should be mentioned in or indorsed upon the policy; otherwise the insurance was to be void and of no effect.

Under this decision, the plaintiff, Carpenter, having lost his suit, filed a bill on the equity side of the court, averring that in December, 1836, and December, 1837, and at divers other times, the Providence Washington Insurance Company had notice from Wheeler & Co. of the insurance at the office of the American Insurance Company, and that said notices were given for the purpose of having the same indorsed on the policy at the office of the Providence Washington Insurance Company, or otherwise acknowledged by them in writing. The bill further averred, that it was the duty of said insurance company to have indorsed said notice upon said policy at their office, or to have otherwised acknowledged the same in writing. The prayer of the bill is recited in the commencement of this statement.

The defendants filed an answer and an amended answer. In the amended answer, they deny that said policies of insurance, or *either of them, executed by the said [*188 American Insurance Company, and bearing date the 12th day of December, A. D. 1836, the 14th day of December, A. D. 1837, and the 11th day of December, A. D. 1838, were notified to these defendants in any form, or that these defendants had any knowledge or suspicion of the existence of said policies, or either of them, until long after the execution, by these defendants, of the policy of the 27th day of September, A. D. 1838.

They then aver that they executed said policy of the 27th of September, A. D. 1838, in entire ignorance of all said policies at the said American Insurance Office, and in the full belief that the said policy by these defendants was all the insurance which the said plaintiff had on the property insured.

They object to the admission of any evidence that said policies by the said American Insurance Company, of the 12th of December, A. D. 1836, and the 14th of December, A. D. 1837, were notified to these defendants, except the mention of said policies in the policy executed by these defendants, or the indorsement of the same thereon; and also object to the admission of any evidence that said policy executed by the said American Insurance Company on the 11th day of December, A. D. 1838, was notified to these defendants, except the indorsement of said notice on said policy of the 27th of September, A. D. 1838, or an acknowledgment by these defendants in writing of such policy.

The answer then sets out specifically the misrepresentation under which the American Insurance Company had executed the policies of 1836, 1837, and 1838, and claims the benefit of it, alleging that if notice had been given to the defendants of these policies, their existence,

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coupled with the representations which had been made, would have led the defendants to believe that both policies would have left a sufficient proportion of the property at the risk of the owner, and consequently they would have had no objection to executing the policy of the 27th of September, 1838, or to indorsing a notice of the policy of December 11th, 1838, upon their policy.

The answer then pleads the former verdict and judgment in bar.

Amongst other evidence taken in the cause were the depositions of Samuel G. Wheeler, a former owner of half the mill, Allen O. Peck, secretary of the American Insurance Company, and Warren S. Greene, the secretary of the Providence Washington Insurance Company from October, 1836, to that time.

Wheeler deposed, that he caused insurance to be effected upon the property in December, 1836, at the American office in Providence; that there was a pre-existing policy in the office of the Providence Washington Insurance Company; that he gave notice, by letter, to the late president of the latter company, Mr. Jackson, of the insurance effected in the former 189*] about the time when it *was done, viz., in December, 1836; that he had no copy of the letter; that the recollection was distinctly on his mind that he did write such a letter; that he was an agent for the Providence Washington office, and well acquainted with the terms and conditions of a policy of insurance, and of the necessity of giving notice.

On his cross-examination, he stated the contents of the letter to be a notice of the insurance of $6,000 at the American office, with a request that the necessary entry should be made on the books of the company; that he could find no letter from Mr. Jackson, in reply; that he had not any distinct recollection of having received a reply; that he had no business of his own which required a clerk, and therefore employed none for himself; that his impression was, that he put the letter into the post office, but could not say positively; and in reply to an interrogatory why he did not take a copy of the letter to Mr. Jackson, answered as follows:

Answer. "The first reason is, which may have operated on my mind, that I did not at that time know that it was necessary to get from the office an acknowledgment in writing that notice had been received. I supposed it only necessary to make the communication in the usual way. And the other was, that after I removed to New Jersey, my correspondence was so limited that I did not always take copies; sometimes they were copied by members of my family, sometimes I copied minutes only, and sometimes didn't copy at all.

Allen O. Peck, being sworn, and shown the letter from Samuel G. Wheeler to him, dated December 13th, 1837, and a copy of this reply, dated December 13th, 1837 (above referred to), testified, that it was the common practice to carry letters of this nature to the Washington office; that he recollected distinctly having an interview with Mr. Jackson, president of the Washington Insurance Company, upon the subject, at the Washington office; and that he had no doubt that he did carry the letter from Samuel G. Wheeler, of December 13th, 1837, to the Washington office, and show the same to Mr. Jackson; but he had no recollection of so carrying said letter, or handing it to Mr. Jackson; that his impression that he did carry said letter, and present it to Mr. Jackson, is derived from the fact that it was his custom to communicate such information in that way; that whatever communication was made, was made to Mr. Jackson; that the representation referred to in the first letter of Samuel G. Wheeler to the American office, as being in the Washington office, was obtained by him from the Washington office for examination; that whatever communications were made by him were made to Mr. Jackson, he being the active organ of the company; that he had no doubt he did show the letter aforesaid to Mr. Jackson, but that he had no recollection of having *done so, [*190 and that the statement he now makes, that he did so, is founded on the fact that such was his practice in similar cases; that Mr. Jackson died in April, 1838.

Warren S. Greene deposed that there was no record, memorandum, or notice on the books, records, or papers of the Providence Washington Insurance Company, of insurance on the Glencoe Mill by the American Insurance Company; that Mr. Jackson, late president of the office, died on the 18th of April, 1838, having been confined to his house by sickness between two and three weeks; that he was not confined so as to keep him away from his business till his last sickness.

The complainant took the depositions of Joseph Strong, Richard A. Reading, Edward W. Laight, and Lewis Phillips, of the city of New York, and Joseph Balch and Charles W. Cartright, of Boston, as to the usage and practice of insurance companies, who testified that it was not the practice of their or other offices, after notice of a policy upon the same property at another office, to require notice of the renewal of such policy at such other office. To cross-interrogatories, these deponents replied, that notice should be given in the manner prescribed in the policy, and that where such notices were verbal they were not sufficient, unless some memorandum of them was made on the books of the company; that the practice of not requiring notice of the renewal of other insurance was confined to cases where the original notice was given in the mode prescribed in the policy.

At November Term, 1843, the cause came on for hearing, upon bill, answer, and the testimony, when the court decreed that the bill should be dismissed, with costs.

From this decree, an appeal brought the case up to this court.

The case was submitted, on printed arguments, by *Mr. Whipple* and *Mr. Wood* for the appellant, and *Mr. R. W. Greene* and *Mr. Sergeant* for the appellees.

As the decision of the court turned upon the sufficiency of the proof of the fact that notice was given to the company, the arguments of counsel upon other points are omitted.

Mr. Whipple, for the appellant, stated the case, and then proceeded:

The whole case (with the exception of something about the merits having been tried at law) is involved in the above extracts from the answers, and they present two questions. First. Is there sufficient proof of the fact of notice? And second. If there is, will the misrepresen-

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tation at the American office have the same effect as if it had been made at the Washington office? The last is in the nature of a preliminary question, and entitled to the earliest attention.

191* *[The argument upon this point is omitted.]

The great, and I consider the only, question in the case is the sufficiency of the evidence to establish the fact of notice to the Washington office previous to September, 1838 (the date of the last and existing policy sought to be reformed), of the existence of a previous policy at the American office, upon the same property. I say a previous policy at the American office, because there never was but one policy at that office, the policy of the 12th December, 1836. No new policy was ever effected, but that policy, that insurance, was renewed on the 14th December, 1837, by a renewal receipt, and again renewed in December, 1838.

The representation of December, 1836, extended to all subsequent renewals, because it was the same insurance.

The clauses in the policy now in dispute require that notice shall be given of "any other insurance" prior to or subsequent. If notice had been given to the defendants of the policy at the American office of the 12th December, 1836, and indorsed upon the policy of the defendants, it would be a strained construction of the words "any other insurance," to extend them to subsequent renewals of the same policy. Without any previous knowledge of their opinions or practice, the plaintiff has taken the depositions of the most experienced underwriters in Boston and New York.

The interrogatories propounded are in page 70 of the record. By the answers of Joseph Balch and Charles W. Cartwright, it appears, 1st, that notices are usually verbal; 2d, that it is the practice for the office to note the notice on the margin of the policy; 3d, that it has not been the practice to require notice of the renewals of policies.

By the depositions of Strong, Phillips, Reading, and Laight, it appears, 1st, that notices are usually verbal; 2d, that it is considered the duty of the office either to reject the proposition and cancel the policy, or to make the indorsement on the books of the company, or on the policy; 3d, that it is not the practice in New York to require notice of a renewal.

It further appears by the depositions, that it is not the practice in New York or Boston to make such a defense, unless in cases of a well grounded belief that fraud has been practiced.

The defendants have not attempted to establish any different practice or usage in Providence. Here, as everywhere else, these notices are usually verbal.

Mr. Reading says: "When notice is given of another policy, we receive or reject it. If we reject it, we cancel our own policy. If we accept it, we require no notice of the renewal."

I have referred to the answers to the cross-interrogatories by the defendants. The answers to the direct interrogatories are equally strong and conclusive.

The prayer of our bill is for a "decree com-

192* pelling said company *to indorse said notice on said policy, or otherwise acknowledge the same in writing, according to the terms of their policy, as they long since ought to have done," &c.

In the first place, it is not a bill to reform a written instrument. We do not ask that one line or one letter of the policy of September, 1838, should be altered, or differently interpreted from the usual meaning of the words. We do not say that something was omitted which ought to have been inserted, or something inserted which should have been omitted. The policy reads as both parties supposed it read, and means what both supposed it meant. No accident or mistake has prevented the exact meaning and intention of both the parties from being fully and fairly expressed.

In bills for reforming written instruments, the proof is required to be much stronger than in ordinary cases, because there is always a presumption, a very strong presumption, that an instrument which has received the examination and scrutiny of both the parties fairly embodies the meaning, and the whole meaning, of both the parties. In cases of this sort, says *Mr. Justice* Story, in his Commentaries on Equity (Vol. I., pages 168 and 169), the rule is, that the fact must be "clearly made out by satisfactory proofs." Relief will be refused, says the same learned writer, "whenever the evidence is loose, equivocal, or contradictory, or is in its texture open to doubt, or to opposing presumptions."

These and other rules of construction laid down by the same learned writer are all founded in great good sense, and illustrate most fully the wisdom of this branch of the law. As you increase the presumptions against the relief sought, you increase the necessity for proof strong enough to overcome them, just as a head wind and tide require more nerve and vigor at the oar.

Every case cited by the author in relation to insurance were attempts to alter the original policy. Every bill to reform a written instrument or contract is a bill to alter the contract. But the present is more like a bill for the specific execution of a contract. It goes not behind, but in front of, the contract. It requires a party to fulfill what he agreed to fulfill in this very contract. The company agreed that, upon receiving notice of any other insurance, they would assent or dissent. If the former, that they would enter their assent upon the policy or in some other writing. If they dissented, that they would notify us and cancel their policy. Instead of undoing what has been done, the object of our bill is to compel the other party to do what he has left undone. He has contracted to do certain things upon our giving a certain notice. The contract specifies no form of the notice. It may be in writing or verbal. It may be formal or informal. All that the underwriters require is, that in case of any prior or subsequent insurance, the insured will let them know it.

It is like all other liabilities depending upon notice—the liability *of an indorser or [*193 other surety in special cases—like all other liabilities, throughout the whole range of human transactions, which are dependent upon the happening of some contingency. When the ordinary evidence is given and not contradicted, the evidence which is usually given of such contin-

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gency, the liability becomes fixed, unless that proof is opposed by counter proof. I say counter proof, because, unlike the bill to reform a written agreement, there are no counter presumptions. Giving notice is an act *in pais*. The law neither presumes that it was or was not given.

Many a poor wretch has swung upon the gallows without half the evidence that we have presented. Many and many a conviction has been had, directly against the legal presumption of innocence, upon evidence not half so precise and direct, nor proceeding from men of half the character and intelligence.

I do not perceive why this office, with so many years' premiums in their pockets, paid by my unfortunate client, should be entitled to stronger evidence than is usually given of such facts.

This brings us to the question of the evidence itself. The party who gave the notice was Samuel G. Wheeler, who became a purchaser in October, 1836, and parted with all his interest in the property on the 6th of December, 1837. On that day he conveyed his moiety to Jeremiah Carpenter, the present plaintiff. The policy at the American office was effected by Wheeler on the 12th day of December, 1836.

In the first place, then, it must be admitted that Samuel G. Wheeler was aware of the necessity of giving notice, and that he had no design to conceal the existence of the policy of the American office. In both his depositions, he states, that he then was and for a long time had been the agent of the Washington office to procure policies for them in New York and elsewhere.

This agency is admitted, consequently his knowledge of the necessity of notice is admitted.

In the second place, he had no design to conceal the second policy, for in his first application to the American office (see his letter of 14th November, 1836, and letter of Thornton in reply), he refers Mr. Thornton to the Washington office for a description of the property. Mr. Thornton, in his reply, says: "The survey at the Washington office was examined." It would be preposterous, after this, to pretend that Wheeler did not intend to give notice of the second policy. Had he intended a fraudulent concealment of an over insurance, he would have applied to an insurance office in a remote State, and not under the very eye of the defendants, referring to them for information.

Two facts, then, must be admitted: 1st, that Wheeler knew of the necessity of giving notice, and that he intended to give it. Accordingly we find the positive testimony of Wheeler:

194*] *"I gave a notice, by letter, to the late president, Mr. Jackson, about the time the insurance was effected, in December, 1836."

And again:

"The recollection is distinctly on my mind at the present moment that I did write such a letter."

In his cross-examination he says:

"It was a notice of the insurance of $6,000 at the American office, with a request that the necessary entry should be made on the books of the company." "My impression is, that I put the letter into the postoffice myself."

But this is not all. On the 13th of December, 1837, he wrote to the American office that he had sold his half of the mill to Jeremiah Carpenter, and requested a renewal receipt to him. He also says:

"There is insurance on this mill at Providence Washington Insurance Company for $15,000. Will you be so kind as to notify them of the change of owners, and when you write to Mr. Carpenter state to him that you have done so."

On the day succeeding, the secretary of the American office wrote to Carpenter, that

"I have notified the Providence Washington Insurance Company that Mr. Wheeler has disposed of his interest to you, of which they have made record. This company have made a similar record."

It seems that, out of greater caution, Wheeler, on the same day, 13th December, 1837, wrote a similar letter to the Washington Company.

Mr. Allen O. Peck, secretary of the American Insurance Company, swears:

"That it was the common practice to carry letters of this nature to the Washington office; that he recollected distinctly having an interview with Mr. Jackson, president of the Washington Insurance Company, upon this subject, at the Washington office; and that he had no doubt that he did carry the letter from Samuel G. Wheeler, of December 13th, 1837, to the Washington office, and show the same to Mr. Jackson; that his impression that he did carry the letter and show it to Mr. Jackson is derived from the fact that it was his custom to communicate such information in that way; that whatever communication was made, was made to Mr. Jackson."

He again repeats, at the close of his deposition,

"That he had no doubt he did show the letter to Mr. Jackson, but that he had no recollection of having done so."

It seems, also, that Mr. Peck was the man who went to the Washington office in November, 1836, to obtain the representation of the property, and that he borrowed it for the use of the American office.

*Upon this proof, can there be any [*195 reasonable doubt that notice was given?

Wheeler swears to the fact unhesitatingly. His whole subsequent conduct was based upon the belief that notice had been given. It is certain that he intended to give notice, for he referred the American office to the representation of the property at the Washington office, in December, 1836. His testimony is not only unimpeached, but it is not even brought into question.

Then it is also certain that Wheeler wrote the letter of the 13th of December, 1837, requesting the secretary of the American office to notify the Washington office of the change of owners. It is equally certain that Mr. Peck, then a clerk in the American office, did go to the other office, and did have an interview with Mr. Jackson upon that subject. He swears that he recollects the interview distinctly. Suppose he had stopped here, would not the evidence of notice have been sufficient? Was it ever known that an officer of one office went to another to give notice of a change of owners, unless there were policies upon the same property in both? Mr. Peck swears that he very often went upon such errands, but he does not

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swear to an instance unless both offices were upon the same property.

But Mr. Peck goes further, and swears that he has no doubt that he read or showed the letter to Mr. Jackson, because such was the custom, such his practice. Mr. Peck must mean that such was his invariable custom; for if he sometimes showed the letter and sometimes kept it back, he could not swear that he had no doubt in relation to the fact in this particular case. Do we not all know that it is an invariable custom? When mercantile information is requested to be communicated to others, and the person receiving that information takes the letter with him for the sole purpose of communication, and carries it, not in his pocket-book, but in his hand, are we to suppose that he would depart from an established custom, and neither read or show the letter?

It must be remembered that all the other statements or facts are certain. That he did go there is certain, because the contemporaneous correspondence shows it. That he had no other business there, that he started with this letter in his hand, that he had an interview with Mr. Jackson upon this business, is all certain; that is, it is legally certain. It is sworn to by an honest and disinterested witness, whom no man has yet doubted.

The court will observe that Wheeler, in his letter to the American office, of the 13th of December, 1837, does not request the secretary to give notice to the Washington office of the existence of a policy at the American office. He acted, in December, 1837, upon the belief that he had given that notice in December, 1836. His not giving that notice a second time is a confirmation of his testimony that he did give it in 1836, because he must have known **196***] *that the fact of an officer of the American office (who had been there before for a statement of the property) going to notify a change of owners would necessarily imply that there was a policy at the American office. This silence about the American policy proves that Wheeler, in December, 1837, had no doubt that he had given notice in 1836, because this was before any dispute was apprehended.

When the loss took place, in April, 1839, Carpenter had no doubt that notice had been given of the American policy, for in his preliminary proof forwarded to the Washington office, he states that the property was insured by both offices.

It will be remembered that the letter of the 13th of December, 1837, which Peck carried in his hand to the Washington office and showed to Mr. Jackson, contained the statement of the policy at the American office.

How is this evidence met?

The answer is not evidence for the respondents.

The testimony of a single witness prevails against the denial of an answer sworn to only by a defendant who has no personal knowledge of the facts. (*Combs* v. *Boswell*, 1 Dana, 474; 3 Eq. Dig., 385-388; *Pennington* v. *Gittings*, 2 Gill & Johns., 208; *Clark* v. *Van Riemsdyk*, 9 Cranch, 153; *Knickerbacker* v. *Harris*, 1 Paige's Ch. Rep., 209.)

The answer, then, is most clearly no evidence for the defendants. It purports to be the answer of the Providence Washington Insurance Company. The first answer states that these defendants answer and say: "They never had any notice in any form" of the three policies of December, 1836, 1837, and 1838, at the American office.

"That the policy of the 27th of September, 1838, was executed by these defendants in entire ignorance of said policy, and of the renewal thereof, executed by the said American Insurance Company."

In the amended answer, they deny that the policies at the American office "were notified to these defendants in any form, or that these defendants had any knowledge or suspicion of the existence of said policies, until long after the execution, by these defendants, of the policy of the 27th of September, 1838."

This amended answer was sworn to on the 7th of November, 1843.

They do not say, "until long after the loss in April, 1839," but long after September, 1838; and before April, 1839, they had notice of these policies at the American office. Then these directors, this company, or some of them, admit that before the loss they had notice of the policy at the American office.

From whom did this notice proceed? At what time? What was the notice to these defendants? Did some one of their own company *tell them that notice had been [*197 given by Mr. Peck to Mr. Jackson, in December, 1837?

Did not the notice, which by their answer they acknowledge they received before the loss, refer back to 1837? Did it not proceed from the agencies which we had established? From the American office, or some of its officers? If it proceeded from the agents, it proceeded from us. Why keep back the time and the source and the extent of this information? If a disclosure of the whole truth would not have injured their case, they would have disclosed the whole.

But the amended answer states that they had no knowledge or suspicion of the policies at the American office, until long after September, 1838.

If such be the fact, it establishes one very important point in the case. It proves that Mr. Jackson was not in the habit of communicating all the transactions of the office, however material to the interests of the whole. If they had no suspicion of policies at the American office, they remained in entire ignorance of the fact, that in November, 1836, the clerk (Mr. Peck, at that time) went to the Washington office, at Wheeler's request, and borrowed the representation of the property made to the Washington office by Egbert Reed & Company, in September, 1835.

Mr. Peck returned that representation. They were ignorant of that also. Mr. Jackson knew of this. Mr. Greene, the witness, knew of this, for he was the secretary at the time, and probably delivered the paper. He does not swear that he had no suspicion of a policy at the other office until September, 1838. But this answer shows that none of the other members of the company knew of it.

So far as the answers go, they confirm the testimony of the plaintiffs.

The only testimony on the part of the defendants is filled with the same tendency.

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Mr. Greene was the secretary of the office from October, 1836, down to the time of giving his deposition.

He swears that there was no letter on file from Wheeler giving this notice, and no copy of any answer to it; and that it was the usage to file and preserve the letters and copies of the answers.

Dabney swears that such was the practice at a preceding period.

The tendency of the evidence is to lessen the weight of Wheeler's deposition. It creates a counter presumption; how strong, the court will judge.

But what is very important is, that Peck's testimony has been long known to the defendants. He was sworn as a witness upon the trial at law. Greene was subsequently called, and from that day to this they have never asked Greene whether he was present when Peck carried Wheeler's letter to Mr. Jackson. The sec-
198*] retary *is usually at the office from the time of opening to the time of closing its doors. Peck was there the 13th of December, 1837.

Not a question is put to Mr. Greene in relation to this fact. He is not asked when he first knew of the policy at the American office. If it was important for the new president, Mr. Dorr, who was elected in May, 1838, to state that neither he nor the company ever knew or suspected the existence of these American policies until long after September, 1838, how much more important was it to them that the secretary never suspected their existence at a long anterior period; the man whose ignorance of their existence would have established a most formidable presumption against the plaintiff.

He says nothing about either of Peck's three visits upon this very business. In the first place he went for the representation, in November, 1836. The paper was in Greene's possession, for he was the secretary. He obtained it, no doubt, from Greene. He returned it to Greene. He had a conversation the next year, during business hours, when Greene must be presumed to have been present.

The defendants long since must have seen that Peck's testimony was upon a vital point of the case. They are at great pains to establish the ignorance of Mr. Dorr, who had no connection with the office at that period; so great that Mr. Dorr swears for himself and the company, in his first answer, that he never suspected the existence of these policies; and in the second, that he did not suspect their existence until long after September, 1838; and although their swearing, which is not evidence, is deemed so very important, yet the swearing of the man who was a competent witness, and most likely to have heard of the fact, had notice been given, is deemed of so very little moment, that not a single question is put to him upon the subject!

He has been called three times as a witness, once upon the trial at law, in November, 1839; once upon this bill, on the 11th of November, 1843, when he was asked, whether there was any entry of notice upon the books of their office; and again, as late as the 16th of January, 1844.

Upon neither of these occasions have the defendants hazarded the question, what passed between Mr. Peck and Mr. Jackson, nor the question, when he first knew of the policies at the American office. He was their witness, and they asked such questions only as would elicit favorable answers.

To be brief, then, in the mere opening of this important case, we do say, and say earnestly, that the answers and testimony of the defendants go strongly to confirm the testimony of Peck.

Our claim to the entry of this notice upon the policy, together *with a claim for relief [*199
under this bill, will be more properly enforced in the closing argument.

We suppose the real truth of the case to be, that it was wholly and entirely owing to the neglect of Mr. Jackson that the entry was not made in the books of the company. In December, 1837, he had reached an advanced age. Though he did not wholly retire from business until March, 1838, yet it is well known that he had been out of health for a long period, and consequently more indifferent to all business concerns. Had Mr. Jackson been living and in health in September, 1838, when the policy was renewed, some entry would have been made. When he received notice, he probably deferred any action upon it until more information was obtained. The renewal of the policy found a new president, and the company took a new premium for another year, with notice of a policy at another office. Can this be permitted?

Mr. R. W. Greene and *Mr. Sergeant*, for the appellees:

The bill charges, "that in the month of December, A. D. 1836, and in the month of December, 1837, and at divers other times, the said Providence Washington Insurance Company had notice of the said insurance at the office of said American Insurance Company, and that said notices were given for the purpose of having the same indorsed on the policy at the office of the said Washington Insurance Company, or otherwise acknowledged by them in writing."

The defendants deny that they have received notice of these policies in any form, either by writing or parol; and we will proceed, in the first place, to consider this question upon the evidence which is in the cause, assuming, for the purposes of the present argument, that this evidence is admissible; and not now inquiring whether, even if it were proved, it constitutes a ground of equity upon which this court can proceed.

The only evidence in the cause to prove notice of the policy of December, 1836, is the deposition of S. G. Wheeler. The report of his testimony, contained in the bill of exceptions, is not evidence in the present suit.

He states in answer to the fourth direct interrogatory: "I gave a notice by letter to the late president, Mr. Jackson, about the time the insurance was effected at the American office, in December, 1836."

In answer to the ninth cross-interrogatory—"Did you put said letter in the postoffice yourself, or send it by some third person?"—he says, "My impression is, that I put it in the postoffice myself, but I cannot say positively."

This evidence totally fails to prove even that

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a letter was deposited in the postoffice. The witness says, in terms, that he cannot say 200*] positively *that he did put it in the postoffice, though his impression is that he did so.

Suppose these defendants were sued as the indorsers of a promissory note, and the defense was want of notice. The rule in such cases is not, that the holder of the note is bound, at all events, to give notice to the indorser, but he must use reasonable diligence to do so; and if, notwithstanding reasonable diligence, the indorser does not receive the notice, that is his misfortune, and constitutes no defense against the note. It has accordingly been decided, that if the holder put a letter in the postoffice at the proper time, and properly directed, giving the indorser notice, this is enough, although the letter may never be received. But this deposition of Wheeler does not bring the case even within this rule. The deposit of the letter in the postoffice is not proved. The witness merely gives a loose impression, six years after the date of the transaction, and after the loss has happened.

By the clause in the policy of the defendants, requiring notice of prior and subsequent insurance, the insured is bound at all events to give notice to the defendants, and to bring it home to their knowledge. Whether any other evidence except that agreed upon in the policy can be received, that is, whether the contract can be altered from its own express terms, so as to make it a different contract from the one expressly agreed upon, is another question, to be considered hereafter; but assuming for the present that the evidence is admissible, it must nevertheless prove actual notice brought home to the defendants. And in a case where the parties have agreed in the policy upon written evidence as the only proof of notice, the court, if they were to admit parol proof at all, would at least require that this proof should be clear and positive. Even if the deposit of the letter in the postoffice had been proved beyond all doubt, it would only have furnished a presumption of its receipt by the defendants, liable to be rebutted by counter proof. In the case of a note or bill, the party is only required to use due diligence, which is defined by law. But here, by his own express agreement, he is to give the notice, so that the underwriter may act upon it. And it is most clear, that nothing is notice, according to the policy, which does not so reach the insurer that he can give it an answer. To send a notice is not enough. No diligence is enough. The contract is not to use diligence, but to give the notice effectually. If a hundred notices were sent, and no one of them reached the insurer, the case of the policy would not be made out.

There are many circumstances connected with this letter which show that Mr. Wheeler must be mistaken in supposing that he wrote it.

No copy of it was taken. The counsel for the plaintiff says Wheeler was fully aware of the importance of this notice, and was deter- 201*] mined *to give it. In answer to the seventh direct interrogatory, he says: "After retiring from business, in August, 1836, and removing from New York to New Jersey, I did not always take copies of my letters. I would sometimes take copies of the leading points; and at other times didn't take copies at all."

Here was a letter involving the safety of a policy for $15,000 of property, of the importance of which, it is said, he was fully aware. It must necessarily have been brief, not more than two or three lines. One would suppose that Mr. Wheeler would, at least, have taken a copy of the leading points of so important a communication. When in business in New York, he says he had a clerk who always copied his letters, and when in New Jersey he had no regular clerk for himself. This witness is a shrewd business man, accustomed to business correspondence, aware of the importance of preserving copies of his letters, and was in the habit of taking copies of some of his letters at the time he says he wrote this.

Of this brief but important letter, it seems, he did not think it worth while to take a copy himself, or even minutes, or to request any one of his family to do so for him.

By the twentieth cross-interrogatory, he is asked why he did not take a copy of this letter, being the same question which had been put by the seventh direct interrogatory.

He says, in answer: "The first reason is, which may have operated on my mind, that I did not, at the time, know that it was necessary to get from the office an acknowledgment in writing, that notice had been received; I supposed it only necessary to make the communication in the usual way." How can this be? The same cause in the policy which requires the notice, prescribes the mode in which it is to be acknowledged. This reason was discovered between the time of answering the direct and the cross-interrogatory. In the policy at the American office, the Washington office policy is mentioned, in strict conformity to the provision of the American office policy, which is similar to the provision in the Washington office policy.

But aside from this, Wheeler knew that notice was at least important, whether acknowledged in writing or not, and would he not have preserved so important a piece of evidence of the fact of notice as a copy of the letter containing it?

Again, he received no letter from Mr. Jackson in reply.

Why did he not write again? He knew that such a letter, if received, would be answered by the Washington office, according to their invariable practice. Again, why did he not inquire of Mr. Jackson, the president of the company, about this letter when he next saw him?

The papers in the case show that Wheeler was a man of unusual caution and care in business. The changes of property were all *promptly and duly notified in both [*202 offices. The sale of his half of the mill to the present plaintiff, Carpenter, was notified to the Washington office by letter, dated December 13, 1837. Not satisfied with this, which was the usual mode, he on the same day, in a letter to A. O. Peck, notifying the American office of the same sale, requests Peck to notify the Washington office of the change of owners, and when he wrote to Carpenter, to inform him that he had done so. All this care is taken for his son-in-law and brother, but for himself

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he is content to write a letter; he is not certain that he put it in the postoffice himself; he takes no copy; although he received no reply, he never wrote again, nor, when he met the president, made any inquiry about the matter, and never knew whether it was received or not.

We think these circumstances show that Mr. Wheeler is mistaken in his recollection, when he says he wrote such a letter. We should have been better satisfied with Mr. Wheeler's testimony if he had produced to us his letter-book, by which we could see whether copies of letters written at and about this very time were not taken.

But however this may be, we submit to the court there is no proof whatever that such a letter was ever put in the postoffice. And we might safely leave the cause upon the plaintiff's proof alone.

But how stands the counter-proof?

In the first place, notice is denied in the original and amended answer in the most positive form.

The answers are sworn to by Sullivan Dorr, the president of the company, who was such at the date of the policy of September, 1838, and for some time before. All who know Mr. Dorr will agree with me in saying he is incapable of making, still less of swearing to, a statement which he does not conscientiously believe to be true.

The plaintiff's counsel cavils at the difference between the two answers in the mode of denying notice.

The amended answer was made for the purpose of setting up the judgment at law as a bar to the plaintiff's bill, and not to alter the allegations of the first answer, denying notice.

Both answers deny that notice was ever given to the defendants, in any form, of said policies, or either of them.

Both these statements are true. They never had notice in the sense of the policy; that is, notice to be indorsed or acknowledged. They never knew or heard of the policy at the American office until after the loss; then the policy at the American office necessarily became public, and in the first proof of loss presented to the Washington Company, the insurance at the American office is stated.

In another part of the amended answer, it is 203*] stated that the said *policies at the American office were not notified to the defendants in any form, or that the defendants had any knowledge or suspicion of the existence of said policies, or either of them, until long after the execution by the defendants of the policy of September 27th, 1838.

This difference was without any design. The counsel who drew the answer supposed it was sufficient to deny notice until long after the policy on which the defendants are sued was executed. If the defendants executed the policy of September, 1838, without ever having received any notice of any policy at the American office, and in entire ignorance of the fact of any such policy, that is fatal to the plaintiff, and it was not material at what time after that the defendants came to the knowledge of the further insurance. It is not pretended that the defendants had any notice or information of the policy at the American office after they subscribed the policy of September, 1838. The plaintiff must have but a slight foundation for his claim of notice, when he attempts to draw aid from such an answer.

But throwing the answer aside, let us consider the proof of the defendants.

Warren S. Greene, a witness on the part of the defendants, states: "That he had been secretary to the Washington Insurance Company since October, 1836; and that no letter was received from Samuel G. Wheeler, giving notice of the insurance at the American office, and that from the course of business in said office he must have known it, had any such letter been received; that he could find no letter from Samuel G. Wheeler to the Washington Insurance office, giving notice of the insurance at the American office, and that there is no record at the Washington office of further insurance at the American office, and that there was no copy of a letter acknowledging information of the policy at the American office; that the invariable practice of the office was, when notice was received of any subsequent insurance, for the directors to take the same into consideration, and to give an immediate answer to the insured, whether or not they consented to the indorsement of such subsequent insurance on the policy. That it was also the invariable practice of the office carefully to preserve all letters by them received, and also to keep copies of all letters by them written."

Charles H. Dabney, predecessor of Mr. Greene, confirms his testimony in relation to the usages of the office.

If Wheeler had sworn positively that he put a letter in the postoffice, directed to the President of the Washington Insurance Company, at Providence, containing the notice of the insurance at the American office, it would at most but furnish a presumption that the letter was received—a presumption liable to be overthrown by proof that it was not received. We have, on this point, *the positive testi- [*204 mony of the secretary of the company, whose duty it was to take all letters from the office directed to the company, to file all letters received by the company, and to preserve copies of all letters written by the company. If such a letter had been received, he must have known it. He says: "There is no record, memorandum, or notice on the books, records, or papers of that office, of insurance on the Glencoe Mill by the American Insurance Company."

His testimony is confirmed by the fact that the directors were never called together, nor any consultation had, in relation to any such letter. It is confirmed further by the fact that no letter was ever written to Mr. Wheeler in reply, either consenting to the further insurance, or objecting to it.

It is, too, utterly incredible that the directors of this company, if such a letter had been received, should not have taken some action upon it. They had already insured the property to the amount of $15,000, the largest amount taken upon any one mill, and they had insured it to within three fourths of the value put upon it by the owner, which, it is well known, is always a liberal estimate, and one they did not exceed. Three fourths is the largest amount which the company insures upon manufacturing property, or deems admissible to be insured

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upon it, by one or by several companies, as is fully proved.

The usage of the office, like that of every well regulated institution, was, and is, to insure from two thirds to three fourths of the value. Now, it is utterly incredible that these directors should have remained satisfied with a further insurance on this property to the amount of $6,000, both policies exceeding the value of the property as estimated by the owner himself, and making an amount so inconsistent with the policy or the company. And the court will perceive, that when Wheeler applied to the American office, referring them to the representation made at the Washington office for the description and value of the property, they refused to insure at all, deeming, as they say, the amount insured by the Washington office as much as was safe to underwrite upon the property.

The only supposition which could render it at all credible that these directors would have consented to the further insurance is, that upon the receipt of the letter, they went and examined the representation at the American office, and conferred with the directors of that office, and found that $10,000 additional property were represented to have been put upon the estate. Had this been the case, such conference and examination could have been proved by the directors of the American company. But the truth is, no such letter was ever written; if written, there is no proof that it was put in the postoffice; and, if put in the postoffice, we prove most conclusively that it was never received by the Washington Insurance Company.

205*] *We will not, in this stage of the cause, stop to consider the legal question, as to the effect which such notice would have, if actually received, upon the policy of September, 1838. But we will respectfully ask the attention of the court to the precise agreement of the parties, which is, that all shall be in writing. The court will no more vary the contract on the equity side than on the law side, nor give it an interpretation different from the plain import of the words, when the words are free from ambiguity and doubt. That would be to make a new contract—a power which a court of equity never assumes. It is not incumbent upon the defendants to show why this part of the contract is in the terms which are used, nor to vindicate its propriety. The fact that it is a part of the contract, is enough, as was said by this honorable court in the judgment at law. Its requirements are not impracticable, nor even difficult to be complied with; but the very precision and accuracy of the terms in which the clause is conceived are evidence of the value set upon it by both the parties, and so is the express, deliberate agreement, that everything shall be in writing, and nothing be trusted to parol. This court is not, however, insensible to the importance of the clause, nor of the offices it has to perform, which were fully recognized in the opinion at law. In the first place, it makes the law in case of several insurances, between the insured and the underwriter, and between the several underwriters, because it furnishes the evidence upon which the law arises. This evidence, therefore, must be certain and permanent, as the other parts of the policy, and not left to depend upon uncertain recollection, or liable to be affected by motives of interest or bias. In the next place, it is indispensably necessary to protect against fraud, being the only security against excessive insurance, often made with fraudulent intention, and always a temptation to fraud. And finally, without going into all the numerous considerations connected with the matter, it is to cut off, by the policy itself, such questions as it is attempted here to raise, the tendency of which to produce confusion and embarrassment is so manifest in the present case.

If the evidence were even more satisfactory than it is—if it were not so completely contradicted—still what does it tend to prove? Not a compliance, most obviously. It proves, on the contrary, a non-compliance, and asks of this court to dispense with that part of the contract which has not been complied with, upon no other ground than that it has not been complied with.

The next piece of evidence relied upon by the plaintiff to prove notice is the testimony of Mr. A. O. Peck, in connection with the letter of S. G. Wheeler to him, of December, 1837.

This testimony applies to the policy of December, 1837. The argument on the part of the plaintiff is, that Mr. Peck showed this letter to Mr. Jackson; that, consequently, Mr. Jackson must *have known there was a pol- [*206 icy on the Glencoe Mill at the American office.

In the first place, Mr. Peck states that he has no recollection of showing this letter to Mr. Jackson, and his statement that he did so is founded entirely upon his practice to do so in like cases. The whole strength of the evidence, then, consists in the presumption derived from Mr. Peck's usual habits of business in this particular. The thing which he was requested to do was no part of his official duty. It was a matter of favor to Wheeler, to be done in a manner most convenient to himself. It would rest, therefore, entirely in his own caprice; whether he would make a verbal communication to Mr. Jackson, or whether he would hand him the letter. Ordinarily he would find it more convenient, perhaps, to hand the letter, than to make a verbal communication, unless that communication were brief, which was the case with the matter to be communicated here. But the presumption derived from the usage of an individual, in relation to matters of this sort, has none of the strength of a presumption derived from usages in relation to official acts, such as the making record of changes of owners of property insured, or of notices of other insurance, of preserving files of all letters received, and copies of all letters written by the insurance company, and of replying to all letters received which require a reply.

Now, we oppose to the presumption derived from Mr. Peck's usages, the usage of Mr. Jackson, president of the Washington Insurance Company, to act upon all notices of further insurance upon the same property; if the further insurance was subsequent, to call the directors together, and decide whether to assent or dissent, and to give prompt reply to the insured.

Mr. Jackson is well known in this community to have been remarkable for promptitude.

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sagacity, and fairness in the discharge of the duties of his office, an office which he held for more than thirty years. No one knew the merits of his character more thoroughly, in all these particulars, then the learned counsel who has made the opening argument for the plaintiff. But in this argument, we claim for Mr. Jackson nothing more than the presumption which the law would make in his favor, that is, that the duties of his office would be fairly discharged unless the contrary is shown.

We oppose, therefore, the presumption derived from the usages of the Washington Insurance Company and their officers to the presumption derived from Mr. Peck's habits of business; and we say that the latter is entirely overthrown by the former. The fact that no consultation was had among the directors, is conclusive to show that they could not have known of this policy at the American office. Mr. Peck states, that he recollects distinctly that he had an interview with Mr. Jackson upon 207*] the subject, but the *plaintiff's counsel cautiously abstained from asking him what communication he made to Mr. Jackson. The natural presumption is, that he told Mr. Jackson what Mr. Wheeler requested him to tell, which was, that Wheeler had sold his interest to Carpenter in the Glencoe Mill. He could have had no motive to go beyond this. There is, therefore, no proof of any information given to Mr. Jackson of the policy at the American office, either by the exhibition to him of Wheeler's letter to Peck, or by any verbal communication of Peck himself. The reasonable presumptions are all the other way.

We refer in this connection to the memorandum indorsed upon the record of the policy at the Washington office, under date of December 15th, 1837:

"Samuel G. Wheeler informs by letter to this company, dated Patterson, December 13, 1837, that he has sold his half of the Glencoe Mill to Jeremiah Carpenter. It is, in consequence thereof, agreed, that the risk assumed by this policy for account of S. G. Wheeler continue for account of said Jeremiah Carpenter. The original policy not being at hand, this indorsement is not put thereon.

"RICHARD JACKSON, President.
"WARREN S. GREENE, Secretary."

This memorandum shows that Mr. Jackson acted even with regard to the notice of the change of property from Wheeler to Carpenter, not from any information derived from Peck, but upon the letter from Wheeler himself.

The memorandum also goes to show that Peck could not have shown Mr. Jackson the letter of Wheeler.

The letter to Peck and the letter to the Washington company are dated on the same day, December 13th, and on the 14th, Mr. Peck replies by letter to Mr. Carpenter, stating, "I have notified the Providence Washington Insurance Company that Mr. Wheeler had disposed of his interest to you, of which they have made record."

The record at the Washington office shows that Mr. Peck must have been mistaken. He might have had the interview with Mr. Jackson informing him of the sale from Wheeler to Carpenter, and Mr. Jackson might have told him that he would make a record of it, but receiving the letter from Wheeler, he naturally referred in his memorandum to the letter of Wheeler to the Washington company as the more authentic source of information. The insured are required by the terms of the policy to notify the company of all sales of the property insured, and the assent of the insurance company is necessary in order to cover the property for the new owner. This is a provision comparatively unimportant. The insurance company do not rely so much upon *their knowledge of the character of [*208 the insured, as upon his interest. They leave a material proportion of the property at his risk. The provision, therefore, with regard to prior and subsequent insurance, is one of paramount importance, and yet the court will perceive that the various changes and sales of this property from 1835 to 1838 are all noted upon the books of the Washington Insurance Company with great exactness and promptitude, but there is no memorandum or indorsement anywhere of these policies at the American office.

Again, notice of a subsequent insurance must come from the insured, or from an agent authorized to give this notice. It is a notice which binds the insured if assented to by the insurer; and entitles the insurer, in case of loss, to contribution from the subsequent underwriters, each in proportion to the amount of their subscription.

The language of the clause is, "shall with all reasonable diligence give notice thereof to the corporation, and have the same indorsed on the instrument, or otherwise acknowledged by them in writing."

The company would not be authorized to make an indorsement upon rumor, incidental information, or upon any information not communicated by the insured himself, or by his authorized agent, nor beyond what he directs to be notified. Now, Mr. Peck was Wheeler's agent, not to notify to the Washington office the policy of the American office, but to notify to them the sale from Wheeler to Carpenter; beyond that he had no authority. He could give no notice which would bind the insured, and could give no notice that would bind the insurer. What authority had he to call upon the Washington Insurance Company to indorse a notice of the American policy on the policy at the Washington office, or otherwise acknowledge the same in writing?

But let us look at the letter itself. It states that the policy at the American office had expired, which was the fact. It is true, he applies on behalf of the new owners for a renewal of this policy, but the letter does not state it was renewed, nor is there any evidence in the cause that information of its renewal was ever communicated to Mr. Jackson, or to any officer or member of the Washington office, by Mr. Peck, or in any other way. The whole extent, then, of the information contained in the letter is, that there had been a policy at the American office which had expired, and that the new owners of the property had applied for a renewal. It may reasonably be inferred from the letter, that the policy at the American office was on a distinct inter-

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est; at least it leaves the matter in doubt. The letter states, that the expired policy had been assigned to Epinetus Reed, and requests the company to make the new policy payable to the same individual. Another important fact in relation to this matter is this: The letter
209*] *from Wheeler to Mr. Jackson, giving notice that Wheeler had sold his interest to Carpenter, is dated on the same day with the letter to Peck. Mr. Jackson might well suppose, that if there was any insurance on this property at the American office, which was to be notified to the Washington office, that Wheeler would have stated it in his letter to him.

Again, the bill charges that the notice given to the Washington Insurance Company was given "for the purpose of having the same indorsed on the policy at the office of the said Washington Insurance Company, or otherwise acknowledged by them in writing."

Was Mr. Peck's communication to Mr. Jackson, whatever it may have been, made for the purpose of having it indorsed on the policy, or acknowledged in writing? If Mr. Jackson read this letter, that part of it which relates to the policy at the American office was not intended by Wheeler for him, or to be read by him; that part of the letter was intended for the American company, and the American company only. If Mr. Peck, therefore, verbally or otherwise, made Mr. Jackson acquainted with that part of the letter which related to the policy at the American office, he did that which he not only had no authority from Wheeler to do, but what Wheeler never intended he should do. If Mr. Peck was a man of business, the presumption is directly the reverse of what is claimed, namely, that he conformed to his instructions, and did not transcend them.

The opening counsel for the plaintiff supposes the real truth of the case to be, that it was wholly and entirely owing to the neglect of Mr. Jackson that the entry was not made upon the books of the company, and attributes his neglect in this particular to his advanced age. He was not much older than the learned counsel himself, and as competent to do business as he ever was in his life. He was careful at this very time to make the proper indorsement of the sale from Wheeler to Carpenter, a matter of no importance compared with the notice of a subsequent insurance. Had Mr. Jackson been living in September, 1838, when the policy sued on was executed, the learned counsel thinks some entry would have been made. Such a presumption is entirely gratuitous. The time to make the entry was when the notice was received. This is proved to have been the invariable practice of the office, and no man was more strict in the observance of its usages than the late Mr. Jackson. Besides, what entry could Mr. Jackson make? He could only copy the letter, and that merely contains a proposal for further insurance for the new owners at the American office. The notice could not be given till the insurance was made, nor could it be taken till then, nor indorsed on the policy. Mr. Jackson would naturally say, if this proposition be acceded to, the owners will of course give us notice, and as no further information
210*] was *given, Mr. Jackson, had he been living when the policy of September, 1838, was subscribed, would have concluded that the proposal for further insurance at the American office had not been assented to. At all events, he had no right to make the indorsement till such notice was given.

The counsel suggests, that when Mr. Jackson received notice, he probably deferred any action upon it until more information was received. This concedes the whole case. Surely notice was not to be of a character which would leave the insurance company ignorant or in doubt. It was to be explicit and certain. If this letter had been read to Mr. Jackson by Mr. Peck, he certainly could not have acted upon it, for the reasons which have been already stated. He must, as a prudent man, have waited for further information. It was not his fault that the information was not more perfect. The further information never came. There is not a tittle of proof that any information was ever communicated of insurance at the American office, subsequent to the time referred to in Mr. Peck's testimony.

The learned counsel suggests that Mr. Greene, the secretary of the Washington Insurance Company, must have been present at the interview between Mr. Jackson and Mr. Peck, and must have heard what was said by Mr. Peck. Suppose he had been, he could not have heard anything more than Mr. Jackson, and there is no reason to suppose that Peck told Mr. Jackson anything more than Wheeler requested him to tell. The learned counsel complains because the defendants do not ask Greene in relation to this matter. If he supposed Greene knew anything, or heard anything, of this conversation, it was his place to have inquired in relation to it. The burden of proof is on the plaintiff, to prove notice to us, being affirmative proof; not on us to disprove it. The plaintiff had an opportunity to prove the verbal communication of Peck to Mr. Jackson, by Peck himself, who was the most proper witness for that purpose; and yet he has cautiously abstained from making any inquiry of Mr. Peck in relation to this matter, but complains that we did not examine Mr. Greene, to ascertain if he were present, and if he were, what was said.

Again, the learned counsel complains that we did not ask Mr. Greene when he first suspected the existence of the policies at the American office. We had no right to ask Mr. Greene such a question. The plaintiff might have asked it. This resort, indeed, establishes, that the ingenuity of the learned counsel, great as it certainly is, was tasked far beyond any man's strength, being required to make a case where none really existed, by suggesting probabilities where there was neither fact nor probability. All the circumstances that ever took place in relation to this matter are in proof.

The American Insurance Company, in the application of *Wheeler, were referred [*211
to the representation at the Washington office for a description and estimate of the property. The plaintiff has not called Mr. Thornton to prove what he said at the Washington office, when he called there to examine the representation. The probable presumption would be, that if he called there for that representation, that he did so with a view to act upon a proposition to underwrite upon the property. But the Washington Insurance Company would

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take no notice of such a fact, and it would make no impression upon the mind of the officers, because if the American company should finally agree to underwrite, the assured were bound to give them notice as soon as the policy was executed. If, therefore, Mr. Thornton, when he went to the Washington office to examine that representation, had stated to Mr. Jackson that Wheeler had applied for further insurance, and that he had examined the representation with a view to decide upon the application, Mr. Jackson would have thought nothing of it, because if the negotiation should finally terminate in further insurance, he knew Wheeler was bound to give him notice. It will hardly be contended, at all events, that this was notice of the policy at the American office, or that the Washington office would be at liberty to act upon it. Besides, Mr. Jackson, as an experienced underwriter—and no man was more so—must have felt sure that the American company would not have made any further insurance upon this property, the Washington company having already insured the property for more than three fourths of its value.

In point of fact, therefore, if Thornton had specifically stated to Mr. Jackson the purpose for which he called to examine the representation at the Washington office, it would give Mr. Jackson no reason to believe that the American company would make any further insurance upon the property, and in fact they did refuse to make any further insurance upon that representation. Besides, it would not be notice, being to a different intent and for a different purpose, that is, to obtain information and nothing more.

The learned counsel, while he complains that we have not inquired of Mr. Greene if he recollects that Mr. Thornton came to the office and borrowed the representation, and what was said by him, was careful not to call Mr. Thornton himself.

One would suppose Mr. Thornton was the best witness to tell what he said, as Peck is to tell what he said, and yet no inquiry is made of Peck, and Thornton is not called. The fact that the secretary of one insurance company borrowed of another a representation would make no impression upon the mind of the secretary or president of the other, even if the motive was stated, because they rely upon notice being given them if the policy should be executed, and have no right to act upon anything less. Mr. Greene has been under examination as a witness, and if the plaintiff thought [*212 *he knew or suspected anything with regard to the policy at the American office, it was in his power to have inquired of him. We have asked him all the questions we had any right to ask him. His character is such, as the plaintiff's counsel well knows, that he would have answered every question with the most entire truth and candor.

The truth is, that he, as well as all the other officers at the Washington office, were taken entirely by surprise, when, after the loss of the Glencoe Mill, they found the policy at the American office.

We have now reviewed all the evidence which has been offered on the part of the plaintiff to prove notice of the policies at the American office. We think, from this review of the evidence, that it is quite apparent not only that the plaintiff has failed to prove notice of the policies at the American office, but that the defendants have disproved it. The failure to make out what seems to be proposed is just as signal as the insufficiency of the purpose itself. The whole object seems to be to establish that Mr. Jackson was to perform the complainant's duty as well as his own, to speak for the complainant where he was silent, to understand for him without being told how he wished to be understood, and to act for him without instruction or authority, because, in the event, it appears to have been for the interest of the complainant that he (Mr. Jackson) should have spoken, understood, and acted.

Mr. Wood, for the appellant, in reply and conclusion:

I propose, in this reply, not to repeat the arguments advanced in opening the case.

I shall attempt to establish the following propositions:

1st. That the Washington company, who are the first insurers, had notice of the second insurance in the American office.

2d. That this notice, under the circumstances of this case, is sufficient to bind them in equity to pay for the loss under their policy

There are a few miscellaneous topics discussed in the close of the respondent's argument, which I will first dispose of.

It is said that the complainant had his election of two remedies—one at law, the other in equity; and that having first selected the common law remedy, he is precluded from going into equity for relief.

This would be true in a case where the two tribunals have concurrent jurisdiction. But it does not apply to a case like the present, where the common law court has no relief to give, and the party in going there mistook his remedy.

Where a party mistakes his remedy at law, and fails on that ground, he may still, at law, resort to the appropriate remedy and recover.

*It was proper in this case to try the [*213 remedy at law first. Because, although the relief sought is strictly equitable, yet of late years common law courts have extended their remedies in many cases so as to embrace what is strictly equitable relief.

This court, however, has shown a disposition to keep the remedies in the respective courts distinct, and we therefore abandon our former ground, and resort to the equity side of the court. The learned justice intimated, in no equivocal language, that we had, in the first instance, mistaken the proper forum.

It is said we can get no relief in equity different from law, on a bill for specific performance. That will depend on circumstances and the character of the relief sought. We do not ask the court to put upon the contract an interpretation different from the common law court. But we seek relief, under the equitable circumstances of this case, against certain requirements, which the rigid rules of the common law will not dispense with, but which in equity will be dispensed with, when, by an adherence to them, they will become an engine of fraud.

If we have made out such a case, equity will

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relieve us. The court of equity does not interpret the contract differently from the court of law, but relieves against some of the requirements of the contract, and even of the law bearing upon the contract, where the parties have acted in a way which in equity amounts to a dispensation with those requirements.

My first proposition is, that the Washington company had notice of this second insurance at the American office.

This matter is discussed in the opening argument, from page 193 to page 198. Samuel G. Wheeler proves that he sent the notice to Jackson, the president, by letter, in December, 1836. That he sent such a letter, he is certain and positive; the impression upon his memory is, that he personally put the letter in the postoffice. Such an impression is satisfactory unless overcome. This evidence is corroborated by other facts and circumstances. His letter of the 13th of December, 1837, to the American office, accompanied with the evidence of Peck, is strongly corroborative of the above testimony. A letter informing them of a change of ownership, with a request that he, Mr. Peck, would communicate it to the Washington office, accompanied with Peck's evidence that he is satisfied he communicated this matter to Mr. Jackson, the president, by showing him the letter, because it was his custom to communicate such information in that way, is strong evidence to satisfy the mind that Jackson had such notice.

Would Mr. Jackson receive such information from another office in his immediate neighborhood, and send the representation of the property to the American office in November, 1836, without getting from such circumstances notice that there was another insurance in that office? If he could, it is impossible to **214*]** consider *him the shrewd business man that they represent him to be. This evidence, standing unimpeached, is amply sufficient to satisfy a jury, or a court acting in the place of a jury, that notice of this second insurance in the American office was brought home to the respondents.

It remains to consider the views taken of this subject on the other side.

It is said the answer of the defendants is evidence in their favor, that they never had such notice.

An answer by a party who states a fact of his own knowledge which is responsive to the bill, and free from all suspicion, is evidence; but not such an answer as this; the answer is too good to have any confidence reposed in it. It states, positively, that the defendants had no such notice.

On such a point they could only swear honestly to their belief. Notice, in such cases, is usually given to the officers of the company, who have the active management of the concern. Greene or Jackson would have been the persons to receive it, and it would have been their duty, when received, to have it filed or entered on the minutes. It would only come before the board through their instrumentality. Notice to those officers would in law be notice to the company. How could this corporation say that Jackson had not received such notice? How could Dorr, the new president, who came in afterwards, and who was a perfect stranger to all these transactions, swear positively that Jackson, in his lifetime, had not received this notice. Experience has shown that answers generally, in litigated cases, but more especially such an answer, should be viewed with great jealousy. The remark in page 202 of the respondents' argument may furnish a clue to this answer. It is said they never had notice, in the sense of this policy, that is, notice to be indorsed or acknowledged. If that is the cover under which this positive denial of notice in the answer rests, it must pass for as much as it is worth.

But the respondents have put in a supplemental answer, in which they qualify, to a certain extent, the positive denial in the first answer, by stating that they had not such notice until long after the execution by these defendants of the policy of the 27th of September, 1838. This clearly implies that they did get such notice, though obtained long after that time—a notice to be indorsed or acknowledged. They surely did not mean to say that they got such notice after the fire. When did they get it? What do they mean by long after? It may mean one month or two months. There is a point of time at which it is somewhat important to know whether they had that notice, namely, in December, 1838, when the American policy was renewed. It was their duty to tell us plainly when they got that notice. The manifest inference is, that they got the notice before or at the time of the renewal of the *policy at the American office, other- [*215
wise they would have said they had it not then. This is a circumstance of some importance in the view hereafter to be presented.

It is said that Wheeler has only a loose impression on his mind that he sent the letter to Jackson. He does not give any such epithet. It is the impression on his memory, that he himself put the letter in the postoffice. The guarded caution with which he speaks entitles him to the more credit. The reason why Wheeler did not preserve a copy of the letter is sufficiently accounted for.

It is asked why Wheeler did not write again to Jackson, when he received no reply to his letter, and why he did not speak about it to Jackson the next time he saw him. In reply, I might ask, Why do merchants and others, when dealing with those in whom they repose confidence, omit to have contracts reduced to writing, when required by the statute of frauds? And when they reduce them to writing, why do it by letter, embracing only the heads, instead of entering into special agreements? We all know, in practice, how these things are done. And perhaps persons dealing with insurance companies are as often as in any other cases inattentive to those niceties and particularities.

To rebut the evidence of Wheeler, much reliance is placed on the testimony of Greene, that no such letter can be found in the Washington office, no memorandum of it on the minutes or elsewhere, and no entry of its having been laid before the board, as usual in such cases.

There can be no doubt that Wheeler meant to give the notice. He could not have been guilty of the absurdity of having two insur-

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ances in two offices in the immediate neighborhood of each other, and of attempting to conceal a second insurance. A loss and claim for compensation would inevitably lead to detection. It was the interest of Wheeler to give the notice. It was the duty of Jackson, the president, when the notice was received, to lay it before the board and have it entered in the office. Both Jackson and Wheeler are represented in the respondents' argument to be punctual business men. The inference from the interest of Wheeler is, that he sent the notice. The inference from the duty of Jackson is, that it was not sent. The one is a fair set-off against the other. Then we have the positive evidence of Wheeler and of Peck, which are not overcome. The omission to examine Greene as to his personal knowledge on the subject raises a strong suspicion that this letter was received, but omitted to be placed on the files, and that notice was received through Peck. It is said, on the other side, that we ought to have examined him on this point. We rely on our own evidence; they call this witness to rebut it. They go half way in the inquiry, and tell us that we ought to have pursued that inquiry for them—that we should have examined their own witness, called to rebut our evidence, on 216*]the *points on which it was all-important he should have been examined in order to render such rebuttal of any avail at all. This would certainly be a novel mode of proceeding.

I shall now proceed to the second proposition. This notice ought to bind the Washington company in equity.

[This part of the argument is omitted.]

Mr. Justice WOODBURY delivered the opinion of the court:

This was a bill in equity on a policy of insurance made by the defendants. The original policy, executed September 27th, 1835, for one year, and annually renewed till September, 1838, contained the following clauses: "And provided further, that in case the insured shall have already any other insurance against loss by fire on the property hereby insured, not notified to this corporation, and mentioned in or indorsed upon this policy, then this insurance shall be void and of no effect. And if the said insured, or their assigns, shall hereafter make any other insurance on the same property, and shall not, with all reasonable diligence, give notice thereof to this corporation, and have the same indorsed on this instrument, or otherwise acknowledged by them in writing, this policy shall cease and be of no further effect." A loss having occurred on the 9th of April, 1839, an action at law was instituted to recover the amount of the defendants, on which final judgment was rendered in their favor in this court, at the January Term, 1841. (See *Carpenter* v. *Providence Washington Ins. Co.*, 16 Peters, 495.) This was chiefly on the ground that another policy had been affected on the same policy at another insurance office, in December, 1836, and renewed yearly till December, 1838, but which had not been "mentioned in or indorsed on this policy," "or otherwise acknowledged by them (the defendants) in writing."

For various other particulars connected with the case, reference can be had to the above case, and the statement which precedes this opinion. Under these circumstances, the complainant next resorted to the bill now in consideration, and alleged, that "in the month of December, A. D. 1836, and in the month of December, A. D. 1737, and at divers other times, the said Providence Washington Insurance Company had notice from the said H. M. Wheeler & Co. of the said insurance at the office of said American Insurance Company, in Providence, and said notices, so given, were given for the purpose of having the same indorsed on the policy at the office of said Providence Washington Insurance Company, or otherwise acknowledged by them in writing. And your orator supposed that the said Providence Washington Insurance Company had performed their part of said contract in this behalf, as in equity and good conscience they were bound to do."

He then added: "Wherefore, inasmuch as your orator is *remediless at and by the [*217 strict rules of the common law, he prays your honors to issue a decree compelling said Providence Washington Insurance Company to indorse said notice on said policy, or otherwise acknowledge the same in writing, according to the terms of their policy, as they long since ought to have done, and to compel said Providence Washington Insurance Company to pay your orator said sum of fifteen thousand dollars, with interest from the time of said loss, and his costs."

The defendants, in their answer, deny that they ever had notice in any form of the additional insurance, or not till long after the execution of the policy now in question, and object to the admission of any evidence on the subject, except such as is in writing, according to the stipulation in the policy itself. And they further deny "that the plaintiff has any equity to compel these defendants to indorse a notice of such previous or subsequent insurance on said policy, or to acknowledge the same in writing."

They then aver, that if the additional policy had been communicated to them, and the present insurance still continued, it would have been void, because false representations, material to the risk in respect to the value of the whole property, were made, affecting the additional policy, and that the probability is the present one would not have been continued on seeing the additional policy, as that is for $6,000, and the present one $15,000, making an aggregate insurance of $21,000, when, in the original statement to the defendants, the whole property was valued at only $19,000, and when it is not the custom of insurance companies to take risks on this kind of property beyond three-fourths of its value, in order to keep the insured still interested to the extent of the other fourth, and thus likely to use greater precautions against fire, and lessen the risk of the insurers, compared with what it would be if an additional insurance was obtained covering the whole value.

It will be seen, by this state of the case, that important questions, both of fact and law, are involved in it—of fact, whether the additional policy was ever made known to the defendants for the purpose of being acknowledged in writing; and of law, whether, in that event, it was their duty so to have acknowledged it, and, not doing so, whether this court can now compel

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them to do it. There are other considerations which arise in the course of the inquiry that will receive attention, but are incidental, rather than raised directly through the pleadings. The testimony in support of the leading allegation in the bill is not very complicated. But how much of evidence should be required to prove that allegation, under the principles applicable to the circumstances of this case, is one of some difficulty, and is first to be settled. Where an answer is responsive to a bill, and, like this, denies a fact unequivocally and under oath, it must in most cases be proved not only by the testimony of one witness, so as to neutralize 218*] that denial *and oath, but by some additional evidence, in order to turn the scales for the plaintiff. (*Daniel* v. *Mitchell*, 1 Story's Rep., 188; *Higbie* v. *Hopkins*, 1 Wash. C. C. R., 230; *The Union Bank of Georgetown* v. *Geary*, 5 Peters, 99.) The additional evidence must be a second witness, or very strong circumstances. (1 Wash. C. C. R., 230; *Hughes* v. *Blake*, 1 Mason's C. C. R., 514; 3 Gill & Johns., 425; 1 Paige, 239; 3 Wend., 532; 2 Johns. Ch. R., 92. *Clark's Ex'rs* v. *Van Riemsdyk* (9 Cranch, 158) says, "with pregnant circumstances." (*Neale* v. *Hagthrop*, 3 Bland's Ch., 567; 2 Gill & Johns., 208)

But a part of the cases on this subject introduce some qualifications or limitations to the general rule, which are urged as diminishing the quantity of evidence necessary here. Thus, in 9 Cranch, 160, the grounds of the rule are explained; and it is thought proper there, that something should be detracted from the weight given to an answer, if from the nature of things the respondent could not know the truth of the matter sworn to. So, if the answer do not deny the allegation, but only express ignorance of the fact, it has been adjudged that one positive witness to it may suffice. (1 J. J. Marshall, 178.) So if the answer be evasive or equivocal. (4 J. J. Marshall, 213; 1 Dana, 174; 4 Bibb, 358.) Or if it do not in some way deny what is alleged. (*Knickerbacker* v. *Harris*, 1 Paige, 212.) But if the answer, as here, explicitly denies the material allegation, and the respondent, though not personally connusant to all the particulars, swears to his disbelief in the allegations, and assigns reasons for it, the complainant has in several instances been required to sustain his allegation by more than the testimony of one witness. (3 Mason's C. C. R., 294.) In *Coale* v. *Chase* (1 Bland, 136) such an answer and oath by an administrator was held to be sufficient to dissolve an injunction for matters alleged against his testator. So is it sufficient for that purpose if a corporation deny the allegation under seal, though without oath (*Haight* v. *Morris Aqueduct*, 4 Wash. C. C. R., 601); and an administrator denying it under oath, founded on his disbelief, from information communicated to him, will throw the burden of proof on the plaintiff beyond the testimony of one witness, though not so much beyond as if he swore to matters within his personal knowledge. (3 Bland's Ch., 567, *note;* 1 Gill & Johns., 270; *Pennington* v. *Gittings*, 2 Gill & Johns., 208.) But, what seems to go further than is necessary for this case, it has been adjudged in *Salmon* v. *Clagett* (3 Bland, 141, 165) that the answer of a corporation, if called for by a bill, and it is responsive to the call, though made by a "corporation aggregate under its seal, without oath," is competent evidence, and "cannot be overturned by the testimony of one witness alone." We do not go to this extent, but see no reason why such an answer, by a corporation, under its seal and sworn to by the proper officer, with some means of knowledge on the subject, *should not generally impose [*219 an obligation on the complainant to prove the fact by more than one witness. (5 Peters, 111; 4 Wash. C. C. R., 601.) Here the denial by the corporation is explicit and responsive to the bill, and its truth sworn to by its president, "according to the best of his knowledge and belief." The only difficulty is in respect to the extent of that knowledge. He was not the president of the company at the time the information of the second insurance is alleged to have been given. Nor is it relied on in argument that he was then a member and lived near, or was for any reason likely to be consulted when such notices were received. But he has since had access to all the files and records, in his official capacity, so as to know if any letter on this subject appears to have been received, and therefore testifies with some means of knowledge. And though it it is admitted that the certainty is not so great against the reception of the notice as if Jackson himself was alive and testified against it, yet, in the nature of the case and by the precedents, the denial is strongly enough made and supported to impose on the complainant the proof of his allegation by something more than the testimony of one witness, though not so much more, it is conceded, as the "pregnant circumstances" before alluded to.

The next inquiry is, whether the material allegation in this case is thus proved? On an examination of the evidence, it will be found that not even one witness swears positively to it; and whatever is sworn in support of it is much impaired by other proof.

The allegation, it will be remembered, is, that in December, 1836, and divers other times, the defendants had notice from the insured of the second insurance, given for the purpose of being indorsed on the policy, or acknowledged in writing.

There is no attempt to prove any such notice except on two occasions—one in 1836, and one in 1837. The only witness called to support the first is Mr. Wheeler. He testifies that about the time of the second insurance, in December, 1836, he wrote a letter to the president of the Providence Washington Company, stating that such an insurance had been effected, and thinks he put the letter in the postoffice. This is all on that point in behalf of the complainant concerning this notice.

It is to be observed that the testimony of Wheeler, in its full extent, does not prove the fact that information of the second insurance ever actually reached the defendants for the purpose of being indorsed or acknowledged, but merely that a letter was writen for that purpose, and probably put in the postoffice.

Though such evidence, standing alone, in the case of notice of nonpayment of bills of exchange and promissory notes, is sufficient, under mercantile usage, to raise a presumption that the holder had used due diligence, yet even in such cases it is not held to prove the actual

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receipt of notice. (*The Bank of Columbia* v. 220*] *Lawrence*, 1 *Peters, 582, and *Dickins* v. *Beal*, 10 Peters, 581.) Much less can it prove the receipt of it where no such usage exists, as in the case of policies of insurance.

When we look for any other proof to sustain or strengthen Wheeler's evidence, thus defective, it will appear to be weakened rather than strengthened by the other testimony and circumstances. Because, first, such a letter, if ever received, would probably be preserved on the files of the office. So would it probably be answered, as that was not only the usage in respect to all letters on official business, but it is shown, specially, to have been the custom of the office to act forthwith and officially on letters like these when received, and to send a reply in conformity to the decision of the company upon them. Yet no answer is stated ever to have been received concerning this; nor is any trace of an answer, or of the original, found in the office, either in the recollection of other officers, or in any files, books, records, or even memoranda.

Again, the insured, if conscious that such a letter had been sent, and reached its destination without being answered, would naturally have written, or called to ascertain, why information of the second insurance was not acknowledged in writing, apprised as the insured must be, both by the published terms of insurance and the policy itself, that the latter was void and ceased to operate without such an acknowledgment, and that it was the duty and interest of the insured to see to this acknowledgment being made. Nor is it a sufficient answer to the last objection, that he might rest quiet without a reply, supposing the acknowledgment had been indorsed on the policy, because the policy was in the possession of the insured, and not of the insurers; and hence it was well known to the insured that no such indorsement had been made on that.

It is difficult, likewise, to discover any adequate motive for not replying to the letter, if it was ever received, unless it be one resting on a gross fraud. If the company, or its president, on a receipt of it, should not choose to continue the policy, as would probably be the case, for reasons before mentioned, they would feel no reluctance to state the fact to the insured, and thus end a risk where the insurance exceeded the value of the property, and differed so much from their usual prudent terms of underwriting. But if they did choose to continue it, they would be likely soon to reply, stating that fact, because, without such a reply, they knew the insured would probably consider the policy terminated, in conformity with the stipulations in it, and would insure elsewhere, and they lose a premium which they had decided it was expedient for the company to retain.

This is all which it is considered necessary to say in respect to the evidence of the notice supposed by the plaintiff to have been given by Wheeler in 1836.

221*] *But it is urged, beside this, that another notice of the additional insurance at the Providence American Company was given the ensuing year, in December, 1837, through Mr. Peck. It is manifest, however, that this last notice, like the other, must stand or fall by itself, as they are distinct or disconnected in time and circumstances—not parts of one transaction—and are attempted to be sustained by testimony not cumulative, but entirely different. What is proved on this matter by Mr. Peck? Merely that a letter, written to him for another purpose, contained a statement of the existence of the second insurance, and his impression that he showed the letter to the president of this company for the other purpose. It will be seen that his testimony is rather argumentative from his usual habits of business, than positive, that he showed the letter at all to the president; but if he did, it is conceded that the object was to communicate merely the other fact—"the change of owners in the property." (See Wheeler's letter.) And if he carried the letter in his hands, which contained other matter, mentioning an insurance at the American office, he was not desired, as appears by the letter itself, to communicate that part of it, nor does he say, in his written reply, that he had communicated that part, but only "notified the Providence Washington Insurance Company that Mr. Wheeler had disposed of his interest to you, of which they had made record."

Beside this, and against any such notice having been given or intended for the purpose set up in this bill, there are most of the collateral considerations which have been enumerated in opposition to the other notice, alleged to have been given the previous year.

It must also be recollected, that a letter was written to the president by Wheeler on the same day he wrote to Peck, saying nothing in it concerning any second insurance; and the president promptly answered it, saying nothing in reply concerning that subject, but all which was expected as to the other. On this, it will occur immediately to ask, if Peck had given such notice, or been requested to do it, or even if Wheeler had before given it, why Wheeler did not at once write again, stating that an answer had been received as to the notice of a change of property, but none as to the second insurance. In short, a convincing proof that nothing was communicated but the change of owners in the property is, that nothing more seems intended to have been communicated; that nothing more was contained in the letter to the president, and nothing more wished to be stated by Peck, and no witness testifies that the other information was actually read by, or named to, the president, and no collateral fact renders the last circumstance probable. This is the whole evidence in the case, on this point, that is essential. To show more fully that under it none of the material questions of law arise or can be considered, which might otherwise be presented, it may not be unimportant to discriminate *and examine briefly [*222 what those questions are, and what must be proved in order to raise them.

Several precedents exist, where respondents in equity are allowed, by way of defense, to prove, by parol, that the written contract relied on does not contain all the original terms agreed, and in this way entitle themselves to be exonerated under the terms proved by parol. (*Woollam* v. *Hearn*, 7 Ves., 211; 2 Story's Eq. Jurisp., sec. 770; and Sugden on Vendors, 125 to 140, and cases cited.) Others exist, of this kind of proof being at times permitted to com-

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plainants in relation to separate subsequent terms of agreement modifying the prior ones, and on those subsequent terms being proved by parol, a recovery be allowed. (4 Bro. Ch. R., 514; 1 *Ibid.*, 92.) There are other precedents of complainants seeking to show by parol a portion of a contract existing when the original was made, but which was omitted from it by accident, and against doing which some of the authorities seem to decide. (7 Ves., Jun., 211; 15 *Ibid.*, 518; Story's Eq. Jurisp., sec. 770, and *note.*) On the contrary, some decide for it. (2 Ves., Sen., 875; 1 *Ibid.*, 456; 1 Starkie on Ev., 1015–1018.) But neither of these classes of cases can be claimed as embracing this. Here the parol proof is offered by a complainant, rather than by way of defense; and it is not pretended that any omission has happened of a part of the original contract, or that there has been any new separate contract modifying that.

On the contrary, in the most natural aspect of the case, it is one of a complainant attempting to show, by parol, a fact, which, if true, is supposed to establish a neglect or wrong in the defendants—a breach of official duty happening sometime after the contract of insurance was made—by not acknowledging then in writing the receipt of information that another policy had been obtained on the property, and saying in reply, under these new circumstances, that the first contract should either continue or terminate.

This presents, it will be seen, a question somewhat novel, namely, whether the specific performance of a duty in private life, not of a contract, can be enforced by courts of equity, and a party compelled, by a sort of *mandamus*, to acknowledge in writing what he had never promised so to acknowledge.

That question, however, need not now be decided, as such a duty is not claimed to exist except where a notice of the second insurance is actually received. And to prove such a receipt here, the evidence offered is certainly insufficient, whether requiring only one positive witness, unimpaired, or something more than one.

But there is another aspect of the case, which would present a different question of law if it was set out specially in the bill, and was supported by any stronger proof as to the material fact. It is, that the respondent should be con-
223*] sidered as barred or estopped *from setting up the want of an acknowledgment in writing, if that want was the result of his own neglect of duty. In that view, both the receipt of the information, and a consequent obligation to make an acknowledgment of it in writing, must be satisfactorily established before any neglect of duty can be imputed. But, as already shown, the first fact, the receipt of the information, is not established in that manner; and if it were, some difficulty might exist as to the second point, in considering a mere omission to reply as a wrong, and such a wrong as to estop the insurers from making an objection expressly provided for and allowed in the policy. Because it is not the insurer, but the insured, on whom the obligation seems to be imposed to have the notice of the further insurance reduced to writing, as a condition precedent to a recovery. It is the insured who by that further insurance increases the risk of the former insurers, and who ought, therefore, to have it both communicated and acknowledged in the manner stipulated, in order to render it sure that a continuance of the first risk is assented to. And though an omission to answer a letter from the insured might incommode him, and be a breach of comity, it is not easy to discover any engagement or promise which it violates.

Supposing, however, the bill to be broad enough in its allegations, and the sending of notice of the second insurance proved, and the duty to acknowledge it, if received, to be clear, we might, in most cases like this, enforce a discovery of the receipt of it, if coming to hand: and might enjoin the insurers against using, by way of defense, a circumstance caused by their own misconduct. (*Baker* v. *Biddle*, 1 Bald. C. C. R., 405.) But whether we could go further, and enforce a recovery for the loss on the equity side of this court, when an action had been brought for it on the law side and failed, and other remedies there may still exist for any wrong done, is a question open to doubt, and need not, for the reasons before stated, be now decided. (*Le Guen* v. *Gouverneur*, 1 Johns. Cas., 436; *Simpson* v. *Hart*, 1 Johns. Ch. R., 91; *Gordon* v. *Hobart*, 2 Sumner's C. C. R., 401.)

Finally, it is urged that a fraud has been perpetrated here, and that frauds constitute at all times a distinct and sufficient ground for a recovery in chancery. The fraud, if existing here, would not be in failing to answer the receipt of information of the second policy, stating frankly, as convenience and a spirit of courtesy required, whether the original insurance would be continued longer or not; but in omitting to give full explanations on the subject when the insured applied for a renewal of the policy, and in proceeding then to take a further premium, with a covert design to defeat the insurance on account of the second policy, provided any loss should happen.

The rule of equity is very broad to prevent a fraud, which would exist if one was permitted "to derive a benefit from his *own [*224 breach of duty and obligation." (2 Story's Eq. Jurisp., sec. 781.) And it has been laid down, that "if by fraud or misrepresentation one prevents acts from being done, equity treats the case as if it were done." (1 *Ibid.*, sec., 389; 11 Ves., 638.)

In the bill, there is an averment of fraud, and, at the close, a general prayer for any suitable relief; and it seems plausible, that we might, if satisfied of the existence of fraud, estop the party guilty of it from profiting through his own wrong, by preventing him from setting up, as a defense, the want of an acknowledgment in writing, when such want was the result or the instrument of his own misbehavior. But there is still a difficulty in this view of the case, from the circumstance that redress has been and still is open to the plaintiff, at law, for any fraud; and the Judiciary Act provides, that "suits in equity shall not be sustained in either of the courts of the United States in any case where plain, adequate, and complete remedy may be had at law." (Act of September 29th, 1789, sec. 16; 1 Story, 59.) And also from another reason, which

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has affected the previous points—a want of satisfactory evidence of the facts alleged. The first step in proving a fraud fails. Neither a neglect nor wrong is shown by the positive testimony of any one witness; and whatever is sworn to by anyone in behalf of the complainant is counteracted by opposing circumstances, rather than strengthened, as it should be, after a sworn denial in the bill, and in so grave a charge as fraud, by very satisfactory auxiliaries, though not, perhaps, by so strong evidence as is necessary in reforming contracts; that is, by evidence which is "irrefragable," and not open "to opposing presumptions." (1 Bro. Ch., 347; 2 Cranch, 419; 1 Ves., Sen., 317; 6 Ves., 332; 8 Wheat., 211; 1 Peters, 18; 2 Johns. Ch., 595, 630.)

It is a matter of regret that so great a loss, which the plaintiff and those under whom he claims intended to guard against by insurance, should happen entirely without indemnity. But it is to be remembered that the defendants gave abundant and repeated notice to him in writing and print in the policy itself, as well as other ways, that they would not take any risks on property where it was insured beyond a certain ratio of its full value, unless the circumstances were made known to them, and the additional policy recognized in writing, so as to avoid any mistake, or accident, or want of deliberate attention to the subject.

If the plaintiff, after all this, omitted to comply with so substantial a provision in the contract itself, as we are bound to believe on the evidence now offered, we see no way, equitably or legally, to prevent the consequences from falling on himself, rather than others, being the result either of his own neglect, or that of some of the agents he employed.

An adherence to such important rules is peculiary necessary for the protection of absent stockholders, often interested extensively in in-**225*]** surance *companies; and so far from its being unconscientious to enforce them, when their existence is well known, and when the risk has been increased without conforming to them, it is the only and just safeguard of all concerned in such institutions.

Let the judgment below be affirmed.

Mr. Chief Justice TANEY, being sick, did not sit in this cause.

S. C., 16 Pet., 495.
Cited—5 How., 275; 1 Wood. & M., 118, 145, 253, 297; 2 Wood. & M., 131, 379, 440, 491; 5 Biss., 142; 3 Cliff., 522.

THE AGRICULTURAL BANK OF MISSISSIPPI ET AL., *Plaintiffs in Error*,

v.

CHARLES RICE AND MARY, HIS WIFE, AND MARTHA PHIPPS, *Defendants.*

Married women—words of grant necessary to convey title to land—subsequent receipt of consideration will not give effect to deed void as to them—requisites of transfer of title.

A bond for the conveyance of land does not transfer the legal title, so as to serve as a defense in an action of ejectment, and such a bond, when signed by married women, neither confers a legal nor equitable right upon the obligees.

In order to convey by grant, the party possessing the right must be the grantor, and use apt and proper words to convey to the grantee.

If, therefore, the title to land is in married women, and a deed for the land recites the names of the husbands, as grantors, purporting to convey in right of their wives, the deed is insufficient to convey the title of the wives.

Nor is such a deed made effective by its being signed and sealed by the wives. The interest of the husbands is conveyed by it, but nothing more.

A receipt of money, subsequently, by the female grantors, does not pass the legal title, nor give effect to a deed, which, as to them, was utterly void.

THIS case was brought up by writ of error from the Circuit Court of the United States for the Southern District of Mississippi.

It was an ejectment brought by the defendants in error against the Agricultural Bank and others, to recover two undivided third parts of a lot of ground in the city of Natchez, bounded as follows: fronting on Main Street, between Canal and Wall streets (formerly Front and Second streets), beginning on Main Street, at the corner of a lot owned by the heirs of Samuel Postlethwaite, on which a large new cotton warehouse has been erected; thence along the northwestern side of Main Street, west, to the line of the lot bequeathed by Adam Bower, deceased, to his widow, now Mrs. Pendleton; thence north, along the eastern line of the said last mentioned lot, to the back line of the said premises, where the same bounds on the property formerly owned by Elijah Bell; thence along said last mentioned line, to the line of the lot belonging to the heirs of said Postlethwaite; and along said last mentioned line to the place of beginning, on Main Street; and being the same property now known as the City Hotel, in Natchez.

The plaintiffs below claimed the lot as the heirs and devisees of Adam Bower, deceased, who died seized of the property, and the only question in the case was, whether or not they had conveyed away their title in the manner prescribed by law.

*The circumstances are so fully set [***226** forth in the bill of exceptions, that a recital of the bill will be sufficient. The cause was tried at May Term, 1843, when the jury, under the direction of the court, found a verdict for the plaintiffs.

Bill of Exceptions tendered by the Defendants.

Be it remembered, that on the trial of this cause, and while the same was before the jury, the said plaintiffs, by their counsel, to maintain and prove the said issue on their part, gave in evidence and proved that one Adam Bower (now deceased), in his lifetime, previous to the year 1833, was seized in fee of a certain lot or parcel of land in the said declaration, and hereinafter described. That on the 16th of April, 1833, the said Adam Bower, being so seized of said land, died, leaving three daughters, to wit, Martha Phipps, wife of William M. Phipps; Mary Haile, wife of William R. Haile, and Sarah Bower, a *feme sole*, his heiresses, who

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NOTE.—*Requisites of deed of land.*
It must be in writing, signed and sealed. Co. Litt., 35, *b*.
This rule has been either expressly adopted by statutes of the several States or assumed as law, throughout the United States.
What crops or produce of land may be sold by parol without deed under seal. Frear v. Harden-

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took and inherited under the last will and testament of the said Adam Bower the said fee of the said land. That the said Martha, Mary, and Sarah, at the decease of the said Adam Bower, were infants under the age of twenty-one years. That since the death of the said Adam Bower, the said William M. Phipps and William R. Haile have both departed this life, and that since the death of the said William R. Haile, Mary Haile, his widow, has intermarried with Charles Rice, one of the plaintiffs. That at the time of the commencement of this suit, the said defendants were in possession of said premises, holding the same adversely.

The plaintiffs' counsel here rested.

Whereupon, the counsel for the said defendants, to maintain and prove the said issue on their part, gave in evidence, that after the death of the said Adam Bower, and while the fee of the said land was still vested in the said Martha, Mary, and Sarah, the said Noah Barlow and one Henry S. Holton contracted with the said heirs and their husbands aforesaid for the sale and purchase of the said lands, and in consideration that the said heirs would make and insure to them a good and valid title in fee-simple to the said land, they agreed to give and pay to the said heirs for the same the sum of $40,000; $5,000 whereof should be paid in hand on the delivery of possession, and the residue should be secured to be paid in installments, to be specified, in promissory notes, to be executed by the said Holton, and indorsed by the said Barlow, and by a mortgage on the said land. That the said Holton and Barlow, in pursuance of the said contract, paid the said $5,000 to the said heirs, and delivered to them twelve promissory notes for $2,916.66⅔ each, all bearing date the 16th day of April, 1835, and payable as follows: three of said notes in twelve months, three others in two years, three others in three years, and the other three in four years from the date thereof; all made by the said Henry S. Holton, and indorsed by the

227*] *said Noah Barlow. And the said heirs, upon receipt of the said notes and the said sum of $5,000, delivered to the said Henry S. Holton and Noah Barlow possession of the said land, with the tenements and appurtenances, and at the same time executed to the said Holton and Barlow a bond for title, in and by which said bond the said heirs agreed and bound themselves, and their heirs, to make, execute, and deliver, after duly acknowledging the same, a full and complete general warranty deed of all said premises and appurtenances, buildings and furniture, to the said Holton and Barlow, their heirs and assigns, thereby covenanting a good and indefeasible title to said lot of ground to said Holton and Barlow, their heirs and assigns, against all persons, as soon as a surveyor can be had to make a survey of the premises to ascertain the exact boundaries. That the said bond was executed by said Sarah, as Sarah Gibson, and by her husband, David H. Gibson, the said Sarah having intermarried with the said David H. Gibson between the drafting of the said bond and its execution; which said bond is in the words and figures following, to wit:

Agreement entered into and executed this —day of April, 1835, between William M. Phipps, and ——, his wife, William R. Haile, and ——, his wife, and Sarah Bowers, parties of the one part, and Noah Barlow and Henry S. Holton, parties of the other or second part: the above named parties of the first part, for the consideration hereinafter named, agree this day to deliver to said parties of the second part full possession of the tenements, tavern, stables, and other buildings occupied and owned by the late Adam Bower, and heretofore also occupied since his death by the said William M. Phipps, and the lot or parcel of ground upon which the same stands, being on the north side of Main Street, between Canal and Wall streets, in said city of Natchez; and also the furniture, kitchen and household, as well as that about the stables, and belonging to and in said tavern, buildings, and said premises; and said parties of the first part do further, for the consideration hereinafter named, agree and bind themselves, and their heirs, to make, execute, and deliver, after duly acknowledging the same, a full and complete general warranty deed of all said premises and appurtenances, buildings and furniture, to said parties of the second part, their heirs and assigns, thereby

burgh, 5 Johns., 272; Lower v. Winter, 7 Cow., 263; Evans v. Roberts, 5 Barn. & Cress., 820; Anon., 1 Ld. Raym., 182; Smith v. Surman, 9 Barn. & Cress., 561; Yale v. Seely, 15 Vt., 221; Teal v. Aurty, 2 Brod. & Bing., 99; Claflin v. Carpenter, 4 Metc., 580; Crosby v. Wadsworth, 6 East., 602; Jones v. Flint, 2 Perry & D., 594; 10 Ad. & Ell., 753; Jainsbury v. Matthews, 4 Mees. & W., 343; Brittain v. Mackay, 1 Ired. N. C., 265; Stewart v. Doughty, 9 Johns., 113; Waddington v. Bristow, 2 Bos. & Pull., 452; Emerson v. Heelis, 2 Taunt., 38; Long. on Sales, p. 80; Green v. Armstrong, 1 Denio, 550; Bank of Lansinburgh v. Crary, 1 Barb., 542; Pierrepont v. Barnard, 5 Barb., 364; Dunne v. Ferguson, 1 Hayes, 542.

The definition and character of a seal, as a requisite to a deed, are well settled. By common law the seal is an impression upon wax or wafer or some tenacious substance capable of being impressed. A scrawl with a pen at the end of the name is not a seal. According to Lord Coke, a seal is wax, with an impression. Inst., 169; Perk. Conv., sec. 134; Bro., tit. *Faits*, 17, 30; Lightfoot and Butler's Case, 2 Leon, 21; Warren v. Lynch, 5 Johns., 239; Andrews v. Heriot, 4 Cow., 508.

The common law definition of a seal, and the use of rings and signets for the purpose, and by way of signature and authenticity, is corroborated by the usages and records of all antiquity, sacred and profane. Genesis, ch. 33, v. 18; Exodus, ch. 28, v. 11; Esther, ch. 8, v. 10; Jeremiah, ch. 22, v. 10, 11; Cicero, Acad. Q. Lucul., 4, 26; Heinec. Elem. Jur. Civ., 497.

In the eastern States, generally, and in New York, sealing in the common law sense, is requisite. Yet in New Hampshire it has been held that a distinct impression of the seal upon paper, without wax or wafer, is a sufficient seal. Carter v. Benley, 9 N. H., 558; and in Connecticut, by statute in 1838, deeds executed without seal, are declared to be valid as though the same had been sealed.

But in the southern and western States, from New Jersey inclusive, the impression upon wax has been disused to such an extent as to induce the courts to allow (but with certain qualifications in some of the States) a flourish with the pen, at the end of a name, or a circle of ink, or scroll, to be a valid substitute for a seal. Force v. Craig, 2 Halst., 273; Alexander v. Jameson, 5 Binn., 238; Temple v. Logwood, 1 Wash., 42; Relph v. Gist, 4 McCord, 25; Trasker v. Everhart, 3 Gill & J., 234, 246; 1 Munf., 487; 1 Minor, Ala., 187; Statute of Alabama of Feb. 2, 1839. Many States, as New Jersey, Delaware, Virginia, Ohio, Kentucky, Michigan, Indiana, Illinois, Missouri, and Tennessee, have provided by statute, that the scroll may supply the place of the seal. Act of Michigan, April 12, 1827; Overseers of the Poor of Hopewell v. Overseers of the Poor of Amwell, 1 Halst., 169; Perrine v. Cheeseman, 6 Halst., 174; Revised Laws of New Jersey, 395, sec. 1; Chase's Statutes of Ohio, Vol. I., 287; VanBlair-

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conveying said lot of ground, appurtenances, and buildings, and said furniture, and warranting a good and indefeasible title thereto to said parties of the second part, their heirs and assigns, against all persons, as soon as a surveyor can be obtained to make a survey of said premises, so as to ascertain the exact extent and boundaries of said premises. In consideration of which, said parties of the second part agree to pay this day to said parties of the first part five thousand dollars, and upon the execution and delivery of the said deed to them as afore-
228*] said, *they, the said parties of the second part, their executors or administrators, will execute and deliver to said parties their promissory notes for thirty-five thousand dollars, payable in one, two, three, and four years, in the following manner, to be secured by a mortgage executed by said parties of the second part, and their wives, on said premises, to wit:

WM. M. PHIPPS.	[L. S.]
MARTHA PHIPPS.	[L. S.]
W. R. HAILE.	[L. S.]
MARY HAILE.	[L. S.]
D. H. GIBSON.	[L. S.]
SARAH GIBSON.	[L. S.]

That the said bond, though apparently incomplete, was executed as complete, and the notes were secured by mortgage by said Holton and Barlow, according to said contract. That after the execution and delivery of said bond and notes, and when the said Holton and Barlow were in quiet possession of the premises, they handed said bond to their counsel, with instructions to have a deed drawn in compliance with said bond, and on or about the 14th of September, 1835, received from their counsel an instrument in writing, or deed, without examining the same, all parties supposing it to be correct, and in conformity with their directions; that the said deed was executed and delivered on the said 14th of September, 1835, by the said heirs and their respective husbands. And it was intended by said heirs to convey to said Holton and Barlow the complete title of the said heirs and their husbands in said land, which said deed is in the words and figures following, to wit:

This indenture, made the 14th day of September, in the year of our Lord one thousand eight hundred and thirty-five, between William M. Phipps in right of his wife Martha, William R. Haile in right of his wife Mary, and David H. Gibson in right of his wife Sarah, legal heirs and representatives of Adam Bower, deceased, of the County of Adams and State of Mississippi, of the one part, and Noah Barlow and Margaret, his wife, and Henry S. Holton and Theoda, his wife, of the same place, of the other part, witnesseth: that the said parties of the first part, for and in consideration of the sum of forty thousand dollars, to them in hand paid by the said parties of the second part, at or before the sealing and delivering of these presents, the receipt whereof is hereby acknowledged, and the said parties of the second part, their heirs, executors, and administrators forever released therefrom, by these presents, have granted, bargained, sold, conveyed, and confirmed, and by these presents do grant, bargain, sell, convey, and confirm unto the said parties of the second part, their heirs and assigns forever, all that certain lot or parcel of ground situate in the city of Natchez *and State aforesaid, fronting on Main [*229 Street, between what were, before the confusion of names produced by the wisdom of the city council, Front and Second streets, which said lot is bounded and described as follows, to wit: beginning on Main Street, at the corner of a lot now owned by the heirs of Samuel Postlethwaite, on which a large new cotton warehouse has been erected by Harriett ——, along the northwestern side of Main Street, west, to the line of the lot bequeathed by Adam Bower, deceased, to his widow, now Mrs. Pendleton; thence north, along the eastern line of said last mentioned lot, to the back line of the premises hereby conveyed, where the same bounds on the property of Elijah Bell; thence along said last mentioned line to the line of the lot belonging to the heirs of said Postlethwaite; and along said last mentioned line to the place of beginning on Main Street; the lot hereby conveyed being the large tavern establishment occupied by said Bower in his lifetime, and

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cam v. Yeo, 2 Blackf., Ind., 322; Statute Laws of Indiana, 1838, p. 462.

In Mississippi and New York, the seal retains its original definition and character as to deeds. Revised Code of Mississippi, 1824; Warren v. Lynch, 5 Johns., 239; Farmers' & Man. Bank v. Haight, 3 Hill, N. Y., 493.

But in cases of courts and public offices, an impression on paper, without the use of wafer or wax, is valid. 2 N. Y. Rev. Stat., 276, sec. 10; 404, sec. 41.

At common law, a seal is an impression upon wax, wafer, or some other tenacious substance. An impression upon paper alone is not a seal, except where it has been made so by statute. Colt v. Millikin, 1 Den., 376; Warren v. Lynch, 5 Johns., 239; Bank of Rochester v. Gray, 2 Hill, 227; Farmers' & Man. Bank v. Haight, 3 Den., 493; Andrews v. Herlot, 4 Cow., 508; overruling Meredith v. Hinsdale, 2 Cai., 262.

An actual seal—not mere words or lines in writing—stamped upon paper, of sufficient tenacity to receive and retain the impression, must be deemed technically and strictly a seal. Pillow v. Roberts, 13 How., 472; Hempst., 624; Follett v. Rose, 3 McLean, 332; Ross v. Bedell, 5 Duer, 462; Curtiss v. Leavitt, 17 Barb., 399; but see same case aff'd 17 N. Y., 321, 541, 546; but to the contrary is Bank of Rochester v. Gray, 2 Hill, 227.

A piece of paper, affixed with mucilage, and stamped with a permanent impression, is good as a common law seal. Gillespie v. Brooks, 2 Redf. N. Y., 349.

The finding of the court below, on inspection of the deed, that a revenue stamp was intended for a seal, will not be disurbed, on appeal. VanBokkelen v. Taylor, 62 N. Y., 105.

A mark with ink, acknowledged by the maker to be his seal, is sufficient to create a specialty, though no wax, wafer, or other similar substance be used. United States v. Coffin, Bee's Adm., 140.

In 7th U. S. Circuit, *Illinois*, a bond with a scrawl seal is valid. United States v. Stephenson, 1 McLean, 462.

One seal will suffice for several grantors. Sir W. Jones, 268; 4 Term R., 313; Ludlow v. Simons, 2 Cai. Cas., 1, 7, 42, 55; Mackay v. Bloodgood, 9 Johns., 285; Townsend v. Hubbard, 4 Hill, 351.

If two sign an instrument, a seal affixed opposite the name of one is to be deemed the seal of both, if it is shown to have been fixed by authority of both. Perk., 59, sec. 134; 1 Dall., 63; 3 Monr., 376; 2 Dev., 493; 1 Bl., 102; 7 Gill & J., 284; VanAlstyne v. VanSlyck, 10 Barb., 383.

A deed cannot bind a party sealing it, unless it contains words expressive of an intention to be bound. If the wife merely signs a deed with her husband, but it is not otherwise mentioned in the deed, and there are no words of grant or release, as from her, the deed has no operation against her. Catlin v. Ware, 9 Mass., 218; Lufkin v. Curtis, 13 Mass., 223.

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since his death by the said William M. Phipps; also, all the household and kitchen furniture, and apparatus, and utensils about said tavern, stables, or other buildings on said lot; together with all and singular the appurtenances, hereditaments, privileges, and advantages whatsoever unto the above described premises belonging, or in any wise appertaining; and also all the estate, right, title, interest, and property, and claim whatsoever, either at law or in equity, of them the said parties of the first part, of, in, and to the same; to have and to hold the above granted, bargained, and described premises, with the appurtenances, unto the said parties of the second part, their heirs and assigns, forever; and the said parties of the first part, for themselves, their heirs, executors, and administrators, do covenant, grant, promise, and agree, to and with the said parties of the second part, their heirs and assigns, that they, the said parties of the first part, and their heirs, the above described and hereby granted premises, and every part thereof, with the appurtenances, unto the said parties of the second part, and their heirs and assigns, against the said parties of the first part, and against all persons or —— claiming, or to claim said premises, or any part thereof, shall and will warrant, and by these presents forever defend.

In witness whereof, the said parties of the first have hereunto set their hands and seals, this day and year above written.

WM. M. PHIPPS. [L. S.]
MARTHA PHIPPS [L. S.]
WILLIAM R. HAILE. [L. S.]
MARY HAILE. [L. S.]
DAVID H. GIBSON. [L. S.]
SARAH GIBSON. [L. S.]

Signed, sealed, and delivered in the presence of N. W. CALMES, J. P.

230*] *THE STATE OF MISSISSIPPI. Adams County:

Personally appeared before the undersigned, justice of the peace for said county, William M. Phipps and Martha, his wife, and William R. Haile and Mary Haile, his wife, and David H. Gibson and Sarah Gibson, his wife, and acknowledged that they signed, sealed, and delivered the within deed on the day and year and for the purposes therein contained. And Martha Phipps, Sarah Gibson, and Mary Haile, wives of William M. Phipps, William R. Haile, and David H. Gibson, having been examined separate and apart from their husbands, and acknowledged that they signed, sealed, and delivered the same as their act and deed, free of fears, threats, or compulsion of their said husbands.

Given under my hand and seal, this 15th day of September, 1835.

N. W. CALMES, J. P.

Received for record, 15th September, 1835.

F. WOOD, Clerk.
By S. WOOD, D. Clerk.

STATE OF MISSISSIPPI, Adams County:

I, Fleming Wood, clerk of the Probate Court for said county, do hereby certify that the within deed is recorded in my office, in book W of the record of deeds, pages 300 and 301.

Witness my hand and seal of office, this 16th day of September, *Anno Domini* 1835.

[L. S.] F. WOOD, Clerk.
By S. WOOD, D. Clerk.

That in the said deed, by a mistake of the draftsman, the said heirs, Martha, Mary, and Sarah were not named as grantors, but that only their several husbands are so named, although said deed is executed by said heirs and their husbands.

That on the 14th day of September, 1835, on the delivery of said deed, the said Holton and Barlow executed, acknowledged, and delivered to the said heirs and their several husbands a deed of mortgage on said land, to secure the payment of said notes according to said contract, and the said notes and mortgages were accepted by said heirs and their husbands. That at the time of the marriage of the said Mary Haile with the said Charles Rice, in the year 1838, said Holton and Barlow were in quiet and peaceable possession of the said land, and ignorant of any objection to their title. That the buildings on said land, at the time of the purchase, having been destroyed by fire, the said Holton and Barlow rebuilt the same at an expense of $100,000, which improvements were made with the full knowledge of said heirs, and without any objection on their part. And that the said Martha Phipps and Mary Haile, now Mary Rice, by accepting and receiving payments of money from the said Holton and Barlow upon the said notes and *mortgage, during the time between the [*231 death of the said Phipps and Haile, and the last marriage of the said Mary, and when the said Martha and Mary were of full age, which said payments were proved to have been made and received, have further ratified and confirmed the said bond and the said deed.

That said Holton and Barlow, principally by reason of such expenditures, became largely indebted to the Agricultural Bank and the Planters' Bank, two of the defendants, and to secure that indebtedness, the said Barlow, on the 5th of May, 1838, executed to them a good and valid deed of mortgage, conveying to them his undivided interest in said premises.

That the said Holton, in February, 1839, sold and conveyed his interest in said premises to the said Demon B. Spencer, one of the defendants; that said Spencer, in consideration of the terms of his purchase from Holton, did, on the 27th of July, 1839, convey the same, by a good and valid mortgage, to the said Planters' Bank.

That the said Agricultural Bank and the said Planters' Bank are now in possession of said premises as mortgagees, and by virtue of a good and valid quitclaim deed from the said Sarah Gibson and her husband David H. Gibson.

That the said Holton and Barlow, and those claiming under them, were unmolested in their possession, and unapprised of any supposed objection to their title. That they have paid the whole of said purchase money.

Which testimony, as set forth herein on both sides, was all the testimony in the cause.

The counsel for the said defendants here offered to read in evidence the said bond for title, and the said deed hereinbefore mentioned, in connection with the foregoing proofs.

But to the reading of the same in evidence the said counsel for the said plaintiffs objected, because he says, that at the days of the dates of the said bond and of the said deed the said

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heirs, Martha, Mary, and Sarah, were under coverture, and were infants under the age of twenty-one years, so that the said bond and the said deed are absolutely void. The said judge did then and there declare and deliver his opinion, that the said objection, so taken by the said counsel for the said plaintiffs, ought to be allowed; that the said bond and the said deed ought not to be admitted in evidence, and did accordingly decide that the same should not be read in evidence on the part of the said defendants; to which said opinion of the said judge, the said counsel for the said defendants did then and there, in due form of law, except, before the jury retired from their box, and prayed that the said exceptions might be signed, and sealed, and made a part of the record. And it is accordingly done. S. J. GHOLSON. [L. S.]

May 24th, 1843.

232*] *To review this decision of the court below, the case was brought up to this court.

It was argued by *Mr. Mason*, Attorney-General, for the plaintiffs in error, and *Mr. Thomas J. Johnston* and *Mr. Crittenden* for the defendants in error.

Mr. Mason, for the plaintiffs in error, stated the case, and then proceeded:

I. The title, bond, and deed were admissible in evidence. The common law imparted to the husband, as a necessary incident to the seisin he acquired of the wife's freehold estate by the marriage, a power, by alienation, of converting her interest in it to a mere right. Hence a conveyance by him of the fee operated a discontinuance, and ejectment would not lie; although, by the statute of 32 Hen. VIII., ch. 28, sec. 6, explained by the seatute of 34 and 35 Hen. VIII., the act of the husband alone was not permitted to have this effect, and a right of entry was reserved to the wife, and to her heirs, on the death of the husband, it has never been questioned that she might, after the termination of the coverture, confirm her husband's deed. (1 Roper on Husband and Wife, 54, 55.)

The deed from the husband is only a link in the chain of title, and was necessarily admissible, in connection with other testimony, to establish an act of confirmation by the wife, when sole and free from disability.

The reason assigned by the court below was wholly insufficient; neither the infancy nor the coverture of the *femes covert* necessarily excluded the deed.

There are many cases in which the deed of a married woman binds her, without confirmation, when sole, although, at its date, she was an infant; and the deed of a husband for his wife's real estate may be confirmed, and pass the title. (Douglas's Rep., 53, Cowper's Rep., [illegible]; 2 P. Wms., 126.) The deed from the husband is the basis, or first link, in the chain of title, and ought not to have been excluded. If the bond and deed had been admitted as evidence, and no sufficient confirmation by the wife, when sole, had been shown, it would have been competent for the court to charge the jury as to the sufficiency of these instruments in law to bind the wife's interests.

The court erred in excluding evidence which [illegible] was insufficient, but which, nevertheless was competent.

II. It is submitted, that it appears on the record, notwithstanding this exclusion of the first link in defendants' paper title, that the female plaintiffs had ratified and confirmed the *bona fide* sale of the fee-simple property after their disability was removed.

1. They received and gave acquittances of the purchase money. They cannot be permitted to deny knowledge of the consideration *for which the payments were thus [*233 made. They had signed both bond and deed. The deed was acknowledged by them, and their relinquishment made privily, with full explanation, and the deed was of record.

2. The tenement on the premises was destroyed by fire, and they, free from disability, stood by and permitted the grantees of their husbands and themselves to erect buildings thereon, at a cost far exceeding the purchase money, without interposing, by any warning that the title made was objected to and its confirmation denied; such acts, on the part of persons free from disability, ought to be regarded as confirmatory of a defective *bona fide* conveyance; and the parties, although they be females, will not be permitted to recover the property thus improved without objection on their part, and for which they have themselves received the full payment of the purchase money.

III. The deed is the act of the *femes covert;* they are parties to it, executed it, and the estate granted and intended to be conveyed was their property. The deed is between the legal heirs of Adam Bower, deceased, of the first part. Martha, wife of Phipps, Mary, wife of Haile, and Sarah, wife of Gibson, were the children and heirs of Bower. They signed the deed, and their renunciation was taken in substantial conformity with the law of Mississippi, and the thing granted was their inheritance. The phraseology employed is not material. A deed by an attorney in fact is valid, whether he signs as B. W., attorney for R. C.: or R. C., by B. W., his attorney. (4 Hen. & Mun., 184.)

The claim of title set up by two of these females, now that they are married to other husbands, is sustained by the most refined and technical reasoning. The printed argument of *Mr. Johnston* affords a specimen of this.

It is not denied, that, to bind a married woman by a deed executed with her husband during coverture, she must have acknowledged it in substantial conformity with the terms of the statute. The requisites are—

1. A previous acknowledgment made by her, on a private examination, apart from her husband.

2. That she signed, sealed, and delivered the same as her voluntary act, freely, without any fear or compulsion of her husband.

3. And a certificate thereof, written on or under the said deed of conveyance, signed by the judge or justice before whom it was taken.

The statute of Mississippi does not prescribe the form of the certificate. The guards thrown around the rights of married women are contained in these requisites, and the deed is good and binding, if they have been substantially observed.

In Virginia there is a similar statute, with an additional section, prescribing the form of the wife's acknowledgment. Tucker, in his

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234*] *Commentaries (Vol. I, tit. Deeds of *Feme Covert*, p. 267), after referring to these provisions of the Virginia statutes, remarks:

"Here we see that the object of the law is to ascertain, by a privy examination of the wife, apart from her husband, whether, in the execution of the deed disposing of her rights, she exercises that free will which is of the essence of all contracts. This is effected by an examination in court by one of the judges thereof or in vacation by two justices of the peace." [One is sufficient in Mississippi.] "Now, upon well received principles, it is clear that this act must be strictly pursued; for it is an innovation upon the common law; and, moreover, it prescribes the mode in which a person may convey, who was before disabled to convey. That mode must therefore be pursued; and as we do not pursue it if we vary from it, so it follows that it should be substantially, at least, complied with."

Acts of justices of the peace, done in the country, are always viewed favorably; and, if substantially comformable to law, are held sufficient.

The certificate in this case is on the ninth page of the record. It is not denied that the justice of the peace was duly authorized to act, and that his official certificate was written on or under the deed. But it is objected, that he has not done or certified what the law requires.

There is no objection that the same certificate embraces two official acts. The first paragraph certifies the acknowledgment of all the parties to the deed, with a view to its record. That was a separate and independent act.

The second paragraph or sentence of the certificate is the subject of dispute. What does the justice certify?

1. That Martha Phipps, Sarah Gibson, and Mary Haile, wives of William M. Phipps, William R. Haile, and David H. Gibson, having been examined separate and apart from their husbands,

2. Acknowledged that they signed, sealed, and delivered the same as their act and deed, free of fears, threats, or compulsion of their said husbands.

3. And these facts he certifies.

Now, is not this a substantial compliance with the statute?

The objection to the grammatical construction of this sentence does not appear to me well founded. Its true reading is, that the justice certifies his having examined the wives separate and apart from their husbands: and, on that examination, the wives, thus being separate and apart from their husbands, made the acknowledgment. Privy examinations in court and in the country have been long practiced. The terms are technical. It is against the influence of the husband that the wife is protected; and an examination is privy or private, within the statute, when he is not present. The casual presence of others would not vitiate it; and 235*] *there is no just reason to infer, in this case, that anyone was present. The statute requires a "private examination, apart from the husband." The justice certifies that he made an examination, separate and apart from the husband.

The statute requires a previous acknowledgment that she signed, sealed, and delivered the same as her voluntary act, freely, without fear, threats, or compulsion of her husband. The certificate is, that they acknowledged to have signed, sealed, and delivered the same as their act and deed, free of fears, threats, or compulsion of their husbands.

This court, in 12 Peters, 345, said: "The law presumes a *feme covert* under the coercion of her husband." It is against this presumed influence that the privy examination is intended to protect her, when the statute requires, that she shall acknowledge the same as her voluntary act, freely, without fear; and it means nothing more than that she shall declare her act to have been done free from such influences. This is done in the certificate, and the affective and essential words of the statute are employed. (*Hepburn* v. *Dubois*, 12 Peters, 345; *Shaller* v. *Brand*, 6 Binney, 435; *McIntire* v. *Ward*, 5 Binney, 296; 1 Peters, 155.)

There is no proof in the record that the *femes covert* were infants.

IV. It is objected that the acknowledgment of the *femes* is not recorded. By the record, it appears that the deed, with the certificate, which was an essential part of it, was received for record on the day after the execution; and, on the next day, the clerk certifies that the within deed is recorded. It is an unauthorized conclusion, that the certificate was not recorded as a part of the deed.

No such objection appears to have been taken below, and there is nothing in the circumstances of this case to induce the court to presume defects which do not appear to exist in favor of the plaintiffs. But no question arose as to the record of the certificate. If the fact were so, it was sufficient; but the court, by refusing to allow the deed to be read, deprived the defendants of the right to exhibit the proof, which, it is confidently asserted, was at hand to perfect their case, so far as the record of the certificate was required by law.

The defendants, *bona fide*, bought and paid for the property of the *femes*. They united in a bond and conveyance of the property; when relieved from disability, they received the purchase money, and they stood by and permitted the innocent purchasers of this property to put on it improvements at a cost of more than one hundred thousand dollars, without interposing objection or assertion of title; they have not proposed to return the purchase money, or to indemnify against enormous expenditure for improvements. It can hardly be, that, under such circumstances, the claim *of title set up by their subsequent husbands can be suc- [*236 cessfully maintained by the refined and technical reasoning resorted to.

Mr. J. J. Johnston, for defendants in error:

The exceptions to the decision of the court below were taken and were confined to the rejection of two instruments of writing, which were offered in evidence on behalf of the defendants, now the appellants; and, if they were properly rejected, the judgment must be affirmed.

The first of these was a bond, and the second a deed, in alleged pursuance of it, both purporting to have been executed, under coverture, by Mrs. Haile (now Mrs. Rice) and Mrs. Phipps, to persons under whom the appellants claim. The

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question of the title depends solely upon the validity of these conveyances.

I. 1. As to the bond, it is only necessary to refer to the case of *Hickey's Lessee* v. *Stewart et al.*, which was decided, upon able debate and ample deliberation, at the last term of this court, wherein it was held that an equitable title could not be set up either to sustain or to defeat an action of ejectment. (3 How. U. S. R., 760.) Hence, had the bond been acknowledged by these married women, and otherwise valid, it was properly rejected by the lower court.

2. The same ceremony of an acknowledgment, on a private examination, is required, by the statute of Mississippi, in the alienation of equitable as in that of legal estates, both kinds of estate being within the terms and meaning of the statute: "No estate of a *feme covert* shall hereafter pass by her deed or conveyance," &c. (quoted hereafter). (Howard & Hutchinson, 347.) So, in Ohio, leases by *femes covert* must be acknowledged. (6 Ohio R., 313.) In this case, there is no certificate or acknowledgment whatever of the bond.

3. The bond of a married women is, upon the general principles of the law, utterly void. (2 Kent, 168, 5th ed.; 6 Wend., 1; 1 Bailey, 184; 2 Story's Eq., 617; 5 Day, 492; 7 Conn. R., 128.)

II. The deed was properly rejected upon three grounds:

1. Its intrinsic defect. Phipps, Haile, and Gibson grant, "in right of their wives," but these wives are not parties to the deed. It is true, their signatures are affixed, but their names are not in the body of the deed. Now, it is rather trite learning to say, and to say here, that there must be a grantor, a grantee, and a thing granted, to every deed that grants land; that a grantor is as necessary as a grantee or thing granted; or that there is a place in a deed for the name of the party who grants, and that this place is not the bottom of the deed. This is a good conveyance of the life estates of Phipps, Haile, and Gibson; the two former be-
237*] ing *dead, and their wives never having been made parties to it by apt words, are not bound by it.

A deed of land, executed by husband and wife, but containing no words of grant by the wife, does not convey her estate in the land, nor her right of dower. (3 Mason's C. C. R., 347.)

Where there are no grantors, there is no remedy even in equity. (10 Ohio R., 305.)

A deed is invalid, though the *feme covert* be named in the premises, and her signature be affixed, if not named elsewhere. (7 Ohio R., 195.)

2. The deed was properly rejected, because of the defective certificate of examination and acknowledgment.

The statute of Mississippi is as follows (Howard & Hutchinson, 347):

"No estate of a *feme covert* in any lands, tenements, or hereditaments, lying and being in this State, shall hereafter pass by her deed or conveyance, without a previous acknowledgment made by her, on a private examination, apart from her husband, before a judge, &c., that she signed, sealed, and delivered the same as her voluntary act and deed, freely, without any fear, threats, or compulsion of her husband, and a certificate thereof written on or under said deed or conveyance, and signed by the judge or justice before whom it was made; and every deed or conveyance so executed and acknowledged by a *feme covert* and certified as aforesaid shall release and bar her right of dower in the lands, tenements, and hereditaments mentioned in such deed or conveyance."

It does not appear from the certificate in this case, that the acknowledgment of the married women was taken on a private examination, which is required by the statute.

In the first sentence of the certificate, the husbands and their wives all appear and act together; in the second, the wives all appear and act together. For it is stated: "And Martha Phipps, Sarah Gibson, and Mary Haile, wives of William M. Phipps, William R. Haile, and David H. Gibson, having been examined, separate and apart from their husbands, and acknowledged that they signed," &c. If grammatical construction require the insertion of the word "having" before the word "acknowledged," it is questionable whether there be any affirmative statement of the acknowledgment at all. If the "word separae," which is not in the statute, and imparts no vigor to its phraseology, be stricken out, the certificate will be: "And Martha Phipps, Sarah Gibson, and Mary Haile, wives, &c., having been examined apart from their husbands," &c. It is in vain to call this an "acknowledgment made by her (them) on a private examination"; for it eviscerates the very vitals of the statute. The examination may have *been not only apart and sep- [*238
arate from their husbands, but private, or, in the language of Coke, solely and secretly, and yet the acknowledgment may have been made not only in the presence of the relatives, friends, and dependents of their husbands, but in that of the husbands themselves. The interpolation of the word "separate" imparts no strength to "apart," nor are they, separate and apart, or united, equivalent to "private"; "separate" having reference to the position of husband and wife, while "private" indicates the position of the magistrate and the wife in reference to the whole world besides. The two houses of Congress are separate and apart, but not very private; the Chief Justice and his associates are separate and apart, yet together constitute one public bench. The examination of married women, separate and apart from their husbands, though in the company of each other, would not be regarded as a compliance with the statute; yet it is obvious from the face of the certificate, that the three sisters, Mrs. Phipps, Mrs. Gibson, and Mrs. Haile, were all of them together, acting, acknowledging, and being examined; and, for aught that appears to the contrary, may have been surrounded, at the time of the acknowledgment, by the friends, relatives, and dependents of their husbands, and of their grantees, against whose arts and influences, if it do not appear by the certificate that the rights of the married women have been shielded and protected, the statute becomes a dead letter, and the private examination a mockery. The case of *Jones* v. *Maffett et ux.* (5 Serg. & Rawle, 534) was decided upon the ground that the Pennsylvania statute did not require a privy examination, but that it was sufficient if the *feme covert* were examined "separate and apart

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from her husband." There is a mutilated quotation, I believe, in the same case, of the maxim, *omnia presumuntur rite esse acta*, which is severed from *donec probetur in contrarium*. The certificate annihilates the presumption.

The disability of coverture can only be overcome by the precise means allowed by law for the alienation of the real estate of married women (2 Story's Eq., 617), of which an essential part is a private examination, derived from the English mode of conveyance by fine, and rescued from its wreck. Lord Coke thus discourseth of the same:

"The examination must be solely and secretly, and the effect thereof is, whether she be content of her own free good will, without any menace or threat, to levy a fine of these parcels, and name them to her, everything distinctly contained in the writ, so as she perfectly understand what she doth; and if the judge doubteth of her age, he may examine her upon her oath." (2 Inst., 515; 6 Wend., 12.)

It is a general principle of American law, that all deeds of married women, without a privy examination, are void (2 Lomax's Dig., 239*] *18); and that all acts not conformable to acts of Assembly are void. (*Ibid.*, 52.) Some States provide, simply, that there shall be a private examination upon the execution of a deed by a *feme covert*, and leave everything else to the integrity and intelligence of the officers authorized to conduct it; others prescribe the acts to be performed by the officer, such as reading the deed, making known its contents, or explaining its effects (12 Leigh, 464; 1 Binney, 477; 6 Serg. & Rawle, 50), without the performance of which the deed is inoperative and void. But it is obvious that the requirement of the private examination alone, and the requirement of the acts which constitute it, are the same thing—the object of both being to remove the disability which results from the matrimonial connection, while they throw an intrenchment around the rights of the *feme covert*, who is hardly considered, in contemplation of law, to have a separate legal existence, her husband and herself constituting but one person. The sacred injunction, Whom God hath joined together, let no man put asunder, is, *pro hac vice*, disregarded, and the minister of the law is clothed with a confidence which is denied to the husband. The inefficient or negligent discharge of the duties of the office, which tend to its degradation, will neither be sustained by subtle construction, nor receive the countenance of courts of justice.

The words of the certificate are, that "they signed, sealed, and delivered the same as their act and deed, free of fears, threats, or compulsion of their said husbands;" the language of the statute is, that "they signed, sealed, and delivered the same as their voluntary act and deed, freely, without any fear, threats, or compulsion of their said husbands." The omission of two words of such pregnant import, emphatically reiterated, as if to stamp freedom of volition not only on the act itself, but the manner of the act, is, I humbly submit, so utterly fatal to the certificate as to render any further remarks unnecessary, except that, though an act done by a person capable of contracting would be presumed to have been voluntary, yet this is not that case; and that each word of the certificate may be perfectly true, yet the deed may have been signed reluctantly and not voluntarily, sealed reluctantly and not voluntarily, and delivered reluctantly and not voluntarily.

III. The acknowledgment of the *femes* is not recorded, the certificate of the clerk embracing the deed only.

Be it remembered, that the deed was not proved as an original; to be read otherwise than as such, both the acknowledgment and the certificate must be recorded. (Howard & Hutchinson, 343.)

It is not the fact, but the recording of the fact, that makes the deed effectual. (Tate's Dig., 170; 1 Pet., 138, 140.)

It is in the nature of a judicial proceeding, of which there must be a record.

*IV. *Confirmation.* It may yet be [*240 contended, that the bond, or the deed, or the mortgage, was confirmed, after disability removed, and that the mode of confirmation was the receipt of money upon the notes given for the property for which suit was brought.

Void instruments are incapable of confirmation (Story's Cont., sec. 47; Plowden's R. 397), which must be by an instrument of as high a nature. (8 Taunt., 36; 10 Peters, 59.)

A lease, which is void as to a remainderman, cannot be set up as a defense to an action of ejectment brought by him, although it be proved that he received rent, or suffered the tenant to make improvements. (Law Lib., Oct., 1845, p. 300; Doug., 50.)

Confirmation cannot be, unless with a knowledge of their rights. (5 Ohio R., 355.)

To make an act amount to redelivery, there must be clear knowledge. (5 Dana, 234.)

It must be known that receipt of money made good the redelivery. (9 Dana, 477.)

The act relied on here was the receipt of money upon the notes, without any reference whatever to the bond, deed, or mortgage, by payor or payee.

Upon the mortgage, which was not offered in evidence, no question was raised in the court below; of course, none can be raised or considered here. (11 Wheat., 199.)

The time when, and the character in which, this money was received, will shed light upon the intention with which it was received, and the effect of its receipt.

The defects in the deed had not been ascertained when the payments were made. The bond was understood to be merged in the deed, and the deed was believed to be valid; hence there could have been no intention to confirm what was already considered as obligatory. Suit was brought as soon as the deed was discovered to be defective. The effect of the receipt of money in a fiduciary character cannot prejudice the private rights of Mrs. Rice or Mrs. Phipps. By law, they could only receive it thus, since they had no right to the personalty of their respective husbands; upon which, moreover, there was a statutory lien for their debts. The law will not put them in the predicament of saving their private rights by faithlessness to their trust, or losing their private rights by a faithful performance of the duties of executorship or administration.

There was neither instrument, act, nor inten-

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tion of confirmation, nor knowledge of their rights, till suit was brought.

Mr. Crittenden, on the same side:

It might be dishonorable for any parties except married women to try and get this property back; but the law is not friendly to their rights, and in nine cases out of ten, they do not 241*] know what they *are conveying away when they execute deeds. In this case, the property belonged to the wife, but she is not named as a grantor in the deed, and therefore is not bound by it. (3 Mason's C.C.R., 347.)

[*Mr. Crittenden* then examined the certificate of the magistrate, which he contended was not sufficient.]

It is argued that a subsequent acceptance of money by these wives, after the death of their husbands, reacts upon the original contract and confirms it. But it cannot make a deed good which is intrinsically void. Instruments may be confirmed in some cases, it is true, but only when they are valid for some purposes, and not where they are wholly void. And besides, the confirming act must be performed with the intention and purpose of producing such a consequence. It cannot be effected incidentally. The mere receipt of money is not sufficient.

Mr. Chief Justice TANEY delivered the opinion of the court:

This being an action of ejectment, the only question between the parties is upon the legal title.

It is admitted, in the exception, that Mary Rice and Martha Phipps, lessors of the plaintiff, were each of them, as heirs-at-law of Adam Bower, entitled to an undivided third part of the premises mentioned in the declaration, in fee-simple. In order to show title out of them, the plaintiffs in error relied upon the bond of conveyance and deed, mentioned in the statement of the case, both of which were signed and sealed by these lessors of the plaintiff, but were executed while they were *femes covert*.

As regards the bond, it would not have transferred the legal title, even if all the parties had been capable of entering into a valid and binding agreement. But as to the *femes covert* who signed it, it was merely void, and conferred no right, legal or equitable, upon the obligees.

The deed, also, is inoperative as to their title to the land. In the premises of this instrument, it is stated to be the indenture of their respective husbands in right of their wives, of the one part, and of the grantees, of the other part—the husbands and the grantees being specifically named; and the parties of the first part there grant and convey to the parties of the second part. The lessors of the plaintiff are not described as grantors; and they use no words to convey their interest. It is altogether the act of the husbands, and they alone convey. Now, in order to convey by grant, the party possessing the right must be the grantor, and use apt and proper words to convey to the grantee, and merely signing and sealing and acknowledging an instrument, in which another person is grantor, is not sufficient. The deed in question conveyed the marital interest of the husbands in these lands, but nothing more.

242*] *It is unnecessary to inquire whether the acknowledgment of the *femes covert* is or is not in conformity with the statute of Mississippi. For assuming it to be entirely regular, it would not give effect to the conveyance of their interests made by the husbands alone. And as to the receipt of the money mentioned in the testimony, after they became sole, it certainly could not operate as a legal conveyance, passing the estate to the grantee, nor give effect to a deed which as to them was utterly void.

The judgment of the Circuit Court is therefore affirmed.

Cited—6 McLean, 203.

CHARLES CLIFTON, Claimant, *Plaintiff in Error*,

v.

THE UNITED STATES.

Seizure for violation of revenue laws—when burden of proof is on claimants—omission of proof, presumptions on—one good count in information for forfeiture will support judgment—fraudulent undervaluation—bar—statutes explained.

Upon the trial of a cause where goods had been seized upon suspicion of being fraudulently imported, and the United States had shown sufficient ground for an opinion of the court that probable cause existed for the prosecution, and notice had been given to the claimant to produce his books and accounts relating to those goods, it was proper for the court to instruct the jury, that, if the claimant had withheld the testimony of his accounts and transactions with the parties abroad from whom he received the goods, they were at liberty to presume that, if produced, they would have operated unfavorably in his cause.

The doctrine laid down in 2 Evans's Pothier, 149, cited and approved, namely: "That if the weaker and less satisfactory evidence is given and relied on in support of a fact, when it is apparent to the court and jury that proof of a more direct and explicit character was within the power of the party, the same caution which rejects the secondary evidence will awaken distrust and suspicion of the weaker and less satisfactory, and it may well be presumed, that if the more perfect exposition had been given, it would have laid open deficiencies and objections which the more obscure and uncertain testimony was intended to conceal."

The principle established in the case of Wood v. The United States (16 Peters, 342) reviewed and confirmed, namely: "That if goods are fraudulently invoiced, they are not exempted from forfeiture by having been appraised in the custom-house at valuations exceeding the prices in the invoices, and delivered to the importers on payment of the duties assessed upon such increased valuations."

If the information contains several counts, founded on the following acts, namely, the sixty-sixth section of the Act of 1799, the fourth section of the Act of 1830, and the fourteenth section of the Act of 1832, the defectiveness of the counts upon the Acts of 1830 and 1832 would be no ground for reversing a judgment of condemnation, provided the count is good which is founded upon the Act of 1799; because one good count is sufficient to uphold a general verdict and judgment.

The difference between these sections explained.

In this case, therefore, it is unnecessary to decide what averments are required in counts resting upon the Acts of 1830 and 1832, or whether the counts are or are not void from generality.

THIS case was brought up by writ of error from the Circuit Court of the United States for East Pennsylvania.

The facts are fully set forth in the opinion of the court.

The case was argued by *Mr. Meredith* for the

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243*] plaintiff in error, *and *Mr. Cadwallader* and *Mr. Mason* (Attorney-General) for the United States.

Mr. Justice NELSON delivered the opinion of the court:

This is a writ of error from the judgment of the Circuit Court for the Eastern District of Pennsylvania, affirming a judgment of the District Court of the same district.

The original suit was a libel of information, *in rem*, founded upon a seizure on land in the said district of some seventy-one cases of cloths and cassimeres imported into the United States, and alleged to have been forfeited.

The libel contained thirteen counts, resting upon different sections of the several acts of Congress regulating the collection of duties on imports and tonnage; but it will be material to notice particularly those only which are founded upon the sixty-sixth section of the Act of 1799, ch. 22 (Litt. & Brown's ed.), the fourth section of the Act of 1830, ch. 147, and the fourteenth section of the Act of 1832, ch. 227, which provides against the making up of false invoices and false packages of the goods imported, with the intent to evade or defraud the revenue.

Various pleas were put in by the claimant, but as no questions are raised upon them, they need not be stated.

On the trial of the cause, it appeared that the goods in question had been originally imported into the port of New York, and were there duly entered and landed, and the duties paid upon the invoices produced by the claimant to the collector. The goods were appraised at the custom-house, at a valuation of ten per cent. above the invoice prices, and no appeal taken. They were afterwards transported to the city of Philadelphia, and were there seized by the custom-house officers, under a warrant issued for that purpose, in the stores of certain persons having the custody of them in that city for the claimant.

A good deal of evidence was given on the part of the United States, tending strongly to establish the fact that the several invoices upon which the duties had been paid at the custom-house in New York, and which invoices were produced before the court, had been made up greatly under the actual cost and value of the goods in England, the place of exportation, and with the intent to evade and defraud the revenue; and in the progress of the trial, the counsel for the government, in pursuance of a notice given some months previously, called upon the claimant for the production of his ledger containing entries of each of the several invoices of the goods thus imported; also, for the production of his cash book for the years 1838 and 1839, embracing the period within which the goods had been imported, and for the entries therein relating to the said importations; also, for the charges of the payment of freight upon 244*] said goods; to each of which *calls the counsel were answered, that the claimant had no such book in court.

The counsel for the government, like previous notice having been given, also called upon claimant for the production of the accounts in the ledger, for the years 1838 and 1839, with each of the houses in England who had sold and invoiced the said goods to him, and for his letter-book for said years, and the correspondence with each of the said houses respectively, and also for his day-book; to which calls the counsel answered, that neither of them were in court.

When the testimony closed, the court below instructed the jury that it was alleged, on the part of the United States, that the goods in question had been forfeited, from having been imported into New York by false invoices, with intent to evade the payment of part of the duties to which they were subject. That it was incumbent upon the government to show upon the trial that there was probable cause for the prosecution; and if that had been shown, of which the court was to judge, the burden of proof was on the claimant, who must then satisfy the jury that the goods were invoiced at their actual cost.

That with a view to show probable cause, the government relied mainly upon the evidence, that the actual value of the goods in England exceeded the prices per yard mentioned in the invoices, and that after the testimony which had been produced on the part of the government of the value of the goods at the time and place of exportation; as compared with the prices fixed in the invoices, it was material to notice the negative evidence, arising out of the absence of testimony on the part of the defendant of the actual cost of the goods; and to consider whether its absence had been accounted for. That there was evidence that one of the persons, by whom a portion of the goods in controversy appeared to have been invoiced to the claimants, was within the reach of a subpœna, and it was reasonable to presume that it was in the claimant's power to have produced evidence of the real state of his accounts and transactions with all the parties in England from whom the goods had been received, as the correspondence showed that two years ago his counsel had advised him to procure proof on this subject, which had not been produced; that the claimant knew from whom he had bought the goods, and what their actual cost was, and yet he had not produced the evidence, nor accounted for its absence; that to withhold testimony which was in the power of a party to produce, in order to rebut a charge against him, where it was not supplied by equivalent testimony, might be as fatal as positive testimony in support or confirmation of the charge, that if the claimant had withheld proof which his accounts and transactions with these parties afforded, it might be presumed that if produced they would have operated unfavorably to his case; that the government *had [*245 shown probable cause, and that the next inquiry was, whether the claimant had relieved himself from the burden of the proof, &c.

The court further instructed the jury, that in respect to some of the invoices, the government and claimant relied upon the same circumstance, namely, that goods included in the information, in passing through the custom house in New York, were appraised at amounts exceeding the invoice prices, and that the claimant, without appealing, had paid the duties assessed upon the increased value, and received the goods from the custom-house.

The counsel for the government contended that this acquiescence implied an admission

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that the invoices were untrue, while the counsel for the claimant contended, that by this appraisement, assessment, and payment of duty, the government were precluded from alleging or enforcing a forfeiture of these goods. The court expressed the opinion that the question of liability to forfeiture was so far distinct from questions connected with the ascertainment and payment or duties, that the passing of goods through the custom-house, under such circumstances, was not, in a legal point of view, decisive of any question before the jury. That the question was, whether the goods were falsely invoiced, with intent to defraud the revenue, &c.

The counsel for the claimant excepted to that part of the charge in which the jury were instructed, that, if the claimant had withheld the testimony of his accounts and transactions with the parties abroad from whom he received the goods, they were at liberty to presume that, if produced, they would have operated unfavorably to his case; and also to that part in which the jury were instructed, that, if the goods in controversy were fraudulently invoiced, they were not exempted from forfeiture by having been appraised in the custom-house at valuations exceeding the prices in the invoices, and delivered to the importer on payment of the duties assessed upon the amount of such appraisement; and also to that part of the instructions in which the jury were advised that probable cause had been shown by the government in support of the prosecution.

A general verdict was rendered for the United States.

As to the instructions given to the jury first excepted to, in which the court below expressed the opinion "that if the claimant had withheld proof which his accounts and transactions with the parties afforded, it might be presumed that, if produced, they would have operated unfavorably to his case": in order to comprehend fully the appropriateness and legality of the instructions, it is material to refer to the posture of the case at the time they were given, and to the question then under the consideration of the court.

The counsel for the government had furnished proof tending strongly to the conclusion that the invoice prices of the goods in question were greatly under the actual cost at the place 246*] and in the *country whence they were imported. This proof rested mainly upon the testimony of several merchants, importers and dealers in the particular article, who had examined the goods and estimated their cost.

The average estimate exceeded the invoice prices some fifty per cent.

The counsel also, with a view of further strengthening their case, and in pursuance of previous notice for that purpose, called upon the claimant for the production of his books and papers containing an account of the several importations, and of his dealings in respect to them with the foreign houses, together with his and their correspondence concerning the same. Neither were produced, nor any account attempted to be given for the nonproduction.

Upon this the government rested. Probable cause for the prosecution having been thus sufficiently established, the claimant went into his defense; and, instead of furnishing evidence of the prices actually paid by him to the houses abroad from whom the goods were purchased, as he might have done, either by executing a commission to take their testimony, or by persons concerned in making the purchases, or by the production of the books of account that had been called for, as the call afforded him an opportunity to put them in evidence, he placed the defense altogether upon the judgment and opinions of merchants and other persons acquainted with this description of goods, as to the value and cost of the article in the home market, tending thereby to confirm and support the correctness of the valuations as fixed in the invoices.

The burden of the case was upon the claimant, and it was in this stage and posture of it that the instructions were given which are the subject of the exception; and in which the court stated, "that the claimant knew from whom he had bought the goods, and what was their actual cost, and yet had not produced this testimony, or accounted for its absence; that to withhold testimony which it was in the power of the party to produce, in order to rebut a charge against him, where it is not supplied by other equivalent testimony, might be as fatal as positive testimony in support or confirmation of the charge. And that if the claimant had withheld testimony of his accounts and transactions with these parties (meaning the foreign houses from whom he had purchased the goods), the jury were at liberty to presume that, if produced, they would have operated unfavorably to his case."

The instructions had a direct reference to, and are to be construed as intended to bear upon the matters of defense, probable cause having been shown; and upon the nature and species of the evidence relied on by the claimant in support of it; and in this aspect of the case, at least, without now referring to any other, we think they were not only quite pertinent to the question in hand, *but [*247 founded upon the well established rules and principles of evidence.

The prosecution involved in its result, not only the forfeiture of a considerable amount of property, but also the character of the claimant, both as a merchant and an individual. He was charged with a deliberate and systematic violation of the revenue laws of the country, by means of frauds and perjuries, and the court, as was its province, under the seventy-first section of the Act of 1799, had pronounced the proof sufficient to establish the offense, unless explained and rebutted by opposing evidence.

Under these circumstances, the claimant was called upon by the strongest considerations, personal and legal, if innocent, to bring to the support of his defense the very best evidence that was in his possession, or under his control. This evidence was certainly within his reach, and probably in his counting-room, namely, the proof of the actual cost of the goods at the place of exportation. He not only neglected to furnish it, and contented himself with the weaker evidence, but even refused to furnish it on the call of the government; leaving, therefore, the obvious presumption to be turned against him, that the highest

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and best evidence going to the reality and truth of the transaction would not be favorable to the defense.

One of the general rules of evidence, of universal application, is, that the best evidence of disputed facts must be produced of which the nature of the case will admit. This rule, speaking technically, applies only to the distinction between primary and secondary evidence; but the reason assigned for the application of the rule in a technical sense is equally applicable, and is frequently applied, to the distinction between the higher and inferior degree of proof, speaking in a more general and enlarged sense of the terms, when tendered as evidence of a fact. The meaning of the rule is, not that courts require the strongest possible assurance of the matters in question; but that no evidence shall be admitted, which, from the nature of the case, supposes still greater evidence behind in the party's possession or power; because the absence of the primary evidence raises a presumption, that, if produced, it would give a complexion to the case at least unfavorable, if not directly adverse, to the interest of the party.

This is the reason given for exacting, in all cases, the primary evidence, unless satisfactorily accounted for. (1 Phillips on Ev., 218, C. & H.'s *notes*, 414, 418, and cases.)

For a like reason, even in cases where the higher and inferior testimony cannot be resolved into primary and secondary evidence, technically, so as to compel the production of the higher; and the inferior is therefore admissible and competent without first accounting for the other, the same presumption exists in full force and effect against the party withholding [*248] the better evidence; especially *when it appears, or has been shown, to be in his possession or power, and must and should, in all cases, exercise no inconsiderable influence in assigning to the inferior proof the degree of credit to which it is rightfully entitled.

It is well observed by Mr. Evans (2 Evans's Pothier, 149), in substance, that if the weaker and less satisfactory evidence is given and relied on in support of a fact, when it is apparent to the court and jury that proof of a more direct and explicit character was within the power of the party, the same caution which rejects the secondary evidence will awaken distrust and suspicion of the weaker and less satisfactory; and that it may well be presumed, if the more perfect exposition had been given it would have laid open deficiencies and objections which the more obscure and uncertain testimony was intended to conceal.

We will only add, that practical illustrations of this application of the rule are witnessed daily in the administration of justice in criminal cases, and are too familiar to every lawyer to require a more particular reference.

We are satisfied, therefore, that no error was committed by the court below in giving the instruction first excepted to.

The second exception was to that part of the charge in which the court instructed the jury, that, if the goods were fraudulently invoiced, they were not exempted from forfeiture by having been appraised in the custom house at New York at valuations exceeding the prices in the invoices, and delivered to the importers on payment of the duties assessed upon the amount of such appraisement.

In respect to this instruction, it is only necessary to refer to the case of *Wood* v. *The United States* (16 Peters, 342), in which a similiar one had been given, and came up for review, and the correctness of which was affirmed by the court.

The third and last exception taken was to the instruction, that probable cause had been shown by the United States for the prosecution, which was virtually given up on the argument. There can be no doubt as to its correctness.

In addition to the foregoing exceptions, the counsel for the plaintiff in error insisted, on the argument, that the fifth, sixth, seventh, eighth, ninth, eleventh, twelfth, and thirteenth counts in the information, all of which are founded upon the fourth section of the Act of 1830 (ch. 147, Litt. & Brown's ed.), and the fourteenth section of the Act of 1832, ch. 227, were substantially defective, by reason of the generality and uncertainty of the averments in each and every of the said counts; and that, for this reason, the judgment should be reversed.

It was not denied but that the fourth count, which is founded upon the sixty-sixth section of the Act of 1799, ch. 22, was good in form and substance, and sufficient, if it stood alone, to uphold the recovery; but it was insisted, as the verdict and judgment were general upon all the counts in the information, that, if one or more were bad, an error existed upon the record for which the court was bound to reverse the judgment. [*249]

The sixty-sixth section of the Act of 1799, Vol. I., p. 677 (Litt. & Brown's ed.), provides, "that if any goods, wares, or merchandise, of which an entry shall have been made in the office of a collector, shall not be invoiced according to the actual cost thereof at the place of exportation, with design to evade the duties thereupon, or any part thereof, all such goods, &c., shall be forfeited."

The same section also provides for seizing the goods on suspicion of fraud, and detaining them for examination. This section condemns the goods to forfeiture in cases where they are invoiced below their actual cost at the place of exportation, with intent to defraud the revenue.

The fourth section of the Act of 1830 provides that the collector shall cause at least one package out of every invoice, and one package, at least, out of every twenty packages of each invoice, and a greater number if deemed necessary, of the goods imported, which package or packages he shall first designate on the invoice, to be opened and examined; and if the same be found not to correspond with the invoice, or to be falsely charged in such invoice, the collector shall order, forthwith, all the goods contained in the same entry to be inspected, and if subject to an *ad valorem* duty, the same shall be appraised; and if any package shall be found to contain any article not described in the invoice, or if such package or invoice be made up with intent, by a false valuation, or extension, or otherwise, to evade or defraud the revenue, the same shall be forfeited.

This section condemns the goods to forfeiture,

1. If the package is found to contain any article not in the invoice; and,

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2. If it shall be found that the package or invoice is made up with intent to defraud the revenue by a false valuation or otherwise.

The fourteenth section of the Act of 1832 provides that whenever, upon opening and on examination of any package or packages of imported goods, composed wholly or in part of wool or cotton, in the manner provided for by the fourth section of the Act of 1830, the goods shall be found not to correspond with the entry at the custom-house, and the package shall be found to contain any article not entered, such article shall be forfeited; or if the package be made up with intent to evade or defraud the revenue, the package shall be forfeited, and so much of the said fourth section as prescribes a forfeiture of the goods found not to correspond with the invoice is repealed.

This section condemns to forfeiture,

250*] *1. The article in the package which it is found does not correspond with the entry, and,

2. The package which it is found has been made up with intent to defraud the revenue; and,

3. Repeals that part of the fourth section in the Act of 1830 which forfeits the package in which an article is found not corresponding with the invoice.

The fourth section of the Act of 1830, and fourteenth of 1832, enlarge the grounds of forfeiture beyond the sixty-sixth section of the Act of 1799; but the frauds provided against in those sections, and upon which the forfeiture proceeds, appear to be limited to cases where the detection takes place in the course of the examination at the custom-house.

The sixty-sixth section limits the forfeiture to the case of fraud in making up the invoice prices below the actual cost of the goods, but leaves the time and place of detection unrestricted. Under this section, whether the discovery of the fraud be made by the custom-house officers while the goods are passing inspection, or afterwards, is immaterial. In either case condemnation follows, as has already been held by this court in the case of *Wood* v. *The United States* (16 Peters, 342).

As already stated, it is not denied but that the condemnation is well supported under the count founded upon the sixty-sixth section; but it is insisted that all the counts founded upon the fourth section of the Act of 1830, and the fourteenth of the Act of 1832, are substantially defective for their generality and want of averments setting forth the special circumstance of the examination and detection of the fraud under the authority of the collectors. Whether this be so or not, it is unimportant to determine in this case, as it was held, at an early day, in this court, that one good count was sufficient to uphold a general verdict and judgment upon all the counts, though some of them might be bad, the information being regarded in the nature of a criminal proceeding. (*Locke* v. *The United States*, 7 Cranch, 339; 1 Johns. R., 320; Doug., 730; 8 Bac. Abr., 114.)

The same must have been virtually held in the cases of *Wood* v. *The United States*, already referred to, and *Taylor et al.* v. *The same* (3 How., 197).

We will merely add, as to the sufficiency of the counts upon the fourth section of the Act of 1830 and forteenth section of 1832, that, by the sixty-sixth section of the Act of 1799, the collector was authorized, in case he suspected fraud in the invoice prices, to seize the goods and detain them for examination as fully as is provided for in the two sections of the Acts of 1830 and 1832. There is no substantial difference, in this respect, except that the latter makes it the duty of the collectors, in all cases, to direct an examination before the goods are allowed to pass through the custom-house, whereas *the sixty-sixth section left it [*251 as matter of discretion, depending upon suspicion of fraud in the invoices.

Upon the whole, we are satisfied that the judgment of the Circuit Court, affirming that of the District Court, is legal, upon all the grounds which have been urged against it, and should be affirmed.

Cited—17 How., 94; 3 Wall., 143; 14 Wall., 56; 18 Wall., 545; 2 Bank. Reg., 446; 6 Bank. Reg., 39; 3 Ware, 79, 208; 2 Curt., 587, 591; 2 Abb. U. S., 314; 3 Ben., 76; 1 Dill., 57.

JAMES BUCKLEY, Claimant of three bales and eight cases of Cloth, *Plaintiff in Error*,

v.

THE UNITED STAES.

Revenue laws—fraudulent undervaluation—information for forfeiture—trial of—evidence—questions for court or jury—averments.

In the trial of a cause where goods had been seized upon suspicion of being fraudulently imported, it was proper to allow to go to the jury, as evidence, appraisements of the goods made either by the official appraisers or appraisers acting under an appeal, they being present to verify the papers. The objection that the appraisements had not been made in presence of the jury was not sufficient.

Such papers are documents or public writings, not judicial, and may be used as evidence, under the rules which regulate all that class of papers.

Other invoices of other goods imported by the party are admissible. The decision on this point in Wood v. The United States (16 Peters, 359, 360) confirmed.

It was proper to show, in such a case, that the agent of the claimant had sold goods for him at prices which yielded profits, which other persons, engaged in the same trade, averred could not fairly have been made in the then state of the market.

The court is the tribunal to determine, from the evidence, whether or not there was probable cause for the seizure.

In order to sustain counts in the information, founded on the Acts of 1830 and 1832, it is not necessary that they should contain averments of the special circumstances of the examination of the goods and detection of the fraud under the authority of the collector. The language of the court in Wood's case re-examined, explained, and controlled.

The court below was right in instructing the jury, that, under such an information, they were not restricted in the condemnation of the goods to any entered goods which they found to be undervalued, but that they might find either the whole package or the invoice forfeited, though containing other goods correctly valued, provided they should find that such package or invoice had been made up with intent to defraud the revenue.

THIS case was brought up by writ of error from the Circuit Court of the United States for the Eastern District of Pennsylvania.

On the 16th of August, 1839, Patrick Brady, a resident of the city of Philadelphia, presented to the custom-house in that city an entry of

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certain goods which had arrived from Liverpool in the ship Franklin. Accompanying the entry was the oath of James Buckley, the present claimant, taken at Liverpool, on the 8th of June, 1839. It was what is called the manufacturer's oath, as contradistinguished from the purchaser's oath, and stated the value, the purchaser's oath stating the actual cost of the goods. The bill of lading was for three bales, marked P. B., 810, 811, 812, and eight cases, marked P. B., 813 to 820, which were consigned to the said Patrick Brady.

These goods were ordered to be appraised by 252*] the two regularly *appointed appraisers for the port of Philadelphia, namely, Thomas Stewart and Henry Simpson. The examination was not finished until the 25th of September, 1839; the result of which was an appraisement of £1,917, the invoice being £1,647.

On the 15th of February, 1840, the claimant, being then in England, made out a copy of the invoice of the goods in question, to which he annexed a purchaser's oath, stating the goods to have been purchased on the 28th of May, 1839, from William Buckley & Company.

On the 25th of May, 1840, the claimant appealed from the decision of the official appraisers, in the manner pointed out in the act of Congress providing for an appeal, when Samuel Ross and A. J. Lewis were appointed to make an appraisement. On the 22d of June, 1840, they took the oath required by law, and proceeded to make the valuation.

About this time, but the record does not state exactly when, the agent of the claimant filed in the custom-house at Philadelphia the purchaser's oath just spoken of.

On the 22d of June, 1840, the appraisers, Ross and Lewis, who had been appointed under the appeal to appraise the goods, took the necessary oaths and proceeded to execute the duty. The result was, that their appraisement was seventeen per cent. higher than the value as stated in the invoice.

On the 28th of September, 1840, an information was filed against the goods in the District Court for the Eastern District of Pennsylvania. It consisted of four counts.

The first was founded on the sixty-sixth section of the Act of 1799.

The second, upon the fourth section of the Act of 1830, and charged that the invoice was made up, with intent, by a false valuation, to evade and defraud the revenue of the United States.

The third, upon the same section of the same act, charging that each of the several packages was made up with intent, &c.

The fourth, upon the 14th section of the Act of 1832, charging that the goods were composed wholly, or in part, of wool or cotton, and that all and each of the several packages in the invoice were made up with intent, &c.

As these counts are the subject matter of a part of the decision of the Supreme Court, it is proper to insert them *in extenso*.

In the District Court of the United States of America, in and for the Eastern District of Pennsylvania.

EASTERN DISTRICT OF PENNSYLVANIA, ss.:

Be it remembered, that, on this twenty-eighth day of September, in the year of our Lord one thousand eight hundred and forty, into the District Court of the United States of America, in and for the Eastern District of Pennsylvania, comes John M. Read, attorney *of the said United States of America, [*253 and prosecuting in their name and on their behalf, and gives the said court here to understand and be informed, that, on the twenty-fourth day of June, in the year aforesaid, at the city of Philadelphia, in the Eastern District of Pennsylvania, and within the jurisdiction of this court, the following goods, wares, and merchandise, to-wit:

Three bales of cloths marked P. B., 810, 811, 812, and eight cases of cloth, marked P. B., 813, 814, 815, 816, 817, 818, 819, 820, were seized on land by Calvin Blythe, Esq., collector of the customs of the port and district of Philadelphia, in the said Eastern District of Pennsylvania, and are now in his custody, as being forfeited, for the causes hereinafter mentioned, to wit:

1. That the aforesaid goods, wares, and merchandise are of the growth, produce, and manufacture of some foreign place or country, to the said attorney unknown; and were heretofore, to wit, on the sixteenth day of August, in the year of our Lord one thousand eight hundred and thirty-nine, brought or imported in a ship or vessel, being a ship called the Franklin, from a foreign port or place, to wit, the port of Liverpool, to the port of Philadelphia, in the collection district of Philadelphia, in the Eastern District of Pennsylvania, which said goods, wares, and merchandise are subject to the payment of duties to the United States, on being brought and imported as aforesaid.

That an entry of the aforesaid goods, wares, and merchandise, duly signed, was, at the time of said importation thereof, made at the office of the collector of the customs of the said port and district of Philadelphia; and that, on such entry being made as aforesaid, an invoice of the goods, wares, and merchandise included in such entry was produced, and left with the said collector of the customs of the port and district of Philadelphia.

And the said attorney further avers, that the aforesaid goods, wares, and merchandise, which were so entered as aforesaid, and of which an invoice was so produced and left as aforesaid, were not invoiced according to the actual cost thereof at the place of exportation, but, on the contrary, were in fact invoiced at less sums than the actual cost thereof at the place of exportation, with design to evade the duties thereupon, or some part thereof, against the form of the act of Congress in such case made and provided.

2. That the aforesaid goods, wares, and merchandise, being subject to the payment of *ad valorem* duties to the United States, an entry thereof, duly signed, was, at the time of the importation thereof, made at the office of the collector of the customs of the said port and district of Philadelphia, and that, on such entry being made as aforesaid, an invoice of the goods, wares, and merchandise included in such entry was produced and left with the said collector of the customs of the said port and district of Philadelphia.

*And the said attorney further avers, [*254

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that the said invoice, so produced and left as aforesaid, was made up with intent, by a false valuation, to evade and defraud the revenue of the United States, against the form of the act of Congress in such case made and provided.

3. That the aforesaid goods, wares, and merchandise, being subject to the payment of *ad valorem* duties to the United States, an entry thereof, duly signed, was, at the time of the importation thereof, made at the office of the collector of the customs of the said port and district of Philadelphia; and that, on such entry being made as aforesaid, an invoice of the goods, wares, and merchandise included in the said entry was produced and left with the said collector of the customs of the said port and district of Philadelphia.

And the said attorney further avers, that all and each of the said several packages contained in the said entry so made, and in the invoice so produced and left as aforesaid, in which the aforesaid goods, wares, and merchandise were so imported and entered as aforesaid, was made up with intent, by a false valuation, to evade and defraud the revenue of the United States, against the form of the act of Congress in such case made and provided.

4. That the aforesaid goods, wares, and merchandise, being composed wholly or in part of wool or cotton, an entry thereof, duly signed, was, at the time of the importation thereof, made at the office of the collector of the customs for the port and district of Philadelphia; and that, on the said entry being made as aforesaid, an invoice of the said goods, so as aforesaid composed wholly or in part [of] wool or cotton, included in such entry, was produced and left with the said collector of the customs of the said port and district of Philadelphia.

And the said attorney further avers, that all and each of the several packages in the said invoice so produced and left as aforesaid, and in the said entry so much as aforesaid, in which the aforesaid goods were so imported as aforesaid, were made up with intent to evade and defraud the revenue of the United States, against the form of the act of Congress in such case made and provided.

By reason of all which the premises and the acts of Congress in this behalf made and provided, the said goods, wares, and merchandise have become and are forfeited.

Wherefore, the said attorney prays the aid and the advice of the said court here in the premises, and due process of law for the condemnation thereof. JOHN M. READ,

United States Attorney for the Eastern District of Pennsylvania.

The acts of Congress upon which these counts are founded are as follows:

255*] *The sixty-sixth section of the Act of 1799, ch. 22, provided,

"That if any goods, wares, or merchandise, of which entry shall have been made in the office of a collector, shall not be invoiced according to the actual cost thereof at the place of exportation, with design to evade the duties thereupon, or any part thereof, all such goods, wares, and merchandise, or the value thereof, to be recovered of the person making the entry, shall be forfeited."

The fourth section of the Act of 1830, ch. 147 (4 Litt. & Brown's ed., 410), provided,

"That the collectors of the customs shall cause at least one package out of every invoice, and one package at least out of every twenty packages of each invoice, and a greater number, should he deem it necessary, of goods imported into the respective districts, which package or packages he shall have first designated on the invoice, to be opened and examined, and if the same be found not to correspond with the invoice, or to be falsely charged in such invoice, the collector shall order, forthwith, all the goods contained in the same entry to be inspected; and if such goods be subject to *ad valorem* duty, the same shall be appraised, and if any package shall be found to contain any article not described in the invoice, or if such package or invoice be made up with intent, by a false valuation or extension, or otherwise, to evade or defraud the revenue, the same shall be forfeited" (then follows a repeal of the fifteenth section of the Act of 1823, and of any act which imposes an additional duty or penalty of fifty per cent. upon goods appraised above their invoice price); "and no goods liable to be inspected or appraised as aforesaid shall be delivered from the custody of the officers of the customs, until the same shall have been inspected or appraised, or until the packages sent to be inspected or appraised shall be found correctly and fairly invoiced and put up, and so reported to the collector, provided," &c., &c., &c.

The fourteenth section of the Act of 1832, ch. 224 (4 Litt. & Brown's ed., 593), provided,

"That whenever, upon the opening and examination of any package or packages of imported goods, composed wholly or in part of wool or cotton, in the manner provided by the fourth section of the act for the more effectual collection of the impost duties, approved on [the] 28th day of May, 1830, the said goods shall be found not to correspond with the entry thereof at the custom-house; and if any package shall be found to contain any article not entered, such article shall be forfeited: or if the package be made up with intent to evade or defraud the revenue, the package shall be forfeited; and so much of the said section as prescribes a forfeiture of goods found not to correspond with the invoice thereof be, and the same is hereby repealed."

On the 7th of October, 1840, Buckley filed his claim, and on *the 13th of Decem- [*256 ber, 1842, the cause came on for trial. In the course of it, the counsel for the claimant took nine exceptions to the admissibility of certain evidence offered in support of the prosecution, which may be stated as follows:

1. The first exception was to the admissibility of Thomas Stewart to prove an appraisement of the goods made by him as one of the official appraisers of the port; to which testimony the counsel for the claimant objected that the appraisement was not made in presence of the court and jury.

2. Was to the admissibility of the appraisement.

3. Was to the admissibility of the testimony of Felix A. Huntingdon, an importer and experienced judge of goods, to prove what was the value, in his belief, of the goods in the British market at the date of the invoice upon which they were entered; the ground of the

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objection being that the appraisement was not made in the presence of the jury.

4. Was to the admissibility of the affidavits of Samuel Ross and A. J. Lewis, who had appraised the goods under an appeal, taken by them before entering on the performance of their duty as appraisers under the appeal.

5. Thereupon the counsel of the United States gave in evidence their appraisement; and to this the claimant excepted, that the appraisement had not been made in presence of the jury.

6. The counsel for the United States having produced the invoices of two importations—one into Philadelphia, and the other into New York—of goods exported from England by the claimant, whose affidavit was in each case annexed, dated 23d May, 1839, and 12th June, 1839, the counsel for the claimant excepted to the reading of these two affidavits.

7. Several other invoices, affidavits, and entries were offered on the part of the United States, after being verified in the same manner as those mentioned in the last exception; and to their admission in evidence the counsel for the claimant excepted.

8. The counsel of the claimant also excepted to any evidence being given of certain importations made by the claimant into New York, per Republic and United States, in which cases the value of the goods were appraised at a higher value than the invoices.

9. The counsel for the United States proved that the claimant's factors in Philadelphia had received goods from him to be sold for his account, and had sold the same at prices more, by one hundred and twenty per cent., than the prices entered upon the invoices upon which they had been entered; and to the admissibility of this testimony the counsel for the claimant excepted.

The evidence being closed on both sides, the counsel for the United States prayed certain instructions, and the court proceeded to charge the jury. The two following appear to be the passages to which the counsel for the claimant excepted:

257*] *The United States allege that the appraisements and the affidavits, and the fact of Mr. Buckley's acquaintance with the different forms of oaths, show his fraudulent intent in this importation. Other invoices of the claimant are also given in evidence to show the same fraudulent design. Fraud is to be judged of by various circumstances. If this were the only case, the presumption might be that there was a mistake; but the United States have presented these various invoices to show that there was no mistake. They have further shown the appraisements and the sales of these other importations by James Buckley at an advance from one hundred and fourteen to one hundred and forty per cent. in the invoice. Whereas eighty-five per cent. advance is a fair profit according to the testimony. These circumstances go to show intention; because, though the goods may be under-invoiced, yet, unless fraud was intended, the under valuation will not work a forfeiture. The United States are only bound in the first instance to prove to the court probable cause. I have no difficulty in saying that the United States have abundantly shown probable cause; the burden of proof is hence thrown upon the claimant.

It is said that, although some of the goods were undervalued, some were not so, and should not be condemned. The law is this: if in any particular package the prices of some of them are undervalued, and some of them are fair, if the whole package has been made up by a false valuation with intent to defraud the revenue, the whole is forfeited. The same is the case with an invoice. Although it may be composed of some packages fairly made up, yet, if the whole invoice has been made up with intent to defraud, the whole invoice will be forfeited. If the cost of the whole invoice offered for entry is made up with intent to defraud, the whole of the goods contained in it are forfeited.

The first question for your decision, then, is, whether the goods were put in the invoice under their cost or value; if so, whether such undervaluation was with a view to defraud; if this were so, then as to those goods there can be no difficulty; whether the other goods in the invoice are to be forfeited must depend on the intent of the party in making up the invoice.

1st. And thereupon the counsel for the claimant did except to so much of the said charge as decided upon the question of probable cause as a question of law, taking it entirely from the jury.

2d. And to so much of the said charge as decided that, under the present information, the jury should not be restricted in their condemnation to any restricted goods which they found undervalued; but find, first, either the whole package, or second, the invoice in which they were imported, forfeited, though containing other goods correctly valued; if they should find that such package or invoice had been made up with intent to defraud the revenue of the United States.

*And forasmuch as the exceptions [*258 aforesaid do not appear of record, the said defendant prayed that the court will sign and seal this his bill of exceptions, which is done accordingly. ARCHIBALD RANDALL.

Mr. Justice WAYNE delivered the opinion of the court:

Nine exceptions were taken, upon the trial of this cause, to the admissibility of the testimony which was offered on the part of the United States.

The first, second, third, fourth, and fifth are objections to the introduction of the appraisements which were made of the goods entered by the claimant, to the introduction of the persons who made them, to the affidavits of Ross and Lewis, the appraisers upon the claimant's appeal from the official valuation, and to the admissibility of an experienced judge and importer of goods, who was put upon the stand, to prove the value of the goods in the English market, at the date of the invoice, upon which they were entered. The objection in each instance is, that the appraisements had not been made in the presence of the jury. The goods were subject to *ad valorem* rates of duty. The collector, having cause to suspect that they were invoiced below their true value or actual cost, with an intent to evade or defraud the

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revenue, directed them to be appraised by the official appraisers. From their valuation the claimant appealed. Ross and Lewis acted as appraisers upon the appeal, and made their estimate of the value or cost of the goods. The originals of both appraisements were returned to the custom-house. It is not denied that they were made according to the provisions of the acts of Congress. They were so made. From the character of those papers, we think they were admissible. They are documents or public writings, not judicial. As such they may be used as evidence, subject to the rules applicable to the admissibility of such writings as evidence. The originals or examined copies were admissible, as is the case wherever the original is of a public nature. They are within the reach of either party in a cause; either for inspection or for copies, when a copy is wanted to be used as evidence. We need not enumerate the classes of such writings, or the particular kinds of them which from analogy have been adjudicated to be such, as both may be found in any of the elementary treatises upon evidence. There is authority for so classing these appraisements. It has been decided that a copy of an official document, containing an account of the cargo of a ship, made in pursuance of an act of Parliament by an officer of the customs and lodged there as an official document, should be admitted as proof that the property mentioned in it was put on board of a vessel. So, also, the copy of an official document containing the names, capacities, and descriptions of passengers on board a vessel, made in pursuance of an act of Parliament, has 259*] been received as *proof of such persons being on board. (*Richardson* v. *Mellish*, 1 Ryan & Moody, 68; 2 Bing., 229.)

In this instance, the counsel for the United States offered the originals of the appraisements, at the same time introducing the persons by whom they were made, as witnesses to authenticate them. They were not offered as conclusive of the cost or value of the goods, or as conclusive that an attempt had been made to enter them with an intent to evade or defraud the revenue. They might, with other evidence, conduce to establish those facts, and there is no doubt they were in part used for such a purpose in this case. But the primary object was to show from them, with other testimony, that there was probable cause for the seizure, that a course had been taken by the collector which the law permitted, and that everything had been done to give to the claimant the opportunity of establishing the fairness of his suspected entry. What we have said of the character of the appraisements is equally applicable to the objection to the admissibility of the affidavits of Ross and Lewis, by whom the goods were appraised upon the appeal. There is no force, then, in the objection that the appraisements were not made in the presence of the jury. We have thus disposed of the first five exceptions to the admissibility of the evidence, for we do not understand that any objection was made to Stewart and Huntingdon as witnesses to prove, from their knowledge of the value of goods, what was the value of the goods in question, but that they were objected to, as it is expressed in the exception, because the appraisements made by them were not made in the presence of the jury. As experienced judges of goods and of their value, they were certainly good witnesses to testify what in their belief was the value of the goods in the English market at the date of the invoice upon which they were entered. The sixth, seventh, and eighth exceptions were objections to the admissibility as evidence of other invoices of other importations made by the claimant, to show fraud in this case. Such invoices for the same purpose were decided by the court in *Wood's* case (16 Pet., 359, 360) to be admissible. It is not necessary to repeat what was then said upon the subject. The ninth exception is an objection to the introduction of any evidence to show that the factors of the claimant had sold goods for him at more than one hundred and twenty per cent. above the invoice prices. We know that the prices of commodities fluctuate from many causes, and that enhanced prices can of themselves be no proof of unfair dealing, or of an entry having been made at the custom-house upon an undervalued invoice. But if in a particular business testimony can be found to establish that an importer has received prices extravagantly above invoice prices, such as others engaged in the same trade, at the same time, declare could not have been made in the state of the market during the time, a strong presumption arises that unfair means have been used *to [*260 produce effects contrary to the usual results of contemporary trade. Such a fact may well, then, be considered as good evidence, when the issue in a case is fraud or no fraud in the importation of goods.

The exceptions taken to the evidence having been disposed of, we proceed to examine such as were taken to the charge of the court. The first, that the court had undertaken to determine from the evidence that there was probable cause for the seizure, without submitting it to the jury, was abandoned in the argument. This court had ruled in *Taylor* v. *The United States* (8 Howard, 211), that the judge, and not the jury, was to determine whether there was probable cause, so as to throw on the claimant the *onus probandi* to establish the fairness of the importation.

The second exception is an objection to so much of the charge of the court as instructed the jury that, under the present information, they were not restricted in their condemnation to such goods as they should find had been undervalued, but that they might find either the whole package or the invoice forfeited, though it contained other goods correctly valued, if they were of the opinion that such package or invoice had been made up with intent to defraud the revenue of the United States.

The information contained four counts. The first, upon the sixty-sixth section of the Act of 1799, to which the exception does not apply. The second and third counts were framed upon the fourth section of the Act of 1830, ch. 147; and the fourth upon the fourteenth section of the Act of 1832, ch. 227. The objection is not meant to deny the liability of the goods to forfeiture in a case made out under either of those acts, from any conflict between them, or from either being a repeal of the other in any particular, so as to exempt the goods from condem-

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nation. But the exception is confined to the insufficiency of the averments in the second, third, and fourth counts to enforce a forfeiture. The language of the counsel in argument was, that the second, third, and fourth counts of the information are defective on account of the uncertainty and generality of the averments in each and every of them, and that the judgment ought, therefore, to be reversed. The uncertainty complained of is, that there is not in either of the three counts an averment of the special circumstances of the examination of the goods and detection of the fraud, under the authority of the collector. In support of the objection, the counsel relied chiefly upon this court having said in *Wood's* case, that such an averment was necessary to enforce a forfeiture under the fourth or fourteenth sections of the acts of 1830 and 1832. Pressed as it was with other arguments in support of the position, the preparation of this opinion has been delayed, with the view of giving to the objection the most deliberate examination. Having made it, by a close scrutiny of all the acts of Congress which have been passed to prevent frauds upon the revenue; by a comparison of what has been the practice in our own courts, **261***] *upon informations of a like character under those acts, and of what have been, both in England and in our own country, declared to be essential allegations in informations for offenses against the revenue arising from foreign trade, we have concluded that the language in *Wood's* case is stronger than it should have been. It was used argumentatively to show that the sixty-sixth section of the Act of 1799 had not been repealed by the fourth and fourteenth sections of the Acts of 1830 and 1832; and it was assumed in the argument, that certain allegations were proper in a count under the last two sections, which were not necessary and would not be suitable in a count under the sixty-sixth section. In that section, goods not invoiced according to the actual cost thereof at the place of exportation, with design to evade the duties, are subject to forfeiture. They are so, whether the undervaluation shall be discovered after they have been entered and passed from the custom-house, or whether there has or has not been an examination of them. But then, under that section, only such of the goods not invoiced according to actual cost, without any reference to the contents of the package in which they may be, or to the entire invoice of which they may form a part, are subject to forfeiture. It is neither necessary nor proper, then, as was said in *Wood's* case, in a count under that section, to allege the circumstances which led to the detection of the fraud. But it is said that previous examination and a consequent appraisement must be made under the fourth section of the Act of 1830, and under the fourteenth section of the Act of 1832, in the manner directed in the former; and therefore it is necessary, in a count under either of them, to aver that both were done. That, however, is only one of the ways which the collector may pursue, under existing laws, for the purpose of securing the payment of lawful duties, by detecting intended frauds upon the revenue. The object of an examination by packages, under the fourth section of the Act of 1830, is for the purpose of ascertaining whether or not either of the causes mentioned in it exist to make it the duty of the collector to have all the goods in the same entry inspected and appraised, but he is not confined to one package out of every invoice, or to one out of every twenty packages of each invoice. He may examine a "greater number" of packages should he deem it necessary, extending the examination to every package in the invoice. If, before that course has been taken, the collector suspects the entry to be fraudulent as a whole, or any package of it to be falsely charged, he can, without any designation of particular packages, have all the goods inspected and appraised. Or, in making an appraisement under the seventh and eighth sections of the Act of 1832, ch. 227, he may direct it to be done with reference to the detection of an apprehended fraud of any kind whatever, as well as to those particulars mentioned in the fourth and fourteenth sections of the acts of 1830 and 1832, which, when discovered and proved to the satisfaction *of a jury, attaches a [*262 forfeiture either to a package of an entry or to the entire invoice. The fourth and fourteenth sections direct the collector how he is to act in one way to detect frauds upon the revenue. But one mode of prevention, without restrictive terms, limiting an examination and appraisement of goods to that mode, does not imply that other lawful means shall not be used to produce the same result. If the frauds, for which the fourth and fourteenth sections declare there shall be a forfeiture, shall be discovered, in any way of making an appraisement differing from the manner of examining goods under the fourth section of the Act of 1830, no one can be found to say that the forfeiture would not attach, without any reference to the means by which the fraud was discovered. It follows, then, that the mode of making an examination is not confined to that mentioned in the fourth section of the Act of 1830, and that the averment of it is not essential in a count under either of the sections of the law upon which the present information was framed. Without such an averment, a count under the fourth section of the Act of 1830, and fourteenth section of the Act of 1832, stating time and place, and such circumstances or particulars of those sections that a correction or acquittal might be given in evidence to prevent another information for the same offense, would be sufficient to prevent the judgment from being arrested upon a motion for that purpose. We think there was no error in the court having instructed the jury, that, under the information in this case, they were not restricted in the condemnation of the goods to any entered goods which they found undervalued, but that they might find either the whole package or the invoice forfeited, though containing other goods correctly valued, if they should find that such package or invoice had been made up with intent to defraud the revenue of the United States.

The judgment in the court below is affirmed.

Cited—17 How., 94; 3 Wall., 143; 4 Ben., 412; 7 Blatchf., 474; 15 Blatchf., 547.

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MICHAEL MUSSON AND GEORGE O. HALL, Surviving Partners of WILLIAM NOLL, *Plaintiffs*,

v.

WILLIAM A. LAKE.

Bill of exchange — protest — evidence — notary must present bill at time of demand—this rule prevails in Louisiana—lex loci contractus.

By the law merchant, when a demand of payment is made upon the drawee of a foreign bill of exchange, the bill itself must be exhibited.

Neither the statutes of Louisiana, nor the decisions of the courts of that State, have changed the law in this respect.

The statutes and decisions examined.

If, therefore, the notarial protest does not set forth the fact that the bill was presented to the drawee, it cannot be read in evidence to the jury.

Even if the laws of Louisiana, where the drawee resided, had made this change in the law merchant, it would not affect the contract in the present case, which is a suit against an indorser residing in Mississippi, where the contract between him and all subsequent indorsees was made, and where the law merchant has not been changed.

263*] THIS case came up, on a certificate of division in opinion, from *the Circuit Court of the United States for the Southern District of Mississippi.

The question which was certified to this court will be found at the conclusion of the following statement.

Lake was sued as indorser of the following bill of exchange.

VICKSBURG, 17th December, 1836.

Exchange for $6,133.

Twelve months after first day of February, 1837, of this first of exchange (second of the same tenor and date unpaid), pay to the order of R. H. & J. H. Crump six thousand one hundred and thirty-three dollars, value received, and charge the same to account of

STEELE, JENKINS & Co.

To KIRKMAN, ROSSER & Co., New Orleans.

Indorsed: R. H. & J. H. CRUMP,
W. A. LAKE.

Kirkman, Rosser, & Co., New Orleans, 3d February, 1838—protested for nonpayment.

A. MAZUREAU, Not. Pub.

It being admitted that Vicksburg, where said bill bore date, was in the State of Mississippi, and New Orleans in the State of Louisiana, the plaintiffs then offered to read in evidence to the jury the protest of said bill of exchange; which protest, thus offered to be read, is in the words and figures following, to wit:

UNITED STATES OF AMERICA, State of Louisiana:

By this public instrument, protest, be it known, that on this third day of February, in the year one thousand eight hundred and thirty-eight, at the request of the Union Bank of Louisiana, holder of the original draft, whereof a true copy is on the reverse hereof written, I, Adolphe Mazureau, a notary public in and for the city and parish of New Orleans, State of Louisiana aforesaid, duly commissioned and sworn, demanded payment of said draft, at the counting-house of the acceptors thereof, and was answered by Mr. Kirkman that the same could not be paid.

Whereupon I, the said notary, at the request aforesaid, did protest, and by these presents do publicly and solemnly protest, as well against the drawer or maker of the said draft, as against all others whom it doth or may concern, for all exchange, re-exchange, damages, costs, charges, and interests, suffered or to be suffered for want of payment of the said draft.

Thus done and protested, in the presence of John Cragg and Henry Frain, witnesses.

In testimony whereof, I grant these presents under my signature *[L. S.] and the im- [**264** press of my seal of office, at the city of New Orleans, on the day and year first herein written. A. MAZUREAU, Notary Public.

The copy of the said bill of exchange, referred to in said protest, on the reverse side thereof written, is in the words and figures following, to wit:

VICKSBURG, 17th December, 1836.

Exchange for $6,133.00.

Twelve months after the first day of February, 1837, of this first of exchange (second of same tenor and date unpaid), pay to the order of R. H. &. J. H. Crump six thousand one hundred and thirty-three dollars, value received, and charge the same to account of

STEELE, JENKINS & Co.

To KIRKMAN, ROSSER & Co., New Orleans.

Indorsed R. H. &. J. H. CRUMP,
W. A. LAKE.

WM. NOLL & Co., in liquidation.

But the defendant objected to said protest, and the copy of the bill on the reverse side thereof written being read in evidence to the jury, on the ground that it was not stated in said protest that the notary presented said bill of exchange to the acceptors, or either of them, or had it in his possession when he demanded payment of the same.

And that for this alleged defect, which it was insisted could not be supplied by other proof, the said protest was invalid and void upon its face, and could not be received as evidence of a legal presentment of the bill for payment, or of the dishonor of the bill. And, thereupon, on the question whether the said protest could be read to the jury, as evidence of a legal presentment of the bill for payment, or of the dishonor of said bill, the judges were opposed in opinion. Which is ordered to be certified to the Supreme Court of the United States for their decision.

J. MCKINLEY. [L. S.]
J. GHOLSON. [L S.]

The cause was argued by *Mr. Barton* for the plaintiffs, and *Mr. Mason*, Attorney-General, for the defendant.

Mr. Barton, for plaintiffs:

On the trial of this cause, and after the original bill of exchange, upon which the suit was brought, had been read to the jury, the plaintiff offered in evidence the protest thereof, and the following is a copy of the material parts thereof, to wit:

*" UNITED STATES OF AMERICA, State [**265** of Louisiana:

" By this public instrument of protest, be it known, that, on this 3d day of February, 1838, at the request of the Union Bank of Louisiana, holder of the original draft, whereof a true

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copy is on the reverse hereof written, I, Adolphe Mazureau, a notary public in and for the city of New Orleans, State of Louisiana aforesaid, duly commissioned and sworn, demanded payment of said draft at the counting-house of the acceptors thereof, and was answered by Mr. Kirkman (one of the firm) that the same could not be paid."

The counsel of the parties to this suit do not differ at all as to the duty of a notary, when making a personal demand of the payment of negotiable paper prior to the protest thereof. We concur in opinion that he must have the note or bill with him, and should present it for payment, &c.; and the only difference which arises is, as to the species of evidence which is indispensable to prove the fact of presentment. Must the term itself be used in the protest, and will no form of words therein supply its place? This is the position assumed for the defendant; and, this being controverted, the issue is made which is now to be disposed of.

A number of authorities have been cited by the learned counsel for the defendant, which, though certainly applicable to the duties to be performed by a notary *ante* protest, are believed not to decide the question raised here; nor, if they did, can it be conceded that they would be conclusive, upon a matter specially pertaining to Louisiana's jurisprudence.

The stress of the argument in the learned counsel's brief is, that in all cases the fact of presentment must appear, *in verbo*, upon the face of the protest; and this is assuredly not so. For example: if a note or bill should be payable at a particular place, and the notary takes it thither at maturity, and there should be no one there to whom to present it, or of whom to demand payment, the law dispenses the party with making either, and the notary, of course, from certifying either, for *nullus cogitur ad vana*. So in the case of a lost note; a valid protest could be made thereof without its production, if an adequate indemnity was tendered to protect the party from all future liability, or to re-imburse him for any payments he should be constrained to make. In these and analogous cases, it could hardly be insisted, either that the law required the notary to certify to a presentment which was never made, and the failure whereof the law excuses; or, that the protest would be invalid without it. One of the most important of the cases cited adversely is a strong authority to establish this. It is the case of *Freeman et al.* v. *Boynton* (7 Mass. R., 483). The court there, after affirming the necessity of having the note or bill present when the demand is made, says:

"This rule may admit of exceptions—as where the security may be lost; in which case a tender of sufficient indemnity would make **266*]** *the demand valid, without producing the security. And where, from the usual course of business, of which the parties are conversant, the security may be lodged in some bank, whose officers shall demand payment, and give notice to the indorser, according to the custom of such banks—the security not being presented at the time of the demand, but the parties being presumed to know where it may be found." Here, again, presentments are dispensed with, in cases where protests are authorized; and surely these protests must dispense with averments which would not be true.

The forms of protest vary in different countries. They vary in different States. They vary in the same State. They must necessarily adapt themselves to the true circumstances attendant upon the dishonor of bills and notes.

The acts of public officers are favored to the extent that they are presumed to know their duty and to do their duty, unless the contrary appears. A notary has no right "to demand payment," in the absence of the security which attests the party's liability, or without its presentment; and of course he is presumed to know that he cannot do it. Where, then, notaries "demand payment," they have a right to the presumption that the demand followed the presentation. A contrary doctrine casts the presumption against the officer, and arraigns him, by implication, for a breach of duty; and that, too, in the absence of an interest or a motive. Hence, therefore, a "demand of payment," in the absence of other words, far from implying an actual presentment, would imply that there was none. It is believed that no principle, nor usage, nor even precedent, gives the sanction of its authority to accusatory implications like these.

If the protest had averred that "payment was duly demanded," surely that would have implied that the demand was made upon presentment; and if so, is it to be implied that the demand alleged in this protest was otherwise than duly made? If a protest states the substance of what is required to be done, it is all that is needed. No form of words is sacramental; protests have been holden good though they stated that the demand was made "at the maturity" of the bill or note; or "at the time they were due," in lieu of the usual mode of stating the precise day, month, and year when the demand was made. So, notaries must make their demand within certain hours of the days when the bills or notes mature. Demands made in unseasonable hours would be of no avail. Nevertheless, protests but rarely enter into such details, but the thing itself—the presentation—is as much required to be made within the prescribed hours, as it is required to be made at all. Why, then, is more speciality of statement needed about the exact performance of one duty than the other? Why, if the demand of payment implies that it was made in due time, may it not imply that it was made after due presentation?

*But the protest *ad hoc* was made in [**267** Louisiana. If good there, it must be good elsewhere. Commercial usages, however ancient, however prevalent, and however reasonable, cannot confront her statutes and annul them, nor reverse her courts' judgments which settle their meaning. Most disastrous would be the results were it otherwise; for notarial offices in the large cities have their printed forms of protests, which they use in all cases in like conjunctures, and which have been in use for years, and are in daily use; and in heavy business offices (like that of Mazureau's), there are sometimes from twenty to a hundred protests made in a single day, in behalf of the banks; and hence there are vast and incalculable interests dependent upon the validity of these protests, and it would be an intolerable grievance to deal-

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ers in commercial paper, if, while these protests bound indorsers in Louisiana, they released them elsewhere.

A rapid synopsis of the statute and decisions of the Supreme Court of Louisiana will settle the law of protests especially applicable to the case at bar.

The Act of the Louisiana General Assembly, of March 13th, 1827, section 1, provides: "That all notaries, or persons acting as such, are authorized in their protests of bills of exchange, promissory notes, or orders for the payment of money, to make mention" (not of the presentment, but) " of the demand made upon the drawer, acceptor, or person, on whom such order or bill of exchange is drawn or given; and of the manner and circumstances" (not of such presentment, but) "of such demand; and whenever they shall have so done, a certified copy of such protest, &c., shall be evidence of all the matters therein stated."

In the case of *The Louisiana Ins. Co.* v. *Shaumburg*, (2 Mar., N. S., 511), it was decided that a notary's certificate of demand of payment and protest may be contradicted by other evidence. If it might, evidence might be marshaled to rebut that contradiction, and even supply, by parol, omissions excepted to; and if this were so, the objection to the protest at bar should not have been to its admissibility, but to its effect, &c. And this would accord with the decision of *Allain* v. *Whittaker, et al.* (5 N. S., 513), which declares that "the uniform practice in this State has been to received the protests of notaries as evidence of the demand on the maker of a note or acceptor of a bill of exchange."

In the case of *Gale* v. *Kemper's Heirs* (10 Louisiana Rep., 208), the court says: "The note was made payable at the office of discount and deposit of the Bank of the United States, in the city of New Orleans, and the protest states that" (not the presentation, &c., but) "the demand was made there of the proper officer. When a note is payable at a particular place, a personal demand on the drawer or maker cannot be made, and is not always required. It suffices to have been made of any persons there."

268*] *In the case of *Thatcher* v. *Goff* (18 Louisiana Rep., 363), the court gave a striking instance of its liberality of interpretation when construing the language of protests. It decided that where certain notes, payable at the Branch of the United States Bank at Natchez, are protested by a notary residing in Natchez, who states in his protest that he demanded payment at the United States Bank, it will be considered as meaning the Branch at Natchez, and not the principal Bank of Philadelphia; thus supplying, by intendment, the important words, "Bank at Natchez," which the notary had ommitted in his protest.

The learned counsel has cited the case of *Warren* v. *Briscoe* (12 Louisiana Rep., 472); but it is believed to be clearly distinguishable from the case at bar. There the note was "payable at the Planters' Bank of Mississippi at Natchez," and the protest stated that "he went to the Planters' Bank, Natchez, and was informed by the teller there were no funds in the bank for the payment of said note; wherefore he protested," &c. Not only is no presentment stated, but there are no words from which it is to be implied, for no demand is stated to have been made; and though it be inferable that there was some note of the party which the bank had no funds to take up, yet *non constat* that it was the note in question, unless the same had been exhibited to the teller. But this case was fully reviewed in the next case to be cited, which it is respectfully suggested is decisive of the validity of the protest in question.

The case referred to is that of *Nott's Executor* v. *Beard* (16 Louisiana Rep., 308). The protest passed upon was from the identical notarial office which made the one in the case at bar. It is couched in the like language, thus: "I demanded payment of said draft at the counting-house of the acceptors thereof, and was answered by Mr. Burnett, one of said firm, that the same could not be paid." It is to every extent the very case at bar; it decides emphatically that, under the laws of Louisiana, the word "presentment" is unnecessary in notarial protests; that the word "demand" implies the presentment, and is all-sufficient.

Mr. Mason, Attorney-General, for the defendant:

This is an action brought by the plaintiffs against the defendant, as indorser of a foreign bill of exchange. The question raised in the Circuit Court, and upon which the judges divided in opinion, was whether the protest offered in evidence showed upon its face that a presentment to the drawees of the bill, and a demand of payment, had been made. The protest does not state that the bill was presented to the drawees and payment demanded, but simply that the notary demanded payment of the bill, without alleging that he presented it, or that he had it with him and exhibited it at the time he made the demand. We maintain that, by the settled principles of the commercial law, the protest of a foreign bill must *show [*269 that at the time the notary demanded payment he had the bill with him, ready to deliver in case it should be paid; this is generally done by stating that he presented or exhibited the bill. It does not necessarily follow, from a mere statement that he demanded payment of the bill, that he had the bill with him, and presented it or exhibited it to the drawees or acceptor, because he could demand payment of a bill without actually having it with him. To present a bill for payment is to exhibit or show the bill itself to the drawer or acceptor; to demand payment of a bill is to request its payment; and this request may be made whether the bill be present or not. A presentment *ex vi termini* imports that the bill itself was shown to the acceptor. A mere demand of payment does not necessarily import that the bill was shown and exhibited to the acceptor at the time the demand was made.

It is essential, to constitute a legal demand of payment of a bill or note, that it should be presented to the acceptor at the time the demand is made, or, in other words, that the person who makes the demand should have the bill with him. In *Hansard* v. *Robinson* (7 Barn. & Cress., 90, 14 Eng. Com. Law Rep., 20), the Court of the King's Bench decided that the holder of a bill of exchange cannot insist on

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payment without producing and offering to deliver up the bill. The same principle is asserted in *Freeman* v. *Boynton* (7 Mass. Rep., 483), and other authorities. (*Vide* Chitty on Bills, edit. of 1836, 385, *et seq.*; 12 Louisiana Rep., 473.)

The contract of an indorser is conditional; he promises that the bill shall be paid if it is duly presented for payment, or if not paid upon presentment, and notice of its nonpayment be given to him, that he will pay it. These constitute conditions precedent to a right of recovery against him. (Chitty on bills, edit. of 1836, 385.) And being conditions precedent, the proof must be clear and explicit to charge him. (20 Johns. Rep., 381.) In the last case, the Supreme Court of New York say: "The question is not what inference the jury might draw from the evidence, but what testimony does the law require in such case. We have seen that this is a condition precedent, and strict proof is required. The law has allowed the indorser this protection; nothing short of clear proof of notice shall subject him to liability. The reason and justice of requiring clear proof against a surety will not be doubted. It is imposing no hardship on the party," &c. In that case, the proof was, that notice was left at the office of the defendant, or at the postoffice. In the one case the notice would have been sufficient, in the other it would not; and as the proof did not affirmatively and clearly show that it was left at the office of the defendant, it was held insufficient. So here, if the bill was present, and shown to the acceptor when the demand was made, it was sufficient to charge the indorser; if it were not present, and ready to be delivered up when payment of it was demanded, it was not suffi-
270*] cient; *and as the evidence (that is, the protest) does not show it was presented or exhibited when the demand was made, it necessarily follows that the proof was insufficient to charge the indorser; because, as before shown, the statement in the protest that he demanded payment of the bill, does not of itself import *ex vi termini* that he had the bill with him when such demand was made. The refusal to pay in this case, when payment was demanded, may have been predicated upon the fact that the notary did not have the bill. Every fact stated by the notary in this protest may be true, and yet no dishonor of the bill have occurred on which to charge the indorser. The protest must show every act to have been done that is necessary to charge the indorser, and can leave nothing to inference or intendment. If every fact stated in this protest might be true, and the bill itself never have been exhibited or shown for payment, the proof is insufficient.

In suits against indorsers of foreign bills of exchange, the only legal evidence to prove the presentment of the bill and demand of payment is the protest. In regard to the drawer, if he had no funds in the hands of the drawee no protest is necessary, and an explicit promise to pay an indorser may waive the necessity of a protest; but without such express waiver, a protest is the only evidence of presentment and demand known to the law. "Whenever," says the law (Chitty on Bills, edit. of 1836, 489 *et seq.*), "notice of nonpayment of a foreign bill is necessary, a protest must also be made, which, though on first view it might be considered mere matter of form, is, by the custom of merchants, indispensably necessary, and cannot be supplied by witnesses or the oath of the party, or in any other way; and it is said is part of the constitution of a foreign bill of exchange, because it is the solemn declaration of a notary, who is a public officer recognized in all parts of Europe, that a due presentment and dishonor has taken place, and all countries give credence to his certificate of the facts stated." To the same point are the following cases: 10 Mass. R., 1; 12 Pick., 484; 4 Harr. & Johns., 54, 61; 4 Wash. C. C. R., 468.

To make the protest evidence of presentment and dishonor, it must then show on its face the solemn declaration of the notary, that a due presentment of the bill and its dishonor has taken place, and to constitute such due presentment and dishonor, it has been shown that a presentation or exhibition of the bill itself to the acceptor, and a demand of payment, is necessary. And to establish a legal presentment, the bill must accompany the demand. The evidence must affirmatively show that fact, and as the protest in case of a foreign bill is the only evidence admissible to prove it, it must show that the bill accompanied the demand, by stating that it was presented, &c., or other equivalent words. This is expressly stated by Mr. Chitty. (Chitty on Bills, edit. of 1836, 492.) He *says: [*271 "When the drawee, &c., refuses to pay the bill, the holder should cause it to be protested. For this purpose, he should carry the bill to a notary, who is to present it again to the drawee and demand payment," &c. If the drawee again refuse to pay, the notary is thereupon to make a minute, &c. The next step is to draw up the protest, which is a formal declaration, on production of the bill itself, &c., "that it has been presented for payment, and payment refused," &c.

In countries governed by the commercial law, the form of the protest shows that the bill itself must be stated to have been presented in the protest, as well as the demand of payment. The form runs thus: "On this day, the 1st, &c., at the request of A. B., bearer of the original bill of exchange, whereof a true copy is on the other side written, I., B. C., notary, &c., did exhibit the said bill," &c., &c. The demand of payment and refusal is then stated, *vide* form. (Chitty on Bills, edit. of 1836, 496, 497.)

If it be necessary to exhibit the bill at the time payment of it is demanded, it would seem necessary to prove it; and if it be necessary to prove it, the protest, which is the instrument of proof, must not only show a demand of payment, but a presentation of the bill itself at the time the demand was made. And in conformity with these principles, the Supreme Court of Louisiana held, in the case of *Warren* v. *Briscoe* (12 Louisiana Rep., 472), the protest must show that the bill itself was presented, &c.

This case, it is true, has in effect been overruled by the case of *Nott's Executor* v. *Baard* (16 Louisiana R., 308), although the court endeavored to reconcile the two cases. The last case, it is submitted, is irreconcilable with the principle and the adjudicated cases hereinbe-

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fore cited. It substitutes inference or presumption for fact, and decides the point mainly on the ground that the notary is a public officer, and must be presumed to have done his duty. It introduces a new rule, unknown to the commercial law, and substitutes inference of a fact, the existence of which the law required should be shown by express proof; and, moreover, it assumes to raise the presumption from the statement of a fact (to wit, demand), which by no means necessarily imports that the bill was presented when such demand was made. The case is, as we will endeavor to show, inconsistent not only with the previous case in the same court in 12 Louisiana Rep., but with principle.

The court (p. 312) admit the law to be, that the person making the demand must have the bill with him; but, say they: "It does not follow as a consequence, because both words are not used in the protest, that he had not the bill with him." By "both words," we understand the court to mean the words "presentment" and "demand," as used in the previous part of the sentence, in which they say: "The person making the 'presentment' or 'demand' must have the bill with him." With all due 272*]*deference to the opinion of that court, for whom we entertain the highest respect, the question was not whether it followed as a consequence, because both words were not used, that the notary had not the bill with him, but whether it followed as a consequence, from the statement of the one used, to wit, "demand," that he had the bill with him. The law required the plaintiff to prove that he presented the bill and demanded its payment, which was refused. It does not follow, that, because he demanded payment of a bill, therefore he had the bill itself with him and presented it. He may have had it when he demanded payment, or he may have demanded payment of the bill without having it. It is probable he had it, but the law will not permit the liability of an indorser to be established by the substitution of probability for proof. The statement, therefore, that he demanded payment of it, is not proof that he presented or exhibited it. If it be essential that the bill should be presented or shown, and payment thereof demanded, it follows that both the presentment of the bill for payment and the demand of payment should be stated. Chitty (page 492) says the notary should present it and demand payment, and if payment be refused he should protest it, which is a formal declaration that he presented it, &c. From this, it appears the protest must state the presentment, that is, the exhibition of the bill to the acceptor, and the demand of payment.

Aware of the difficulty of sustaining their opinion, if the same rule of evidence applied to the statements of the notary that would apply to the same statements on oath by a private individual, they say he is a public officer, and it is not to be presumed that he would do so useless an act as to go to the house of the acceptor and demand payment if he had not the bill with him, and that the law will presume the notary had done his duty. The principle, that the law presumes public officers to do their duty, it is respectfully submitted, was misapplied by the court. It is true, in a proceeding against an officer for dereliction of duty, the presumption is that he has done his duty, and the contrary must be proved, though it involve a negative. But if this principle applies to a collateral proceeding like this, it proves too much, and the long train of recorded decisions, requiring a protest to be produced on the trial, will at once be struck from the commercial code. If the law presumes he will do his duty, why require the protest to be produced? proof that the bill was left with him to protest would be sufficient, because, as it was his duty to protest it, it will be presumed he did so. So, when it is made his duty to give notice when he protests a bill, as is the case in some of the States, no notice need ever be proved; all that is necessary, upon the principle assumed by the court, is in such case to prove the protest, and then, as it was the notary's duty to give the notice, it will be presumed he gave it. Nay, if it is proved that the bill was put in his hands *to protest, it will be presumed he did [*273 his duty, and therefore it will be presumed he did protest it. But the question might be here asked, what is the duty of a notary when a foreign bill is placed in his hands for protest? It is not merely to present and demand payment, but to set forth these facts in his protest. If he omits to do so, the protest on its face shows he has not done his duty, and of course the presumption falls to the ground. The principle might be carried out to cure any defective statement as to the time notices were given; if omitted to be stated when notice was given, as the notary's duty was to give notice, at furthest, the day after the protest, it could be presumed he did so, although his protest does not show the time when he gave the notice.

The court endeavor to distinguish the case from the one in 12 Louisiana Rep., 472. They say, in the last named case, the notary certified that he went to the Planters' Bank, and was informed by the teller there were no funds in the bank to pay the note, &c. He does not say, says the court, that "he presented the note or made a demand of payment." What was the use to do so, if their opinion in 16 Louisiana Rep. is correct? According to that opinion, as he was presumed to do his duty, and as it was his duty to present the note and demand payment, this would be presumed; nay, as they say in that case, that it is not to be presumed the notary would do so useless an act as to go to the house of the acceptor without the bill; so, in this case, they might with equal justice have said it would not be presumed he would go to the bank to demand payment, and yet make no demand when he got there. Why was it not presumed he did his duty in that case, as well as in the last? Simply because in that case the court decided, very correctly, that the facts which constitute a legal presentment, &c., must appear on the face of the protest, and cannot be presumed.

Upon the whole, it is believed, both on principal and authority, that the case in 16 Louisiana Rep. cannot be sustained, and that the protest in this case is not legal evidence of presentment, to charge the defendant.

Mr. Justice MCKINLEY delivered the opinion of the court:

The plaintiffs brought an action of *assumpsit*,

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in the Circuit Court of the United States for the Southern District of Mississippi, against the defendant, as indorser of a bill of exchange, drawn at Vicksburgh, in said State, by Steele, Jenkins & Co., for $6,133, payable twelve months after the first day of February, 1837, to R. H. & J. H. Crump; and addressed to Kirkman, Rosser & Co., at New Orleans, and by them afterwards accepted, and indorsed by the payees and the defendant.

On the trial of the cause, the plaintiffs offered to read as evidence to the jury a protest of the bill of exchange, to the reading of which the defendant objected; because it did not appear **274*]** in the *protest that the notary had presented the bill to the acceptors, or either of them, when he demanded payment thereof. And upon the question, whether the protest ought to be read to the jury as evidence of a presentment of the bill to the acceptors for payment, or as evidence of the dishonor of the bill, the judges were opposed in opinion. Which division of opinion they ordered to be certified to this court; and upon that certificate the question is now before us for determination.

The indorser of a bill of exchange, whether payable after date or after sight, undertakes that the drawee will pay it, if the holder present it to him at maturity and demand payment; and if he refuse to pay it, and the holder cause it to be protested, and due notice to be given to the indorser, then he promises to pay it. All these conditions enter into and make part of the contract between these parties to a foreign bill of exchange; and the law imposes the performance of them upon the holder, as conditions precedent to the liability of the indorser of the bill. A presentment to and demand of payment must be made of the acceptor personally, at his place of business or his dwelling. (Story on Bills, sec. 325.) Bankruptcy, insolvency, or even the death of the acceptor will not excuse the neglect to make due presentment; and in the latter case it should be made to the personal representatives of the deceased. (Chitty on Bills, 7th London ed., 246, 247; Story on Bills, 360; 5 Taunt. R., 30; 12 Wend. R., 439; 2 Douglass, 515; *Warrington* v. *Furbor*, 8 East, 245; *Esdaile* v. *Sowerby*, 11 East, 117; 14 East, 500.)

The reasons why presentment should be made to the drawee are, first, that he may judge of the genuineness of the bill; second, of the right of the holder to receive the contents; and third, that he may obtain immediate possession of the bill upon paying the amount. And the acceptor has a right to see that the person demanding payment has a right to receive it, before he is bound to answer whether he will pay it or not; for, notwithstanding his acceptance, it may have passed into other hands before its maturity. And he, as well as the drawee, has a right to the possession of the bill, upon paying it, to be used as a voucher in the settlement of accounts with the drawer. (Story on Bills, sec. 361; *Hansard* v. *Robinson*, 7 Barn. & Cress., 90.)

Mr. Justice Story has given the form of a protest now in use in England, in his treatise on bills of exchange, by which it will be seen that the words "did exhibit said bill" are used, and a blank is left to be filled up with "the presentment, and to whom made, and the reason, if assigned, for nonpayment." (Story on Bills, 302, *note*.) This, with the authorities already referred to, shows that the protest should set forth the presentment of the bill, the demand of payment, and the answer of the drawee or acceptor. The holder of the bill is the proper person to make the presentment *of it for payment or acceptance. [*275 (Story on Bills, sec. 360.) But the law makes the notary his agent for the purpose of presenting the bill, and doing whatever the holder is bound to do to fix the liability of the indorser. Everything, therefore, that he does in the performance of this duty must appear distinctly in his protest. He is the officer of a foreign government; the proceeding is *ex parte;* and the evidence contained in the protest is credited in all foreign courts. (Chitty on Bills, 215; *Rogers* v. *Stephens*, 2 T. R., 713; *Brough* v. *Parkings*, 2 Ld. Raym., 993; *Orr* v. *Maginnis*, 7 East, 359; *Chesmer* v. *Noyes*, 4 Camp., 129.) The evidence contained in the protest must, therefore, stand or fall upon its own merits. It rests upon the same footing with parol evidence; and if it fails to make full proof of due diligence on the part of the plaintiff; it must be rejected.

But the counsel for the plaintiffs insists that the statute of Louisiana, and the interpretation given to it by the Supreme Court of that State in the case of *Nott's Executor* v. *Beard* (16 Louisiana Rep., 308), have so changed the law merchant as to render unnecessary the presentment of a foreign bill for payment. After a careful examination of the opinion of the court in that case, we are unable to perceive any intention manifested to depart from the settled usages of the law merchant; but, on the contrary, they attempt by argument and authority to bring the case within that law. The question before that court was the identical question now before us. The protest was objected to because it did not show that the bill had been presented by the notary to the acceptors for payment. To this objection that court said it might perhaps have been more specific if in the protest it had been stated that the bill was presented, and payment thereof demanded. And they admit the law is well settled, that, before the holder of an accepted bill can call on the drawer for payment, he must make a presentment for, or demand of, payment, and give notice of the refusal. Here, then, is a definite proposition, asserting that a presentment for payment and a demand of payment are convertible terms, and that the proof of either would be sufficient.

To support this proposition, they refer to Chitty on Bills, and Bayley on Bills, and the annotators on them. And as further proof and illustration, and to show that demand of payment should be preferred to presentment for payment, they refer to the statute of Louisiana, passed in 1827, in which they say the word "demand" is used in it, and that the word "presentment" is not; and they refer to the statute also to show that notaries were vested with certain powers by it, which gave authority to their acts; and that they being public officers, the presumption of law is, that they do their duty; and therefore, if the protest were defective, and liable to the objection urged

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against it, this presumption of law would cover 276*] *all such defects. This is substituting presumption for proof, in violation of all the rules of evidence.

With all due respect for that distinguished tribunal, we are constrained to dissent from the general proposition they have laid down on the subject of demand and presentment, and from all their reasoning in support of it. Due diligence is a question of law; and we think we have shown, by abundant authority, that the holder of an accepted bill, to fix the liability of the drawer or indorser, must present it to the acceptor and demand paymnent thereof. It may be well here to repeat what Lord Tenterden, *Ch. J.*, said on this subject, in delivering the judgment of the Court of King's Bench in the case of *Hansard* v. *Robinson*, before referred to. He said: "The general rule of the English law does not allow a suit by the assignee of a chose in action, The custom of merchants, considered as part of the law, furnishes in this case an exception to the general rule. What, then, is the custom in this respect? It is, that the holder of the bill shall present the instrument, at its maturity, to the acceptor, demand payment of its amount, and, upon receipt of the money, deliver up the bill. The acceptor paying the bill has a right to the possession of the instrument for his own security, and as his voucher, and discharge *pro tanto*, in his account with the drawer. If, upon an offer of payment, the holder should refuse to deliver up the bill, can it be doubted that the acceptor might retract his offer, or retain his money?" This extract, we think, furnishes a full answer to all that has been said by the Supreme Court of Louisiana to prove that it is not necessary to present the bill to the acceptor for payment; and to the presumption of law relied on to cure the defects in the protest.

But to show that, by the statute of Louisiana, the presentment of a bill to the acceptor for payment is not dispensed with, and that the presentment is, by a fair construction of the act, as much within its true intent and meaning as the demand, we proceed to examine its provisions. The principal object of the Legislature in passing this statute seems to have been to give authority to notaries to give notices, in all cases of protested bills and promissory notes; and to make their certificates evidence of such notices. And, therefore, all that is said on the subject of the demand and the manner of making it, and the other circumstances attending it, was not intended as a new enactment on these subjects, but as inducement to the powers conferred on the notary, which was the principal object of the statute, as will appear, we think, by reading it. That part of it which relates to this subject is in these words: "That all notaries, and persons acting as such, are authorized, in their protests of bills of exchange, promissory notes, and orders for the payment of money, to make mention of the demand made upon the drawee, acceptor, or per-277*] son on whom such *order or bill of exchange is drawn or given, and of the manner and circumstances of such demand; and by certificate, added to such protest, to state the manner in which any notices of protest to drawers, indorsers, or other persons interested were served or forwarded; and whenever they shall have so done, a certified copy of such protest and certificate shall be evidence of all the notices therein stated."

It seems to have been taken for granted by the Legislature, that the notaries knew how to make out a protest, and therefore they did not prescribe the form, but gave the substance of it, to which the notary was required to add a certificate of the manner in which he had given notices, and when done, according to the statute, a certified copy of the protest and certificate should be evidence, not of the demand and manner and circumstances of the demand, but of the notice only. This shows that the intention of the Legislature, in passing this part of the statute, was merely to authorize the notaries to give notices, and to make the copy of the protest, and the certificate added to it, evidence of notice in the courts of Louisiana. But, independent of this view of the subject, we think the language employed in this statute includes the presentment of the bill for payment, and for all other purposes, as fully as it does the demand of payment. In giving construction to the act, the phrase "and of the manner and circumstances of such demand" cannot be rejected, but must receive a fair interpretation. When taken in connection with other parts of the statute, what do these words mean? The manner of making a demand of payment, we have seen, is by presenting the bill to the drawee or acceptor; and so important is this part of the proceeding, that the omission to present the bill to the acceptor will justify his refusal to pay it, although payment be demanded. The Legislature cannot be presumed to have intended to make so important a change in the law merchant as that ascribed to them by the counsel for the plaintiffs, without at the same time providing some other mode of obtaining the acceptance and payment of bills of exchange, and of holding drawers and indorsers to their liabilities. It is but reasonable, therefore, to give to the phrase before referred to such construction, if practicable, as will leave the law merchant as it stood before the passage of the statute, and carry into effect the main intention of the Legislature. This, we think, may fairly be done without doing any violence to the intention or the language of the statute.

The manner of the demand must, therefore, mean the presentment of the bill for either acceptance or payment; and the circumstances of the demand, we think, means the place where the presentment and demand is made, and the person to whom or of whom it is made, and the answer made by such person. It is very clear that bills payable at sight, and after sight, are within the *meaning of the [*278 statute; because it provides for a demand of payment of the acceptor of a bill. Now, how can there be an acceptor of a bill without a presentment for acceptance? Until the bill become due, payment cannot be demanded of the drawee. This shows that without the word "presentment" and the word "demand," also, the plain meaning of the statute could not be carried into effect. A bill, payable at a fixed period after its date, need not be presented for acceptance; it is sufficient to present it and demand payment when it arrives at maturity; but a bill payable at sight, or after sight, can never

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become due until after it has been accepted. How is the holder or the notary to obtain the acceptance of such a bill under the decision of the Supreme Court of Louisiana? Will it be sufficient to demand payment of the bill? That would be a nugatory act, because it is not due; then it must be admitted that, by fair and necessary construction, the word "presentment" is within the plain meaning and intention of the statute, and that the bill may be presented for acceptance or for payment, and therefore neither the statute nor the decision of the Supreme Court of Louisiana has changed the law merchant in any of these respects.

There is, however, another question, entirely independent of the statute and the decision of the Supreme Court of Louisiana, which may be decisive of the case before this court; and that question is, whether the contract between the holder and indorser of the bill in controversy is to be governed by the law of Louisiana, where the bill was payable, or by the law of Mississippi, where it was drawn and indorsed. The place where the contract is to be performed is to govern the liabilities of the person who has undertaken to perform it. The acceptors resided at New Orleans; they became parties to the bill by accepting it there. So far, therefore, as their liabilities were concerned, they were governed by the law of Louisiana. But the drawers and indorsers resided in Mississippi, the bill was drawn and indorsed there; and their liabilities, if any, accrued there. The undertaking of the defendant was, as before stated, that the drawers should pay the bill; and that if the holder, after using due diligence, failed to obtain payment from them, he would pay it, with interest and damages. This part of the contract was, by the agreement of the parties, to be performed in Mississippi, where the suit was brought, and is now depending. The construction of the contract, and the diligence necessary to be used by the plaintiffs to entitle them to a recovery, must, therefore, be governed by the laws of the latter State. (Story on Bills, sec. 366; 4 Peters, 123; 2 Kent's Com., 459; 18 Mass. R., 4; 12 Wend. R., 439; Story on Bills, sec. 76; 4 Johns. R., 119; 12 Johns. R., 142; 5 East, 124; 3 Mass. R., 81; 3 Cowen, 154; 1 Cowen, 107; 5 Cranch, 298.)

279*] *Whatever, therefore, may have been the intention of the Legislature in passing the statute, and of the Supreme Court of Louisiana in the decision of the case referred to, neither can affect, in the slightest degree, the case before us. In Mississippi the custom of merchants has been adopted as part of the common law; and by that law and their statute law this case must be governed. We think, therefore, the protest offered by the plaintiff, as evidence to the jury, ought not to have been received as evidence of presentment of the bill to the acceptors for payment, nor as evidence of the dishonor of the bill; which is ordered to be certified to the Circuit Court accordingly.

Mr. Justice McLEAN: I think the protest was evidence. The notary made demand of payment, at the maturity of the bill, and we know that he had possession of the bill, from the fact of the protest being made on the same day. Now, as the notary could not make a legal demand in the absence of the bill, the fair, if not the necessary, inference is, that he had possession of the bill when he demanded payment.

Mr. Justice WOODBURY: I regret being compelled to dissent from a portion of the opinion of the majority of the court which has just been pronounced. This I should be content to do without explanation, if the grounds for it did not appear to be misunderstood. I do not question that a note should be present usually when payment is demanded (*Freeman* v. *Boynton*, 7 Mass. R., 483; 17 Mass. R., 449; 3 Metcalf, 495); and that a written protest is the proper evidence to show a presentment or demand in the case of a foreign bill of exchange. (8 Wheat., 333; *Burke* v. *McKay*, 2 Howard, 71.) But, in my view, a protest like this was competent evidence to be submitted to the jury, in order that they might infer from it that the note was presented when the demand was made. That was the point presented by the division of opinion between the judges in the court below. One held it was competent evidence from which to make such an inference, and the other, it was not, and we are merely to decide which was right.

The question of due presentment and demand is a mixed one of law and fact, and not one of mere law, unless all the facts are first conceded or agreed. (*United States* v. *J. Barker*, 1 Paine's C. C. R., 156.) This is in analogy to the rule about notice. (1 Peters, 583.) In all cases where it is possible for the jury on any reasonable hypothesis to infer a proper presentment from the protest offered, it is safer that the writing should not be withdrawn from them, but go in, and the court instruct the jury on the whole evidence what the law was on such facts as they might be satisfied of. Chancellor Kent (3 Com., 107) thinks it very difficult, in these mixed questions of law and fact about commercial paper, to do *justice by any other course. In this [*280 case the jury might or might not be satisfied of the fact of the bill being present when the demand was made. But why not let them pass on that fact? It is manifest that no evil or danger would result from leaving the matter to them, under due instructions from the court, provided there be no legal obstacle to such a course.

Is there, then, any such obstacle?

It is conceded, on both sides, that the protest is competent evidence, and contains enough from which the jury could infer a demand of payment. That is the most material part of the notary's duty. It is not only so described in some elementary treatises, but the duty of having the note present, or of calling with it at the hours of business alone, are not described separately; but are involved or implied in the general duty of making a demand. Thus Dane, in his Abridgment, Bills of Exchange (art. 11, sec. 1), says: "In making a protest, three things are to be done—the noting, demanding, and drawing up the protest." "The material part is the making of the demand." So the word "demand" is at times used as synonymous with the word "presentment" by Bailey. (16 Louisiana Rep., 311.)

But the protest in this case states not only a

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demand, but that payment of the bill was refused, and that he had it in possession, so as to make a copy "of the original draft" on the back of the protest, or, to use his own words, "whereof a true copy is on the reverse hereof written," and also "demanded payment of said draft," and was answered "that the same could not be paid."

Under these expressions, it could hardly be deemed unfair, or any stretch of probability, to infer that the bill was present at the demand, and the more especially as the notary knew it was his duty to have it present, and does not state that any objection was made, or refusal to pay, on account of its absence, as he should have stated, if such was the truth. My views do not differ from those of a majority of this court concerning the importance of having the principles as to commercial law, and especially commercial instruments, uniform, and as little fluctuating as possible; and hence as to them I would make no innovation here. But our difference is rather on a question of evidence. Thus, had the testimony offered been submitted to the jury, and they had inferred from it a due presentment of the note, it would not change any commercial principle as to the necessity of presentment, but merely establish the fact of presentment here on evidence deemed by the jury to render that fact probable. And if juries should be disposed to find such a fact on slight testimony, it would do no injury to commercial paper, or commercial principles, or substantial justice between parties, but merely indicate an increased liberality as to forms, where substance has been regarded, that is, where the vital point in the transaction is beyond controversy, namely, that payment has clearly been de-
281*]*manded and not made. Such a course would accord, also, in spirit, with what was laid down by this court in 1 Peters, 583, that rules as to commercial paper ought to be formed and construed so as to be reasonable and founded in general convenience and with a view to clog as little as possible, consistently with the safety of parties, the circulation of paper of this description.

There is nothing in the nature of protests and presentments which on principle requires any increased strictness in the proof of them, but, on the contrary, much to justify every reasonable presumption in their favor. Any holder would be anxious to get his money at once of the drawee, and not neglect to have the note with him so as to give it up on payment and prevent delay. So would he wish to be paid and excused entirely from making protest, rather than resort to that and notice, and suffer the delay of recovering it of a drawer or indorser.

Both of these considerations strengthen the inference that he and his agent would present the note, or have it with them, when demanding payment, and render it reasonable, after slight proof of presentment, to leave it to the opposite party to rebut that inference, so natural, by stronger proof that the note was not present, if the facts would warrant such proof.

Another consideration against requiring great or greater rigidity in the evidence of a present-

ment and form of protest, is the fact that a protest is of less materiality than notice.

As an illustration that the notice is deemed more material than the protest, "omitting to allege in the declaration a protest of a bill is only form, not to be taken advantage of on a general demurrer." (1 Dane's Abr., Bills of Exchange, ch. 20, art. 11, sec. 9; Lill. Ent., 55; 3 Johns. R., 202; *Salomons* v. *Staveley*, Doug., 684, in note to *Rushton* v. *Aspinall*.)

But, omitting to state a demand or notice is bad after verdict. (Doug., 684.)

Dane, in his Abridgement (Vol. I., p. 395, ch. 20, art. 10, sec. 1), says: "Notice is very material. Protests are mere matter of form." Yet notice may be very loose, and it answers in all cases, if it disclose merely the fact of demand, and a reliance on the person notified for payment. (*Shed* v. *Brett*, 1 Pick., 401; *Miller* v. *Bank of United States*, 11 Wheat., 431; *Gilbert* v. *Dennis*, 3 Metc., 495; 2 Johns. Ch. R., 337; 12 Mass. R., 6; 4 Wash. C. C. Rep., 464.)

"The notice, however, should inform the party to whom it is addressed, either in express terms or by necessary implication, or, at all events, by reasonable intendment, what the bill or note is, that it has become due, that it has been duly presented to the drawer or maker, and that payment has been refused. (Chitty on Bills, 9th Lond. & 10th Amer. edit., 469.)

But it has again and again been held, that the notice need not *state a presentment [*282 in express terms, and that it will be implied from stating a demand and nonpayment, and a looking to the indorser. (9 Peters, 33; 3 Kent's Com., 108; 10 Mass. R., 1; 4 Mason, 336; 1 Johns. Cas., 107.) So, "Your note has been returned dishonored," is enough from which to intend all. (See various other illustrations, 6 Adolph. & Ellis, 499; 5 Dowl., 771; 2 Chit. R., 364; 2 Mees. & Welsb., 109.)

It may be a letter, merely to that effect, and need not be a copy of the protest. (1 Chit., 2d Eng. & 1st Amer. edit., 363, 364, 498, 499; 3 Camp. R., 334; 2 Starkie, 232; *Goodwin* v. *Harley*, 4 Adolph. & Ellis, 520, 870; 4 Eq. R., 48; see 8 Mass. R., 386.) And it has been adjudged, that the notice need not state, in express terms, that the note was present, or if present was exhibited, if it only contained matter from which, by reasonable intendment, this can be inferred. (Chitty on Bills, last edit., 469; 2 Peters, 254; 9 Peters, 33.)

It not being necessary, then, to inform the indorser of the presentment of the note itself, in so many words, there seems to be no use in having the fact stated at length in the protest, if enough appear to render the fact probable.

It would be difficult to find a reason, in the absence of positive law, why the form of the protest should not be dealt by as liberally as that of notice; and if, like the other, it disclose a demand, allow the jury to infer from that, as in the case of notice, that the note was present. Indeed, a protest is not required to be in writing at all except in case of foreign bills, drawn on persons abroad. (1 Chitty on Bills, 643; *Rogers* v. *Stevens*, 2 D. & E., 713, 2 Starkie on Ev., 232; 6 Wheat., 572; 8 Wheat., 333; 3 Wend., 173; 2 Peters, 179; 1 Cranch, 205.) And then it doubtless originated in a rule mere-

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ly allowing it to be done to save the expense and trouble of bringing a witness from abroad to prove the fact, rather than making it imperative.

Instead of a written protest being better evidence than a witness of the presentment and demand in case of inland bills or promissory notes, or even foreign bills drawn on persons here, it is inferior evidence to witnesses for proving presentment and demand, and is usually inadmissible, except by special statutes. (1 Chitty on Bills, 405; 3 Pick., 415; 6 Wheat., 572; 5 Johns. R., 375; 4 Wash. C. C. Rep., 148; 4 Camp. R., 129; 2 Howard's U. S. Rep., 71; 8 Wheat., 146.)

Some seem to suppose that there is danger in allowing an informal written protest to go to the jury as evidence to be weighed in proving that the note was present. But there can be no more in that than in allowing an informal notice to go to the jury. The jury must be satisfied, in both cases, and should so be instructed, that all has been done which the law in both requires. If there be any defense in either case, that all proper has not been done, it can prob-
283*] ably *be shown by counter evidence in one as well as the other. Why should it not be? And why is not that an ample security against being improperly charged? For the protest is not a written contract between the parties, or a sealed instrument not open to be contradicted by parol evidence. But it is a mere certificate of a notary, a subordinate officer, admitted for convenience as *prima facie* evidence of certain facts, and allowed to that extent in order to save the expense of witnesses and delays, but ought to be always open to be impaired or disproved by the other party in interest, who has never been heard before him, and of course cannot reasonably be concluded forever by his acts. The notary is not required to swear to them, when they are admissible as evidence, as he would be to a deposition, because of his official obligations and standing. But the character and construction that properly belong to his certificate as evidence seem to be like those of a deposition; and if it states, in so many words, that the note was presented, or states what justifies such an inference, there appears to be no good reason why the contrary may not be proved, if such was the fact, and the indorser be thus protected against statements or inferences not well founded. And the absurdity of the contrary course is still more apparent as to protests, when one made by any respectable merchant, and attested by two witnesses, in the absence of a notary, has the same validity as his. (Chitty on Bills, 303; Story on Bills, sec. 276.)

In *Nicholls* v. *Webb* (8 Wheat., 336), counter testimony was held to be admissible against the minutes of a notary offered to prove demand and notice.

So is it admissible, that the notary mistook the place, and did not demand the bill at the place of business for the drawee. (*Insurance Co.* v. *Shamburgh*, 2 Martin's R., N. S., 513.)

In *Vandewall* v. *Tyrrell* (Mood. & Malk., 87), counter evidence was offered, and avoided the protest, because the clerk of the notary, and not the notary himself, as stated in the protest, made the demand. (See Chitty on Bills, 495, *note.*)

This point thus being established on both principle and precedent, all the danger or difficulty as to the merits of the case, by admitting a protest like this, is obviated. But it is further urged against it, that presentment is averred in the declaration, and therefore must be proved. This we admit. (Chitty on Bills, 643–647.) And so is notice averred in the declaration and notice of a presentment, and so that must be proved. (1 Chit., 633; Doug., 654, 680.) All we urge here is to let them be proved by similar general statements, from which the similar inferences may be drawn in one case as the other, that the note was present at the time of the demand, unless the contrary is shown—as it may be, if true.

Again, it is said that the forms of protest generally state, that the bill was present or exhibited. This is true. (1 Chitty, *395, [*284 396, 1st Amer. edit.; Story on Bills of Exchange, sec. 276, *note.*)

But we are aware of no case deciding that this fact must be stated, in so many words, in the protest itself, though we admit that the jury must be satisfied that the fact existed. Minutes in the book of a messenger deceased have been held to be proof to be submitted to a jury as evidence of due demand and notice. (*Welsh* v. *Barrett*, 15 Mass. R., 380.) Yet there does not appear to have been a presentment stated, *eo nomine*, or that there was any but inferential evidence that he had the note with him. (See, also, *North Bank* v. *Abbott*, 13 Pick., 469.) And it is not a little remarkable, that the only statute in England (9 and 10 Will. III.) which prescribes the form of a protest, and which is in relation to inland bills of five pounds and upwards, in order to recover damages and interest, the form does not state in so many words that the bill was present or was exhibited, but merely "at the usual place of abode of the said A. have demanded payment of the bill," &c. (Chitty on Bills, 465, 9th ed.) In such cases, precisely that, and that alone, must be done which is contended for here, namely, leave it to the jury to infer the presence of the bill from its payment being demanded, and any other facts stated, unless the contrary is shown. Look at another analogy. It is necessary that the exhibit of the note and the demand be made in the legal hours of business. (Chitty on Bills, 349, 354; *Ruben* v. *Beanet*, 2 Taunt., 388; 2 Camp., 537; *Parker* v. *Gordon*, 7 East, 385; 1 Maule & Selw., 20.) But, as in respect to the presence of the note, no case holds that this must appear by so many words in the protest. And it is not stated, in the common forms, that the demand was made in the usual hours of business. (1 Chitty on Bills, 396.) On the contrary, the jury are allowed or instructed that they may infer, from the statement of the demand and nonpayment, that they were made within the proper hours. And if it was not, the other party would doubtless be allowed to disprove it by counter evidence.

How can such a case, then, be distinguished in principle from this?—except that there is much less in the usual form of protest from which to infer that the bill was presented in legal hours, than there is in this protest from which to infer that the bill was present when the demand was made. I am the more inclined, also, to the opinion, that this protest is com-

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petent evidence, because, under a special law in Louisiana, passed March 13th, 1827, such protests have been adjudged sufficient. Their law uses the word "demand" when describing what the protest shall contain, and such a protest is there allowed to go to the jury as evidence from which to infer that the note was present. (*Nott's Executor* v. *Beard*, 16 Louisiana R., 308.)

The bill now in dispute was on its face payable in Louisiana; and hence the principles of commercial law require that the protest 285*] *be made at the time and in the manner prescribed by that State. (Story on Bills of Exchange, sec. 176; 1 Chitty on Bills, 193, 506; Story's Conflict of Laws, sec. 360.)

But whether the statute of Louisiana, prescribing what protest shall be sufficient ought to be considered as affecting anything beyond the evidence of protest in its own courts, is not very clear on principle. (See cases, Story on Bills, Sec. 172.)

Hence, in forming an opinion, I have placed it mainly on general considerations, though in the construction of a Louisiana statute, which clearly affected the contract, and not the evidence; and where the judgment of its court clearly rested on the statute alone, about which some doubt exists, it ought unquestionably to control us in respect to contracts made or to be fulfilled there, even if a departure from the general principles of commercial law. I wish, also, to avert some serious consequences that I apprehend may result from the decision of the majority of the court in several of the States of the Union.

Bills of exchange drawn in one State on persons in another must be considered, under the previous decisions of this court, as foreign bills. (*Townsley* v. *Sumrall*, 2 Peters, 179, 586, 688; *Lonsdale* v. *Brown*, 4 Wash. C. C. R., 87, 153; 1 Hill, 44; 12 Pick., 283; 15 Wend., 527; 5 Johns., 375; *Dickins* v. *Beal*, 10 Peters, 579.) Demand of payment, then, cannot be proved in suits upon them out of the State where presented, unless by a written protest, according to the cases before cited.

Whenever the protest, then, in such case, does not state in detail a presentment or presence of the bill, though stating a demand, refusal, and no objection, the protest must, as in this decision, be ruled out as incompetent evidence; and the same decision virtually implies that no other evidence except the written protest is admissible to show that fact, or indeed any fact which may be omitted by accident or otherwise in the written protest, and that no inference can be admitted to be drawn from the protest as to presentment, when only a demand, refusal, and no objection are stated, as here. These consequences, with others before named, I would avoid, by making the protest competent evidence, and when it showed a demand, refusal, and no objection explicitly, as here, would leave it to the jury, from that and the other circumstances, to say whether they were or were not satisfied that the note was present.

In this way it is easy to reconcile full action of the jury on the facts with that of the court on the law, and this, too, without any innovation or change in the rule as to commercial paper, or any violation of adjudged cases, but rather in conformity to them and to several strong analogies.

This court have in other cases gone still further, and held it proper even to expand or enlarge the rules of evidence in certain exigencies. In *Nicholls* v. *Webb* (8 Wheat., 332) the principle laid *down by Lord Ellenborough, [*286 in *Pritt* v. *Fairclough* (3 Camp. R., 305), as to the rules of evidence, was adopted, namely, "That they must expand according to the exigencies of society." And in *The Bank of Columbia* v. *Lawrence* (1 Peters, 588), speaking of a rule as to diligence, Thompson, *J.*, says: "For the sake of general convenience it has been found necessary to enlarge this rule."

But all I ask here is to go as far as the existing rules of evidence seem to justify, and let reasonable inferences and presumptions be made by the jury from all that is stated in the protest, and thus decide whether the note was not probably present when the demand was made.

Cited—Abb. Adm., 130.

THE UNITED STATES, *Appellants*,

v.

JOHN C. McLEMORE.

Jurisdiction of circuit court—judgment in favor of U. S.—credits on—injunction to restrain collection—costs.

Although a circuit court, sitting as a court of law, may direct credits to be given on a judgment in favor of the United States, and consequently examine the grounds on which such an entry is claimed, and may direct the execution to be stayed until such an investigation shall be made, yet it cannot entertain a bill, on the equity side, praying that the United States may be perpetually enjoined from proceeding upon such judgment.

Nor can a decree or judgment be entered against the government for costs.

THIS was an appeal from the Circuit Court of the United States for the District of Middle Tennessee, sitting as a court of equity.

It is unnecessary to recite all the circumstances which led to the filing of the bill in equity, as it was dismissed for the want of jurisdiction in the Circuit Court. The facts in the case are summarily stated in the opinion of the court. It is proper, however, to exhibit the account to which the opinion of *Mr. Justice* Wayne refers:

NOTE—*No judgment can be entered against the United States for costs.*

No judgment or decree can be rendered directly against the United States for costs. The Antelope 12 Wheat., 546; U. S. v. Hooe, 3 Cranch, 73; U. S. v. Barker, 2 Wheat., 395.

Judgment for the payment of money cannot be rendered against the United States in any court, except court of claims, without jurisdiction is given by special act of Congress. Case v. Terrell, 11 Wall., 199.

An existing right for costs, due from the United States may be set up as a defense in a suit brought by the U. S. U. S. v. Ringold, 8 Pet., 150.

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THE UNITED STATES OF AMERICA,
v.
SEARCY'S EXECUTORS AND SECURITIES.

DR.	Robert Searcy, late District Paymaster, in account with the U. S.		
	To amount of judgment, 21st June, 1827,		$17,028.41
	To amount of interest till 20th Sept., 1843, 16 years, 3 months, 29 days,		16,597.80
			$33,626.21
1828, May 3, Cr.	by payment to Tho. H. Fletcher,	$1,283.62	
"	interest till 20th Sept., 1843, 15 years, 4 months, 17 days,	1,184.00	
" July 8, "	payment to Tho. H. Fletcher,	519.25	
1828, July 8, "	interest till 20th Sept., 1843, 15 years, 2 months, 12 days,	473.33	
" July 18, "	payment to Tho. H. Fletcher,	1,940.68	
"	interest till 20th Sept., 1843, 15 years, 2 months, 2 days,	1,766.05	
" July 24, "	payment made to Tho. H. Fletcher,	498.33	
"	interest till 20th Sept., 1843, 15 years, 1 month, 26 days,	455.34	
*" Oct. 28, "	payment made to Tho. H. Fletcher,	960.00	
287*] "	interest till 20th Sept., 1843, 14 years, 10 months 22 days,	857.92	
" Nov. 10, "	payment made to Tho. H. Fletcher,	715.19	
	interest till 20th Sept., 1843, 14 years, 10 months 10 days,	637.54	
1829, Jan. 15, "	payment made to Tho. H. Fletcher,	304.60	
"	interest till 20th Sept., 1843, 14 years, 8 months, 5 days,	267.77	
" Jan. 24, "	payment made to Tho. H. Fletcher,	498.34	
"	interest till 20th Sept., 1843, 14 years, 7 months, 26 days,	437.91	
" Jan. 26, "	payment made to Tho. H. Fletcher,	286.67	
"	interest till 20th Sept., 1843, 14 years, 7 months, 24 days,	251.39	
" April 6, "	payment made to Tho. H. Fletcher,	1,273.76	
"	interest till 20th Sept., 1843, 14 years, 6 months, 14 days,	1,110.48	
" June 12, "	payment made to James Collinsworth,	1,163.50	
"	interest till 20th Sept., 1843, 14 years, 3 months, 8 days,	995.92	
" June 24, "	payment made to James Collinsworth,	1,027.75	
"	interest till 20th Sept., 1843, 14 years, 2 months, 26 days,	877.40	
" Oct. 22, "	payment made to		
1829, Oct. 22, Cr.	by James Collinsworth,	1,920.00	
"	interest till 20th Sept., 1843, 13 years, 10 months 28 days,	1,602.56	
1831, Oct. 28, "	payment made to James Collinsworth,	200.00	
"	interest till 20th Sept., 1843, 11 years, 10 months 22 days,	142.73	
1832, Jan. 1, "	payment made to James Collinsworth,	500.00	
"	interest till 20th Sept., 1843, 11 years, 8 months, 20 days,	351.67	
" Sept. 3, "	payment made to James Collinsworth,	1,669.49	
"	interest till 20th Sept., 1843, 11 y'rs and 17 days,	1,166.27	
1833, Jan. 1, "	payment made to James Collinsworth,	2,104.60	
"	interest till 20th Sept., 1843, 10 years, 8 months, 20 days,	1,251.00	
1834, Jan. 1, "	payment made to Collinsworth,	1,279.80	
"	interest till 20th Sept., 1843, 9 years, 8 months, 20 days,	756.08	
1833, Jan. 1, "	payment made to Collinsworth,	861.09	
"	interest till 20th Sept., 1843, 10 years, 8 months, 20 days,	553.91	
1839, Jan. 1, "	payment made to J. P. Grundy,	422.00	
"	interest till 20th Sept., 1843, 4 years, 8 months, 20 days,	119.58	
1831, Aug. 10, "	payment made to Collinsworth,	425.00	
"	interest till 20th Sept., 1843, 12 years, 1 month, 10 days,	308.84	
			$35,861.27
	Amount overpaid,		$1,895.06

The case was argued by *Mr. Mason*, Attorney-General, for the appellant, and by *Messrs. Brinley* and *Eaton* for the defendant.

Mr. Justice McLEAN delivered the opinion of the court:

This is an appeal from the decree of the Circuit Court of the United States for the District of Middle Tennessee.

*The bill was filed by McLemore and [*288 Cantwell, surviving executor of Robert Searcy, deceased, and surviving executor of George M. Deoderick, deceased, representing that a judgment was obtained by the United States against the executors of Searcy, for the sum of seventeen thousand and twenty-eight dollars and forty-one cents. That various payments had been made on the judgment until the whole, or nearly the whole, had been paid. That the last execution on the judgment was issued the 10th of January, 1842, for a balance claimed on the judgment of two thousand eight hundred thirty-two dollars and thirty-seven cents. And they state that their payments were made to different persons named, who succeeded each other in the office of District Attorney of the United States for Middle Tennessee; and that

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by the absence and death of a part of them it is difficult to show the sums paid. That the money was principally collected by the district attorneys on notes handed them for collection, the proceeds of which, when received, were to be applied to the discharge of the judgment. That this arrangement was sanctioned by the Treasury Department. And the prayer of the bill is, that the judgment may be enjoined, &c.

The District Attorney of the United States answerd the bill, and the matter of payments was referred to a master, who reported a balance against the United States, after paying the judgment. On this report, the district judge holding the Circuit Court decreed a perpetual injunction, and that the United States should pay the costs.

There was no jurisdiction of this case in the Circuit Court, as the government is not liable to be sued, except with its own consent, given by law. Nor can a decree or judgment be entered against the government for costs.

The Circuit Court, as a court of law, may direct credits to be given on the judgment, and having a right to order satisfaction to be entered on the judgment, consequently may examine the grounds on which such an entry is claimed, and may direct the execution to be stayed until such an investigation shall be made.

This bill is dismissed.

Mr. Justice WAYNE concurred in the decision of the case, but said it appeared in the record that a different mode of computing interest had been pursued from that which had been settled by this court. In *Livingston* v. *Story* (18 Peters, 371), the court said: "The correct rule, in general, is, that the creditor shall calculate interest whenever a payment is made. To this interest the payment is first to be applied; and if it exceed the interest due, the balance is to be applied to diminish the principal. If the payment fall short of the interest, the balance of interest is not to be added to the principal so as to produce interest. This rule is equally applicable, whether the debt be one
289*] which expressly draws *interest, or on which interest is given in the name of damages." Nor is it to be considered, by anything which the court has done upon the motion, that any sanction is given to any other mode of computing interest.

Cited—9 How., 389; 11 How., 290; 6 Wall., 488; 5 Sawy., 220, 221.

ZELLER'S LESSEE
v.
JACOB K. ECKERT ET AL.

Statute of limitations—entry on land in privity with owner—disavowal, what will amount to—presumption of grant to holder—what will justify practice.

Under a will which devised land to the son of the testator, and provided that the widow should continue in possession and occupation of the premises until the son arrived at the age of fifteen years, she was entitled to their possession and enjoyment until the time when the child would have reached the age of fifteen if he had lived, although he died before that time.

Her possession, therefore, was not adverse to the heirs of the child, during that period.

Where the original possession by the holder of land is in privity with the title of the rightful owner, in order to enable such holder to avail himself of the statute of limitations, nothing short of an open and explicit disavowal and disclaimer of holding under that title, and assertion of title in himself brought home to the other party, will satisfy the law.

The burden of proof is on the holder to establish such a change in the character of the possession.

The statute does not begin to run until the possession becomes tortious and wrongful by the disloyal acts of the tenant, which must be open, continued, and notorious, so as to preclude all doubt as to the character of the holding, or the want of knowledge on the part of the owners.

In this case there was evidence enough given upon this point to authorize the court below to submit the question of adverse possession to the jury, and advise them that a foundation was laid upon which they might presume a grant for the purpose of quieting the title.

The whole charge of the judge to the jury is incorporated into this record. This mode of making up the error books is exceedingly inconvenient and embarrassing to the court, and is a departure from familiar and established practice.

So far as error is founded upon the bill of exceptions incorporated into the record, it lies only to exceptions taken at the trial, and to the ruling of the law by the judge, and to the admission or rejection of evidence. And only so much of the evidence as may be necessary to present the legal questions thus raised and noted should be carried into the bill of exceptions. All beyond serves to incumber and confuse the record, and to perplex and embarrass both court and counsel.

The earlier forms under the statute giving the bill of exceptions are models which it would be wise to consult and adhere to.

THIS was a writ of error to the Circuit Court of the United States for the Eastern District of Pennsylvania, to bring up for review certain instructions to the jury in an action of ejectment brought by the plaintiff in error against the defendants in error, and in which the latter obtained the verdict.

Frederick White was the owner of the premises in question, being part of a small tract of land situate in the County of Lancaster, Pennsylvania, of which he died seized in March, 1798, leaving a last will and testament by which he devised the said land in fee to Frederick White, Jun., his only child, who was then about four years of age. He also provided in the will that his widow should continue in *possession and occupation of the prem- [*290
ises till the son arrived at the age of fifteen.

The widow married again in about nine months after the decease of her husband, Frederick White, to one George Eckert. One of the defendants, Jacob K. Eckert, is a son of that marriage, who was born in 1799. The other defendants claim under him.

Frederick White, Jun., the son, died in 1800, then about six years of age, leaving his mother and Jacob K. Eckert, the half brother, surviving.

The mother resided upon the farm about one year and then left the possession; but her husband had the charge of it, occupying and improving the land, leasing the same

NOTE.—*As to requisites of adverse possession*, see note to Ricard v. Williams, 7 Wheat., 59.

As to disclaimer by tenant of landlord's title, and that tenant who disclaims becomes trespasser and his possession adverse, see note to Willison v. Watkins, 3 Pet., 43.

As to the occupancy necessary to constitute adverse possession, see note to Ewing v. Bernet, 11 Pet., 41.

As to exceptions, and what particularity in is necessary in order to a review in apellate court, see note to Moore v. Bank of Metropolis, 13 Pet., 302.

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and receiving the rents and profits, till their son became of age, when he went into the possession and management, and he and those claiming under him have been in the possession and occupation of the same down to the present time. The farm has always been occupied, improved, and claimed as belonging to the half-brother, first by Eckert, the father, during his minority, and afterwards by the son (Jacob K.) himself, and those under him. Large and valuable improvements have been made while it was thus occupied.

Frederick White, the testator, was a native of Germany, and emigrated to this country as early as 1755, and soon after settled in Lancaster County, and purchased the premises in question, where he resided till his death, in 1798, being then about eighty years of age.

The lessors of the plaintiff claim to be the descendants of a half-sister, whom he left in Germany, and to be the heirs-at-law of Frederick White, Jun., the deceased son. Evidence was given on the trial tending to establish the heirship derivable from this source, and which constitutes their title to the premises.

It further appeared, that, as early as 1806, a family of the name of Bonert, another branch of the descendants of the half-sister, instituted [an] action of ejectment against George Eckert, the father of the defendant, in the Common Pleas of Lancaster County, to recover the premises, as the heirs of the deceased son, Frederick White, Jun. This litigation appears to have been continued till 1810, when the controversy was referred to arbitrators, and an award made against the plaintiffs.

Another suit in ejectment was brought in the Circuit Court of the United States for the Eastern District of Pennsylvania, by the same plaintiff, which ended in a compromise between the parties, in 1818, by whom it was agreed that the property should be appraised, the plaintiffs to have one third, and Jacob K. Eckert, the half-brother, the remaining two thirds; and that they should cast lots in order to determine which of the parties should have the land, and pay the valuation according to their proportion. The land was appraised at the sum of $24,000; the plaintiffs got the right **291*]** *to make their election, and they chose the land, by which they became obligated to pay to Eckert the sum of $16,000, in one year from the time the election was made. They failed to make the payment in pursuance of the agreement, and in 1828 a judgment was recovered against them for the amount, and interest, and all their right and title to the property was sold on execution, under the judgment, to Jacob K. Eckert, the half-brother.

It further appeared that the lessors of the plaintiff in the present suit, called the Shultzheiss branch of the descendants of the half-sister, also brought suits against George Eckert, executor of the estate of Frederick White, the testator, to recover their share of the personal property, in the Common Pleas of Lancaster County, which in 1810 was referred to arbitrators, and an award made against them.

The latter were the only suits instituted by this branch of the heirs till the present suit was instituted to recover the real estate, which was commenced in April, 1834, and of course has been pending for nearly twelve years.

When the testimony closed, the counsel for the plaintiff prayed the court to instruct the jury, that, inasmuch as the widow of Frederick White was directed by his will to keep possession of the land until the son to whom it was devised should arrive at the age of fifteen, the possession by her and her husband was to be considered in the character of trustees of the estate for his benefit; and after his death, for the benefit of those who might be entitled to the inheritance as heirs-at-law; and that the possession, therefore, was not adverse to the plaintiff's title; that the trust having once attached, the possession of Eckert and wife could not become adverse to the title of the *cestuis que trust*.

Which instruction the court refused, and charged the jury as follows:

"That, however true it might be, in point of fact, that the widow and her husband did enter upon and continue the possession of the land as trustees for young White, or his heirs, up to any stated period, the legal consequences asserted by the plaintiff's counsel would not result. A trustee of any description may disavow and disclaim his trust, though it is in the utmost bad faith, or in violation of his express agreement, from which time his possession of lands, money, or chattels, held under an original trust, becomes adverse, so as to bar an action of account after six years, or an ejectment in twenty-one years after notice of the disavowal, disclaimer, and adverse possession is given to the person entitled to the benefit of the execution of the trust." "That notice of the disclaimer puts the true owner under the same obligation to reclaim the possession within the fixed period, as if no trust had ever existed; and it matters not whether the trust began by the voluntary act of the trustee, or the law made him a trustee against his *will, as [*292 the result of his situation or conduct." And further, "That taking all the testimony in the cause in connection, the court thought the jury would be justified in finding that the possession of the defendants, from the death of young White, was adverse to the right and title of the plaintiff, and that George Eckert held it for his son; and that, should this be their opinion, the statute of limitations began to run against the right in 1809, and had its full effect in 1830, by a continued adverse possession of twenty-one years."

The court also instructed the jury that they were authorized, from the fact of the lessors of the plaintiff having made a claim to the estate of Frederick White, Sen., as early as 1806, and afterwards abandoning it till 1834, together with the other facts and circumstances in the case, to presume a grant to Jacob K. Eckert from the heirs.

To all which instructions the counsel for the plaintiff excepted, and a verdict was rendered for the defendants.

The cause was argued by *Mr. Charles J. Ingersoll* for the plaintiff in error, and *Mr. Scott* for defendants.

Mr. Ingersoll, for the plaintiff in error, said that the opinion of the Circuit Court was, that the plaintiff was barred by limitation. But the widow was directed by the will to hold the property for the child, and both she and her husband were trustees for the child and his heirs. The trust once existed; that is certain.

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But the court say that a trustee may disavow his trust, and establish his own right, "though it is in the utmost bad faith, or in violation of his express agreement." It is very true that a trustee may disavow his trust, and give notice that he means to hold the property in his own right; and in such case the other party is required to take care of himself. But the law will not sanction bad faith. In the charge of the court, it is said, also, that the effect of the record and writings introduced in evidence was for the court to decide; but the question was a mixed one of law and fact. (7 Wheat., 535; 5 Peters, 438, 440, 491, 493; 11 Peters, 51; 6 Peters. 743; 3 Peters, 48; 4 Peters, 500; 10 Peters, 221, 226.)

These cases do not sustain the doctrine stated by the Circuit Court, namely, that "a trustee of any description may disavow and disclaim his trust, though it it is in the utmost bad faith, or in violation of his express agreement; from which time his possession of lands, money, or chattels, held under an original trust, becomes adverse, so as to bar an action of account after six years, or an ejectment in twenty-one, after notice of the disavowal, disclaimer, and adverse possession is given to the person entitled to the benefit of the execution of the trust."

The case in 2 Sch. & Lefr., 628, 636, is stronger, it must be admitted, in favor of the doctrine, but the case in 14 Serg. & Rawle, 293*]*570, does not bear out the Circuit Court. (See 1 Binney, 575, and, also, 14 Serg. & Rawle, 333.)

The Pennsylvania cases all look to the fairness of the transaction, but here the court say that it was natural for the party holding to believe that the property belonged to him, and that these German heirs must have known that the trustee was claiming it in his own right.

Mr. Scott, for defendants:

There is no bill of exceptions in the record. It ought to be signed and sealed, and this court cannot notice an exception which does not come up in that way. (3 Peters, 418; 4 Peters, 104; 3 Wheat., 651.)

The charge of the judge below has been misunderstood. He inculcates no immoral principles. It was necessary for the jury to find the intention of the party, for it is one of the elements of adverse possession. If it is natural for a father to consider himself as holding property for his son, then this natural feeling is one of the evidences of intention, and it was not wrong in the judge to indicate to the jury all the sources from which they would be enabled to find the intention.

The intention is important. (5 Peters, 438, 440, 500.)

The judge in his charge refers to the escheat laws of Pennsylvania, by which the estate would have gone to the half-brother for the want of other heirs of young White, with the unsettled state of the laws of descent for more than thirty years afterwards, and says, it "is a powerful consideration in our minds to denote a contrary intention." (See Purdon's Digest, 384, or 2 Dallas, 552, or 2 Smith, 425; 3 Yeates, 400.)

So the law stood until overruled by 7 Serg. & Rawle, 397, in 1831. Was it a fault or crime in a father to hold for his son, under this state of the law, or in a judge to say so?

Statutes of limitations are to be enforced by courts, and disabilities, in order to exonerate a party from their operation, are not to be heaped one upon another. (7 Serg. & Rawle, 209; 1 Watts, 341.)

It has been said that the judge argued the case too much. But this court has nothing to do with the comments of the court below upon evidence; its only province is to correct mistakes in law. (4 Peters, 1; 3 Howard, 205.)

The charge expressly says that the jury are to decide, without being bound by the opinion of the court.

It is also said that the claim, having been made within eighteen years, will prevent the statute from running. The statute of Pennsylvania requires the suit to be brought within twenty-one years, and a suit upon some collateral matter is not sufficient. If there is no such exception in the statute, the court can make none. *The very fact of litigation shows [*294 the possession to have been adverse. (3 Howard, 674.)

The statute of limitations is found in 2 Dallas, 281, or 2 Smith, 299.

There are no exceptions on the record of this case, and no instructions asked. White died in 1798, and directed his widow to keep possession, but not for his son, as is said by the other side. The will is not in the record, and is only found in the charge of the judge. But it is stated in 1 Binney, 576. The widow's fifteen years were out in 1809. She married again in 1798, and the defendants sold and leased the property. In 1809 some claimants appeared and brought suits, which were compromised. The language of the judge which is complained of contains the doctrine of this court. (7 Wheat., 535, 549; 3 Peters, 48, 52; 4 Peters, 500; 5 Peters, 438, 440, 491–493; 10 Peters, 221, 226; see, also, Preston on Abstracts, 376; 1 Watts, 275; 7 Johns. Ch. Rep., 100; 3 Howard, 411; 1 Howard, 189.)

Mr. Ingersoll, in reply:

The agreement of counsel which is found in the record removes all difficulty which might arise from there being no bill of exceptions signed and sealed. The reason why such an agreement was made is that there were two ejectments pending, in one of which there was a long trial, and the court gave the charge which is in the record. In the second case it was thought unnecessary to have another charge, and we agreed to bring the case up, adopting the charge in the first case. The case comes up somewhat irregularly, but *Judge* Sergeant has said that short pleadings are sanctioned by the bill of rights.

There is only one main point in the case, which is, whether or not there was an implied trust in the property. How far trusts are within the statutes of limitation, see 2 Preston on Abstracts, 375; 7 Johns. Ch. R., 90.

We do not deny that a trustee can repudiate the title of his *cestui que use*, but we say that such repudiation must be distinct and explicit. And as the widow was directed, by her first husband's will, to hold the premises for the first son till fifteen years of age, she and her second husband, Eckert, held as trustees, and no adverse possession took place. During the first six years, as long as the first son lived, it clearly was a trust, and this trust was never dis-

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owned. The charge of the court below included the discussion of this fact of adverse possession, and thus excluded the jury from the consideration of what belonged to them alone. We say, therefore, that there was error.

Mr. Justice NELSON delivered the opinion of the court:

According to the true construction of the will 295*] of Frederick *White, we are inclined to think that the widow was entitled to the possession and enjoyment of the premises in question down to the year 1809, when the son would have arrived at the age of fifteen had he survived, notwithstanding his death in 1800, some nine years short of that time, as the testator probably intended the rents and profits during this period as a part of her provision in the settlement of his estate. The right of entry, therefore, did not accrue to the lessors of the plaintiff till that time. Then the widow and her husband were bound to surrender the possession to the son had he lived, and of consequence to his heirs-at-law in the event of his death.

The statute of limitations attached and began to run from this period, provided the evidence is sufficient to raise an adverse possession on the part of the defendants, in hostility to the title of the heirs.

This suit was commenced in April, 1834, some twenty-five years from the time the right of entry accrued. The statute of limitations in the State of Pennsylvania is twenty-one years.

The original possession of Eckert, the husband of the widow, being confessedly in subordination to the title of the younger White during his lifetime, and after his decease to the title of the heirs-at-law, down to 1809, when the right to occupy under the will ceased, the burden lay upon him to establish a change in the character of the possession after this period; and being thus in privity with the title of the rightful owner, nothing short of an open and explicit disavowal and disclaimer of a holding under that title, and assertion of title in himself, or in his son, the half-brother, brought home to the lessors of the plaintiff, will satisfy the law. Short of this, he will still be regarded as holding in subserviency to the rightful title. There are authorities maintaining the doctrine, that a party standing in the relation of Eckert to the title in question is incapable in law of imparting, by any act of his own, an adverse character to his possession; and that, in order to deny or dispute the title, he must first surrender the possession, and place the owner in the condition he stood before the possession was taken under him. This doctrine was supposed to govern the rights of trustee and *cestui que trust*, landlord and tenant, vendor and vendee, tenants in common, &c., and that no lapse of time would lay a foundation for a statute bar to the right of entry by reason of an adverse possession between parties standing in this relation, or any others in like privity.

The law, however, has been settled otherwise. The trustee may disavow and disclaim his trust; the tenant, the title of his landlord after the expiration of his lease; the vendee, the title of his vendor after breach of the contract; and the tenant in common, the title of his cotenant; and drive the respective owners and claimants to their action within the period of the statute of limitations. *(2 Bos. & [*296 Pull., 542; 5 Barn. & Ald., 232; Cowp., 217; 2 Stark. Ev., 887; 7 Johns. Ch. R., 90; 20 Johns. R., 565; 4 Serg. & Rawle, 310; 7 Wheat., 548; 3 Peters, 52, C. & H.'s note, pt. 1, *notes* 307, 311, and cases; 2 Sch. & Lefr., 633; 2 Jack. & Walk., 1, 191.)

The only distinction between this class of cases and those in which no privity between the parties existed when the possession commenced is in the decree of proof required to establish the adverse character of the possession. As that was originally taken and held in subserviency to the title of the real owner, a clear, positive and continued disclaimer and disavowal of the title, and assertion of an adverse right, and to be brought home to the party, are indispensable before any foundation can be laid for the operation of the statute. Otherwise, the grossest injustice might be practiced; for, without such notice, he might well rely upon the fiduciary relations under which the possession was originally taken and held, and upon the subordinate character of the possession as the legal result of those relations.

The statute, therefore, does not begin to operate until the possession, before consistent with the title of the real owner, becomes tortious and wrongful by the disloyal acts of the tenant, which must be open, continued, and notorious, so as to preclude all doubt as to the character of the holding, or the want of knowledge on the part of the owner. If he then neglects to enforce his rights by action within the period fixed by the statute, the loss, as in every other case of the kind, is attributable to his own laches, and not to the law.

The main question, therefore, here is, as to the sufficiency of the proof. It appears that as early as 1809 the heirs claiming here instituted actions against Eckert, as executor of Frederick White, the testator, to recover their share of the personal estate, as next of kin to the younger White, which were resisted, on the ground the whole estate belonged to the half-brother, and the claim defeated. Another branch of the same family, at an earlier date (1806), instituted actions of ejectment to recover their share of the real estate, which were resisted upon like ground, and like result. Both branches of the litigation were brought to a close in 1810. The latter branch (not the parties here) again renewed the litigation to recover the realty in 1816, which terminated in 1818 by compromise, with a view to put an end to the controversy, but which fell through by reason of the failure of the plaintiffs to fulfill the conditions of the settlement.

The present is the first suit brought by this branch of the heirs to recover the real estate, and which was commenced after the lapse of twenty-five years from the time their right of entry accrued, and after the lapse of the same period, also, from the termination of a litigation on behalf of themselves and their co-heirs *to recover the estate, real and personal, [*297 in which the present defendant succeeded. During all this time their title has been disavowed, and resisted, and the right and title of the half-brother of the younger White asserted and maintained; and the property occupied, cultivated, and improved under this claim of title

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and ownership; and portions of it are now in possession of *bona fide* purchasers, upon which large and valuable erections and improvements have been made.

We are satisfied, therefore, that the court below were right in submitting the question of adverse possession to the jury; as there was evidence enough, even within the strictest rules of law on this subject, arising out of the fiduciary relation in which the defendant originally stood to the title, to make this the duty of the court. And, further, looking at all the facts and circumstances disclosed at the trial, and characterizing the possession, occupation, and improvement of the property, we cannot say that any error was committed in also advising the jury that a foundation was laid upon which they might presume a grant for the purpose of quieting the title.

Twenty years' possession by one of two tenants in common, accompanied with an exclusive appropriation of the rents and profits, acquiesced in by the co-tenant, has been held to afford the presumption of a conveyance from the party out of the possession (Cowp., 217), and the same length of time, coupled with other circumstances, a conveyance or release of an equity of redemption to the mortgagee in possession. (9 Wheat., 490, 497,498.)

The facts and circumstances in this case, in connection with the length of the possession and occupation, are much stronger in favor of allowing the presumption, than existed in several cases where the doctrine has been applied.

The charge of the court below is a most elaborate one, discussing at large both the law and the facts upon general principles and upon authorities, as well as in reference to the particular questions involved, and the whole incorporated into the record. Some of the comments, both upon the law and the facts, are justly liable to the criticisms made by the learned counsel on the argument. But, looking at the whole case, and the main grounds upon which it was placed before the jury, we cannot say that the appellate court should interfere, or that the parts obnoxious to the criticisms afford ground of review and reversal on a writ of error.

This mode of making up the error books is exceedingly inconvenient and embarrassing to the court, and is a departure from familiar and established practice.

So far as error is founded upon the bill of exceptions incorporated into the record. it lies only to exceptions taken at the trial to the ruling of the law by the judge, and to the admission or rejection of evidence. (1 Bac. Abr., 298*] 779; Bull. *N. P.*, 316.) Beyond this *we have no power to look into the bill, on a writ of error, as it is the creature of statute, and restricted to the points stated. (13 Edw. I., ch. 31.) And only so much of the evidence given on the trial as may be neccessary to present the legal questions thus raised and noted shall be carried into the bill of exceptions. All beyond serves only to incumber and confuse the record, and to perplex and embarrass both court and counsel.

We have no concern, on a writ of error, with questions of fact, or whether the finding of the jury accords with the weight of the evidence. The law has provided another remedy for errors of this description, namely, a motion in the court below for a new trial, on a case made. More attention to the practice in drawing up the bill of exceptions, and to method and order in making up the error books, would greatly relieve the court, and enable counsel to bring out more readily and distinctly for consideration the legal questions involved. The earlier forms under the statute giving the bill of exceptions are models which it would be wise to consult and adhere to.

We think the judgment in the Circuit Court should be affirmed.

Cited—5 How., 276, 289; 11 How., 158; 17 How., 14; 18 How., 252; 1 Black., 220; 2 Wood. & M., 143, 199; 2 Cliff., 577.

JOHN KNOX, JAMES BOGGS, AND JAMES A. KNOX, trading under the firm of KNOX, BOGGS & Co., *Appellants*,

v.

PEYTON SMITH ET AL., *Defendants*.

Court of Equity no jurisdiction where remedy may be had at law—conflicting executions out of State and federal courts—case must be made by bill and proof, not by answer.

A bill in chancery, which recites that the complainants had recovered a judgment at law in a court of the United States, upon which an execution had issued and been levied upon certain property by the marshal; that another person, claiming to hold the property levied upon by virtue of some fraudulent deed of trust, had obtained a process from a State court, by which the sheriff had taken the property out of the hands of the marshal, and praying that the property might be sold, cannot be sustained.

If the object had been to set aside the deed of trust as fraudulent, the fraud, with the facts connected with it, should have been alleged in the bill.

There exists a plain remedy at law. The marshal might have brought trespass against the sheriff, or applied to the court of the United States for an attachment.

No relief can be given by a court of equity, unless the complainant, by his allegations and proof, has shown that he is entitled to relief.

THIS was an appeal from the Circuit Court of the United States for the District of West Tennessee, sitting as a court of equity. The appellants had filed a bill against the defendants, which bill was dismissed by the Circuit Court.

The facts in the case were these:

On the 28d of March, 1839, Probert P. Collier, of the County of Tipton and State of Tennessee, executed to Peyton Smith, of the same State, a deed of trust, reciting the indebtedness of Collier to sundry persons, and proceeding as follows:

*"Now, the above named creditors, [*299 to wit, Robert B. Clarkson, Jordan Brown, Isaac Killough, Stephen Smith, James D. Holmes, Samuel A. Holmes, Joseph T. Collier, and Forsythe, Goodwin & Co., merchants of New Orleans, being willing to wait and give the further indulgence of eighteen months longer from the date of this indenture with the said Probert P. Collier, upon having their debts and the interest accruing thereon; and the said Probert P. Collier being willing to give them a

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certain assurance that their money shall be paid at the expiration of eighteen months from this date; and the said Probert P. Collier being extremely desirous to save harmless and secure from all liabilities his indorsers as above described on the several notes already specified in this indenture as such indorsers.

"Now, therefore, this indenture witnesseth, that the said Probert P. Collier, as well in consideration of securing the said Robert B. Clarkson, Jordan Brown, Isaac Killough, Stephen Smith, James D. Holmes, Samuel A. Holmes, Joseph T. Collier, and Forsythe, Goodwin & Co., merchants of New Orleans, in the faithful payment of their debts and interest as aforesaid, and securing and saving harmless his indorsers as aforesaid, as also the sum of one dollar to him, the said Probert P. Collier, in hand paid by the said Peyton Smith, the receipt whereof is hereby acknowledged, hath this day granted, bargained, sold, transferred, assigned and set over, and by these presents doth grant, bargain, sell, transfer, assign, and set over unto the said Peyton Smith the following real estate and personal property, to wit, as hereafter described, to wit:"

The deed then enumerated several tracts of land, some slaves, horses, mules, and furniture, and proceeded as follows:

"And each and every of them to the said Peyton Smith, his heirs and assigns, to the proper use and behoof of the said Peyton Smith, his heirs and assigns, forever.

"In trust, however, and to the intent and purpose, that if the said three notes, payable to the said Robert B. Clarkson, for six hundred and twenty-five dollars each, dates as above described; also the note, payable to Jordan Brown, for one hundred and eighty-two dollars, on which said note there has a judgment been obtained before Robert J. Mitchell, justice for said county; also the note, payable at the Memphis Bank, indorsed by Joseph T. Collier, James D. Holmes, and Samuel A. Holmes, for five hundred and forty-four dollars, now in judgment in the Tipton Circuit Court; the one payable to Forsythe, Goodwin & Co., commission merchants of New Orleans, for five hundred and sixty-one dollars, now in a judgment as above described; also the note, payable to Isaac Killough, for four hundred and twenty-one dollars, now in a judgment as before described; the one payable to Randolph Merchants' Association, for two hundred dollars, indorsed by Gabriel Smither, James D. **300*]** Holmes, *and Samuel Glass, dates as above described; the one payable to Stephen Smith, for nine hundred dollars, dates not recollected; the one payable to the Branch Bank of the State of Tennessee, at Sommerville, for five hundred and eighty-one dollars, dates not recollected, indorsed by Joseph T. Collier and James Hudley; the one, payable to James D. Holmes, and Samuel A. Holmes, merchants, for three hundred and fifty dollars, due and payable 1st of January, 1839; the note, payable to Joseph T. Collier, for the sum of four hundred dollars, dates not recollected. All of the above notes not well and truly paid, with all lawful interest accruing thereon; and if each of his indorsers, as appear on the several notes described in this indenture, are not entirely secure from each and all of their liabilities by him, the said Probert P. Collier, or some other person for him, before the expiration of eighteen months from this date: then, and in that case, the said Peyton Smith, in executing this trust, hereby taken upon himself, advertise the said real and personal property for the space of twenty days, in a paper printed at Randolph, Tennessee, and by written advertisements, at four of the most public places in the county, one of which shall be at the court-house door of the county aforesaid, that he will expose to the highest bidder the said land and negroes, horses, mules, household furniture, and kitchen furniture, spinning machine and loom, the barouche and harness, wagon and gear, and blacksmith's tools; one of the said lots in the town of Covington, the one on which the said Probert P. Collier resides, on a particular day, for ready money; and if the money be not still paid on that day, designated as aforesaid, then the said Peyton Smith shall proceed to sell the above described real and personal property for ready money to the highest bidder, and, after such sale, to make good and sufficient deeds and bills of sale in fee for said property, conveying all the right and title the said Probert P. Collier or his heirs may have in and to the same.

"And this indenture further witnesseth, that the said Probert P. Collier is to still keep and retain the said land and personal property as above described in his own possession, subject for all losses which the said property may sustain until the expiration of eighteen months from this date; and provided, nevertheless, that if the said money and interest should be paid before the day of sale herein mentioned, and his indorsers secure from liabilities as aforesaid, then this indenture to be wholly void and of no effect, either in law or equity.

"In witness whereof, the said Probert P. Collier hereunto sets his hand and seal, this, the 28d of March, 1839.

"PROBERT P. COLLIER. [SEAL.]
"PEYTON SMITH. [SEAL.]

"Witnessed by
"J. P. FARRINGTON,
"F. M. GREEN."

*On the 4th of December, 1839, [*301 Knox, Boggs & Co., citizens of Pennsylvania, brought a suit in the District Court of the United States, possessing circuit court jurisdiction, and sitting for the District of West Tennessee, against Thomas Eckford and Probert B. Collier, as indorsers of sundry promissory notes held by Knox, Boggs & Co.

On the 8th of April, 1840, a judgment was rendered against these defendants in the above court, for the sum of $3,562.20.

On the 24th of April, 1840, a writ of *fieri facias*, founded on the foregoing judgment, was issued, and the execution levied on seventeen negroes and four mules, as the property of P. P. Collier, being a part of the property included within the deed to Peyton Smith.

A forthcoming bond was taken, with the following condition:

"Now, if the said P. P. Collier shall deliver the property at Covington, on the 21st day of September, 1840, then and there to be sold to

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satisfy said judgment and cost, then this obligation to be void; else, to remain in full force.

(Signed) "P. P. COLLIER. [SEAL.]
"M. BRYAN. [SEAL.]
"HY. FEEZER [SEAL.]
"FRED. R. SMITH. [SEAL.]"

About this time, although the record does not say precisely when, Smith, the trustee, applied to the judge of the District Court for an injunction to restrain the sale, upon the ground that the property belonged to him and not to collier, but the judge declined to grant it. He then applied to the Chancery Court at Brownsville (a State court of Tennessee), and, upon filing his bill for relief, obtained an injunction.

On the 21st of September, 1840, when the property was to be delivered under the forthcoming bond, the marshal made the following return:

"Bond forfeited, and sale of the negroes and mules levied on enjoined by order of the Chancery Court at Brownsville, 21st Sept., 1840.

"ROB'T J. CHESTER, Mar. West Tenn."

On the 27th of October, 1840, an *alias fieri facias* was issued upon the judgment in the District Court, and placed in the hands of the marshal, who levied it, on the 6th of November; upon the same negroes and mules which were the subjects of the former execution. Another forthcoming bond was given for the delivery of the property on the 5th of December, 1840.

On the 20th of November, 1840, the Chancery Court at Brownsville issued the following order:

302*] *"STATE OF TENNESSEE:

"To the Sheriff of Tipton County, greeting:

"Whereas, it hath been represented unto the Chancellor, in our Chancery Court at Brownsville, in the western division of the State of Tennessee aforesaid, on the part of Peyton Smith, trustee, &c., complainant, that he has lately exhibited his amended bill of complaint in our said Chancery Court, against Knox, Boggs & Co., P. P. Collier, and Robert J. Chester, defendants, to be relieved touching the matters therein complained of; in which said bill it is, among other matters, set forth, that the said defendants are combining and confederating to injure the complainant touching the matters set forth in said bill, and that their actings and doings in that behalf are contrary to equity and good conscience.

"We, therefore, in consideration of the premises, do strictly command you, the said sheriff of Tipton County, Tennessee, that you do absolutely seize and take into your possession immediately and forthwith, at all hazards, the following negro slaves, to wit: Jack, Jim, Jane, Marcella, Zilpha, Washington, Margaret, Doll, Bryant, Toney, Catharine, Cully, Cynthia, Sam, John, Clara, and Lucinda, heretofore levied on by the marshal of West Tennessee, as the property of said Collier, to satisfy a judgment in favor of said Knox, Boggs & Co.; and do you safely and securely keep said slaves, so that you have them forthcoming to abide the further order of our said Chancery Court; and this you shall in no wise omit, under the penalty prescribed by law.

"Witness, Sheppard M. Ashe, clerk and master of our said court, at office, in Brownsville, this second Monday in November, 1840, and in the 65th year of American Independence.

"SHEPPARD M. ASHE, Clerk and Master."

On the 5th of December, 1840, when the second forthcoming bond was due, the sheriff, acting under the order of the Chancery Court of the State, and the marshal, acting under the execution issued by the District Court of the United States, both made returns.

The sheriff's return was as follows:

"Levied this attachment on all the within named negroes, except Jim, who was not found, nor was he levied on by the marshal of Tennessee. J. HORNE, Sheriff Tipton County.

"Dec. 5th, 1840."

The marshal's return was as follows:

"The property executed, delivered according to bond; and then arrested from me by the sheriff of Tipton, under an order of the Chancery Court at Brownsville; bill filed; see inclosed. ROB. J. CHESTER, Mar.

"5th Dec., 1840."

*On the 8th of April, 1841, Knox, [*303 Boggs & Co. filed a bill in the District Court of the United States (the same court in which they had obtained their judgment), reciting all the circumstances of the case, stating that Smith claimed under a fraudulent deed of trust, and alleging that a State court had no right, power or jurisdiction, to enjoin the process issued from the District Court; that Collier and the securities upon the delivery bond combined and confederated with Peyton Smith to prevent the sale of the property levied upon, and so defeat the execution of the complainants, who had now no adequate and complete remedy at law. The bill prayed that Collier and Smith and all the securities might be made defendants to answer, and that the property might be sold to pay the judgment obtained by the complainants.

Some of the defendants demurred to the bill but the demurrers were overruled, and they were ordered to answer.

On the 10th of November, 1841, the Chancery Court at Brownsville passed the following decree in the case of the bill which had been filed by Peyton Smith, and in which he had obtained an injunction, as before stated:

"Be it remembered, that this cause came on to be heard on this, the tenth day of November, eighteen hundred and forty-one, before the Hon. A. McCampbell, Chancellor, upon the orders *pro confesso* against said defendants. And it appearing to the satisfaction of the court, that in March, eighteen hundred and thirty-nine, defendant Collier made a deed conveying to complainant, amongst other things, the following negro slaves, to wit: Jack, Jim, Washington, Margaret, Doll, Marcella, Zilpha, Bryan, Toney, Catharine, Cully, Chloe, Phillis, Sam, John, Lucinda, and Cynthia; which said deed was executed by said Collier to complainant in trust to secure the payment of certain debts in the same specified; and by the terms of said deed said Collier was to remain in possession of the property conveyed in the same for the space of eighteen months from and after the execution of said deed; and in the event that the debts specified in said deed were not paid on or before the expiration of the eighteen

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months from the time of the execution of said deed, the property specified in the same was to be sold by complainant, and the proceeds arising from said sale to be applied by him to the liquidation and settlement of the debts set forth in said deed.

"And it further appearing that said deed was duly proven and registered, and that the debts specified in said deed are *bona fide*, and due and owing, with the exception of about five hundred dollars, which has been paid by said Collier since the execution of said deed; and that said deed was executed in good faith, and there is no fraud in the same.

"And it further appearing to the satisfaction **304*]** of the court, that after *the execution, probate, and registration of said deed, defendants Knox, Boggs & Co. recovered a judgment in the District Court of the United States, in the eighth circuit, for the State of Tennessee, at Jackson, for about the sum of three thousand four hundred and sixty-two dollars and twenty cents; upon which said judgment a writ of *fieri facias* issued to defendant Chester; who, by virtue of said writ of *fieri facias*, seized and took into his possession said negro slaves, Jack, Jim, Washington, Doll, Marcella, Zilpha, Bryant, Toney, Cartharine, Cully, Chloe, Phillis, Cynthia, Sam, John, and Lucinda, and that defendant Chester was about to sell and dispose of said negro slaves.

"And it further appearing to the satisfaction of the court, that defendants acquired no lien on any of said several negro slaves by virtue of their said judgment and execution; and that said slaves ought not to be appropriated in satisfaction of the same. "It is therefore ordered, adjudged and decreed by the court, that the injunction heretofore awarded in this cause be made perpetual; and that said defendants, Knox, Boggs&Co., and said Robert J. Chester, be, and are hereby restrained perpetually from selling or otherwise controlling either of said slaves under and by virtue of said judgment and execution.

"It is further ordered, that the sheriff of Tipton County deliver said negroes over to complainant; that complainant pay all costs herein expended, for which execution may issue. And that complainant recover of defendants Knox, Boggs & Co., and Robert J. Chester, the costs of suit herein expended; and that defendant Collier recover of complainant the cost by him about this suit expended; for which execution may issue."

In April, 1842, the respondents answered the bill filed by Knox, Boggs & Co. in the District Court. It will only be necessary to refer to the answers of Smith and Collier. Smith denied that the deed of trust made to him was fraudulent as against creditors, but averred that the same was made in good faith; that he was governed by no other feeling or desire than a wish to discharge his duty as trustee; that the *cestui que trust* looked to him to protect the property; denied all combination and confederation with any person, &c., &c. Collier admitted the truth of the facts as they are set forth in the preceding part of this statement, denied that the deed to Smith was fraudulent, but averred that it was made in good faith, &c., &c.

In May, 1842, a general replication was filed by the complainants.

On the 5th of August, 1842, interrogatories were filed on the part of the complainants, and the depositions of four persons taken. Chester, the marshal, was asked to state the value of the property conveyed by the deed of trust, to which he answered as follows:

Answer. "I believe, from the ages, &c., of the negroes mentioned *in the deed of [**305** trust, and what I saw of them when delivered to me, that they were worth, at the date of conveyance, seven to eight thousand dollars; I do not know what the mules and horses are worth, nor am I acquainted with the value of the land or the town lots."

Harris and Smith answered as follows:

Answer. "I, J. W. Harris, have examined the deed referred to in said interrogatory, and suppose the negroes, judging from their age and size, as stated in said deed of trust, to have been worth, at the date of said deed, seven thousand six hundred and fifty dollars; not being personally acquainted with but few of them, can only state their value from what appears to be their ages in the deed. Horses and mules supposed to be worth four hundred dollars; household and kitchen furniture supposed to be worth four hundred and eleven dollars, including spinning machine, barouche, blacksmith's tools, and loom. As to the land, I have no idea what it was worth, never having been upon it that I know of, and not being acquainted with the value of land."

"I, A. W. Smith, answer and say that I am acquainted with the property conveyed in the deed mentioned in the above interrogatory, and believe it to have been worth, at the date of the said deed, ten thousand three hundred and sixty-six dollars."

Clarkson was interrogated as to the amount which Collier owed to him, to which he responded, that it was a balance of eleven or twelve hundred dollars.

On the 16th of October, 1843, the cause came on to be heard on bill, answers, replication, and proof, when the bill was dismissed, with costs. From which decree an appeal brought the case up to this court.

The case was argued by *Mr. Brinley* for the appellants, and *Mr. Milton Brown* for the appellees.

Mr. Brinley, for the appellants:

It may be proper to make two statements preliminary to arguing the points which are most material. The one is, that the original action was instituted in the District Court of the United States for West Tennessee. That was a correct proceeding, because that court had circuit court jurisdiction imposed upon it by the Act of January 18th, 1839. (5 Litt. & Brown's ed., 313.)

The other remark is, that the delivery bonds adverted to were taken in conformity to the laws of Tennessee. They provide, that when any execution may be levied on real or personal property, if the debtor shall give sufficient security to the officer to have the goods and chattels forthcoming at the day and place of sale, it shall be the duty of the officer to take a bond payable to the creditor for double the amount of execution, reciting the service of the *execution, and the amount of the [**306** money due thereon, conditioned for the true performance of the same. (Laws of Tennessee,

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1801, ch. 13, Caruthers & Nicholson's Compilation, 129.)

The Act of Tennessee of 1831, ch. 25, provides, in the first section, that the securities in such a bond, if forfeited, shall not be responsible for more than the value of the property. The second section provides, that if an execution be levied upon personal property, and bond and security shall be given for the delivery of the property upon the day of sale, and the bond shall be forfeited, in whole or in part, then the officer shall proceed to levy upon so much of the defendant's property as may be found, as shall be sufficient to satisfy the execution; if he finds no property of the defendant, then he shall levy upon property of the security or securities in said forfeited delivery bond. (Laws of Tennessee, Caruthers & Nicholson's Compilation, 129.)

Let us now pass to the consideration of the points arising out of an examination of the deed of trust. It is dated March 14th, 1839; and by it Collier conveys to Smith six parcels of real estate, negroes, horses, mules, furniture, and other property, in trust, to pay certain notes with interest, provided they are not paid by said Collier, or some other person for him, before the expiration of eighteen months from the date of the deed; if not paid by that time, Smith is to sell the property at auction for ready money. By the deed, Collier is to keep and retain the land and personal property in his own possession until the expiration of said eighteen months.

The deed is made to secure the payment of twelve notes, amounting to a trifle over $6,000. The value of the property conveyed, according to the testimony of Smith, is $10,366. Such an amount of property conveyed to secure, not all, but a portion, of Collier's creditors, without any stipulations for a release, indicates fraud in regard to other creditors; more especially as there is no proof of the validity of the debts. By the laws of Tennessee, every gift, &c., made with the intent to delay or defraud creditors of their just and lawful actions, suits, debts, &c., are wholly and utterly void, except as against the person making the same. (Act of 1801, ch. 25, sec. 2.)

Again, the deed of trust had matured before the second levy of the plaintiff's execution, and the property remained in the hands of the debtor; that is, the trustee had not taken possession of it at the time limited for the payment of the money. There was no proof that the trust was *bona fide*. The legal presumption upon this state of facts is, that the trust is fraudulent and void as to creditors, and the *onus* lies on the trustee to prove the contrary, and to prove the validity of the debts.

Possession remaining with the vendor, after an absolute sale, or with the grantor or mortgageor in deeds of trust and mortgage, after 307*] *the time when the debt secured by the latter should be paid, is *prima facie* evidence of fraud, but the presumption of fraud may be repelled by proof of fairness in the transaction, and that the instruments were executed for an adequate consideration. (*Maney* v. *Killough*, 7 Yerger, 440.)

The marshal, therefore, had a right to levy on the slaves as the property of the debtor. The property had been levied on by the marshal, on the first execution, and a bond taken before the trust matured, and the bond was forfeited. But that did not prevent the trustee from taking possession of the negroes after the bond was forfeited; because a forfeiture of the bond released the property from all lien or liability on account of the levy, and it again became a part of the debtor's general property, and might have been taken by the trustee, without legal hindrance, so far as the first levy was concerned.

Where an execution is levied, and bond taken for the delivery of the property on the day of sale, the lien of the execution continues until the bond is forfeited. It is then discharged, and the property is subject to the claims of other creditors. (*Malone* v. *Abbott*, 3 Humphrey, 532.)

The levy of the marshal was, therefore, valid as against the trust, which, for want of proof to the contrary, was fraudulent. This levy vested the title in the marshal for the benefit of the plaintiffs, to pay their debt by execution; it was a lien created by law, which could not be enforced at law, because the marshal was forcibly prevented by the interference of the State tribunals, called into existence by the defendants. Their only remedy was in equity to enforce their lien, to prevent multiplicity of suits, conflicts of jurisdiction, and to inquire into the fraudulent conveyance by the deed of trust.

A judgment creditor, having a lien on personal property, has a right to come into chancery to remove obstacles thrown in the way of the due execution of his process by a levy and seizure of the property by a junior judgment creditor. (*Parrish* v. *Saunders et al.*, 3 Humphrey, 431.) This is an analogous case.

The courts of Tennessee have decided that a suit in equity can be brought for slaves, from the peculiar nature of the property. (*Loftin* v. *Espy*, 4 Yerger, 84.) *A fortiori*, to enforce a lien upon them.

Last. The State court had no authority to enjoin an execution issuing from a court of the United States. (*McKim* v. *Voorhies*, 7 Cranch, 279; 3 Story on the Constitution, 625, secs. 1751, 1752; *United States* v. *Wilson*, 8 Wheat., 253; 1 Kent's Com., 409.) It is true that the national courts have no authority (in cases not within the appellate jurisdiction of the United States) to issue injunctions to judgments in the State courts; or in any other manner to interfere with their jurisdiction or proceedings. (3 Story on the *Constitution, 626, sec. [*308 1753; *Diggs et al.* v. *Wolcott*, 4 Cranch, 179.) But the federal court had complete jurisdiction in this case, by injunction, to prevent the sale of the property levied upon by execution from its court. (*Parker* v. *The Judges of the Circuit Court of Maryland*, 12 Wheat., 561.) And as the State and federal courts had concurrent jurisdiction (Act of September 24th, 1789, sec. 11; 1 Litt. & Brown's ed., 78) of the action brought at law, and the suit in equity which arose out of it, the federal court having first acquired jurisdiction, the same cannot afterwards be taken from it by the State courts. Under such circumstances, the aid of the United States Court is not an irregular interference with the proceedings of the State tribunal.

If the State courts have jurisdiction to en-

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join the marshal from selling specific property in possession of the defendant, they may enjoin for all his property, or for any number of adverse claimants; and thus, in effect, entirely defeat the plaintiff's execution. At the same time an injurious conflict of jurisdiction would be produced, inconsistent with the harmony which ought to exist between the State and federal jurisdictions. "Where the jurisdiction of the federal courts has once attached, no subsequent change in the relation or conditions of the parties will oust the jurisdiction. The strongest consideration of utility and convenience require that, the jurisdiction being once vested, the action of the court shall not be limited, but that it should proceed to make a final disposition of the subject." (*United States* v. *Myers et al.*, 2 Brockenbrough's Rep., 516.)

Mr. Milton Brown, for the appellees:

The principal and leading question in this case arises on the demurrer to the bill; for if this be adjudged for the appellees, there is an end of the case.

The bill, if its allegations be true, states a case of clear and unembarrassed remedy at law. When analyzed, it amounts to this: That complainants had recovered a judgment at law, on which execution issued, and had been levied by the marshal of West Tennessee, on seventeen negroes and four mules, the property of Collier, one of the debtors in the execution, for the forthcoming of which, on the day of sale, a delivery bond had been taken, with sureties.

That one Peyton Smith had applied to the Circuit Court of the United States, from which the execution had issued, for an injunction to restrain the sale of said negroes; which application, however, was refused by the court. That afterwards, the property not having been delivered on the day of sale, the bond was forfeited; and on this judgment of forfeiture another execution issued against the defendants in the original judgment, and also the sureties in the forfeited delivery bond; on which last execution another levy was made, and another delivery bond, with new surety, taken. The **309*]** *bill then adds: "Upon this last execution the marshal made the following return:" "The property executed, delivered according to bond, and then arrested from me by the sheriff of Tipton, under order of the Chancery Court at Brownsville, 5th December, 1840."

The next two paragraphs then disclose the points on which the supposed equity of the bill is made to rest. They are as follows:

"And your orators further show, that the said Peyton Smith, although your honor refused to grant an injunction restraining the sale of said negroes levied upon, has, by some means or other, procured from the State courts of the State of Tennessee a process of injunction, or some other process, enjoining the sale of said negroes and property levied upon by virtue of the executions issuing from your honorable court, and has procured one Josiah Horne, the sheriff of Tipton County, a citizen of the State of Tennessee, to arrest and take possession of said negroes from the custody of the marshal of this court; and the said Josiah Horne has still possession of said property so levied upon as aforesaid, and refuses to deliver the same to the marshal of the western district, to be sold according to law.

"Your orators further show, that said negroes and mules were the property of said Probert P. Collier, and liable to be sold for the debt due to your orators, and that the State courts had no right, power or jurisdiction, to enjoin the process issued from this honorable court; and your orators believe, and so charge, that the said Collier and the securities upon said delivery bond combined and confederated with said Peyton Smith to prevent the sale of the property levied upon, and so defeat the execution of your orators; and your orators have now no adequate and complete remedy at law."

On these vague uncertainties and allegations, meaning nothing and amounting to nothing, the debtors in the original judgment, the sureties to both the delivery bonds, and Peyton Smith and the sheriff of Tipton, are all made defendants. And it is only remarkable that in this wholesale business the Chancellor of West Tennessee was not included.

The prayer of the bill for specific relief is: 1. That the negroes "be sold to pay the judgment due to your orators." 2. "That said defendants be jointly and severally bound personally to pay said judgment and interests to your orators." And, last. "That said negroes be forthcoming, to abide the decree of this honorable court." An injunction was prayed for, but not granted.

To this bill the defendants severally demurred. The demurrers were overruled by the court below, and the defendants required to answer. And now comes up the question, whether there is sufficient equity in the bill, and stated with sufficient legal certainty, to authorize a decree to be made on it.

*And first, as to the defendant Pey- [*310
ton Smith, against whom there is equity, if against anyone. The point is, the improper suing out of process and arresting the property from the possession of the marshal.

If it be the design of the bill to invoke the chancery powers of the court, to control or decide any real or supposed conflict between the federal and State judiciaries, the exercise of such a power would be alike unwarranted and dangerous.

But this is probably not the object of the bill. It proceeds on the ground that the process was wholly and absolutely void. What the process was, whether an injunction or a final process of execution, either in law or chancery, is not stated. The vague and unmeaning allegation is, that it was "a process of injunction, or some other process."

Nor is it stated on what this very uncertain process was sued out, or on what it was founded; whether on a final decree in chancery, on a final judgment at law, or on an application for an injunction, does not appear with any degree of legal certainty. The allegations are, that said Peyton Smith, "by some means or other," "procured from the State courts of the State of Tennessee a process of injunction, or some other process," by which the sale of the slaves by the marshal had been prevented; and that the State courts "had no right, power or jurisdiction," to issue this process.

Now, if these allegations be true, the process, whatever it might be, was absolutely void, and all acting under it trespassers. The marshal

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should have paid no attention to it; and if the property was taken without his consent, an action of trespass or trover, in his name, by virtue of his levy, was the plain remedy. If the process in the hands of the marshal was, as is here alleged, wrongfully and unlawfully obstructed or interfered with, it certainly furnishes no ground on which to invoke the chancery powers of the court. The case would be much nearer the province of a grand jury than the conscience of a Chancellor.

In this it is not designed to intimate, that, in point of fact, there was any unlawful or improper interference with the rights of the marshal or the complainants. Nor is it designed to intimate that there was any conflict of jurisdiction between the federal and State courts. It is believed there was no such interference, and no such conflict. But for the purposes of the argument on the demurrer, the facts are taken as stated in the bill.

The attempt in the appellant's brief to sustain the bill, on the ground of its being filed to set aside a fraudulent deed of trust, finds no support in the allegations or frame of the bill itself. The case made in the bill is the alleged improper issuance of the process from the State courts, and the seizure of the property. On what this process issued, as already clearly [*311 shown, is not stated. There *is nothing on the face of the bill to show, with sufficient legal certainty, that the existence of a deed of trust is the subject of complaint.

"Every material fact to which the plaintiff means to offer evidence ought to be distinctly stated in the premises." (Story's Eq. Pl., sec. 28.) If fraud is charged, it must be distinctly and clearly set out. (Story's Eq. Pl., sec. 251.)

The only reference in the bill to a deed of trust is a mere historical reference in the statement that Peyton Smith had applied to the Circuit Court of the United States for an injunction, which was refused. It is not charged that any other or further use was ever made or intended to be made of it.

Before the issuance of the "process" from the State courts, of which complaint is made, there had, as appears on the face of the bill, been an entire change in the nature of the question. The delivery bond had been forfeited, a new statutory judgment had attached, a new execution had issued, embracing not merely the former defendants, but the sureties in the delivery bond also, a new levy under this execution had been made, &c., &c. This "process," therefore, which is spoken of in the bill in such remarkably indefinite terms, might have been founded on an intervening judgment or decree in chancery, taking priority of lien, as happened in the case of *Brown* v. *Clarke*, decided at the present term of this court. In that case it was decided that, on the forfeiture of a delivery bond, the first lien was extinguished and a new lien attached, and that intervening liens might take precedence. May this not have been the case in this very instance, so far as anything appears on the face of the bill? In fact, the language of the bill favors this conclusion. It says that, "by some means or other," process was sued out. Does this not leave it wholly uncertain whether this process was obtained by "means" of a deed of trust, or by that "other" means referred to? But again, the bill says there was sued out "a process of injunction, or some other process," thus leaving it entirely uncertain what that "other process" was. Might not that "other process" here referred to have been founded on an intervening judgment or decree, creating a prior lien, and entitled to prior satisfaction?

These considerations are deemed sufficient to show that the reference to the deed of trust in the bill is too indefinite and uncertain to require an answer, or form an issue, and can furnish no possible ground for equitable interference. A statement of facts, to form the basis of relief, must not be vague and uncertain. And if, as in this case, they are stated in the alternative, or are otherwise left doubtful, it is such uncertainty as will be bad on general demurrer. (Story's Eq. Pl., secs. 243–249 and 450.)

Upon what ground the sureties in the delivery bonds have been made parties it is hard to perceive. Complainants already had *judgments and executions against [*312 them on the forfeiture; what more did they want? There is nothing in the bill against them, except a general charge of combination and confederacy, which cannot be a sufficient ground of jurisdiction; and, if charged, need not be answered. (Story's Eq. Pl., secs. 29 and 856.)

If the demurrers are sustained by the court, there is, of course, an end of the case; should they be overruled, another question presents itself. Can the reference to a deed of trust, in the answer, put that in issue which was not substantially relied on in the bill? That it cannot is clear. (Gresley on Ev., 22; Story's Eq. Pl., sec. 36, in *note*; *Boone* v. *Chiles*, 10 Peters, 209; *Harrison et al.* v. *Nixon*, 9 Peters, 503; *Jackson* v. *Ashton*, 11 Peters, 249.) In this last case the court say: "It may be proper to observe, that no admissions in an answer can, under any circumstances, lay the foundation for relief under any specific head of equity, unless it be substantially set forth in the bill."

But there is another reason why the statement in the answers, in the present condition of the case, cannot be regarded. The real persons interested in the deed of trust are not made parties; and this may also be regarded as another proof that the bill is framed with a view to no such end. Peyton Smith is a mere trustee, without interest; his answer cannot prejudice the rights of the *cestuis que trust*; and, though a party of record, is a competent witness. (Gresley on Ev., 242, 258.) The true rule seems to be, that the *cestuis que trust* should be made parties in all cases where the "existence or enjoyment of the property is affected by the prayer of the suit." (Calvert on Parties, 212.) To make, therefore, the admissions or statements in the answers of those having no interest in the trust work an injury to those who hold the real interest, would be to violate not merely the established rules of pleading and evidence, but the most obvious rules of substantial justice.

While it is believed that this is the law of the case, and that no decree, on several grounds, can be made touching the rights of the *cestuis que trust*, it is, with equal confidence, believed that there is not the slightest ground to infer fraud

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in the execution of the trust. It was designed to give a preference to Collier's own creditors over debts for which he was a mere security. This he had a lawful right to do. The debts designed to be preferred amounted to over seven thousand dollars, besides interest. The highest estimate placed on all the property is $10,866. But this is palpably an over-estimate, as is proved by the fact that one witness says the seventeen negroes were worth $7,650; while another witness thinks they were worth seven or eight thousand dollars. And yet the face of the bill shows that the same negroes were valued on each levy by the marshal when inserted in the delivery bonds; the first time 313*] *valued at $4,100, and the last time at $4,250. This proves that the estimate attempted to be placed on the property, for the purposes of this cause, is entirely too high. It is believed that at no time would it have sold under the hammer for enough to meet the debts named in the deed of trust.

One other suggestion will close this brief. The question of the validity of this deed has been before the Chancery Court of the State, where the parties in interest have been properly represented, and the result has been a decision in favor of the rights of the *cestuis que trust;* and it is fair to suppose that the trust, under the direction of the court, has, before now, been wound up, and justice done.

Mr. Brinley, in reply:

1. It is insisted by the counsel for the appellees, that there was a remedy at law; that if the property was taken from the marshal without his consent, he had a remedy by action of trespass or trover. This objection is anticipated and met in the opening argument for the appellants.

2. It is contended that there were too many persons made defendants by the bill. Who are they? Peyton Smith, the person claiming the property under an alleged fraudulent deed of trust; Collier, the assignor in said deed. The former should be included beyond a doubt; so, too, the latter. Where the assignment is not absolute and unconditional, or there are remaining rights or liabilities of the assignor, which may be affected by the decree, there the assignor is not only a proper, but a necessary party. (Story on Eq. Pl., sec. 153.) Eckford, being one of the judgment debtors, was of course a party. Bryan, Feezer, and Smith were securities on the delivery bond given on the levy of the first execution; they, together with Boon, were securities on the delivery bond given on the levy of the second execution. They were all made parties to the bill, on the principle that those in interest must be brought into court. By the statutes of Tennessee, as sureties to a forfeited delivery bond, their property might be levied on, and they had a direct interest in the subject. Besides, they were distinctly charged in the bill as confederating with Collier and Smith to prevent the sale of the property levied on. Horne was the sheriff who arrested the property from the marshal, and he was, therefore, made a party. This "wholesale business" was but a compliance with the rules of equity applicable to the circumstances.

3. It is then contended that there are not parties enough; that the *cestuis que trust* are not included.

It may be true, as a general rule, that all persons interested in the subject of a suit should be made parties as plaintiffs or defendants, in order that a complete decree may be made; but there are exceptions. Thus, residuary legatees are interested in the object *of a suit by [*314 a creditor against the executor, to establish his debt or claim against the estate; for the establishment of such debt or claim goes *pro tanto* in direct diminution of their interest in the residue. Yet they are never required to be parties. (Calvert on Parties, ch. 1. p. 5.)

So trustees for the payment of debts and legacies may sustain a suit either as plaintiffs or defendants, touching the trust estate, without bringing the creditors or legatees before the court as parties. (*Fenn* v. *Craig*, 3 Younge & Collier, 216.)

In case of assignment for benefit of creditors, the assignees may file a bill relative to the trust estate, without making the creditors parties; for the assignees are the proper representatives of all of them. In a suit to set aside an assignment as fraudulent, it is sufficient to make the fraudulent assignors and assignees parties. (*Wakeman* v. *Grover*, 4 Paige, 23.)

In the present case, Smith, the trustee, must be considered as the representative of the interest of all parties. It was not necessary to make the *cestuis que trust* parties; the complainants knew not who they were. *Nemo tenetur divinare.*

4. The bill is said to be vague and unmeaning, because it states that "a process of injunction, or some other process," enjoining the sale, proceeded from the State court. The bill states, in the words of the return on the *fi. fa.*, that the property was arrested from the marshal "under order of the Chancery Court at Brownsville." It then states, in the next paragraph, in reference to this order and arrest, that it was by "an injunction or some other process." If the language of the return had been used in that paragraph, it would have been sufficiently certain. the alternative phrase employed is not less so.

The sections in Story on Eq. Pl., referred to by the counsel for the appellees, are to the point, that when the allegations in a bill are extremely vague, loose, and uncertain, or where the title of a plaintiff is stated in the alternative, so that the respondent does not know what he is to answer, they are not sufficient.

A general charge or statement of the matters of fact is sufficient, and it is not necessary to charge minutely all the circumstances which may conduce to a general charge. (Story on Eq. Pl., sec. 28.)

Here the general charge is, that the sale on the execution was enjoined by process from the State court, and the property arrested from the marshal. That is minute enough, particularly as the precise character and appellation of the process were known to Smith, who obtained it. Moreover, a charge in general terms, where it is the point on which the merits of the cause turn, and does not come in collaterally and incidentally, will warrant the production of evidence to particular facts. (2 Atk., 333, 337.)

A plaintiff is not bound to set forth all the minute facts which go *to constitute a [*315 charge; and where the title to relief will be precisely the same in each case, the plaintiff may aver facts of a different nature, which will

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equally support his application. (Story on Eq. Pl., secs. 252, 254.)

The cases cited by the counsel for the appellees, from the reports of this court, are to the undisputed point, that a party is not allowed to state one case in a bill or answer, and make out a different one by proof. No such attempt is made in this case; the allegation in substance is, that an injunction, or a process of like nature issued; that is put in issue. The proof, as obtained from the admissions in the answers of Smith, Collier, Feezer, Bryan, Horne, and Boone, is within the allegation, that an injunction issued. In the case of *Jackson* v. *Ashton* (11 Peters, 249), the court said: "The answer of the defendant is broader than the allegations in the bill; and, although such parts of the answer as are not responsive to the bill are not evidence for the defendant, yet the counsel on both sides have considered the facts disclosed as belonging to the case; and if the facts in the answer, not responsive to the bill, are relied on by the complainants' counsel as admissions by the defendant, he is entitled, thus far, to their full benefit."

So here the counsel, throughout the progress of the cause, have considered the fact that an injunction issued as belonging to the case. It was disclosed (admit it for the argument) in the answer of Smith, though not substantially set forth in the bill; yet the complainants shall have the full benefit of the admission.

The words "or other process" may be considered surplusage.

5. It is said there is nothing on the face of the bill to show that the deed of trust was the subject of complaint.

The bill expressly states that Smith claimed the property under a fraudulent deed of trust, and that he pursued that claim by the intervention of the State court. An illegal proceeding, based on a fraudulent conveyance, is the charge. The reference to the deed of trust is said to be in the statement. There it ought to be; for the statement constitutes the real substance of a bill. (Story on Eq. Pl., sec. 27.)

6. The "process" from the State court, it is argued, may have been founded on an intervening judgment, creating a prior lien, &c. Such a supposition is wholly at war with the true state of the case, as disclosed by the allegations in the bill, and the admissions in the answers.

7. The counsel for the appellees states that "the highest estimate placed on all the property is $10,366;" and therefore there is no reason for inferring fraud. Fraud may not be conclusively established from that circumstance only; but it is one of a number of circumstances which unitedly affords strong presumption of fraud in regard to creditors.

8. The closing remark of the counsel for the [*316] appellees, that *the validity of the deed of trust has been established by the Court of Chancery of the State, is, as it purports to be, a "suggestion," and which cannot affect the decision of this court.

Mr. Justice McLEAN delivered the opinion of the court:

This is an appeal from the decree of the Circuit Court for the District of West Tennessee.

In their bill the complainants state that they recovered a judgment in the Circuit Court against Thomas Eckford and Probert P. Collier, for the sum of three thousand four hundred and sixty-two dollars and twenty cents, &c.; and that execution was issued the 24th of April, 1840, which, about the 18th of July ensuing, was levied on seventeen negroes and four mules; and that the marshal took a delivery bond and security, under the statute of Tennessee.

That one Peyton Smith, a citizen of the State of Tennessee, pretending to claim said property levied upon by virtue of some fraudulent deed of trust executed by Probert P. Collier to him, filed a bill, which prayed for an injunction, in the Circuit Court, and which was refused. That the delivery bond being forfeited, an execution was issued on it, against the principals and sureties, which was levied upon the same negroes and mules; upon which execution the marshall returned that "the property levied on had been taken from him by the sheriff of Tipton County, under the order of the Chancery Court, at Brownsville, 5th December, 1840." The bill alleges that the negroes and mules belonged to Collier, and it prays that they may be sold in satisfaction of the judgment.

There is no allegation in this bill which authorizes a court of equity to take jurisdiction of the case. Fraud is not charged, nor is anything stated going to show that the remedy at law is not complete. It is stated that Peyton Smith, pretending to claim the property, after the first levy, by virtue of some fraudulent deed of trust executed to him by Collier, applied to the Circuit Court, by bill, for an injunction, which was refused. The present bill was not filed by the complainants until after execution was issued on the delivery bond and levied, and the property was taken, as returned by the marshal, under State process.

Now, if the object had been to set aside the deed of trust, as fraudulent, the fraud, with the facts connected with it, should have been alleged in the bill. Or, if the negroes and mules were about to be taken out of the State, and beyond the jurisdiction of the court, unless restrained by an injunction, such fact should have been stated. But the principal allegation in the bill is, that under the State authority the sheriff had no right to take the negroes, &c. If this be admitted, it does not follow that the remedy of the complainants is in a court of equity. On the contrary, from the showing in the bill, there is a plain remedy at law. The marshal might *have brought trespass against the [*317 sheriff, or applied to the Circuit Court for an attachment.

Out of the answer which sets up the deed of trust, the complainants insist they are entitled to relief. Now, no relief can be given by a court of equity, except a proper case be made in the bill. The inquiry is not only whether the defendant, from his own showing or by proof, has acted unjustly and inequitably, but, also whether the complainants, by their allegations and proof, have shown that they are entitled to relief.

The decree of the Circuit Court is affirmed, with costs.

Cited—23 Wall., 470; 1 Biss., 9.

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THOMAS COOKENDORFER, *Plaintiff in Error*,
v.
ANTHONY PRESTON, *Defendant in Error.*

Witness—Notary Public competent to prove his own acts in protesting note—evidence admissible to show change in usage since judicial decision—days of grace in District of Columbia.

In an action brought by the indorsee against the indorser of a promissory note which had been deposited in a bank for collection, the notary public who made the protest is a competent witness, although he has given bond to the bank for the faithful performance of his duty.

He is also competent to testify as to his usual practice.

The cases reported in 9 Wheaton, 582, 11 Wheaton, 430, and 1 Peters, 25, reviewed.

At the time when these decisions were made, it was the usage in the city of Washington to allow four days of grace upon notes discounted by banks, and also upon notes merely deposited for collection.

But since then the usage has been changed as to notes deposited for collection, and been made to conform to the general law merchant, which allows only three days of grace.

Although evidence is not admissible to show that usage was in fact different from that which it was established to be by judicial decisions, yet it may be shown that it was subsequently changed.

THIS case came up by writ of error from the Circuit Court of the United States for the District of Columbia, in and for the County of Washington.

The case was this:

On the 17th of May, 1839, E. T. Arguelles gave the following note:

$300. WASHINGTON, May 17, 1839.

On the first day of February next, I promise to pay to Thomas Cookendorfer, or order, three hundred dollars, for value received, negotiable and payable at the Bank of Washington. (Signed) E. T. ARGUELLES.

(Indorsed) THOS. COOKENDORFER.
ANTHONY PRESTON.

This note was deposited in the Bank of Washington for collection. Not being paid at maturity by the drawer, it was protested under 318*] *the circumstances and in the manner stated in the bill of exceptions.

In February, 1842, a suit was brought by Preston, the indorsee, against Cookendorfer, the indorser, which resulted in a verdict and judgment for the plaintiff.

The following bill of exceptions shows the points of law which were raised and ruled at the trial.

Memorandum. Before the jurors aforesaid retired from the bar of the court here, the said defendant, by his attorney aforesaid, filed in court here the following bill of exceptions, to wit:

Defendant's Bill of Exceptions.

ANTHONY PRESTON
v.
THOMAS COOKENDORFER.

On the trial of this cause, the handwriting of the maker and indorser of the note in the declaration mentioned was admitted, and the plaintiff, to maintain the issue on his part joined, offered George Sweeny, who was admitted to be a notary public for the County of Washington, District of Columbia, lawfully commissioned and sworn, and by him they offered to prove that he, as such notary, was required by the Bank of Washington (who then held the said note for collection) to demand payment of the note mentioned in the declaration, and the said note was delivered to him by the said bank; and he did thereupon, on the 4th day of February, 1840, present the said note at the said bank, and did demand payment thereof at the said bank, and he was answered by the proper officer of the bank, "that there were no funds there for it"; that he, the said notary, did, on the next day, to wit, the 5th day of February, 1840, deliver to the defendant a notice in writing, which notice being now produced to the witness by the defendant, is in the words and figures following:

Notice of 5th February, 1840.

WASHINGTON, February 5th, 1840.

Sir: A note drawn by E. T. Arguelles, dated the 17th May, 1839, for three hundred dollars, payable at 1–4 February, 1840, due, and by you indorsed, and for which you are accountable to the President and Directors of the Bank of Washington, has been this day protested for nonpayment.

Your obedient servant,
GEORGE SWEENY, Notary Public.
THOS. COOKENDORFER, Esq.

And he did, also, on the said 5th day of February, 1840, extend and record in his notarial register the protest of the said note, which is in the words and figures following:

Protest. [*319

$300. WASHINGTON, May, 17, 1839.

On the first day of February next, I promise to pay to Thomas Cookendorfer, or order, three hundred dollars, for value received, negotiable and payable at the Bank of Washington.

(Signed) E. T. ARGUELLES.
(Indorsed) THOMAS COOKENDORFER,
ANTHONY PRESTON.

DISTRICT OF COLUMBIA, Washington County, *act.*

Be it known, that on the 4th day of February, 1840, I, George Sweeny, notary public, by lawful authority duly commissioned and sworn, dwelling in the county and district aforesaid, at the request of the President and Directors of the Bank of Washington, presented at the said bank the original note, whereof the above is a true copy, and demanded there payment of the sum of money in the said note specified, whereunto I was answered, "There are no funds here for it."

Therefore, I, the said notary, at the request aforesaid, have protested, and by these presents do solemnly protest, against the drawer and indorser of the said note, and all others whom it doth and may concern, for all costs, exchange, re-exchange, charges, damages, and interests suffered and to be suffered for want of payment thereof.

In testimony whereof, I have hereunto set my hand and affixed my seal notarial, [SEAL.] this fifth day of February, 1840.

GEORGE SWEENY, Notary Public.

Protesting, $1.75.

Recorded in protest book G. S. No. 3, page—

NOTE.—*As to usage or custom, as controlling or varying demand, notice, and days of grace*, see note to Mills v. Bank of United States, 11 Wheat., 431.

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And the said witness further testified, that he copied the form of the said notice from a form used by Michael Nourse, one of the oldest notaries in the city, and largely employed as notary, and that he made the demand and gave the notice in this case according to his usual practice, and that his said practice conformed, so far as he knows and believes, to the practice of the other notaries in the city of Washington.

And the plaintiff offered further evidence tending to prove the said practice of said notaries to be according to the statement made by Mr. Sweeny, and that the usual practice was, when a notice was to be sent abroad, to put it into the post-office, and date it on the third or last day of grace; but when the notices were to be delivered in the city of Washington, a latitude was allowed to the notary, either to deliver the notice on the third or last day of grace, or the day after the last day, and in all cases to date the notice on the day of its delivery, and the usage is to extend the protest on the day on which the notice is given, as in this case, stat-
320*] ing the demand *to have been made on the last day of grace, and the protest to be dated the same day on which the notice is dated.

And the said George Sweeny, on cross-examination, testified that he usually acted on behalf of the said Bank of Washington, at its request, as the notary in regard to notes and bills in said bank, and that he had given a bond, with security, to said bank, in the penal sum of $10,000, or the faithful performance of his duty as notary public in regard to said business, and that the note in controversy had been deposited by plaintiff in said bank for collection.

And the counsel for the defendant objected to the admissibility and competency of said George Sweeny as a witness, and the court overruled the said objection, and permitted the said Sweeny to be sworn, and to testify as aforesaid to the jury, to which the defendant, by his counsel, excepted, and prayed the court to seal this bill of exceptions, which is done accordingly.

And the said counsel for the defendant further objected to the admissibility and competency of the said testimony upon the subject of the practice and usage spoken of by the witness, but the court overruled the objection, and suffered the said testimony to go to the jury; whereupon the said counsel excepted.

And the said counsel for the defendant thereupon moved the court to instruct the jury, that the said evidence was not sufficient, if believed to be true, to show that payment of said note had been duly demanded and refused, and that due notice of such dishonor had been given to defendant so as to bind him.

But the court refused to give such instruction.

To each of which rulings of the court, in permitting the evidence as aforesaid to go to the jury, in refusing the instruction as prayed, the defendant, by his counsel, excepts, and prays the court to seal this bill of exceptions, which is accordingly done, this 7th day of April, 1843. W. CRANCH, [SEAL.]
JAMES S. MORSELL. [SEAL.]

The cause was argued by *Messrs. Bledsoe* and *Coxe* for the plaintiff in error, and *Mr. Bradley* for the defendant in error.

Mr. Bledsoe, for plaintiff in error, made three points:

1. That the court erred in admitting the testimony of the notary public.

2. That the court erred in refusing the instruction asked for by the defendant's counsel.

3. That the declaration is radically and essentially defective.

1. It may be said, that the objection to the evidence of the notary public goes to his credibility rather than to his competency. But *inasmuch as the bank would be ab- [*321
solved from responsibility if the notary committed an error, and all the liability to the party injured by the fault would devolve upon the notary, it clearly became his interest to exonerate himself from it by proving that he committed no fault. His interest was strong and direct. (Bayley on Bills, 251; 20 Johnson, 372; same case, 3 Cowen, 562.)

If the plaintiff should fail in recovering from the indorser, on account of the ignorance or neglect of the notary in making a sufficient protest, the latter would become personally liable. His interest is to protect himself by securing a recovery from the indorser.

2. Supposing the evidence to be admissible, it is not sufficient.

A note must be presented for payment on the date that it falls due. When is that? On the last day of grace. The time of grace formed a part of the contract by the indorser. (1 Peters, 31.)

But in this case it was presented on the third day of grace. This would have been proper under the general law merchant, if that law prevailed in the District of Columbia. But it does not. It is controlled by a local usage, which is to allow four days of grace. (1 Peters, 34; 9 Wheat., 582.)

Such an usage is part of the contract, whether the parties were acquainted with it or not. (11 Wheaton, 430.)

A presentment too soon is a nullity. (Bayley on Bills, 236.)

No proof was offered in this case of the four days usage, but as it had been once proved and established, we were not bound to prove it again. It then became a part of the law. (1 Peters's C. C. R., 230; 2 Starkie, 7th Lond. ed., 360.)

In 1 Peters, 34, there was no proof of this usage, but the court relied upon its having been proved before. There was proof of another usage, but none of that now in question.

It is apprehended that the counsel on the other side mean to make a distinction between notes discounted by banks and those left for collection; and to contend that the usage of four days grace applies only to notes discounted by banks. But this distinction is not recognized in the case in 1 Peters, 33, 34.

The usage being once established and recognized by law, the court below erred in admitting evidence to contradict it. (9 Law Lib., 40; 2 Burr., 1216, 1220, 1222, 1224, 1228; 1 Call, 159; 2 Starkie, 360.)

It is an usage in other places to allow four days grace, and this is recognized as valid in the books. (Chitty on Bills, 407, *note;* Bayley on Bills, 235, *note*, speaking of this one.)

It is contrary to the policy of the law to leave

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these questions open for the jury. (Chitty on Bills, 402.)

The law merchant is built upon usage taken in connection with the principles of justice, not being found in any statutes. Evidence to unsettle it ought not to be received. (1 Dall., 322*] 265; 3 Wash. *C. C. R., 149; 5 Binney, 207; 6 Binney, 420, 450; 1 Hall, 619.)

3. The evidence does not support the declaration, which says that the note was presented on the third day of grace. The notice does not state the day of presentation, saying only that it was protested on the 5th of February. The note was due either on the 4th or 5th. We say it was not due until the 5th. If so, it was premature to present it on the 4th, the day on which the counsel on the other side say it was due.

Mr. Bradley, for defendant in error:

As to the first point. A notary is not an officer of the law to demand payment of notes, but is merely an agent of the bank. It has been said that the bank would not be responsible for an error of the notary, and the case in 8 Cowen cited to sustain it. But in that case the bank was held responsible.

The bank is the agent of the deposition, and the notary is the agent of the bank. In an action by the holder against the indorser, the competency of the notary cannot be affected. If the action were against the bank, the conclusion might be different. The competency of a notary as a witness is discussed in 2 Bailey's S. C. Rep., 183.

An agent is generally a competent witness as to matters within his agency. (1 Bingham, 368; 6 Lea. R., 29; 1 N. H. Rep., 192; 5 Martin, N. S., 310; see, also, 15 Wend., 314.)

2. The notary not only approved his own acts, but the general usage and custom of allowing different days of grace upon notes discounted by a bank and those merely deposited for collection. It is admitted that if courts have, by their decisions, settled and established what the usage is, it becomes as binding as statute law. The general usage in the United States is to allow only three days of grace, and the special custom of this District is to allow four days only as to those notes discounted by a bank. (9 Wheat., 582, 583; Story on Prom. Notes, 242, *note*.)

In the case of *Bank of Washington* v. *Triplett & Neale* (1 Peters, 33, 34), the report of the case does not show that any evidence was taken to establish usage, but the original record shows that it was so. [Here *Mr. Bradley* produced the original record.] Usage depends on the practice of banks. But this may have changed between 1824 and 1840, and if so, can we not show it? Is a usage, once recognized by a court as existing, to last forever without any change? If the people in the District should conform to the custom in other parts of the United States, shall we be precluded from showing it by evidence? It is said that the evidence given was not sufficient. But the existence of usage is a fact of which the jury are to judge, and the court was right in leaving it to them.

3. The declaration says that demand was 323*] made on the third day *of grace. But the fact of notice on that day is immaterial; it always says on the day and year aforesaid.

Mr. Coxe, for plaintiff in error, in reply:

As to the competency of the witness. The notary was a public officer, and the bank could not be held responsible for his mistakes. It is the duty of the bank to collect notes which are deposited for collection, and for this purpose it must employ competent agents. It is only responsible in case it employs incompetent ones. But where it uses due diligence according to the law of bailments, it is not liable for their errors. In the case in 20 Johnson, the bank was held responsible because it did not employ a public officer, but an agent of its own. In the present case, the bank would be blameless, but the notary is responsible to the holder of the note, if, from any negligence or ignorance on the part of the notary, the holder were to lose his remedy against the indorser. Besides, he has given a bond to the bank, in a penalty of $10,000, for the faithful performance of his duty. If a person, standing in such a situation, is ever admitted as a witness, it is only from necessity, and then he is only allowed to prove his own acts. But here he not only proves what he did, but goes on to testify as to the regularity and correctness of his actions, and that, too, by referring to other persons. For example, he says that he "copied from an old notary." The old notary himself could have proved this much better. The usage is to extend the protest on the last day of grace. The notice here says, "this day protested," &c., that is, on the 5th; but it does not say whether the demand was made on the 3d or 4th day.

Was any evidence admissible in this case to show usage? There have been three decisions of this court upon the subject. In the first (9 Wheat., 582), the note happened to be discounted at bank. But can a contract be changed without the party's being aware of it, merely by the circumstance that the note has been subsequently discounted at bank?

In 11 Wheat., 431, stress was laid upon the note's being made for the purpose of being negotiated.

In *Bank of Washington* v. *Triplett & Neale* (1 Peters, 25), both the above cases came up again for review, and the original record has been referred to by *Mr. Bradley*, to show that evidence was given upon the subject of usage. It was so. That evidence says that it was the usage to demand payment of notes which were deposited for collection on the day after the third day of grace.

Mr. Bradley referred to the record, and said that the original practice was changed by the banks, and demand made on the third day.

It is contended by the other side, that there is a difference between discounted notes and those deposited for collection. But there is no allusion to this in the testimony, and no such distinction *made in any part of [*324 the record. The same usage appears to be applicable to all.

Mr. Justice McLEAN delivered the opinion of the court:

The questions in this case arise on the rulings of the court, to which, at the trial, exceptions were taken.

Preston, the defendant, as the indorsee of a promissory note, brought an action against the

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plaintiff in error, the indorser. The signatures of the maker and indorser were admitted. These grounds of error are assigned:

1. That the court erred in admitting the testimony of the notary public.

2. In refusing the instructions asked by the defendant's counsel.

3. The declaration is defective.

George Sweeny, the notary who protested the note, testified that it was delivered to him by the Bank of Washington, who held it for collection, to demand payment, and that he did thereupon, the 4th of February, 1840, present the note to the bank, and demanded payment, but was informed by the proper officer that there were no funds to pay it, on which he protested the same for nonpayment; and on the next day, the 5th of February, he delivered to Cookendorfer, the plaintiff in error, the following notice, in writing:

WASHINGTON, February 5th, 1840.

"Sir: A note drawn by E. T. Arguelles, dated 17th May, 1839, for three hundred dollars, payable 1–4 February, 1840, due, and by you indorsed, and for which you are accountable to the president and directors of the Bank of Washington, has been this day protested for nonpayment."

And the witness stated "that he made the demand and gave the notice according to his usual practice," and "that said practice conformed, as far as he knows and believes, to the practices of the other notaries in the city of Washington."

And other evidence was given, conducing to show that the usual practice, in such cases, was, "when a notice was to be sent abroad, to put it into the postoffice, and date it on the third or last day of grace; but when the notice was to be delivered in the city of Washington, a latitude was allowed to the notary either to deliver the notice on the third or last day of grace, or the day after the last day, and in all cases to date the notice on the day of its delivery; and the usage is to extend the protest on the day on which the notice is given, as in this case, stating the demand to have been made on the last day of grace, and the protest to be dated the same day on which the notice is dated."

It is insisted that the notary, by reason of his interest in this suit, is an incompetent witness.

325*] *In the case of *Smedes* v. *Utica Bank* (20 Johns. R., 372), it was held that a bank which receives a promissory note for collection, to charge the indorser, by a regular notice, is liable for neglect; but this is not the case where the bank delivers the note to a notary, who is a sworn public officer, and whose duty it is to make the demand and give the notice. The same doctrine is laid down in 3 Cowen, 662. From this it is argued that the notary is liable directly to the holder of the paper for neglect, as a public officer, and not to the bank, as its private agent. That in the latter case he would not be liable to the holder of the paper, but might be called on to indemnify the bank which had suffered on account of his laches.

A notary is a competent witness on the same ground that other agents are admissible. They are always responsible to their principals for gross negligence, and yet, from the necessity of the case, they are competent witnesses to prove what they have done in the name of their principals.

It appears that the witness, who generally acted as notary for the Bank of Washington, had given a bond, with security in the sum of ten thousand dollars, for the faithful performance of his duty as notary public, in the business of the bank committed to him. But this, it would seem, does not render him incompetent. "The cashier or teller of a bank is a competent witness for the bank, to charge the defendant on a promissory note, or for money lent or overpaid, or obtained from the officer without the security which he should have received; and even though the officer has given bond to the bank for his official conduct." (Greenleaf's Ev., 485; *The Franklin Bank* v. *Freeman*, 16 Pick., 535; *United States Bank* v. *Stearns*, 15 Wendell, 314.)

It is further insisted, that if the notary was competent to state his own acts, he could not prove the usage under which he acted. He stated that in making the protest, and giving notice he pursued "his usual practice," "and so for as he knew, the practice of the other notaries in the city." Now, it would be an exceedingly technical rule which would permit a notary to say what he had done in a particular case, but prohibit him from stating that he acted in such case according to his usual practice. And this was all the witness did say; for although he spoke of his belief as to the practice of other notaries in the city, he does not state that he had a knowledge of their practice.

The instruction prayed by the defendant's counsel, and the refusal of which is the second ground of error assigned, was, "that the said evidence was not sufficient, if believed to be true, to show that payment of said note had been duly demanded and refused, and that due notice of such dishonor had been given to defendant, so as to bind him."

In the case of *Renner* v. *The Bank of Columbia* (9 Wheat., *582), a suit was brought [*326 against the indorser of a note which had been negotiated in the Bank of Columbia. Payment was demanded, and the note protested on the fourth day after that mentioned in the note as the day on which it became payable. This was proved to be the usage of the bank, and this court held the demand was made at the proper time. In *Mills* v. *The Bank of the United States* (11 Wheat., 430), this court held, that "when a note is made payable or negotiable at a bank, whose invariable usage it is to demand payment and give notice on the fourth day of grace, the parties are bound by that usage, whether they have a personal knowledge of it or not."

In *The Bank of Washington* v. *Triplett & Neale* (1 Peters, 25), this court sanction the usage to make the demand of payment of a note which was left in the bank for collection on the day after the last day of grace, placing such notes, in this respect, on the same footing as notes discounted by the bank. And that such was the usage in 1817, when payment on the note or bill in question was demanded, was proved in that case. But it was also proved, as ap-

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pears from the record, that the usage was changed in 1818 by all the banks of Washington and Georgetown, "so as to conform to the general commercial usage of demanding payment on the last day of grace." This referred to notes or bills sent to the banks for collection, and of course embraces all notes not negotiated in bank.

Where a usage is sanctioned by judicial decisions, it becomes the law of the place, and no further proof is necessary to establish it; and it is said, that no evidence is admissible to controvert the fact, as laid down by the court. (*Edie* v. *East India Co.*, 2 Burr., 1221.)

Now, if the usage, as sanctioned in the cases above cited, governs this case, it is clear that such diligence has not been used as to charge the indorser. For, under that usage, the demand should have been made on the day after the third day of grace, when it was in fact made on the third day of grace.

This objection is met by the defendant in error by the proof of the usage as stated; which he insists governs all notes not discounted by the banks of the District. The note in question was not discounted by the Bank of Washington, it being merely left there for collection. But it is insisted that this usage cannot be shown to overthrow that which has been sanctioned by judicial decisions. A local usage may be changed in the same mode by which it was established. But parol evidence is not admissible to show that the usage was different, at the time, from what the courts have solemnly adjudged it to be. The law merchant is founded upon custom, and every modification of it by local usage shows that, like other laws, it may be changed.

The usage proved in this case, except in **327*]** *Bank of Washington* v. **Triplett & Neale*, and that is explained by the evidence cited, does not conflict with that decided by this court, if the latter be limited to notes discounted by the banks, and the former applies to all other notes payable in the District. In other words, that the law merchant should be modified by the usage only as to demand and notice on notes discounted by the banks. And it would seem, from the decisions above cited, the usage to demand payment the day after the third day of grace had its origin with the banks, and has not been extended, since 1818, to paper not discounted by them. On all other paper, a demand is made on the third day of grace, and the "usage is to extend the protest on the day on which the notice is given, stating the demand to have been made on the last day of grace, and the protest to be dated the same day on which the notice is dated." Now, a demand and protest on the last day of grace, and a notice on the following day, come strictly within the law merchant. And this was the diligence used in the present case, except the formal date of the protest on the day of the notice. No confusion can therefore arise from this general commercial usage, as it conforms to the established law. No inconvenience has arisen, it is supposed, from the bank usage in the District, which has been so long and so firmly established.

No defects in the declaration are perceived, and none have been pointed out to us, which are not cured by the verdict.

Upon the whole, we affirm the judgment of the Circuit Court, with costs.

Cited—15 How., 544, 545; 2 Wood. & M., 8; 2 Curt., 388; 3 McLean, 585.

ALEXANDER RANKIN, CUNNINGHAM SMITH, GEORGE C. C. THURGER, AND JOHN McCALL, *Plaintiffs in Error*,

v.

JESSE HOYT.

Tariff laws—appraisement of wool—conclusiveness—verdict of jury—adoption of appraisers—acts by collector equivalent to request.

Under the Act of 1832, the collector had power to direct wool to be appraised, for the purpose of ascertaining whether or not it was entitled to be imported free from duty; the exemption depending upon its value not exceeding eight cents per pound at the place of exportation.

Although it was necessary for the collector to request the appraisers to act, and no such request appears in the record, yet the legal presumption is that the collector and appraisers did their duty, he requesting their action and they complying.

And the collector's subsequent adoption of the proceedings of the appraisers is tantamount to having requested them.

It was the duty of the collector to be guided by such an appraisement, and a subsequent verdict of a jury, finding that the value of the wool was under eight cents per pound, cannot be considered as rendering his acts illegal.

The importer had a right to appeal to another board of appraisers, differently constituted, and if he did not choose to resort to them, he cannot, with much grace, afterwards complain that an overestimate existed.

THIS case came up by writ of error from the Circuit Court of the United States for the Southern District of New York.

It was an action brought by the plaintiffs in error, transacting *business as copart- [*328 ners, in the city of New York, under the name of Smith, Thurger & Co., for the return of duties which they alleged to have been illegally exacted, upon several importations of wool, by Hoyt, the collector of New York.

The acts of congress which bear upon the case are the following:

By the Act of the 14th of July, 1832, entitled "An Act to alter and amend the several acts imposing duties on imports," by the first clause of the second section (4 Litt. & Brown's ed., 583), it is enacted: "That wool unmanufactured, the value whereof, at the place of exportation, shall not exceed eight cents per pound, shall be imported free of duty; and if any wool so imported shall be fine wool, mixed with dirt or other material, and thus reduced in value to eight cents per pound or under, the appraisers shall appraise said wool at such price as in their opinion it would have cost had it not been so mixed, and a duty thereon shall be charged in conformity with such appraisal; on wool unmanufactured, the value whereof, at the place of exportation, shall exceed eight cents, shall be levied four cents per pound, and forty per centum *ad valorem*."

By the seventh section of the same act, it is enacted: "That in all cases where the duty which now is, or hereafter may be imposed on any goods, wares, or merchandise imported in-

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to the United States shall, by law, be regulated by, or be directed to be estimated or levied upon, the value of the square yard, or of any other quantity or parcel thereof; and in all cases where there is or shall be imposed any *ad valorem* rate of duty on any goods, wares, or merchandise imported into the United States, it shall be the duty of the collector within whose district the same shall be imported or entered to cause the actual value thereof, at the time purchased, and place from which the same shall have been imported into the United States, to be appraised, estimated, and ascertained, and the number of such yards, parcels, or quantities, and such actual value of every of them as the case may require; and it shall, in every such case, be the duty of the appraisers of the United States, and every of them, and every other person who shall act as such appraiser, by all the reasonable ways or means in his or their power, to ascertain, estimate, and appraise the true and actual value, any invoice or affidavit thereto to the contrary notwithstanding, of the said goods, wares, or merchandise, at the time purchased, and place from whence the same shall have been imported into the United States, and the number of such yards, parcels, or quantities, and such goods, wares, and merchandise, being manufactures of wool, or whereof wool shall be a component part, which shall be imported into the United States in an unfinished condition, shall, in every such appraisal, be taken, deemed, and estimated by **329*** the said *appraisers, and every of them, and every person who shall act as such appraiser, to have been, at the time purchased, and place from whence the same were imported into the United States, of as great actual value as if the same had been entirely finished: Provided, that, in all cases where any goods, wares, or merchandise subject to *ad valorem* duty, or whereon the duty is or shall be by law regulated by, or be directed to be estimated or levied upon, the value of the square yard, or any other quantity or parcel thereof, shall have been imported into the United States from a country other than that in which the same were manufactured or produced, the appraisers shall value the same at the current value thereof, at the time of purchase, before such last exportation to the United States, in the country where the same may have been originally manufactured or produced."

And by the eighth section it is further enacted: "That it shall be lawful for the appraisers to call before them, and examine upon oath, any owner, importer, consignee, or other person, touching any matter or thing which they may deem material in ascertaining the true value of any merchandise imported, and to require the production on oath to the collector, or to any permanent appraiser, of any letters, accounts, or invoices, in his possession, relating to the same; for which purpose they are hereby authorized to administer oaths; and if any person so called shall fail to attend, or shall decline to answer, or to produce such papers when so required, he shall forfeit and pay to the United States fifty dollars; and if such person be the owner, importer, or consignee, the appraisement which the said appraisers may make of the goods, wares, or merchandise, shall be final and conclusive, any act of Congress to the contrary notwithstanding; and any person who shall swear falsely on such examination shall be deemed guilty of perjury, and if he be the owner, importer, or consignee, the merchandise shall be forfeited."

By the third section of the Act of the 28th of May, 1830 (4 Litt. & Brown's ed., 409), entitled "An Act for the more effectual collection of the impost duties," it is enacted: "That if the owner, importer, or consignee, or agent for any goods appraised, shall consider any appraisement made by the appraisers or other persons designated, too high, he may apply to the collector, in writing, stating the reasons for his opinion, and having made oath that the said appraisement is higher than the actual cost and proper charges on which duty is to be charged, and also that he verily believes it is higher than the current value of the said goods, including said charges at the place of exportation, the collector shall designate one merchant skilled in the value of such goods, and the owner, importer, consignee, or agent may designate another, both of whom shall be citizens of the United States, who, if they cannot agree in an appraisement, may designate an umpire, who shall also be a citizen *of the United [**330** States, and when they, or a majority of them, shall have agreed, they shall report the result to the collector, and if their appraisements shall not agree with that of the United States appraisers, the collector shall decide between them."

This last enactment was not repealed by the Act of 1832, and it was under this last act, as modified by the Compromise Act of 1833 (4 Litt. & Brown's ed., 629), that the cause came on to be tried at the November Term, 1842.

The plaintiffs in error made three several importations of wool in the year 1838, viz.:

April,	by the	Sarah Sheafe,	25 bales.
May,	" "	Josephine,	21 "
November,	" "	Renown,	19 "

The whole of the duties paid upon these several importations were claimed in this one action.

The jury found a special verdict of the following facts, viz.: That the plaintiffs in error were copartners; that Hoyt was collector of the customs; that the three importations above mentioned were made and the original invoices produced; that in each invoice the value of the wool was stated to be seven and one half cents per pound; that the wool was all unmanufactured; and then proceeded as follows:

"And the jurors aforesaid, upon their oaths aforesaid, further find, that upon the importation of the said three several invoices of wool as aforesaid, and upon the several entries thereof, the said wool was examined and appraised by the appraisers of the United States for the collection district of New York, and that the said appraisers did, upon such examination, appraise the said wool, and each and every part and parcel thereof, as of the value, at the places of exportation thereof, of nine cents per pound; which appraisements were, by said appraisers, reported to the collector, and from which said

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appraisements, or either of them, no appeal was made by the said plaintiffs.

"And the jurors aforesaid, upon their oath aforesaid, further say that the said appraisers found the said several parcels of wool to be unmixed and of the same quality.

"And the jurors aforesaid, upon their oath, further find that the said collector claimed and insisted that the said wool was subject to the payment of duties to the United States according to the valuation of the appraisers, so reported of him, and refused to deliver the said wool to the plaintiffs except upon payment by them of the duties claimed by the defendant to be due thereon as aforesaid."

The special verdict then went on to find that the plaintiffs in error insisted that the wool was free from and not subject to the payment of any duties to the United States, and protested **331*]** against *the right of Hoyt to require payment of any duties; that they paid, under this protest and a notice that they would bring an action to recover it back, the sum of $1,909.-93, and that the interest thereon, from the time of payment until the 29th of November, 1842, amounted to $577.22, the aggregate of the principal and interest being $2,487.15; that the duties charged by Hoyt were calculated and charged upon the value of the wool, as appraised by the appraisers, and that the wool mentioned in the three several invoices, and each and every part and parcel thereof, at the place of exportation, was of the value of seven and one half cents per pound and no more.

Upon this special verdict, the court, on the 23d of December, 1843, ordered a judgment to be entered in favor of Hoyt, the defendant, and a writ of error brought the case up to this court.

The cause was argued by *Mr. Dudley Selden* for the plaintiffs in error, and *Mr. Mason*, Attorney-General, for the defendant in error.

Mr. Selden made the following points:

First. Under the facts found by the special verdict, the plaintiffs were entitled to judgment.

Second. The power vested in the officers of the revenue to appraise the value of goods subject to duty does not authorize them to decide whether goods are or are not subject to duty.

Third. If the Act of July 14th, 1832, "to amend the several acts imposing duties on imports," has extended the power, under certain circumstances, in regard to the article of unmanufactured wool, the finding in this case shows that those circumstances did not exist, and therefore the appraisment is inoperative.

Fourth. The power given to the appraisers by section second of that act, in relation to unmanufactured wool invoiced at eight cents per pound or less, is confined to the inquiry whether the value thereof has been diminished by being mixed with other material. The seventh section of the act applies alone to goods subject to duty.

Fifth. If the appraisers acted without authority, an appeal from their decision was unnecessary.

Mr. Justice WOODBURY delivered the opinion of the court:

The right of the plaintiffs to recover in this case, and consequently to have a reversal of the judgment rendered in the Circuit Court, must depend on the legality of the course pursued by the defendant.

No question has been made by counsel that an action in this particular form cannot be maintained against a collector of the customs, if the course pursued by him was illegal, or that the protest against paying the duties should have been in writing: points which have arisen in similar controversies and led to special legislation *by Congress, but not being made [*332 here, it is not necessary now to consider them. (See on them *Elliott* v. *Swartwout*, 10 Peters, 138, 158; *Bond* v. *Hoyt*, 13 Peters, 267; *Carey* v. *Curtis*, 3 Howard, 236; *Swartwout* v. *Gibon*, 3 Howard, 110; Act of February 26th, 1845.)

The illegality imputed to the proceedings of the collector is supposed to have consisted in this: that he possessed no power, in cases of this kind, to call on the appraisers to estimate the value of the wool; and if he did possess it, that they do not appear to have acted here by his request. These objections, if well sustained, are material, because, by the appraisal, the true value of the wool was reported to be nine cents per pound, and then, by the Act of July 14th, 1832, a duty on it was "levied of four cents per pound, and forty per centum *ad valorem*." (4 Litt. & Brown's ed., 583.) Whereas if the appraisal was unauthorized, and the invoice should have been the only guide, the value of the wool was but seven and a half cents per pound, and by the same time it ought then to have been allowed to "be imported free."

The legal power of the collector to call on the appraisers to estimate the value of this wool rests on the construction which ought to be given to the second and seventh sections of the act aforesaid, both of which are extracted at length in the statement of this case. The plaintiffs contend, that the seventh section, authorizing an appraisal where the duty may be regulated by the value, or imposed at a rate *ad valorem*, is not applicable to any importations which, like these, if looking to the invoice alone, are not dutiable; and that the second section, regulating the appraisement of wool "mixed with dirt or other material," is the only one applicable to wool which, like this, was valued so low in the invoice as to be free; but did not in this case authorize the action of the appraisers in respect to these particular importations, as these, by the verdict of the jury, afterwards, were found not to have been so mixed.

In the first place, we so far coincide with the views of the plaintiffs, as to be satisfied that the second section does not justify the course pursued by the defendant in the present case. But we dissent from the argument that it is the only section applicable to importations like these, and hold that the seventh section, though open to different constructions on this subject, is plainly susceptible of one which embraces it; and that the spirit of the section, as well as of the whole system of appraisement under the revenue laws, seems not only to justify, but require, the application of its provisions to importations like those now under consideration. It ought, then, to be so construed; since this court has recently decided that acts imposing

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duties are not, as has often been done, to be construed strictly against the government, like penal laws, but so as "most effectually to accomplish the intention of the Legislature in passing them." (*Taylor et al.* v. *United States*, 3 Howard, 210.)

333*] *By the words of this last section, so far as material to the present inquiry, it is provided, that if the duty "imposed on any goods, wares, or merchandise" "shall by law be regulated by, or be directed to be estimated or levied upon the value of the square yard, or of any other quantity or parcel thereof, and in all cases where there is or shall be imposed any *ad valorem* rate of duty," &c., it shall be the duty of the collector" "to cause the actual value thereof, at the time purchased," &c., "to be appraised, estimated, and ascertained," &c., by appraisers.

Under the Act of May 19th, 1828, a duty partly specific and partly *ad valorem* had been imposed on all wool imported from abroad. No doubt can exist that the power to have appraised the value of any wool, imported under that act, had it remained unaltered in 1838, would have existed in the collector, because a duty in all cases was imposed and was in some degree regulated by the value, though it was not wholly an *ad valorem* rate of duty. But by the Act of July 14th, 1832, an amendment was made in the rate on one description of wool, so as to admit it free, if its value did not exceed eight cents per pound, and the argument for the plaintiff is, that as such wool no longer paid an *ad valorem* duty, the collector would no longer call on the appraisers to estimate its value. It is to be noticed, however, that this exemption did not make wool, as an article, cease to be dutiable. Nor did it become, after this change, any less important, in regulating the duty which was proper to be imposed on any wool, to ascertain the true value of it in all cases, so as to levy thereon four cents per pound and forty per cent. *ad valorem*, if the value turn out to be above eight cents per pound; and nothing if at or below eight cents. (See the first section, 4 Litt. & Brown's ed., 583.)

This act may then be considered to authorize the use of appraisers not merely when an article imported pays an *ad valorem* rate of duty, but whenever the duty is regulated by the value, or in other words, as we construe the provision, whenever a duty may exist or cease according to the value, as well as whenever it may increase or diminish, according to it. The language of the seventh section is broad enough, under this view, to justify the course that was adopted by the collector in the present case. But, if we look to the spirit of that section, and of the whole act of which it forms a part, in respect to the policy both of employing appraisers and discriminating in the duties imposed on wool, any remaining doubt as to the propriety of considering this case as coming within the seventh section must be removed. If the appraisers could not be called on to estimate the true value of the wool, when imported at low prices, but the value in the invoice was alone to guide, the revenue on all wool was manifestly liable to be lost, or the treasury greatly defrauded, by the article being put in the invoice at a price below the actual value, in order to introduce it free. Any incidental protection, *contemplated from the duty, [*334 to the growth of finer and more valuable wools in this country, would also be thus exposed to total defeat by the importation of this last kind at a valuation so low as to escape any duty whatever.

The utility of appraisers in such a case is even more apparent and important than in most others, because the value of wool is uncertain, fluctuating, and liable to be concealed by many ingenious devices—lowering the prices in the invoice, and others putting different qualities of wool in the same bail, or bringing it in mixed with dirt and burrs. It is on this last account, and not, as argued for the plaintiffs, because it is the only case in which the appraisers were authorized to act in respect to wool, that the second section requires them, in estimating its value, if mixed, to appraise it as high as if not mixed. In like manner, the Act of 1832, as well as 1828, requires wool imported on the skin to be taxed according to its "weight and value," as in other cases. And, instead of either of these provisions appearing to exclude the use of appraisers generally for ascertaining the true value of low-priced wool, they both seem to contemplate or imply their employment in such imports, knowing that the duty was to be affected or regulated by the value, and proceeding, therefore, merely to lay down specific rules for ascertaining it in cases where the wool is found to be mixed or on the skin.

It is not a little confirmatory of this view, that the Act of August 30th, 1842, which imposes some duty on all kinds of wool, and thus confessedly authorizes an appraisement in every importation repeats substantially the provisions in former acts for guiding the appraisers in estimating the value of mixed wool; thus showing with absolute certainty that such provisions do not in other acts exclude—or can, probably, in the present case be meant to exclude—the employment of appraisers in ascertaining the true value of wool, however low it is put in the invoice, and however unmixed it may be with other materials.

The only adjudged case which has been alluded to by the plaintiffs as supporting their views is that of *Curtis* v. *Martin et al.* (3 Howard, 106).

There the article in question, being gunny-bags, had not, at the time the duty was levied, been specified in the tariff laws, as subject to any duty whatever, in any form or value. The effort by the collector was to impose a duty on it under another name, such as cotton bagging. But in the present case, the article in dispute had been made by Congress dutiable in express terms, and no kinds of it were exempt unless of a particular value; and the object and the effect of the appraisement were not, as has been contended, to make the article of wool dutiable, when it was not before dutiable by law, but to see whether a particular import of the article *was actually of so small [*335 value per pound as by law to be entitled to exemption from duty.

The other leading objection urged in this case is more easily disposed of. In saying that the appraisers had no right to act without previous request of the collector, and that no such

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request appears in the evidence, nothing is stated beyond the truth. But, in the absence of testimony to the contrary, the legal presumption is, that the appraisers and collector both did their duty, he requesting their action, as by law he might, and they complying.

Beside this, it is conceded that he adopted their doings, and such a subsequent ratification of them is undoubtedly tantamount to having requested them. An incidental exception taken in the argument is, that as the jury have found the value in the invoice to be correct, the collector could not be justified in following the higher valuation of the appraisers. But an appraisal, made in a proper case, must be followed, or the action of the appraisers would be nugatory, and their appointment and expenses become unnecessary. (*Tappan* v. *The United States*, 2 Mason's R., 404.) The propriety of following it cannot in such a case be impaired by the subsequent verdict of the jury differing from it in amount, as the verdict did not exist to guide the collector when the duty was levied, but the appraisal did, and must justify him, or not only the whole system of appraisement would become worthless, but a door be opened to a new and numerous class of actions against collectors, entirely destitute of equity. We say destitute of it, because, in case the importer is dissatisfied with the valuation made by the appraisers, he is allowed, by the Act of Congress of May 28th, 1830, before paying the duty, an appeal and further hearing before another tribunal, constituted in part by persons of his own selection. (See second section, 4 Litt. & Brown's ed., 409.)

These persons have been aptly denominated a species of "legislative referees" (2 Mason, 406); and if the importer does not choose to resort to them, he cannot with much grace complain afterwards that any over-estimate existed.

The judgment below is affirmed.

Cited—10 How., 240; 16 How., 273; 24 How., 522, 525; 10 Wall., 453, 454; 2 Blatchf., 389, 398; 1 Cliff., 393; 2 Cliff., 600.

336*] *BENJAMIN D. HARRIS, *Plaintiff in Error,*

v.

JAMES ROBINSON, *Defendant in Error.*

Note—notice of nonpayment may be given by notary or agent—inquiry of parties' residences not always necessary to be made of holder—due diligence.

In the case of a protested note, it is not necessary for the holder himself to give notice to the indorser, but a notary or any other agent may do it.

The object of the rule which requires the notice to come from the holder is to enable him, as the only proper party, either to fix or waive the liability of indorsers.

Where a note was handed to a notary for protest by a bank, and it did not appear whether the bank or the last indorser was the real holder of the note, and the notary made inquiries from the cashier and others not unlikely to know, respecting the residence of the prior indorsers, and then sent notices according to the information thus received, it was sufficient to bind such prior indorsers.

If the last indorser was the holder, the cashier of the bank was his agent for collecting the note, and the evidence showed that in fact the last indorser knew nothing more than the cashier.

The cases on this subject examined.

The facts being found by a jury, the question, whether or not due diligence was used, is one of law for the court.

If due diligence is used in sending the notice to the indorser, it is immaterial whether it is received or not.

THIS case was brought up by writ of error from the District Court of the United States for the Northern District of Alabama.

It was an action brought by the indorsee (Robinson) against an indorser (Harris) of a promissory note.

Robinson, the plaintiff below, was a citizen of the State of Tennessee, and Harris a citizen of Alabama.

The note was as follows:

"$1,600. Eight months after date, we promise to pay Matth. Burks, or order, sixteen hundred dollars; payable and negotiable at the Planters' Bank of the State of Tennessee, at Nashville, for value received. Dated in Lincoln County, Tennessee, 20th November, 1837.

(Signed) "JOHN P. BURKS & Co."

(Indorsed) "Matth. Burks, Benj'n D. Harris, J. Robinson."

The note not being paid at maturity, Robinson, in September, 1839, brought his action against Harris, in the District Court of the United States for the Northern District of Alabama, which, after several interlocutory proceedings, came on for trial at May Term, 1843.

The jury, under the instructions of the court, found a verdict for the plaintiff in the sum of two thousand and sixty-two dollars and sixty-six cents. It is impossible to give a clear idea of the instructions of the court without reciting all the circumstances of the case to which the instructions referred. They are all stated in the bill of exceptions, which is as follows:

The Bill of Exceptions.

In the District Court of the United States of America for the Nothern District of Alabama.

In this case, the plaintiff brought his action against defendant *as indorser of a [*337 promissory note, and introduced the deposition of Alpha Kingsley, which is as follows:

"*Deposition of A. Kingsley.*

"The said Alpha Kingsley, being about the age of sixty years, and being by me first care-

NOTE.—*If due diligence is used in sending notice to the indorser it is immaterial whether it is received or not.*

If notice be put into the postoffice to go by the proper post, it is wholly immaterial to the rights of the holder, whether it actually goes by the proper post, or whether it ever reaches the party entitled to notice, or not. All that the law requires of the holder is due diligence to send the notice within the proper time; and he has done his whole duty, when he puts it into the proper postoffice in due season, and it is properly directed. The holder has no control over the acts, or operations, or conduct, of the officers of the postoffice, and is not responsible for the accidents, or neglects, which may prevent a due delivery of the notice to the party entitled to notice. Story on Bills, sec. 300; Chitty on Bills, ch. 10, p. 503, 504 (8th edit.); Bayley on Bills, ch. 7, sec. 2, p. 279 (5th edit.); Saunderson v. Judge, 2 H. Black., 509; Dobree v. Eastwood, 3 Carr. & Payne, 250; Story on Prom. Notes, sec. 238; Kuhn v. Weston, 3 Esp., 54; 3 Kent Com., 105, 107; Shed v. Brett, 1 Pick., 401; Munn v. Baldwin, 6 Mass., 316; Jones v. Wardell, 6 Watts & Serg., 320; Smyth v. Hawthorn, 3 Rawle, 356; B'k of Col. v. Lawrence, 1 Pet., 578, 583; Thompson on Bills, ch.

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fully examined, cautioned, and sworn to testify the truth, the whole truth, and nothing else but the truth, makes oath, deposeth, and saith: that he resides in the city of Nashville, in the State of Tennessee, and more than one hundred miles from Huntsville, aforesaid, the place of trial of this cause; furthermore he saith, I am now a notary public of Davidson County, in the State of Tennessee, and was such on the 23d day of July, 1838, duly qualified according to the laws of said State; that on that day there came into my hands, as notary public, a promissory note, a true copy of which is herewith inclosed, marked A, and is made a part of this my deposition; that at or about three o'clock of the said 23d day of July, 1838, I presented said promissory note at the counter of the Planters' Bank of Tennessee, at Nashville, where the same was payable, and demanded payment thereof, and was answered by the teller of said bank that it would not be paid; whereupon, as notary public aforesaid, I did protest said promissory note, as well the drawers as the indorsers thereof, and duly recorded the same in my notarial book, and on the evening of the said 23d day of July, 1838, I deposited in the postoffice at Nashville, Tennessee, in time to go by the first mail leaving Nashville after said demand and protest, notices of said demand and protest, directed to John P. Burks & Co., Matth. Burks, and Benjamin D. Harris, Madison County, Alabama, to each separately; a copy of the notice so sent to Benjamin D. Harris is herewith to be inclosed, marked B, and is made a part of this my deposition. I was not, when these notices were forwarded, acquainted with the residence of any of the parties thus protested, or their nearest postoffice; and I made inquiry of those I thought were [not] unlikely to know, where would be the proper place to which to direct notices to them; I applied, I recollect, to Nicholas Hobson, cashier of the Planters' Bank, who informed me they lived in Madison County, Alabama, but could not say where their nearest postoffice was; I also applied to Joseph Estell, who had resided in Madison County, and also had a very general acquaintance there; he likewise informed me that they all lived in Madison County, but did not know their nearest postoffice. I knew of no other source from whence to derive information as to where to direct, and accordingly directed said notices 'Madison County, Alabama,' knowing that, from the general rules of the postoffice department, they would be sent to Huntsville, the county seat. (Signed) ALPHA KINGSLEY."

338*] *Copy of Note.

(Copy of the note, referred to in Alpha Kingsley's deposition, as marked A.)

"$1,600.00. Eight months after date, we promise to pay Matth. Burks, or order, sixteen hundred dollars; payable and negotiable at the Planters' Bank of the State of Tennessee, at Nashville, for value received. Dated in Lincoln County, Tennessee, 20th November, 1837. (Signed) JOHN P. BURKS & Co.

(Indorsed) "Matth. Burks, Benjamin D. Harris, J. Robinson."

(Copy of the notice, made part of Alpha Kingsley's deposition.—B.)

"NASHVILLE, 23d July, 1838.

"MR. BENJAMIN D. HARRIS:

"Please to take notice, that a note drawn by John P. Burks & Co., payable at the Planters' Bank of Tennessee, at Nashville, eight months after date, to the order of Matt. Burks, by him, you, and J. Robinson indorsed, for the sum of sixteen hundred dollars, dated the 20th day of November, 1837, was this day protested by me for nonpayment, and the holder looks to you for payment as indorser thereof.

"Respectfully, your obedient servant,

"ALPHA KINGSLEY, Notary Public."

And defendant introduced the deposition of N. Hobson, which is as follows:

"*Deposition of N. Hobson.*

"Interrogatories to Nicholas Hobson, on the part of the defendant.

"1. Were you acquainted with the defendant, Benjamin D. Harris, in the years 1837 and 1838?

"2. Do you know whether said Benjamin D. Harris resided in Tennessee or Alabama, in 1837 and 1838?

"3. Have you any recollection of ever telling Alpha Kingsley, notary public, that the said Benjamin D. Harris resided in Madison County, Alabama, in 1838?

"4. Were you acquainted with the plaintiff, James Robinson? If so, state where he resided in 1837 and 1838.

"First. I was not acquainted personally with Benjamin D. Harris in 1837 and 1838.

"Second. I do not know whether said Harris resided in Tennessee or Alabama in 1837 and 1838.

"Third. I have no recollection of A. Kingsley having applied to me in reference to this particular case; he often made application to *me in regard to the residence of per- [*339 sons living in Alabama; I know that there are a great many of the name of Harris residing in Madison County, Alabama; and from the fact of the drawers of the note living in Madison County, I may have told the notary public what my belief was as to the residence of Mr. Harris, but not from any personal knowledge I had of his residence.

"Fourth. I was acquainted with the plaint-

6; sec. 4, p. 475 (2 edit.); Stocken v. Collin, 7 Mees. & Wels., 515.

Joint indorsers are each entitled to separate notice. Where they reside in different places, it will make no difference that the notice reaches one of them before it does the other. The holder has performed his whole duty, and exercised reasonable diligence, and his rights are complete and perfect, although the notice should not have reached both, or even either of the joint indorsers. Story on Prom. Notes, sec. 309; Shepard v. Hawley, 1 Conn., 368; Bank of Chenango v. Root, 4 Cow., 126; Willis v. Green, 5 Hill, 232.

As to certificate of notary, evidence of what facts; presentment, demand, notice, see note to Fenwick v. Sears, 1 Cranch, 259.

As to notice of demand and nonpayment, when and how given, see note to Bussard v. Levering, 6 Wheat., 102.

When parol agreement as to place of demand is valid, see note to Brent v. Bank of Metropolis, 1 Pet., 89.

That promise of indorser to pay is waiver of notice with knowledge of laches, see note to Thornton v. Wynne, 12 Wheat., 183.

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iff, James Robinson; he resided in Nashville in the years 1837 and 1838.

(Signed) "N. HOBSON."

Also, the deposition of Joseph Estell, which is as follows:

"*The Deposition of Joseph Estell.*

"Question by defendant. Were you acquainted with the defendant in the years 1837 and 1838?

"Answer. I was, and for some time before.

"Question by same. Do you know whether the defendant resided in Tennessee or Alabama in 1837 and 1838?

"Ans. I understood that he resided in Alabama in 1837 and 1838. I never saw him in Alabama, and how it was that I understood that he resided in Alabama in these years I cannot now recollect; but such was my belief of his place of residence.

"By same. Have you any recollection of telling Alpha Kingsley, notary public, that the defendant resided in Madison County, Alabama, in 1838?

"Ans. I have no recollection that I ever told Alpha Kingsley that the defendant resided in Madison County, Alabama, in the year 1838. Mr. Kingsley has often inquired of us, that is, of my brother, while living, and myself, as to the residence of persons in Alabama, but my recollection does not serve me as to the name of any of those about whom he made inquiries.

"By same. Were you acquainted with James Robinson? If so, state where he resided in 1837 and 1838.

"Ans. I was acquainted with James Robinson; he resided in Nashville, Tennessee, in the years 1837 and 1838.

(Signed) "JOSEPH ESTELL."

Defendant also introduced Joseph Bradley as a witness, who proved that, previous to the maturity of said note, plaintiff had directed to him at Huntsville, Madison County, Alabama, notices to all the parties to the note, requesting him to hand them to the defendant and the other parties, the notices being intended to remind them when the said note would fall due. Witness directed the notices to the postoffices of the parties respectively, and to defendant at his postoffice at Cross Roads, Madison County, Alabama; but the notices of protest of said note were not sent to witness; witness acted as plaintiff's friend in **340*]** the matter; there was no evidence *to show that the notary knew who was the holder of the bill, or where he resided.

The court instructed the jury, that if they believed that the notary made the inquiries stated in his depositions, and sent notice to defendant as therein stated, he being ignorant of his true residence, that the notice was sufficient to charge the defendant, and that, under the circumstances of the case as proved, it was not necessary to make inquiry of the holder of the note as to the residence of the indorser; to which instructions the defendant excepts, and prays the court to sign and seal this bill of exceptions, which is done accordingly.

WM. CRAWFORD. [SEAL.]

The cause was argued by *Mr. Crittenden* for the plaintiff in error, and *Mr. Brinley* for the defendant in error.

Mr. Crittenden:

It is insisted, on the part of Harris, that the instruction given by the court is erroneous:

1st. In making the sufficiency of the notice depend exclusively on the jury's belief of the circumstances stated in the deposition of Kingsley.

2d. In instructing the jury, "that, under the circumstances of the case, it was not necessary (for the notary) to make inquiry of the holder of the note as to the residence of the indorser."

Harris, on the contrary, insists that "the circumstances of the case" were these, namely, that Robinson was the holder of the note; that he was known as such to the notary; that he lived in Nashville at the time, and might have been easily and immediately found, and could, in all probability, have given the required information as to the residence of Harris, and the postoffice nearest to him. It is insisted that all these circumstances are proved by or deducible from the evidence; and that it ought to have been left to the jury, with the instruction, that, if they believed all these circumstances to have existed, then that it was necessary for the notary to have made inquiry of the holder of the note as to the residence of the defendant, Harris; and that if, in consequence of his neglecting to make that inquiry, he misdirected the notice to Harris, then that such misdirected notice is not due notice, or such as entitled the said Robinson to recover in this action.

The general law is, that the holder must give notice. The notary is a mere agent of his. The inquiry as to Harris's residence ought to have been made from Robinson, who lived in Nashville. (Story on Bills, 334, sec. 309; Chitty on Bills, 8th edit., ch. 10, pp. 515, 516, 524, 525; Bayley on Bills, 5th edit., ch. 7, sec. 2, pp. 280–283.)

If the holder does not know, he should inquire. Much more, *then, should the [*341 notary. A notice is more than a mere matter of form, for it might have enabled Harris to save the debt.

Mr. Brinley, for defendant in error, stated the case and then proceeded:

1st. A demand of payment of a note should be made on the last day of grace, and notice of the default of the maker be put into the postoffice, if he live in another place, early enough to be sent by the mail of the succeeding day. (*Lenox* v. *Roberts*, 2 Wheat., 368.)

2d. If there be no postoffice in the town where the indorser resides, the notice may be sent through the postoffice to the postoffice nearest to his residence. (*Freeman* v. *Boynton*, 7 Mass. R., 483; *Ireland* v. *Kip*, 11 Johns. R., 231.)

3d. The putting of notice into the postoffice is sufficient, without proof of its having been actually received. (*Munn* v. *Baldwin*, 6 Mass. R., 316: *Miller* v. *Hackley*, 5 Johns. R., 375: *Dickens* v. *Beal*, 10 Peters, 572; 1 Bell's Com., 5th edit., 418.)

4th. If due diligence be used to give notice to the indorser, and he cannot be found, this is equivalent to due notice. (*Stewart* v. *Eden*, 2 Caines' R., 121; *Smyth* v. *Hawthorn*, 3 Rawle, 355; 1 Bell's Com., 5th edit., 418.)

5th. If the indorsee is ignorant of the indors-

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er's place of abode, it is an excuse for not giving him notice; and then it becomes a question of fact, whether he used due diligence to discover it. (*Bateman* v. *Joseph*, 12 East, 433.)

6th. Whether due notice has been given, all the circumstances necessary for the giving of such notice being known, is a question of law; and the court will determine upon the facts. Where the facts are contested, the question of law becomes mixed with fact, and is for the decision of the jury, under instructions from the court upon the hypothetical state of facts claimed to be proved. (*Eagle Bank* v. *Chapin*, 3 Pick., 180; *Bank of North America* v. *Pettit*, 4 Dallas, 127; *Robertson et al.* v. *Vogle*, 1 Dallas, 252; *Hussey* v. *Freeman*, 10 Mass. R., 86; *Bryden* v. *Bryden*, 11 Johns. R., 187; *Davis* v. *Herrick*, 6 Ohio Rep., 55; *Bank of Utica* v. *Bender*, 21 Wend., 643; *Bank of Columbia* v. *Lawrence*, 1 Peters, 578; *Dickins* v. *Beal*, 10 Peters, 572.)

7th. The defendant excepted to that portion of the opinion of the court below which maintained, that it was not necessary to make inquiry of the holder of the note as to the residence of the indorser.

The inference is, that had such inquiry been made, the requisition of due diligence would be satisfied. The inference is sustained by the authorities. But there is no case which decides that such an inquiry of the holder is indispensable; they decide that such an inquiry is proof of due diligence, not that it is the only proof of such diligence; that it is sufficient, not that it is indispensable. For instance, inquiry of 342*] one of the parties to a bill as to *the residence of the indorser is due diligence. (*Beveridge* v. *Burgis*, 3 Camp., 262.)

The holder of a bill, as indorsee, went to the house of his immediate indorser to inquire the residence of the first indorser, and it was held to be due diligence. (*Bateman* v. *Joseph*, 2 Camp., 461.)

Where the notary made inquiry of the second indorser as to the residence of the first indorser, who informed him that notice to an office in a post town, which, it seems, was three miles and a half from the first indorser, and where he did not receive his papers and letters, it was held to be due diligence. (*Ransom* v. *Mack*, 2 Hill, 587.)

Where the holder, before the note became due, applied to one of the parties to ascertain the residence of the indorser, and he declined giving him any information, the holder was not obliged, after the bill became due, to renew his inquiries of that party. (*Firth* v. *Thrush*, 8 Barn. & Cress., 387.)

8th. There is no evidence to show that the notary knew who was the holder of the note. He had a right to infer that it belonged to the Planters' Bank; he accordingly inquired of the cashier where the parties lived, that he might notify them, and duly mailed notices of protest to Madison County, Alabama, their supposed place of residence. This was sufficient.

Notice of nonpayment to an indorser was left at his boarding-house, where he was reported to reside; but it seems, some weeks before the note fell due, he left Philadelphia for Europe, without the knowledge of the holder of the note. The notice was sufficient, as reasonable diligence had been used to ascertain the residence of the indorser. (*M'Murtrie* v. *Jones*, 3 Wash. C. C. Rep., 206.)

A bill was drawn and dated at New York, on persons residing in that city, who accepted it. The drawers resided in Petersburg, Virginia. The bill being protested for nonpayment, two letters were put into the postoffice, giving notice to the drawers, one directed to New York, and the other to Norfolk, Virginia, the supposed place of their residence. It was holden that this was sufficient notice, inasmuch as it did not appear that the holder knew where the drawers lived, and notice had been directed to their supposed place of residence. (*Chipman* v. *Lipscombe*, 1 Johns. R., 294.)

Besides, there was no evidence to show that the notary, in the case under consideration, knew who was the holder of the bill, or where he resided.

If, after reasonable diligence on the part of the holder, the residence of the indorser cannot be ascertained, an excuse is furnished for a failure to give notice. The rule in such cases is, not that it is sufficient to send the notice to the last place of residence of the indorser, or to the place at which the bill or note bears date, but that it is sufficient to send it to the office believed to be the proper *one, from [*343 information acquired, upon due diligence to ascertain it. (*Hoopes & Bogart* v. *Newman, Executor*, 2 Smedes & Marshall's Rep., 71, Mississippi Rep., January Term, 1844, cites Chitty on Bills, 486; *Nichol* v. *Bate*, 7 Yerger, 305; *Chipman* v. *Lipscombe*, 1 Johns. R., 294.)

9th. But suppose that the notary, knowing that Robinson was the holder of the note, had applied to him for information, what would have been his answer in regard to the residence of the parties? Undoubtedly it would have been, that to the best of his knowledge they resided at Huntsville, Madison County, Alabama.

The defendant introduced Joseph Bradley as a witness, who proved that, previous to the maturity of the note, Robinson had directed to him, at Huntsville, notices to all the parties to the note, requesting him to hand them to Harris and the parties, to remind them when the note would fall due.

There is nothing to prove that Robinson was informed that they were delivered to any place other than Huntsville. Of course, had the notary known that Robinson was the holder, and consulted him as to the residence of the parties, he must have answered that notices had better be sent to Huntsville. The notary did so direct, substantially; that is, he directed the notices, "Madison County, Alabama," knowing that, from the general rules of the Postoffice Department, they would be sent to Huntsville, the county seat.

10th. There is no conflict between the testimony of the notary and that of Messrs. Hobson and Estell; the former swears that he applied to them for information as to the residence of the parties; they could not recollect that he did in this case in particular, because he often inquired as to the residence of persons living in Alabama. His positive testimony, as to the fact which he was interested to ascertain, must be believed; it more than counterbalances their want of recollection, it being of no interest to them to remember.

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Chitty, in his Treatise on Bills (8th Amer. edit., 486), says, that "the holder of a bill of exchange is excused for not giving regular notice of its being dishonored to an indorser, of whose place of residence he is ignorant, if he use reasonable diligence to discover where the indorser may be found"; in support of this undeniable position, he cites Pothier de Change, *n.* 144. The reasoning of Pothier and of Pardessus (Droit Com., tom. 2, art. 426), in the opinion of *Judge* Story (in his Commentaries on the Law of Bills of Exchange, 350, 351). covers the case stated by Chitty, though they both treat in those sections of the *force majeur* (*vis major*) as an excuse for a non-compliance by the holder with the requisites of law, and not upon the question of ignorance of residence. The continental and civil law, which is identical with the common law and common sense, do not require impossibilities. The law does not presume that the holder of the paper is acquainted with the residence **344***] *of the indorsers; and if the notary or holder, after diligent inquiry as to the residence of the indorser, cannot ascertain it, or mistakes it, and gives the notice the wrong direction, the remedy against the indorser is not lost. (3 Kent's Com., 107; *Barr* v. *Marsh*, 9 Yerger, 253; Story on Bills of Exchange, 334–347, in *notes*.) The rule of due diligence "must not be such as to clog commercial operations." (*Bank of Columbia* v. *Lawrence*, 1 Peters, 578.)

Mr. Justice WOODBURY delivered the opinion of the majority of the court:

Under the bill of exceptions in this case, the proper practice in some important particulars respecting notices of nonpayment of promissory notes and bills of exchange is involved. It appears that the defendant was indorser of such a note, and at the trial the court instructed the jury, that if they believed that the notary made the inquiries stated in his depositions, and sent notice to the defendant as therein stated, he being ignorant of his true residence, that the notice was sufficient to charge the defendant, and that, under the circumstances of the case as proved, it was not necessary to make inquiry of the holder of the note as to the residence of the indorser; to which instructions the defendant excepts.

The substance of the inquiries which were made, as shown in the depositions, was, that the note, being "payable and negotiable at the Planters' Bank of the State of Tennessee, at Nashville," the notary, after presenting it and payment being refused, inquired of those "not unlikely" to know the residences or nearest postoffices of the indorsers, as they were not known to him. He recollects, as one of whom he inquired, the cashier of the bank, and was informed by him that Harris lived in Madison County, Alabama, but that he did not know his nearest postoffice. The notary made similar inquiries of a Mr. Estell, who had resided in Madison County, but was found to be ignorant of the defendant's nearest postoffice; and the notary adds, that, knowing "no other source from whence to derive information as to where to direct" the notice, he "accordingly directed" this and others "to Madison County, Alabama, knowing that, from the general rules of the Postoffice Department, they would be sent to Huntsville, the county seat."

The only "other circumstances of the case as proved," to which the judge probably refers, are, that the name of the present plaintiff appears on the back of the note as the last indorser; that he was then an inhabitant of Nashville; and that Joseph Bradley, a witness for the defendant, testified, that before the note reached maturity, he, then living at Huntsville, received notices from Robinson for Harris and the other indorsers, "requesting him to hand them to the defendant and the other parties," in order "to remind *them when said [*345 note would fall due," and that he directed the notice for Harris to his postoffice at Cross Roads, in Madison County.

It is further stated, as a part of the case, "there was no evidence to show that the notary knew who was the holder of the bill, or where he resided."

These being the facts as proved concerning the inquiries and circumstances to which the judge refers, he properly considered it a question of law, whether, upon those facts, if believed by the jury, it was necessary to make inquiry of the holder himself as to the residence of the indorsers, and whether the notice as given was in all respects sufficient to charge the defendant. (*Bank of Columbia* v. *Lawrence*, 1 Peters, 583; 10 Peters, 581; *Bryden* v. *Bryden*, 11 Johns. R., 187; *Hadduck* v. *Murray*, 1 N. H. Rep., 140.)

It is to be regretted, that some other facts were not agreed or referred to the jury; such as the distance of the residence of the defendant, as well as of the Cross Roads postoffice, from Huntsville; whether he was accustomed to receive letters at the former place; and who in truth was the holder of the note at the time it fell due. But the judge properly submitted to the jury whatever facts the parties chose to present; and it is usually the best course thus to submit complicated questions of law and fact, accompanying them, however, with due legal instructions as to the rules which ought to govern. (3 Kent's Com., 107.) Then the instructions can as easily be revised as if the case was withdrawn from the jury, and, what is very desirable, the rules as to commercial paper can be preserved as uniform over the commercial world, and the holders of it have, as they ought to have, a fixed standard, on a like state of facts, for protecting as well as knowing their rights. (11 Johns. R., 187; 1 D. & E., 168; 1 N. H. Rep., 140.)

The first objection that has been raised under the instructions or ruling of the court is, that the notice does not appear to have been given by the holder of the note. There is no evidence here to indicate any person except Robinson or the bank as the holder at that time, and probably at the trial it was taken for granted to be one of them, without making any point concerning it to the court or jury. Whichever it was, there is no pretense but that the notary came into possession of the note from the agent of the holder lawfully, and with a view, as agent, to make the demand, and if not paid, to give due notice. When notes are left at banks for collection, the notaries may often be ignorant of the names of the holders, as the notes are handed to them by

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the cashier. He would as properly do this business when employed by an agent of the holder, as by the holder himself; and having the note in either of these ways, he would be competent in law to deliver it up if paid, or, if not paid, to give notice of that fact to the indorsers. It has been adjudged, that any agent of the holders may give notice. (Chitty on Bills, 527; *Bank of Utica* v. *Smith*, 18 346*] *Johns. R., 239, in point; *Stewart* v. *Kennett*, 2 Camp. R., 177, by Lord Ellenborough, 178; 3 Kent's Com., 108; *Stanton et al.* v. *Blossom et al.*, 14 Mass. R., 116; 7 *Ibid.*, 486; 9 *Ibid.*, 423.)

The agent to collect the note may do it. (*Mead* v. *Engs*, 5 Cowen, 303; 3 Bos. & Pull., 599; 2 Taunt., 38; 15 East, 291; 9 East, 347; 1 Camp. R., 349; *Ogden et al.* v. *Dobbin et al.*, 2 Hall's Rep., 112.)

And in 9 Yerger, 255, it was decided that a notary public is a suitable agent for this purpose. It was done by a notary of the agent in 2 Hall, 112.

The meaning of the rule that the holder must give notice is, not that he may not do it, by an agent, as any other commercial act, but that it shall not be given by some other party on the bill not standing in the relation in which the holder does, and who has no right to give it and try to make the indorser responsible when the holder may be willing to waive a resort to him. (*Tindal* v. *Brown*, 1 D. & E., 170; 7 Ves., Jun., 597; 1 Esp. R., 333.) In this case the notice is express, that "the holder looks to you for payment as indorser" of the bill, and the notary had the note in his possession (11 East, 117; 2 Camp., 178) in order to make demand and give notice in behalf of the holder.

The only remaining questions which are material are, whether any further inquiry, and especially of the holder of the note, ought to have been made by the notary, as to the residence of the indorsers, before dispatching the notices, and whether the notices sent were sufficient, considering the information he obtained, and his ignorance of the true residence of the indorsers. It was a part of the evidence that the indorsers lived remote in another State, and that the notary was ignorant of the exact places of their abode.

Under such circumstances, he was undoubtedly bound to make inquiries of persons likely to be acquainted with their residences. This he did; and, among them, of the cashier of the bank, the person most likely to be acquainted with the place of abode of those making paper negotiable and payable at the bank, and of another person who had lived in the same county with the indorsers, and not getting entire certainty from either, he sent the notices, addressed as accurately as his information enabled him, to the county where they lived, and from the capital of which the notices would be likely to be forwarded to the indorsers.

This, in most cases, might be sufficient as to inquiry, and especially where nobody was known to reside near who was able and bound to give fuller and more accurate information on that subject. It would usually satisfy a jury that the due diligence had been exercised which, and which only, the law imposes. (Chitty on Bills, 525, 8th Amer. ed.; 2 Camp., 461.) But it is argued in this case that the holder probably lived in Nashville, and could and ought to have been resorted to on this occasion for such information. *(Chitty [*347 on Bills, 525.) This argument is not without force, and might be insuperable if the notary knew who the holder was, and did not obtain otherwise all the intelligence on this subject which the holder probably possessed. But the evidence not showing that he knew him, did he resort to the holder's agent, and obtain from him all the information on this point which the holder himself was likely to have possessed?

Supposing the bank to have been the holder, the cashier, its agent, was resorted to, and doubtless gave all the intelligence in possession of the bank on this subject.

But supposing Robinson to have been the holder, which is the only other probable presumption on the evidence, and which is contended for by the defendant, and then the cashier was doubtless his agent to collect the note, and received from Robinson all he knew as to the residences of the prior indorsers, and communicated it to the notary when applying to him on the subject. This is not only the general inference from what would be likely to take place on such occasions, but is strengthened in this case from the testimony of Bradley, on the part of the defendant, saying that Robinson, a short time prior, had sent notice to him at Huntsville for these parties, stating when the note fell due, and that he requested him to hand them to these indorsers. From this it is obvious that Robinson supposed they resided in Huntsville, or he would have sent the notices to a different place; and he would not probably have desired a resident of Huntsville to hand them to the indorsers, unless he believed they lived in the same place.

There can be little doubt, on this evidence, that the real holder, whether the bank or Robinson, did give to the cashier all the information the holder possessed on this subject, and that the cashier communicated the same to the notary, and that the latter would have obtained no more had he known and resorted to the holder in person, and that the cashier, in conforming to this information, by addressing notices to Madison County, supposing that, by the rules of the Postoffice Department, they would be sent to Huntsville, the county town, did all which duty required of him.

Beside the light flung on this subject, and favorable to this conclusion, by some of the general positions in the authorities cited at the bar, there are several precedents which bear more directly on a state of facts such as exists in this case, and which deserve special notice, as they fortify the correctness of the views we have presented.

In *Stewart* v. *Eden* (2 Caines, 121) the court ruled, that the holder was bound to inquire no further than a reasonable and prudent man should, and said, "We do not exact from him every possible exertion," or inquiry. Only "ordinary diligence" is required in inquiring. (*Catskill Bank* v. *Stall*, 15 Wend., 367.) Only "reasonable diligence." (*Fisher* v. *Evans*, 5 Binney, 543.) So in *Chapman* *v. *Lips-* [*348 *combe* (1 Johns. R., 294), where a bill was drawn and dated in New York city, on persons there, and accepted, but protested afterwards for nonpayment, and it did not appear that the holder

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knew where the drawers lived, but sent two notices to them, one addressed to New York and one to Norfolk, it was held that they were good, though the drawer in fact lived in Petersburg.

In that case, inquiry was made at the banks and elsewhere, and notice was sent in conformity with the information received; but he did not inquire of the acceptors, who lived in New York, and could have told him correctly where the drawers lived.

In 3 Kent's Com., 107, it is laid down, that notice need not always be sent to the postoffice nearest to the indorser's residence. It suffices, if sent to the nearest which can be ascertained on due inquiry. And in 1 Peters, 578, and 2 Peters, 551, where a notice like this was addressed to the indorser, as belonging to the county in which he lived, the same rule is recognized. It is true that there the party in fact resided near the county seat, or received some of his letters there, about which there is no particular proof here; but it is said to be proper to address a notice in that way, "if after due inquiry it is the only description within reach of the person sending the notice."

It is enough to send the notices to the place where the information received reasonably requires him to send them. (2 Carr. & Payne, 300; 1 Barn. & Cress., 243; *Bank of Utica* v. *Davidson*, 5 Wend., 587.) If the place it reaches is the wrong one, he is then not in fault. (5 Yerger, 67.) All his duty in this case is to use "ordinary diligence" on the subject, and not to insure at all events that the notice actually reaches the indorser. (1 Peters, 582; 10 *Ibid.*, 581.)

In *Barr et al.* v. *Marsh* (9 Yerger, 255) it was held that the holder was not bound or presumed to know where the indorser lived. But it was enough if the agent of the indorsee or holder made due inquiry, and directed the notices to the places indicated by the information, though wrong. It was the best that could be done under the circumstances. (*Nichol* v. *Bate*, 7 Yerger, 307; *Dunlap* v. *Thompson et al.*, 5 Yerger, 67.) Where so many postoffices exist, the residences of parties change so often, and people live so remote from each other, as in this country, it would clog the circulation of negotiable paper if the holder or his agent was bound to know every alteration in the residence of indorsers. The inquiries were at the bank, and of other persons, in the case of *Barr* v. *Marsh*, much as in this instance.

In *Sturges et al.* v. *Derrick* (Wightwick Exch. Cas., 77) an inquiry was made of the son of an indorser as to his residence, and he did not know it, and the court held, that "sufficient diligence had been used." And in *Stuckert* v. *Anderson* (3 Wharton, 116) the case itself on examination shows that an inquiry of the offi-
349*] cers *of the bank where the note was discounted is deemed sufficient, if there be no others near who are likely to know more as to the residence of the indorsers.

Some cases, it is true, have been more stringent, such as 13 Johns. R., 434, and 3 Camp. R., 262; but they do not contradict our conclusions, as in the first one the notice was sent to a wrong place quite remote, and the inquiry is said to have been limited; while in the last, no inquiry was made except at the "house" where the bill was payable. Most of the cases referred to on this point, of due diligence in making inquiry, are rather cases as to due diligence in respect to the time when the notices are sent.

Some of those, as bearing on this, allow a very liberal time to make inquiries where the residence is remote (2 Barn. & Cress., 246; 8 *Ibid.*, 393; 2 Dowl. & Ryl., 385; 2 Mood. & Ry., 359), and only require the notice to be sent as soon as information is obtained under proper exertion. (1 Barn. & Cress., 245; Gow's R., 81; 2 Camp. R., 462.) And some go so far as to excuse giving notice at all, if the place of residence at the time is unfixed (4 Camp., 285), or cannot be ascertained. (10 Peters, 580, and 9 Wheat., 591, before quoted.) In the case now under consideration, then, the conclusion seems well sustained, that reasonable inquiries were made as to the residences of the indorsers, and notices promptly dispatched, by a proper agent, in comformity with the information received. Whether the notices were actually received or not, and whether, if received, it was not as soon as if they had been directed to the Cross Roads postoffice, does not appear, nor is it material, as the circumstances before mentioned show due diligence, and thus makes out a sufficient case, whether the notices ever reached the indorsers or not.

Let the judgment below be affirmed.

Mr. Justice McLEAN:

I dissent from the opinion of the court in this case with regret.

The Circuit Court instructed the jury, "that if they believed that the notary made the inquiries stated in his deposition, and sent notice to the defendant, as therein stated, he being ignorant of his place of residence, that the notice was sufficient to charge the defendant; and that under the circumstances of the case as proved, it was not necessary to make inquiry of the holder of the note as to the residence of the indorser."

The note was given by John P. Burks & Co. to Matth. Burks, for sixteen hundred dollars, in eight months from its date, payable and negotiable at the Planters' Bank of the State of Tennessee, at Nashville. It was indorsed by Matth. Burks, Benjamin D. Harris, the defendant below, and also by J. Robinson, the plaintiff. The note does not appear to have been negotiated at the bank. A. Kingsley, the notary, made a demand of payment at the bank when *the note become due, but [*350
it does not appear who delivered it to him. Notices of nonpayment were directed by the notary to Matth. Burks and Benjamin D. Harris, the two first indorsers, to Madison County, Alabama.

He did not know where these indorsers resided, but Hobson, the cashier of the bank, to whom he applied for information as to their place of residence, informed him that they lived in the above county and State. Similar information was communicated to him by Joseph Estell, but neither of these individuals knew the postoffices nearest to the respective indorsers.

Bradley, a witness, stated that previous to the maturity of the note, Robinson directed to him, at Huntsville, Madison County, Alabama

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notices to all the parties to the note, requesting him to hand them to Harris and the other parties, stating the time when it would become due. And that witness directed the notices to the respective postoffices of the parties. To Harris, he directed the notice to the postoffice at "Cross Roads," Madison County, Alabama.

On this state of facts, the court instructed the jury, "that the notary was not bound to inquire of the holder as to the residence of the indorsers."

The notary did not act for himself, but as agent of the holder; and it was proved that Robinson, who appears to have been the holder, resided in the same town with the notary, and knew the proper direction for the notices. Now, the holder is bound to give the notice himself, or through his agent; and can he evade the law by employing an agent who is ignorant of the residence of the indorser, which is known to himself? He knows where the indorser resides; is he not then bound to direct the notice as the law requires? It is a new principle in the law of agency, that the knowledge of the principal shall not affect him, provided he can employ an agent who has no knowledge on the subject. The holder is bound to communicate to the notary all the knowledge he has, so that the notice may be properly directed. And if this be not done, and the notice is improperly directed, the holder loses his recourse against the indorser. This seems to me to be clear of all doubt.

In the case of *Preston* v. *Dayson et al.* (7 Louisiana Rep., 7) it was held "that the holder of a bill or note ought not to avail himself of the ignorance of the notary as to the residence of the indorsers in giving them notice of protest; if he knows, he must disclose their residence, or it seems that his neglect will discharge the indorsers." And this is the case now before the court.

There was no proof that the notary knew where Robinson, the plaintiff below, resided; but it is proved that he lived in the same town, his name being on the note, and from the fact that the notary gave no notice to him as indors-
351*] er, it is clear that he knew he was *the holder. In *Hill* v. *Varrell* (3 Greenl., 233) it was held "that where the residence of the drawer of a bill is unknown to the holder, he ought to inquire of the other parties to the bill if their residence is known to him." And in *Hartford Bank* v. *Stedman* (3 Conn. Rep., 489), "where the holder, who was ignorant of the indorser's residence, sent the notice to A, who was acquainted with it, requesting him to add to the direction the indorser's place of residence, it was held sufficient."

"If the holder of a bill uses reasonable diligence to discover the residence of an indorser, notice given as soon as this is discovered is sufficient." (*Preston* v. *Dayson et al.*, 7 Louisiana Rep., 7.) In *Beveridge* v. *Burgis* (3 Camp., 262) Lord Ellenborough said: "Ignorance of the indorser's residence may excuse the want of due notice, but the party must show that he has used reasonable diligence to find it out. Has he done so here? How should it be expected that the requisite information should be obtained where the bill was payable? Inquiries might have been made of the other persons whose names appeared upon the bill," &c. In *Bateman* v. *Joseph* (12 East, 433), "in an action by an indorsee against the payees and first indorser of a bill, it appeared the plaintiff received notice of its dishonor on the 30th of September, in time to give notice to the defendant on that day; he gave no notice, however, until the 4th of October; to excuse which, his clerk proved that the plaintiff did not know the defendant's residence until that day. Lord Ellenborough left it to the jury whether the plaintiff had used due diligence to find the defendant's residence."

In Story on Promissory Notes, 370, *note* 1, it is laid down "That merely inquiring at the house where a bill is payable is not due diligence for finding out an indorser. Inquiry should be made of some of the other parties to the bill or note, and of persons of the same name." And again, in page 368, *note*, "To excuse the not giving regular notice of the dishonor of a bill to an indorser, it is not enough to show that the holder, being ignorant of the residence, made inquiries upon the subject at the place where the bill was payable; he should have inquired of every other party to the bill."

There is no pretense that the bank was the holder of this bill. For the evidence showed that the notary did inquire of the cashier of the bank where the indorsers resided. But the court charged that, under the circumstances, it was not necessary for the notary "to make inquiry of the holder of the note as to the residence of the indorser"; the court, therefore, referred to Robinson as the holder, and not to the bank. This charge is wholly inconsistent with the supposition that the note was discounted by the bank, for then it would have been the holder, and the proper inquiry, as to the residence of the indorsers, was made of it. The note bears no marks of its having been discounted. That Robinson *was the [*352 holder appears from the notice he gave to the parties when the note would become due, from the fact that he was not notified as an indorser, and, also, that he commenced suit as the holder after the dishonor of the note.

The turning point in the case is, whether the holder, in failing to give the proper direction to the notices by his agent, the notary, is not answerable for the knowledge he possessed of the residences of the indorsers, which he failed to communicate to the notary. I care not whether or not Robinson knew the postoffices of the indorsers. He had communicated with them through Bradley, the witness, and if the notices had been thus sent, the law required nothing more.

It will be observed that the cases cited show the duty of the holder as to giving notice. And it is believed no case has been reported, except the one cited from Louisiana Reports, where it has been supposed that a principal having knowledge of the residence of the indorsers could excuse himself from giving notice to them by a want of such knowledge in his agent. That the notary knew Robinson was the holder is conclusively shown, as before remarked, by not treating him as an indorser. His name was upon the note as an indorser, and he must have understood the purpose for which the indorsement by him was made.

All the authorities say the holder is bound to use reasonable diligence to ascertain the resi-

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dence of the indorser; and when he attains that knowledge, is he not governed by it? And if so, is he not equally bound to communicate it to his agent whom he may employ to give the notice? A denial of this principle will overthrow the doctrine of notice, as established for more than half a century.

I think the judgment should be reversed, and the cause remanded for a *venire de novo*, in the Circuit Court.

Mr. Justice McKINLEY also dissented.

Judgment affirmed.

Cited—9 How., 558, 559; 18 How., 519.

353*] *JOSEPH E. FOXCROFT, *Plaintiff in Error*,

v.

DAVID MALLETT, *Defendant.*

Grant of lands upon condition, construction of—mortgage of grantee's interest—decision of State court controlled by common law not conclusive upon this court.

Where a township of land was granted to a college upon condition (amongst others) that the grantees should give security that they would place a certain number of settlers on the land within a certain time, the duty of placing settlers remained as a permanent charge upon the land, unless counteracted by express agreements and special provisions between some of the subsequent grantees.

The second grantee, in his deed to a third grantee for an undivided portion of the land, having "excepted and reserved certain lots," and conveyed the rest, "subject to the condition that the third grantee should perform his part of the settling duties in proportion," and, also, "that from the portion conveyed a part should be taken, in the proportion which the part conveyed bore to the whole township," by this language limited the extent and nature of the grant.

When this third grantee mortgaged his interest, the portion of land destined for settlers did not pass by the mortgage; but when this portion was afterwards located according to law, a title accrued to the settler, paramount to a title held under a foreclosure of the mortgage.

Whether the clause in the original grant be construed as an exception or reservation, or as a condition, the result would be the same. The title to the settlers' lots did not vest in any of the persons through whom the grant passed, but remained as a charge upon the land, until the intentions of the Legislature were carried out by an actual settlement.

By appropriating these lots to settlers, no part of the security provided by the mortgage is withdrawn, because the mortgage itself must have contemplated such an arrangement.

The mortgage being executed on the same day that the mortgageor received his title, and containing a reference to the deed to the mortgageor, both deeds may be considered parts of one transaction, and be construed together.

A decision of a State court upon the construction of a deed, as to matters and language belonging to the common law and not to any local statute, although entitled to high respect, is not conclusive upon this court.

THIS case was brought up by writ of error from the Circuit Court of the United States for the District of Maine.

It was a writ of right sued out by David Mallett, an inhabitant of New Hampshire, demanding two lots of land situated in Lee, in the County of Penobscot, and State of Maine, being lots numbered eleven in the fourth range, and eleven in the fifth range, containing two hundred acres, more or less, in said town of Lee.

As an illustration of the chain of title, on the part of both plaintiff and defendant, the reporter has prepared two diagrams (see opposite page), showing the title as exhibited upon the trial by the plaintiff and defendant respectively.

*On the 19th of February, 1805, the [*355 State of Massachusetts passed the following resolution:

No. 1.

"*Resolve on the Petition of the President and Trustees of Williams College, granting them a Township of Land, with a Proviso. February 19, 1805.*

"The committee of both houses, to whom was referred the petition of the President and Trustees of Williams College, praying the aid of government to enable them to build a chapel for the performance of divine service, and for keeping the college library and apparatus, having examined the origin, rise, and progress of that seminary, from its institution to the present time, together with the aid heretofore afforded by the government, and the existing state of its funds, beg leave to observe, that the funds granted by the original donor and the government have, in the opinion of the committee, been judiciously applied to the object of the institution, and with success exceeding the most sanguine expectations, and that the present state of the college affords a reasonable and pleasing expectation of its future extensive benefits to society, and that a chapel, for the purposes above mentioned, would effectually promote the same; and as the encouragements and grants of the government to that college have not been equal to those made to other seminaries in the Commonwealth, the committee ask leave to report the following resolve, which is submitted by Ezra Starkweather, per order:

"*Resolved*, For reasons set forth in the petition, that there be, and hereby is, granted one township of land, of the contents of six miles square, to be laid out and assigned from any of the unappropriated lands belonging to the Commonwealth in the District of Maine, excepting the ten townships lately purchased of the Penobscot Indians, the same to be vested in the President and Trustees of Williams College and their successors forever, for the use, benefit, and purpose of supporting the said college; to be by them holden in their corporate capacity, with full power and authority to settle, divide, and manage the same, or to sell, convey, and dispose thereof, in such way and manner as shall best promote the interest and welfare of said college; the same to be laid out under the direction of the committee for the sale of the eastern lands, at the expense of the said corporation, and a plan thereof to be lodged in the secretary's office.

"*Provided*, The trustees of said college, or their assigns, shall cause to be settled fifteen families in said township within twelve years from the passing of this resolve; and, also, that there be reserved in said township three lots, of three hundred and twenty acres each, for the following uses, namely, one lot for the first settled *minister; one lot for the use of the [*356 ministry, and one lot for the use of schools, in said township."

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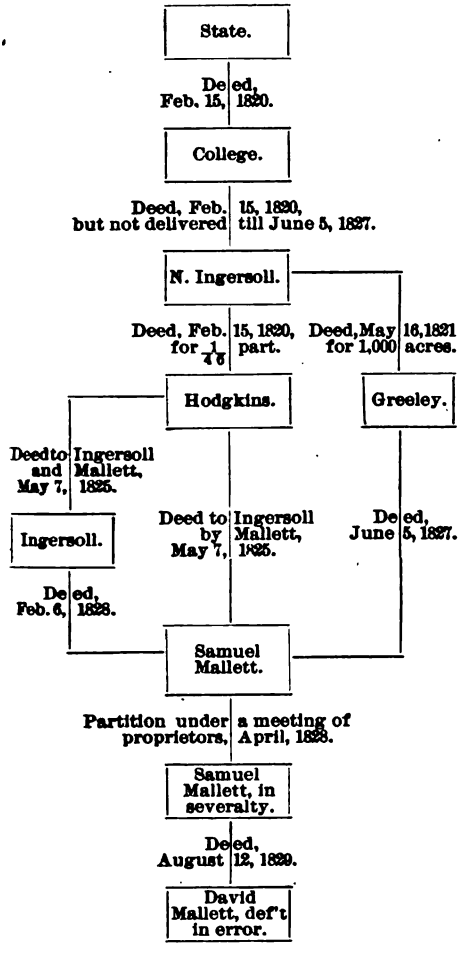
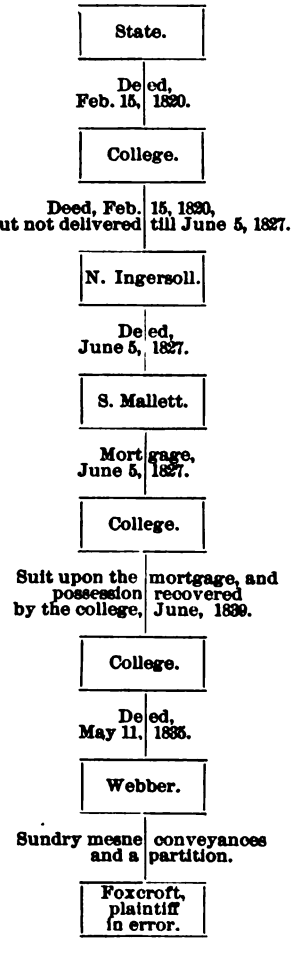
354*] *MALLETT'S (PLAINTIFF BELOW AND DEFENDANT IN ERROR) TITLE.



FOXCROFT'S (PLAINTIFF IN ERROR) TITLE.



And on the 27th of January, 1820, the following:

No. 2.

"*Resolved*, That the commissioners of the land office be, and they hereby are authorized and empowered to satisfy a grant of a township of land of the contents of six miles square, made by a resolve of the nineteenth of February, eighteen hundred and five, to the President and Trustees of Williams College, by locating the same, and conveying the said corporation township number three, in the second north of Bingham's Penobscot purchase, the same being numbered four, as surveyed by Alexander Greenwood. Provided said grantees, or their assigns, shall first pay to said commissioners the expense of surveying and locating said township, and give security to the Commonwealth in a manner satisfactory to said commissioners, that they will, within one year from the passing of this resolve, cut out a road, two rods wide, from the termination of the road commonly called the St. John's Road (which has been opened, under the direction of the said commissioners, from Penobscot River into township number two in the first range) to said township to be conveyed, and clear a traveled track therein of one rod in width; and that within two years they will clear a like road through said township, so to be conveyed, and make the necessary causeways and bridges thereon, all in a manner to be directed by said commissioners; and within three years will place on said township thirty families as settlers, of the description named in the act for promoting the sale and settlement of the public lands in the District of Maine; also reserving in said township the usual public lots."

On the 15th of February, 1820, the commissioners executed a deed to the college, in which they recite the preceding resolution and proceed thus:

"Now, therefore, know ye, that we, the undersigned, whose seals are hereunto affixed, appointed commissioners for promoting the sale and settlement of the public lands in the District of Maine, conformable to an act passed the fifteenth day of February, eighteen hundred

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and sixteen, by virtue of powers vested in the undersigned, and pursuant to the resolve of the twenty-seventh day of January, eighteen hundred and twenty, herein recited, do by these presents, in behalf of the Commonwealth aforesaid, assign, relinquish, and quitclaim to the President and Trustees of Williams College, and their successors forever, one township of land, of the contents of six miles square, lying in the County of Penobscot, as the same was surveyed by Alexander Greenwood, in the year of our 357*] *Lord one thousand eight hundred and eleven, bounded and described as follows, namely, southerly on township number three, in the first range; westerly on located land; northerly on unlocated land, and easterly on township numbered four, in the second range, containing twenty-three thousand and forty acres; conditioned, however, that the said grantees, their successors and assigns, shall lay out three lots of three hundred and twenty acres each for public uses. One lot for the first settled minister, his heirs and assigns; one lot for the use of the ministry, and one lot for the use of the schools in said township.

"To have and to hold the aforegranted premises to the President and Trustees of Williams College, their successors and assigns, on the conditions aforesaid, forever. In witness whereof we have hereunto set our hands and affixed our seals, this fifteenth day of February, in the year of our Lord one thousand eight hundred and twenty.

"EDWARD H. ROBBINS. [L. S.]
"LATHROP LEWIS. [L. S.]
"JOSEPH LEE. [L. S.]

"Signed, sealed, and delivered in presence of
"SAM'L REDDINGTON.
"GEORGE W. COFFIN."

On the same day, namely, the 15th of February, 1820, the treasurer of the college executed the following deed to Nathaniel Ingersoll;

"Know all men by these presents, that I, Daniel Noble, of Williamstown, in the County of Berkshire and Commonwealth of Massachusetts, esquire, treasurer of the corporation of Williams College, for and in consideration of the sum of four thousand six hundred dollars, secured to be paid to said corporation by Nathaniel Ingersoll, of the town of New Gloucester, in the County of Cumberland and Commonwealth aforesaid, have given, granted, sold, and conveyed, and by these presents, in behalf of said corporation, do give, grant, sell, and convey unto the said Nathaniel Ingersoll, a township of land lying in the County of Penobscot and Commonwealth aforesaid, and containing twenty-three thousand and forty acres, as the same was surveyed by Alexander Greenwood, in the year one thousand eight hundred and eleven, bounded and described as follows, namely, southerly on township number three in the first range; westerly by unlocated land; northerly by unlocated land, and easterly on township number four in the second range, the same being township number three in the second range of townships north of Bingham's Penobscot purchase, and numbered four by said Greenwood; conditioned, however, that the said Ingersoll, his heirs and assigns, shall lay out three lots of three hundred and twenty acres each for public uses; one lot for the first *settled minister, his heirs and assigns; [*358 one lot for the use of the ministry, and one lot for the use of schools in said township. To have and to hold the aforegranted premises to the said Nathaniel Ingersoll, his heirs and assigns forever, on the condition aforesaid; and the said Daniel Noble, treasurer of the corporation of Williams College, covenants with the said Nathaniel Ingersoll, that he has good right to sell and convey the premises aforesaid, and that said corporation shall warrant and defend the same, on the condition aforesaid, to the said Ingersoll, his heirs and assigns forever, against the lawful claims and demands of all persons.

"In witness whereof I have hereunto set my hand and affixed the seal of the corporation of Williams College, this fifteenth day of February, in the year of our Lord one thousand eight hundred and twenty.

"DANIEL NOBLE. [L. S.]

"Signed, sealed, and delivered in presence of us—the word 'each' being first interlined in the twenty-sixth line of the first page.

"LATHROP LEWIS.
"GEORGE W. COFFIN."

"SUFFOLK, ss. BOSTON, 16th February, 1820.

"Then personally appeared the honorable Daniel Noble, in his said capacity as treasurer of said corporation, and freely and voluntarily subscribed his name and affixed the seal of said corporation as the act and deed of said corporation, and delivered the same before me.

"GEORGE W. COFFIN,
"Justice of the Peace."

This last deed, although executed in 1820, was not delivered to Ingersoll until June 5th, 1827, being deposited, in the mean time, with the agent of the college, as an escrow.

On the same day, namely, the 15th of February, 1820, Ingersoll conveyed to William Hodgkins one undivided forty-sixth part of the township, saving and reserving out of said forty-sixth part, so called, one forty-sixth part of the lands reserved in the grant of said township to the President and Trustees of Williams College, for public uses.

On the 17th of March, 1820, Ingersoll, with eight other persons, executed to the treasurer of Massachusetts a bond, in the penalty of three thousand dollars, with the following condition, namely:

"The condition of the above obligation is such, that whereas the above Nathaniel Ingersoll, and others above named, have become the assignees of a township of land, being numbered three, in the second range of townships north of Bingham's Penobscot purchase, the same being numbered four, as surveyed by Alexander Greenwood, and the same that was conveyed by the commissioners of the land office, the fifteenth day of February last, to the President and Trustees of Williams College, conformable to a resolve, *passed the twenty-seventh [*359 day of January, eighteen hundred and twenty, and as such have paid the expenses of surveying and locating said township. If, therefore, the said Nathaniel Ingersoll, Roger Merrill, Jonathan Page, Thomas Merriman, Thomas Skofield, Jacob Randall, Simeon Tryon, Jacob Davis, and Hugh Nevens shall, within one year from the passing of said resolve, cut out a road, two rods wide, from the termination of the road com

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monly called the St. John's Road (which has been opened, under the direction of said commissioners, from Penobscot River into township number two in the first range) to said township, and clear a traveled path therein of one rod in width; and that within two years they will clear a like road through said township, and make the necessary causeways and bridges thereon, all in a manner to be directed by said commissioners, and within three years will place on said township thirty families, as settlers, of the description named in the act for promoting the sale and settlement of the public lands in the District of Maine, then this obligation to be null and void, otherwise to remain in full force."

On the 16th of May, 1821, Ingersoll conveyed to Eleazer Greeley one thousand acres of land, "in common and undivided, with the reservation of the public lands."

On the 7th of May, 1825, Hodgkins reconveyed the same land which Ingersoll had deeded to him to Ingersoll, and Samuel T. Mallett.

On the 5th of June, 1827, three several deeds were executed, and in order to enable himself to execute one of them, Ingersoll received the deed which had so long been kept as an escrow by the college, namely, the deed of the 15th of February, 1820, by which the college conveyed the entire township to Ingersoll. Being now in possession of his deed.

1. Ingersoll conveyed to Samuel T. Mallett "six thousand acres of land, in common and undivided, in the township of land lying in the County of Penobscot, as the same township was surveyed by Alexander Greenwood, Esq., in the year 1811, the same being township numbered three in the second range of township north of the Bingham Penobscot purchase, and numbered four by said Greenwood, being the same conveyed to me by the president and trustees of Williams College, as described in their deed, dated February 15th, 1820, and this day delivered to me, reference thereto being had; excepting and reserving the lots marked as settlers' lots on a plan of said town made by John Webber, and excepting also the lot on which I have improved, which are not to be subjected to a draft; subject, however, to the condition that the said Mallett shall perform his part of the settling duties in proportion to the land conveyed, and also that from said six thousand acres a part of the public lands reserved shall be taken in proportion as said six thousand acres bears to the whole township."

360*] *2. Greeley conveyed to the same Samuel T. Mallett "all my right, title, and interest in and to one thousand acres of land, in No. 4, second range, north of Bingham's purchase, and east side of Penobscot River, in common and undivided, with the reservation of the public land, being the same I purchased of Nathaniel Ingersoll, as per deed dated May 16th, 1821."

3. Mallett, being in possession of these two branches of the entire title, mortgaged one of them (namely, the one which he had just received from Ingersoll) to the college, to secure the payment of certain notes to the college. As the whole case turned upon the construction of this mortgage, and what passed under it, the whole paper is inserted.

"Know all men by these presents, that I, Samuel T. Mallett, of Litchfield, in the County of Lincoln, yeoman, in consideration of the sum of three thousand dollars paid by the president and trustees of Williams College (the receipt whereof I do hereby acknowledge), do hereby give, grant, bargain, sell, and convey unto the said president and trustees of Williams College, and their successors, forever, six thousand acres of land, in common and undivided, in the township of land lying in the County of Penobscot, as the same township was surveyed by Alexander Greenwood, in the year 1811, the same being township numbered three in the second range north of the Bingham Penobscot purchase, and numbered four by said Greenwood; being the same this day conveyed to me by Nathaniel Ingersoll, as by his deed, reference thereto being had.

"To have and to hold the aforegranted and bargained premises, with all the privileges and appurtenances thereof, to the said president and trustees, their successors and assigns, to their use and behoof forever. And I do covenant with the said president and trustees, their successors and assigns, that I am lawfully seized in fee of the premises; that they are free of all incumbrances; that I have good right to sell and convey the same to the said president and trustees, to hold as aforesaid; and that I will warrant and defend the same to the said president and trustees, their successors and assigns, forever, against the lawful claims and demands of all persons.

"Provided, nevertheless, that if the said Mallett, his heirs, executors, or administrators, pay to the said president and trustees, their successors, heirs, executors, administrators, or assigns, the sum of three thousand dollars, in equal annual payments, in one, two, three, and four years, with interest, annually, on the whole, from the first day of January last past, as by notes dated May 28th, 1827; then this deed, as also four certain notes of the above date, given by the said Mallett and Jonathan Hodgman, to the said president and trustees, to pay the sum and interest at the times aforesaid, shall both be void; otherwise, shall remain in full force.

*"In witness whereof I, the said [*361 Mallett, have hereunto set my hand and seal, this 5th day of June, in the year of our Lord one thousand eight hundred and twenty-seven.

"SAMUEL T. MALLETT. [L. S.]

"Signed, sealed, and delivered in presence of

"NATH'L INGERSOLL."

On the 6th of February, 1828, Ingersoll conveyed to Mallett a certain piece or parcel of land, situated in No. 3, in the County of Penobscot, being one half of lot numbered eleven, in the fifth range, in common and undivided, being one of the settlers' lots, the half of said lot containing fifty acres; said land being north of Bingham's Penobscot purchase in the County of Penobscot.

On the 16th of April, 1828, a meeting of the proprietors was called, "To see what measures the said proprietors will adopt to divide and apportion said lands, and to act thereon as may be judged proper." After sundry proceedings and adjournments, the meeting voted, on the 1st of July, "That the proprietors will proceed to divide and apportion the lands reserved to be set off as public lots," and a committee was appointed to perform this

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duty. The report of the committee was adopted by the meeting. After setting off nine hundred and sixty acres as "ministerial lands," and some other proceedings, it was voted, "To assign and set off twenty-seven lots as settlers' lots; namely, to Nathaniel Ingersoll thirteen lots, which he has sold to settlers, and on which improvements have been made, as so much towards his share. Also, to Samuel T. Mallett fourteen lots, being lots which he has sold to settlers, as so much towards his share in said lands."

Amongst the lots thus assigned to Mallett were lots No. 11 in range 4, and No. 11 in range 5, being the two lots in controversy in the present case. The meeting then proceeded to make division by lot of the lands not reserved for public lands; and not reserved to be holden as tenants in common among the several proprietors, according to their several rights in said townships; and not assigned to Nathaniel Ingersoll and Samuel T. Mallett.

On the 12th of August, 1829, Samuel Mallett conveyed to David Mallett, the plaintiff below, the two lots in question.

On the 26th of July, 1832, the notes to the college not being paid by Samuel Mallett, the college brought an action called a "plea of land," in the nature of an ejectment, to recover sixty-eight lots of one hundred acres each, which had been drawn to the share of said Mallett as above set forth, the action being for "six thousand acres in common and undivided."

At June Term, 1837, the case came on for trial, and was left to a jury, who found a verdict for the plaintiffs, and the judgment of the court was, "that the said president and trustees of Williams College recover against the said Samuel T. Mallett their title and posses-
362*] *sion of and in the demanded premises, and that a writ of possession issue accordingly, unless the defendant, his heirs, executors, administrators, and assigns [pay] the sum of five thousand three hundred and five dollars and seventy-five cents, and interest, within two months, together with costs of suit, taxed at ninety-five dollars and thirteen cents."

Upon this judgment a writ of *habere facias possessionem* was issued on the 20th of June, 1839.

Under this recovery, Foxcroft, the plaintiff in error and defendant below, claimed. It is unnecessary to set out the mesne conveyances and partition by which his title to the lots in question was established.

The suit brought by David Mallett in the Circuit Court was a writ of right, which came on for trial in October, 1843, when the jury found a verdict for the plaintiff. The following bill of exceptions to a ruling of the court was taken on the part of Foxcroft, the defendant:

"DAVID MALLETT
v.
JOSEPH E. FOXCROFT.

"Be it remembered, that the aforesaid Mallett having, on the twenty-ninth day of August, in the year of our Lord one thousand eight hundred and thirty-nine, brought his writ of right, returnable to said Circuit Court, to be holden on the first day of October, then next, wherein the said David demands against the said Joseph two certain lots of land, with the appurtenances, situate in Lee, in said Maine District, being lots numbered eleven in the fourth range, and eleven in the fifth range, in said town of Lee; which two certain lots the said David claims to be the right and inheritance of him, the said David, and of which he alleges that he was seized in his demesne as of fee and right, within twenty years, and ought now to be in quiet possession thereof, but which the said Joseph unjustly withholds from him. And the said writ having been duly served and returned, when and where the same was returnable, and the action having been duly entered and continued, from term to term, to this term; and the said Joseph having appeared and pleaded, and thereby defended the right of the said David and his seisin, and put himself thereof on the country, and prayed recognition to be made whether he, the said Joseph, had not greater right to hold the tenements aforesaid, to him and his heirs, as tenants thereof, as he now holds the same, or the said David, as he has demanded the same in and by his said writ and declaration; and the plaintiff having joined the issue tendered, and the jury having been duly impaneled to try the same, the plaintiff, to prove the issue on his part, offered in evidence a deed from the Commonwealth of Massachusetts to Williams College, dated February 15th, 1820, of a certain township of land, of which the demanded premises are a part, a copy of which deed is hereunto annexed, *marked A, makes [*363 part of this bill of exceptions. He next offered in evidence a deed from the same Williams College to Nathaniel Ingersoll, dated the same 15th day of February, 1820, of the same township, but which said deed was not delivered until June 5th, 1827, the deed having been in the mean time deposited as an escrow with the agent of the college. He also offered in evidence a deed from the said Nathaniel Ingersoll to William Hodgkins, dated 15th of February, 1820. Also, a deed from the said Nathaniel Ingersoll to Eleazer Greely, dated May 16th, 1821. Also, a deed [from] said William Hodgkins to said Nathaniel Ingersoll and Samuel T. Mallett, dated May 7th, 1825. Also, a deed from said E. Greely to same Samuel T. Mallett, dated June 5th, 1827. Also, a deed [from] said Nathaniel Ingersoll to said Samuel T. Mallett, February 6th, 1828; copies of all which deeds are hereunto annexed and marked B, C, D, E, F, and G, make a part of this bill of exceptions.

"He then introduced the records of a meeting of the proprietors of the township, called and organized according to the laws of the State of Maine, for the purpose of making a partition of the lands in the township among the several owners, &c. The meeting being holden on the first day of July, 1828, by adjournment from the 16th of April, 1828. Portions of the record, so far as they relate to the matter in controversy, were read; a copy of which, marked B, is hereunto annexed, and makes a part of this bill of exceptions. He also offered in evidence, and read to the jury, a deed from said Samuel T. Mallett to David Mallett, the plaintiff, dated August 12th, 1829, purporting to convey to the said David two certain lots,

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being the demanded premises, a copy of which is hereunto annexed, marked H, and makes a part of this bill of exceptions. And the defendant, to maintain the issue on his part, offered in evidence, and read to the jury, a resolve of the Commonwealth of Massachusetts, dated the 19th day of February, 1805, and another resolve of the same Commonwealth, dated the 27th day of January, 1820; copies of which said resolves are hereunto annexed, and marked No. 1 and No. 2, and make part of this bill of exceptions. Also, the deed from the same Commonwealth to Williams College, and the deed from said college to said Nathaniel Ingersoll, hereinbefore referred to, marked A and B, having been offered in evidence by the plaintiff. Also, a bond from the said Nathaniel Ingersoll and others to the said Commonwealth, dated March 17th, 1820, a copy of which is hereunto annexed as a part of this bill of exceptions, marked No. 3. Also, a deed from Nathaniel Ingersoll aforesaid, dated 5th June, 1827, to Samuel T. Mallett aforesaid. Also, a deed of mortgage from Samuel T. Mallett aforesaid to said Williams College, dated the same 5th of June, 1827; copies of both which deeds are hereunto annexed, marked No. 4 and 5, and make a part of this bill of exceptions. Also, the record of the writ and judgment for the foreclosure of 364*] said mortgage, by *the said Williams College, against the said Samuel T. Mallett, a copy of which is hereunto annexed, marked No. 6, and makes a part of this bill of exceptions. Also, a deed from said Williams College to John Webber, dated May the 11th, 1835, assigning said mortgaged premises to him. Also, a deed from John Webber to said defendant, dated the 19th of June, 1835, conveying one undivided half of said mortgaged premises to him, said defendant; copies of which two last mentioned deeds are annexed, and make part of this bill of exceptions, marked No. 7 and 8. Also, the proceedings in partition, instituted by the said Webber and Foxcroft, and the record of the assignment and judgment thereon, in the Supreme Judicial Court of the State of Maine, being the highest court of record in said State, a copy of which proceedings and record is annexed, marked No. 9, makes a part of this bill of exceptions. Also, a deed from said John Webber to said defendant, dated November the 4th, 1836, of the residue or remaining moiety of the mortgaged premises conveyed to said Webber by said Williams College: a copy of which deed is marked No. 10, and annexed hereto, and makes a part of this bill of exceptions.

"It was stated and admitted as a part of this cause, that at the time said proprietors' meeting was held, Samuel Fessenden, the agent of Williams College, resided in Portland, the place of said meeting, but was not present at said meeting.

"Upon this evidence, the honorable justice who presided at said trial ruled that the mortgage deed offered in evidence by the defendant, given to the said trustees of Williams College, dated the fifth day of June, 1827, marked 5, does not comprehend and cover the two lots, 11th in the 4th range, and 11th in the 5th range, being the premises demanded. And the said honorable justice did then and there declare and deliver his opinion aforesaid, that the mortgage deed aforesaid does not comprehend and cover the two lots, namely, No. 11 in the 4th range, and No. 11 in the 5th range, being the premises demanded, to the jury aforesaid, and with that direction left the said cause to the jury, and the said jury then and there gave and returned the following verdict, to wit: 'The jury find that the said David Mallett hath greater right to hold the lands and tenements described in his writ in said suit, as he has demanded the same, than said Foxcroft, the tenant, has to hold the same.' Whereupon the counsel of the defendant did then and there, on behalf of the said defendant, except to the aforesaid opinion of said honorable justice, and insisted that said mortgage deed did comprehend and cover the said two lots No. 11 in the 4th range, and No. 11 in the 5th range, being the premises demanded. And inasmuch as the said several matters so produced and given in evidence on the part of said plaintiff and defendant and by their counsel aforesaid insisted upon, do not appear by the record of the verdict aforesaid, the said counsel for said defendant *did then and there propose their [*365 aforesaid exception to the opinion of the said justice, and requested said justice to put his seal to this bill of exceptions, containing the several matters so produced and given in evidence, on the part of said defendant, as aforesaid; and thereupon the said honorable justice, at the request of said counsel of said defendant, did put his seal to this bill of exceptions, on the eighth day of October, in the year of our Lord one thousand eight hundred and forty-three. "JOSEPH STORY.

[L. S.] "One of the Justices of the Supreme Court of the United States.

"We, the undersigned, certify that this bill of exceptions is satisfactory to us.

"FESSENDEN & DEBLOIS & FESSENDEN,
"For the defendant.
"WILLIS & FESSENDEN,
"For plaintiff."

Upon this bill of exceptions, the case came up to this court.

It was submitted upon printed arguments, by *Mr. Webster* for the plaintiff in error, and *Mr. Evans* for the defendant.

The points made by *Mr. Webster* were the following:

1. By the resolve of January 27th, 1820, and the deed of the 15th of February, 1820, A, the fee in the township passed to the president and trustees of Williams College, unincumbered by any condition as to settlers to be placed on said township, the settling duties being secured by bond.

2. By the deed B, Noble to Ingersoll, the fee in the township passed to Ingersoll, unincumbered by any condition as to the duty of putting on, as settlers, thirty families.

3. By the deed No. 4, Ingersoll to Mallett, the fee in six thousand acres in said township, in common and undivided, of a certain portion of it, passed to Mallett, by the delivery of the deed, subject to the condition subsequent, to perform his part of the settling duties in proportion to the land conveyed.

4. That the settling duties to be performed by Mallett could not mean that he should, within three years from the making of the

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grant, put settlers on said township, because, when the deed was made to Mallett, these three years had elapsed.

5. Mallett was not bound by the condition to appropriate any part of the six thousand acres to settlers; but it would be a good performance of the settling duty incumbent on him according to his deed, had he, Mallett, within a reasonable time after the division of the township and the assignment of his share to him, placed settlers on any part of said township which he, Mallett, might acquire by purchase.

366*] *6. It would be a good performance of the condition, to pay his proportion of the bond made to secure the settlement of thirty families on said township.

7. That it did not and does not appear that the settling duties secured by the condition in the deed from Ingersoll to Mallett had not been performed.

8. There was no evidence offered to show that Ingersoll or his heirs ever entered for a breach of any condition in that deed, and therefore that the fee remained in Mallett or in his grantees, the president and trustees of Williams College.

9. Ingersoll or his heirs were the only persons who could enter for a breach of the condition, and as they did not, the presumption is that the condition was not broken.

10. By the deed in mortgage, Mallett to the president and trustees of Williams College, No. 5, the fee in mortgage of the whole six thousand acres, in common and undivided, in the residue of the whole township, passed to the grantee simultaneously with the fee which Mallett took from Ingersoll.

11. That the condition assumed by Mallett to perform settling duties, whatever might be the import of that condition as between Mallett and the president and trustees of Williams College, and the obligation to fulfill that condition, was not transferred from Mallett to the president and trustees of the college by Mallett's deed of mortgage to them.

12. By the division made by the proprietors, and the assignment to each of his share, sixty-eight lots were assigned to Mallett, and he became seized thereof in fee and in severalty, as well those assigned by direct vote as those assigned by draft, according to a vote.

13. That, by operation of law, when such division was made, the president and trustees of Williams College became seized, as tenants in common with Mallett, by operation of the mortgage deed to the whole sixty-eight lots in proportion as sixty to sixty-eight.

14. That the proprietors had no power to deduct any portion of the lands assigned to Mallett as his share from the lien which attached to them by the mortgage to the trustees; nor have they so done.

15. Neither had Mallett any such power. It is expressly determined by the Supreme Judicial Court of Maine, in the case of *Williams College* v. *David Mallett et al.* (4 Shepley, 84), "That the mortgagor of an undivided portion of a tract of land cannot, without the consent of the mortgagee, by any after conveyance by metes and bounds of any part of the mortgaged premises, withdraw from the lien created by the mortgage the part so conveyed."

In 1839, at the July Term of the Supreme Judicial Court, the *president and trust- [*367 ees of Williams College, in a suit brought on the mortgage of Samuel T. Mallett to foreclose, recovered judgment for the possession for six thousand acres of land in the town of Lee, by which name the township in which are the lands in controversy are situate.

And having assigned the mortgage to John Webber by deed (see No. 7), during the pendency of their suit against Samuel T. Mallett to foreclose the mortgage, the judgment inured to Webber, the assignee of the mortgage. (*Williams College* v. *Mallett*, 4 Shepley, 84.)

16. By lapse of more than three years, the fee in the six thousand acres thus recovered has become absolute in the assignees of the mortgage.

17. By judgment for partition and the proceedings thereon, which judgment and proceedings stand unreversed and in full force, the assignees of the mortgage became sole seized of the lands set off to them by the commissioners appointed by the court, whose doings were accepted and by judgment of court confirmed.

See No. 9, and by which it appears the lots in controversy were assigned to the petitioners to hold in severalty.

18. By the deeds of Webber to Foxcroft, No. 8 and No. 10, the whole fee in those lots passed to Foxcroft, the plaintiff in error.

The question at bar involves the construction of a grant by deed of real estate within the State of Maine. This deed and the construction of it have been made the special subject of judicial decision by the Supreme Judicial Court of Maine. The construction of that deed on the very question at issue has been solemnly settled by the highest judicial tribunal, and is no longer an open question.

The practice under the laws of a State furnishes a rule by which the Circuit Court sitting in that district may proceed. (*Brown* v. *Van Braam*, 3 Dall., 344.)

In cases depending on the statutes of a State, and more especially those respecting titles to land, the court adopts the construction of the State where that construction is settled, and can be ascertained. (*Polk's Lessee* v. *Wendal et al.*, 9 Cranch, 87; *Shipp et al.* v. *Miller's Heirs*, 2 Wheat., 316; *Elmendorf* v. *Taylor et al.*, 10 Wheat.. 152.)

The Supreme Court adopts the local law of real property, as ascertained by the decisions of the State courts, whether these decisions are grounded on the statutes of the State, or form a part of the unwritten law of the State which has become the fixed rule of property. (*Jackson, ex dem. St. John*, v. *Chew*, 12 Wheat., 153; *Society for the Propagation of the Gospel* v. *Wheeler*, 2 Gallis., 105.)

Mr. Evans, for the defendant in error, made the following points:

*I. With regard to that part of the [*368 case prior to the mortgage given by Mallett to the college.

1. Of fact. That Ingersoll and Mallett had, previous to the delivery of the deed, college to Ingersoll, been engaged as proprietors in placing settlers upon the township, under the provisions of the Act of 1816.

That the title of Mallett to his six thousand acres was perfected by the deed of Ingersoll to

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him, and by the delivery of the deed, college to Ingersoll, being parts of one transaction, both necessary to perfect the title of Mallett.

That the condition inserted in the deed to Mallett was but the giving a legal and binding effect to a previous stipulation between the parties, under which they had both been acting.

2. Of law. That whether the facts above supposed were true or not, Ingersoll, as proprietor, had a right to impose the condition under consideration, contained in his deed as an original condition.

That such condition must be construed and understood by a reference to the Act of 1816, referred to in the resolve.

That it must be construed according to the intention and meaning of the parties.

That it could not have been performed by the payment of money under the bond, or in any other way than by getting on the specified proportion of settlers, of the description contained in the Act of 1816.

That the performance of it necessarily involved an appropriation of a certain portion of the land conveyed to settling purposes, and necessarily contemplated a specific appropriation of the quantity of land required, in proportion, for those purposes.

That the condition thus imposed operated as a specific charge and burden upon the land thus conveyed.

II. And with regard to the remaining part of the case, the following points, namely:

1. That the delivery of the deed to Ingersoll, and the execution of the deeds, Ingersoll to Mallett, and Mallett to the college, being at the same time, and the two latter being witnessed and sanctioned by the agent at the college, who delivered the former, the college was thereby affected with notice of the contents of all, and is bound thereby.

2. That whether affected with actual notice or not, the reference in the deed to the college to the deed from Ingersoll to Mallett incorporates the whole of the former deed in the latter, and subjects the college to all its reservations, burdens, and conditions, so far as regards the title and description of the land conveyed.

3. That the reservations and conditions in the deed, Ingersoll to Mallett, being before the *habendum*, may all be considered as part [369*] *of the description, and are, therefore, on the principles assumed by the plaintiff in error, incorporated in the deed to the college, by the reference contained therein.

4. That by this reference, Mallett, the grantor, reserves to himself, necessarily, as mortgageor, the right to discharge the burdens and obligations imposed upon the land by the deed from Ingersoll.

5. That such reservations and conditions are not repugnant to the covenants in those deeds, and no more repugnant to the covenants in a mortgage deed than in any other.

6. That the proprietors of the township had the power to divide the whole or a part of the same among those interested, and that the legality of their proceedings is admitted so far as the division is concerned, both parties claiming under it.

7. That it is not competent for the plaintiff in error to affirm the legality of the assignment to Mallett for one purpose, and deny its validity for another. If that assignment was invalid in part, it was so in the whole; and the lands thus assigned remain common lands; and, in consequence, the plaintiff in error could not have them specifically assigned to him in partition, and his title fails.

8. That the action of the proprietors in assigning fourteen lots to Mallett, "as so much towards his share," with the words, "being lots which he has sold to settlers," operated as a conveyance to Mallett of those lots in trust for the persons to whom he had sold, or contracted to sell them.

9. That the rights of the college were not thereby infringed, inasmuch as by that assignment the condition of the grant from Ingersoll was saved, and the title of the college secured. That Mallett, as grantee, and also as mortgageor, had not only the right, but was also under a moral obligation, to have the burden upon the six thousand acres removed. And that the assent of his co-tenants, as expressed by their votes at the meeting, operated as a confirmation of his proceedings.

10. That no land has been subtracted from the operation of the mortgage, as contended by plaintiff in error, but that by purchasing and owning thirteen hundred acres in the township, besides that covered by the mortgage, Mallett had, within a fraction of one hundred acres, in fact relieved the mortgage from the burden of settling duties; leaving in allotted and common lands six thousand acres in the township, within a fraction of a lot, untouched, and exposed to the operation of the mortgage, with all burdens discharged.

11. That whatever lien the college might have had upon the lots assigned, that lien was devested by the action of the proprietors, and these lots freed from the operation of the mortgage.

12. That neither the case *Williams College* v. *Mallett*, *Randall* v. *Mallett*, nor *Webber* v. *Mallett*, cited by plaintiff in error, *con- [*370 siders the questions at issue in this case, or gives any construction to the deeds, nor were any such questions presented in either of those cases.

13. That the assignment having been made to Mallett for the use of the settlers, a conveyance might be enforced against him in equity; or, if he had given deeds, the title acquired by vote of the proprietors would inure to his grantees, as settlers in the township.

14. That it is not competent for the college to avail itself of the assignment of these lots for one purpose—namely, to protect its title, and then seek to divert the assignment from those to whose use it was made, and appropriate it to its own.

15. If the plaintiff in error has any title, it is under the mortgage alone. If, therefore, the lots in question are not covered by the mortgage, he is a mere stranger, and cannot inquire as to the title of the defendant in error.

16. The proceedings in partition do not involve a consideration of the point in issue in this case, or a construction of the deeds.

17. Neither does the judgment in partition affect, in any manner, the right of property.

18. By the deed of Samuel T. Mallett to David Mallett, the fee in these lots passed to

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David Mallett, and his title cannot be questioned by anyone, not a creditor, a purchaser for a valuable consideration, or a *cestui que trust* of the lands. And the plaintiff in error sustains neither of these relations.

Mr. Justice WOODBURY delivered the opinion of the court:

This is a writ of error, founded on an exception taken to the ruling of the Circuit Court, in the Maine District, as to the construction of a deed.

The action below was brought to recover lots No. 11 in the 4th range, and No. 11 in the 5th range, in the town of Lee, in said district; and the construction objected to was, that a mortgage, executed June 5th, 1827, by Samuel Mallett to Williams College, under which institution the plaintiff in error claims, did not comprehend or convey the demanded premises.

In order to judge of the correctness of this construction, and its bearing on the rights of the parties, it will be necessary to examine the circumstances under which the deed was made, as well as its phraseology.

The demanded premises were part of township No. 3, north of Bingham's Penobscot purchase, conveyed by the Commonwealth of Massachusetts to Williams College, the 15th of February, 1820, under certain resolves, passed by the Legislature, February 19th, 1805, and January 27th, 1820. The only conditions in those resolves material to what is now under 371*] consideration were, that "the *grantees, or their assigns," shall give security that they, "within three years, will place on said township thirty families, as settlers, of the description named in the act for promoting the sale and settlement of the public lands in the District of Maine; also reserving in said township the usual public lots." By the act referred to, for "promoting the sale and settlement of the public lands in the District of Maine," it was provided (in section sixth), "that in every township to be laid out pursuant to this act, the commissioners shall set apart fifty lots, of one hundred acres each, of average quality and value, no two lots of which shall be contiguous to each other, which shall be granted and conveyed to the first fifty settlers in said township, upon the payment of five dollars for each lot." (Statute, February 15th, 1816, p. 172.) The fifth section authorized the commissioners to take a commutation from grantees of any settling duties they were held to perform.

The resolve, granting this township, reduced the number of settlers from fifty to thirty; and, instead of reserving the right to the commissioners to execute such deeds, provided that the grantees might give security to the State to do it and perform the other duties, as to the settlers, under the before mentioned act. Accordingly, Williams College having conveyed this township to Nathaniel Ingersoll, on the 15th of February, 1820, and not having given the before mentioned security themselves, procured him to do it, and he, by bond, dated March 17th, 1820, stipulated with the State, among other things, to place, within three years, "on said township thirty families, as settlers, of the description named in the act for promoting the sale and settlement of the public lands in the District of Maine."

Matters being thus situated, Ingersoll, on the 5th of June, 1827, conveyed to Samuel T. Mallett a portion of said township, under the following description, reservations, and conditions:

"Six thousand acres of land, in common and undivided, in the township of land lying in the County of Penobscot, as the same township was surveyed by Alexander Greenwood, Esq., in the year one thousand eight hundred and eleven, the same being township numbered three in the second range of townships north of the Bingham Penobscot purchase, and numbered four by said Greenwood, being the same conveyed to me by the President and Trustees of Williams College, as described in their deed, dated February fifteenth, one thousand eight hundred and twenty, and this day delivered to me, reference thereto being had; excepting and reserving the lots marked as settlers' lots on a plan of said town, made by John Webber, and excepting also the lot on which I have improved, which are not to be subjected to a draft; subject, however, to the condition that the said Mallett shall perform his part of the settling duties, in proportion to the land conveyed, and, also, that from said six thousand acres a part of the public lands reserved shall be taken, *in proportion as said six thousand acres [*372 bears to the whole township."

On the same day, to secure the consideration for the purchase, and to pay the same to Williams College, in behalf of said Ingersoll, still indebted to the college, Mallett conveyed the same premises, by mortgage, to the college, under the following description:

"Six thousand acres of land, in common and undivided, in the township of land lying in the County of Penobscot, as the same township was surveyed by Alexander Greenwood, 1811, the same being township number three in the second range north of the Bingham Penobscot purchase, and numbered four by said Greenwood, being the same this day conveyed to me by Nathaniel Ingersoll, as by his deed, reference thereto being had."

What passed by this conveyance is the chief difficulty in the case. The question arises in this way:

The debt, secured by that mortgage, not being paid, the college instituted a suit to foreclose the same, in the year 1832, and recovered judgment June 20th, 1839. In the mean time, namely, May 11th, 1835, it transferred the rights under the mortgage to John Webber, who, in June of the same year, conveyed a moiety of them to Foxcroft, the plaintiff in error.

Webber and Foxcroft then, in July, 1836, petitioned the Superior Court of Maine for a partition of what they held in common with others; and, after various proceedings, these lots, No. 11 in the 4th, and No. 11 in the 5th range, were set off to them in severalty; and on the 4th of November, 1836, Webber released all his rights in them to Foxcroft. This, it is contended, vested the title in him, derived under the mortgage; and it might have done so, in one view of the case, had nothing else occurred to prevent or defeat it. But Samuel Mallett, after the conveyance to him by Ingersoll, and the mortgage to the college, proceeded to put on the land various settlers, under the reservations and conditions in the deed to him; and, at a meeting of the proprietors of the town-

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ship, for the purpose of dividing the same, April 16th, 1828, No. 11 in the 4th range, and No. 11 in the 5th, were set off to Samuel Mallett, with other lots, making fourteen in all, and described as "being lots which he had sold to settlers, as so much towards his share in said lands;" and on the 12th of August, 1829, he executed a deed of those lots to the demandant.

The case, then, stands thus: If the title to these lots passed under the mortgage from Samuel Mallett to the college, without condition, except as security for the debt, the plaintiff in error is now possessed of them in severalty, and should retain them. But if the title to them did not pass at all by that mortgage, on account of the exceptions or reservations, either in it or the prior deed, which are applicable to the premises; or if it passed on conditions 373*] which *have since vested these lots in David Mallett, as settlers' lots under the act to encourage the sale and settlement of lands in Maine, then he, as settler and grantee of the same, ought now of right to possess them. The general aspect of the whole case is, we think, strongly in favor of the right set up by the demandant.

On the construction made in his favor by the court below, he will recover only what the laws of the State intended such settlers as he should have; and which it was expressly provided they have in the deed from Ingersoll to Samuel Mallett of the tract including these premises.

But should the opposite construction, contended for by the tenant, prevail, the college and its assignees will get back, under a mortgage to secure a part of the consideration, about one fourth of the township, free from any charge or deduction on account of settlers' claims, when the college was originally entitled to it under the resolve only as burdened with that charge, and has paid nothing since to relieve the land from it; and when the immediate grantee of the college conveyed it so burdened, and has done nothing since to remove the incumbrance. Again, it was a leading principle of public policy with the State, in order to increase its population and wealth, that settlers should be placed upon the land at an early day, and, as an inducement for them to come, should have lots for a very small consideration. The college took the original grant under stipulations to effect this, and were bound to effect it, to the number of thirty families.

Yet, on the construction set up by the tenant, Ingersoll, under his bond, and his assigns, under the clauses in their deeds from him, would be compelled to effect this so far as regards one fourth of the town, without allowing them any consideration therefor, or permitting them to make a permanent charge on the land itself, as it originally was and would naturally continue to be.

But general considerations like these may be counteracted by express agreements and special provisions between the parties; and it is necessary to ascertain next whether any such different and opposing agreements have been entered into here. When Ingersoll, being the second grantee and the obligor in the bond to the State for the performance of duties as to settlers, proceeded to convey about one fourth of the township to Samuel Mallett, it is clear that he preferred making the performance of the duties to settlers in that portion of the township a charge on the land itself, by a condition in the grant, as had formerly been the usage, rather than taking another bond or other collateral security for it to himself. Such a course was also likely to be the safest, and was competent or legal, if he chose to adopt it. Accordingly, at the close of the description of the premises, in his deed to Mallett, he adds, "excepting and reserving the lots marked," &c., which are not those now in dispute, and concludes, "subject, however, *to the [*374 condition that the said Mallett shall perform his part of the settling duties in proportion to the land conveyed, and also, that from said six thousand acres a part of the public land reserved shall be taken, in proportion as said six thousand acres bears to the whole township." There can be no doubt that this language, whether following or preceding the description of the premises, was intended to constitute an integral part of the deed itself, and to limit the extent and nature of the grant. A condition or reservation may be inserted in any part of a deed. (Shepherd's Touch., ch. 6; 5 D. & E., 526; 1 Saund., 60, *note.*)

Nor is such a provision inconsistent with the general covenants, as has been contended by the plaintiff in error. They must be construed as relating only to the subject matter, looking to the whole deed, and the obvious intent of the parties in the whole.

What, then, is the effect of these particular clauses? Clearly to except out of and reserve from passing at all, by the grant, so much of the six thousand acres as "the lots marked as settlers' lots on a plan of said town by J. Webber," and also the lot on which Ingersoll had improved. These were not to be considered as held in common or "subjected to a draft," but were entirely excluded from any future division of the six thousand acres. These, however, are not now in controversy.

What more do these clauses provide? The whole land, which did pass under the grant, was to be held "subject" to the condition that the said Mallett shall perform his part of the settling duties," or, in other words, put on his proportionate number of families, and convey to the head of each a hundred acre lot for only five dollars, and also allow a proportionate share of the public lands reserved in said township to "be taken" from this six thousand acres. This is the important provision bearing on the present case. For aught which appears, the settlers had not then removed upon the land. The public lots reserved in the township had not then been set apart. But the parties virtually agreed that, when settlers were put on and when the public lots were set apart, one fourth, or thereabouts, of the lands in the whole town belonging to settlers should, on the payment of a mere nominal consideration, come out of these six thousand acres, and, in like manner, one fourth of the public lots should be taken therefrom.

This being the special agreement of the parties, the next inquiry is, has it been carried into effect in a manner so as legally to sustain the judgment rendered below?

The controverted expressions in the deed seem, in their most obvious import, either to except from the land conveyed the lots which

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settlers should select, or to make it a condition of the grant, that the title to those lots should afterwards be vested in them. The form of the ruling of the court leaves it a little uncertain 375*] *on which of these grounds the opinion rested, as, after a recital of the evidence in the case, the bill of exceptions says:

"Upon this evidence the honorable justice who presided at said trial ruled that the mortgage deed offered in evidence by the defendant, given to the said trustees of Williams College, dated the 5th day of June, 1827, marked 5, does not comprehend and cover the two lots, 11th in the 4th range, and 11th in the 5th range, being the premises demanded."

At the first blush, it might be inferred that the judge held these lots did not pass at all under the mortgage, having been considered as excepted or reserved. (*Mallett* v. *Foxcroft*, 1 Story's R., 477.) But we are inclined to think that so stringent a view of his ruling is not indispensably necessary: and if it were, we see no reason why the judgment is not to be sustained, as right in substance, and according to the merits of the case, if, at the time the writ of right was brought, the title to these lots was not in the mortgagee or his grantees, but was rather in the demandant, under one of the views or constructions before mentioned.

The learned judge might well mean that the mortgage "does not comprehend and cover the two lots" in dispute, as matters stood, after the settling, partition, and conveyance to David Mallett, and he would thus regard the provision as a condition which had been executed. This would be free from much difficulty. On the contrary, it is supposed by the plaintiff that he regarded it as an exception or reservation of the last lots. This would be, in the spirit and intent of the parties, as the former clause had been, an excepting or reserving of the first named lots. If deciding so (1 Story, 477), he doubtless considered that the last lots would ere long be set apart and marked, and thus become certain on the principles contained in the deed and in the statutes as to settlers and partitions by the proprietors of towns; and he, therefore, may have felt justified in regarding now as sufficiently certain what could be afterwards made certain, *id certum est quod certum reddi potest*. (*Jackson* v. *Lawrence*, 11 Johns. R., 191.) But, in some respects, it is not quite so natural or safe a view to regard this last clause as a reservation or exception, nor does the judge call it so in the ruling. An exception or reservation is sometimes void for uncertainty, and sometimes for being in favor of third persons. (4 East, 464; *Thompson* v. *Gregory*, 4 Johns. R., 81; 9 Johns. R., 73; Co. Litt., 143, *a*.)

Those objections have been urged in this case; and it may, therefore, be least exceptionable to regard the last clause, as it is called in the deed, a condition. (*Rice* v. *Osgood et al.*, 9 Mass. R., 48; *Gray* v. *Blanchard*, 8 Pick., 284.) This view seems well sustained both by the language used and the nature of the transaction. The preceding clause is in words, *eo nomine*, excepting or reserving, while this is, *eo nomine*, 376*] on "condition;" and the lots *there referred to were previously set apart, marked, and identified, while these were not so set apart, but still held in common and in some degree uncertain. The phraseology was also changed in the last clause from "excepting and reserving" to "condition," probably because the latter expression was deemed more appropriate as to lots not then selected or identified, but which were intended and virtually agreed to be, afterwards.

Such an agreement would in its spirit, no less than words, be a condition, as it would be "a bridle" or restraint on the grant, which is one of Shepherd's definitions of a condition. (Shep. Touch., ch. 6.)

The nature of a transaction, as well as the language, may well be regarded always in deciding whether a case is a reservation or a condition. (13 Maine R., 31; 15 Maine R., 216; 4 Johns. R., 82; 1 D. & E., 645; Shep. Touch., ch. 6, p. 122; 12 Pick., 156.)

A charge like this, imposed in a deed by the State, though using words of reservation, was adjudged to be a condition in *Hovey* v. *Deane* (13 Maine R., 31); and same case, 15 *Ibid.*, 216; *Dunlap* v. *Stetson* (4 Mason, 349.) So a provision may be inserted in an instrument as to land, which will be construed either a condition or a covenant, as seems most appropriate. (Bac. Abr., Condition, G.) And words of limitation may be taken for a condition. (Com. Dig., Condition, A; 11 Mod. R., 61.)

But whichever the last clause should be considered as operating, consistent with legal principles, the result on the interests of the parties would be much the same. In the former view, as an exception or reservation, the land afterwards set apart for these lots would be regarded as never passing at all to the mortgagee or his grantees, while, in the latter view, as a condition, it would pass, but only on condition of being vested in the settlers, so soon as set apart and conveyed to them; and as the latter has already been done, the title would not be now in the tenant, under either of these views.

Were it necessary to give validity to the clause, and it would be bad either as a reservation, exception, or condition, it would be no unusual stretch of construction to consider it as a covenant to stand seized to the use of the settlers, and in this way reach a like result. (*Jackson* v. *Swart*, 20 Johns. R., 87; *Bedel's* case, 7 Coke, 40.)

A deed is, if possible, to be made operative in some way; and the construction should be liberal, in order to effect that object, and enforce the original design. (2 Wils., 75; Willes, 682; 5 Barn. & Cress., 106; 2 Saund., 96, *note*; Preston on Conveyancing, 41; Broom's Legal Maxims, 288, 239.)

Making these important clauses, then, in the deed from Ingersoll, operative, and near as may be in conformity to the original design, which was both legal and laudable, why should they not bind subsequent mortgagees and grantees?

Samuel Mallett, having obtained no interest in the six thousand *acres, so far as re- [*377 gards the lots then marked and reserved, and none whatever in the whole tract, free from the condition and charge we have been describing—of other lots to be afterwards marked and assigned, as these have been, to settlers—how could he pass to others, by a mortgage, a greater interest than he obtained?

That condition or charge was on the land, as an incumbrance, by the very terms of the deed

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to him; and he could not, if he tried, convey a title to the land which should be free from it. Such a condition attaches to the land wherever it goes, "although the same pass through the hands of a hundred men." (Shep. Touch., ch. 6; Perkins, sec. 818; 2 Preston on Conveyancing, 412; 1 Co. Litt., 230, *b.*) In our view, it operates like a covenant, which runs with the land; and all assignees are bound by covenants real, that run with the land. (*Spencer's* case, 5 Coke, 15–17; Co. Litt., 47, *a;* Shep. Touch., 161, ch. 6, 176; Com. Dig., Condition; 3 D. & E., 393; 1 Paige's R., 412, 455.)

The condition, or charge, was also public, on record, *in extenso*, in the deed from Ingersoll. That deed was expressly referred to in the mortgage to the college; and the value of the whole, in Samuel Mallett's hands, or in those of his mortgagees, would be known by all to be, at that time, reduced in proportion.

By proceeding afterwards to get the partition made by the proprietors, and to execute the deed to David Mallett, so as to perform his duty in respect to this condition, he did not, as seems to be contended, reduce further the value of the land to himself or mortgagees, or part with any portion of it not before subject to be thus taken.

The extent and nature of his title being spread upon record, nobody could be misled, and nothing could pass by his mortgage, free from the same conditions and reservations under which it had come to him; and whenever certain lots should afterwards be set apart and conveyed to settlers (it being in conformity with the condition), they could not and ought not longer to be held or retained under the mortgage deed. Nor is the subsequent setting apart of the premises, and the conveyance of them to settlers, a withdrawal of any part of the mortgaged security, as is argued by the plaintiff in error; because that security embraced the six thousand acres only as subject to such an event; and its happening was provided for, and was an open and express condition of the title to the property which was held as security.

It is likewise urged by the plaintiff in error that Mallett might, like Ingersoll, have agreed to perform the duties towards settlers, in money. But he did not. So, without any agreement, he might have done it with money, and not left it to become an actual charge on the land, in his mortgage, though placed as a conditional charge on it by Ingersoll. But he did not. So it is said the condition here is a subsequent one, and the title vests, subject to [*378] be devested *only by a breach and an entry for condition broken, and which entry has never been made. (*Rice* v. *Osgood et al.*, 9 Mass. R., 38; 2 Cruise, title 13, sec. 15.)

But it has not been broken, and hence no entry, by Ingersoll or others, is necessary for condition broken. On the contrary, the condition has been fulfilled, by a performance of the duty to the settlers, in getting their lots set apart and conveyed to them; and thus the title to those lots is vested in them now, as the condition described, rather than remaining in the grantee or mortgagee. (*Rice* v. *Osgood et al.*, 9 Mass. R., 44.)

There is no difficulty, then, about a breach and an entry, as everything has been fulfilled in the manner it ought to have been done. So, in answer to another objection, it is clear that this fulfillment was attended to as properly by the mortgagor, before a foreclosure, as by the mortgagee. (18 Mass. R., 87; *Bradley* v. *Fuller*, 23 Pick., 9; 2 Greenleaf, 182.) The mortgagor was in charge of the land, and was still the owner, for all purposes except the security of the creditor. That security is not lessened by what he did in this respect.

Another point has been much argued in relation to the mortgage, which, in this view of the subject, is not material. It is, that the mortgage deed does not contain the condition. After describing the premises, it is true that it does not go into details as to the several exceptions, reservations, and conditions in the deed to Samuel Mallett, but merely adds, "being the same this day conveyed to me by Nath'l Ingersoll, as by his deed, reference thereto being had." This reference, it is contended, is not broad enough to include or cover the exceptions and conditions. But it could not be considered a forced construction to hold that the whole of the deed referred to should be regarded and considered as showing he intended to reconvey for security all, and no more or less, in any view, than what had just been conveyed to him. (*Field* v. *Huston*, 21 Maine R., 69, 72; 22 *Ibid.*, 327; *Foss et al.* v. *Crisp*, 20 Pick., 121.) The reference to the deed might as properly be considered to indicate the interests as the premises just received. In either view, the lots reserved would be reached, as they were connected not only with the title but the quantity of land meant to be conveyed. So as to any charges in the form of a condition imposed on the land, they would be embraced, even under a reference to the premises, as those charges are contained in the same sentence, and tend to show a diminished quantity of land passing absolutely.

Both deeds were also parts of one transaction, and may well be construed together, as having a like object in respect to the extent of the interests no less than the premises. But was the conclusion different, the case would, in the view first taken by us, and which is the legal view, be merely that of a grantor undertaking to sell or *mortgage a larger in- [*379 terest than he possessed, or an interest unincumbered, which was in fact incumbered; and the remedy for such an excess in the conveyance is an action on the covenants, and not to construe the deed as granting more than the grantor himself possessed.

There have been some other questions raised in the argument of this case, which it is not material to consider under the only ruling at the trial, which is excepted to, and which relates entirely to what passed by the mortgage.

One of them is the effect of a former recovery by Foxcroft and Webber against Mallett, in the proceedings for a partition, where the title of the latter to the lots now in controversy was questioned and tried; but this, being a writ of right, is probably not barred by any prior recoveries between these parties. (*Mallett* v. *Foxcroft*, 1 Story's R., 477.) Another of these questions is the correctness of the partition made by the proprietors of this township, when the two lots in controversy were set off to Samuel Mallett. Such a partition, however,

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though the ruling on it is not excepted to in the record, is supposed to be valid under the statutes of Maine, and the usages that have long prevailed in New England among land proprietors of townships situated there. (Smith's Laws of Maine, 175; 3 Shepley, 401; 12 Pick., 534; 3 Fairfield, 398; 10 Mass. R., 146; 3 Pick., 396; 12 Mass. R., 415; 2 Greenleaf, 213; 4 New Hamp. R., 99; 3 Vermont R., 290; 6 Vermont R., 208.)

In conclusion, it has been urged against the judgment we have formed in favor of the right of the demandant, that several actions have been tried in Maine, where his interests have been brought in question as to the premises, and decisions had against him; and that such local adjudications in respect to the titles to real estate should control the opinions of this court. (9 Cranch, 87; 2 Wheat., 316; 10 Wheat., 152; 12 Wheat., 158; 2 Gallis., 105.) But on examining the particulars of the cases cited to govern this (3 Fairfield, 398; 4 Shepley, 84, 88; 14 Maine R., 51), it will be seen that the construction of the mortgage to the college, in respect to this reservation or condition, never appears to have been agitated. If it had been, the decision would be entitled to high respect, though it should not be regarded as conclusive on the mere construction of a deed as to matters and language belonging to the common law, and not to any local statute. (8 Sumner's R., 136, 277.)

Let the judgment below be affirmed.

Cited—6 How., 482; 8 How., 246; 12 How., 148; 19 How., 603; 2 Wood. & M., 481; 2 Curt., 338.

380*] *JAMES STIMPSON, *Plaintiff in Error,*

v.

THE WESTCHESTER RAILROAD COMPANY, *Defendants.*

Patents—use before surrender of defective letters patent gives no right to use after re-issue in correct form—inquiry into issue—patent laws.

The practice of excepting, generally, to a charge of the court to the jury, without setting out specifically the points excepted to, censured. The writ of error not dismissed, only on account of the peculiar circumstances of the case.

Where a defective patent had been surrendered, and a new one taken out, and the patentee brought an action for a violation of his patent right, laying the infringement at a date subsequent to that of the renewed patent, proof of the use of the thing patented during the interval between the original and renewed patents will not defeat the action.

The seventh section of the Act of March 3, 1839, has exclusive reference to an original application for a patent, and not to a renewal of it.

An original patent being destroyed by the burning of the patent office, and the only record of the specifications being a publication in the Franklin Journal, the claim is not limited by that publication, because the whole of the specifications are not set forth in it.

Whether a renewed patent, after a surrender of a defective one, is substantially for a different invention, is a question for the jury, and not for the court.

As the thirteenth section of the Act of 1836 provides for the renewal of a patent, where it shall be "inoperative or invalid by reason of a defective or insufficient description or specification," "if the error shall have arisen by inadvertence, accident, or mistake, and without any fraudulent or deceptive intention," the fact of the granting of the renewed patent closes all inquiry into the existence of inadvertence, accident, or mistake, and leaves open only the question of fraud for the jury.

THIS case was brought up by writ of error from the Circuit Court of the United States for East Pennsylvania.

It was a suit brought in the Circuit Court by Stimpson against the Railroad Company, for a violation of his patent right.

On the 23d of August, 1831, Stimpson took out letters patent for an improvement in the mode of turning short curves on railroads. These letters were not given in evidence upon the trial, having been burned in the conflagration of the patent office, in December, 1836, and no copy could be found. Secondary evidence was given of their contents by the following publication in the Franklin Journal:

"For an improvement in the mode of turning short curves on railroads, such as the corners of streets; James Stimpson, city of Baltimore, August 23.

"37. The plan proposed is to make the extreme edges of the flanches flat, and of greater width than ordinary, and to construct the rails in such a manner that where a short turn is to be made, the extreme edge of the flanch shall rest upon it, instead of upon the tread of the wheel, thus increasing the effective diameter of the wheel in a degree equal to twice the projection of the flanch. The claim is made to 'the application of the flanches of railroad carriage wheels to turn short curvatures upon railroads or tracks, particularly turning the corners of streets, wharves, crossing of tracks or roads, and passing over turnabouts,' &c." (Franklin Journal, Vol. IX., p. 124.)

*On turning to pages 270 and 271, [*381 Vol. IV., there will be found specifications of two patents granted to James Wright, of Columbia, Pennsylvania, for the mode of turning curves claimed by Mr. Stimpson. The only difference is, that Mr. Wright proposes to adapt his cars to several different curves by having three or more offsets in his wheels when necessary.

On the same day, namely, the 23d of August, 1831, Stimpson took out, also, letters patent for an improvement in the mode of forming and using cast or wrought iron plates or rails, for railroad carriage wheels to run upon. These letters being also destroyed, the following extract from the Franklin Journal was given in evidence:

Franklin Journal, Vol. IX., p. 125. "39. For an improvement in the mode of forming and using cast or wrought iron plates, or rails, for railroad carriage wheels to run upon; James Stimpson, city of Baltimore, Maryland, August 23, 1831.

"The claim in this case is to 'the application of cast or wrought iron plates for the use of railways on the streets or wharves of cities or elsewhere. The objects of said improvement being to employ rails that will not present any obstacles to the ordinary use of streets, or sus-

NOTE.—*As to what particularity is necessary in exceptions, in order to a review in appellate court,* see note to Moore v. Bank of Metropolis, 13 Pet., 302.

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tain injury therefrom, and so to form the plates at the intersections of streets or other crossings, that cars will readily pass over them, and also on circles of small radius.'

"The rails are to be formed with a groove in them to receive the flanches of the wheels: on one side of the groove the width is to be sufficient for the tread of the wheel, on the other it need not exceed three quarters of an inch. These rails are to be laid flush with the pavement of the streets. At corners to be turned, the rails are to be cast, or made of the proper curvature, one of them only being provided with a groove, as the flanch is to run upon the other, upon the principle described in No. 37. Provision is to be made by scrapers, or brushes, preceding the carriages, to clear the grooves of dust, ice, and other obstructions."

In 1835, the first mentioned of these letters, namely, for an "improvement in the mode of turning short curves on railroads," were surrendered on account of a defective specification, and on the 26th of September, 1835, a renewed patent was issued for the term of fourteen years from the 23d of August, 1831. The schedule referred to in this patent was as follows:

"*Short Curves.*

"23d August, 1831.—Renewed 26th September, 1835.

"To all whom these presents shall come: Be it known, that I, James Stimpson, of the city and County of Baltimore and State of Maryland, have invented a new and useful improvement in the mode of turning short curves upon railroads with railroad carriages, particularly those round the corners of streets, wharves, &c., 382*] and that *the following is a full and exact description of said invention or improvement, as invented or improved by me, namely: I use or apply the common peripheries of the flanches of the wheels for the aforesaid purpose, in the following manner: I lay a flat rail, which, however, may be grooved, if preferred, at the commencement of the curvation, and in a position to be centrally under the flanches of the wheels upon the outer track of the circle, so that no other part of the wheels which run upon the outer circle of the track rails shall touch or bear upon the rails, but the peripheries of the flanches; they bearing the whole weight of the load and carriage, while the opposite wheels, which run upon the inner track of the circle, are to be run and bear upon their treads in the usual way, and their flanches run freely in a groove or channel; which treads are ordinarily about three inches in diameter less than the peripheries of the flanches.

"Were the bearing surfaces of the wheels which are in contact with the rails while thus turning the curve to be connected by straight lines from every point, there would thus be formed the frustrums of two cones (if there be four wheels and two axles to the carriage), or if but one axle and two wheels then but one cone; which frustrums, or the wheels representing their extremities, will, if the wheels are thirty inches in diameter, and are coupled about three feet six inches apart, turn a curve of about sixty feet radius of the inner track rail. The difference in diameter between the flanches and treads before stated, the tracks of the usual width, and the wheels coupled as stated, would turn a curve of a somewhat smaller radius, if the axles were not confined to the carriage in a parallel position with each other; but this being generally deemed necessary, the wheels run upon lines of tangents, and these upon the inner track being as wide apart in the coupling as the outer ones, keep constantly inclining the carriage outwards, and thus cause the carriage to tend to run upon a larger circle than the difference in diameter of the treads and flanches would otherwise give; but the depth of the flanches and the couplings may be so varied as to turn any other radius of a circle desired.

"What I claim as my invention or improvement is the application of the flanches on the wheels on one side of railroad carriages, and of the treads of the wheels on the other side, to turn curves upon railways, particularly such as turning the corner of streets, wharves, &c., in cities and elswhere, operating upon the principle herein set forth. JAMES STIMPSON.

"Witnesses, JAMES H. STIMPSON,

"GEORGE C. PENNIMAN."

In October, 1840, Stimpson brought his action against the *Westchester Railroad [*383 Company for a violation of this renewed patent, and laid the infringement to have taken place in 1839.

In April, 1842, the case came on for trial.

The plaintiff procured his patent, and gave evidence that the defendants had used upon their road several curves of this description.

The defendants disputed the originality of the invention of the thing patented, under which head of defense much evidence was given; and also contended that the groove was not claimed in the first patent of 1831, and therefore was not included in the renewed patent of 1835. The evidence of Dr. Jones upon this last head being referred to by the court below, it is proper to insert that part of it.

"Interrogatory fifth. What are the contents of the specification of the alleged improvement of August 23d, 1831? What are your means of knowing what were their contents? If you know them, are they dissimilar or similar to those of the plaintiff's specification of September 26, 1835, a copy of which, marked A, is hereto annexed? If dissimilar, state in what particulars, and whether they are as to matters of form and substance, and particularly describe the difference, if any. Answer fully."

"To the fifth interrogatory, I answer, that the plaintiff exhibited to me the specification in question, previously to his filing the same in the patent office; as he likewise did at the same time the specification of a patent for 'forming and using cast iron plates or rails for railroad carriage wheels to run upon,' which last patent is noticed on page 125, Vol. IX., second series, of the Journal of the Franklin Institute. I then examined them cursorily, and expressed an opinion that the improvements described in the two specifications might have been embraced in one, and that it would have been better to have pursued that course. The specification of the mode of turning short curves appeared to me incomplete; an essential feature of it being contained in that for 'forming and using cast iron plates,' &c. The papers, however, remained as drawn up by Mr. Stimpson's legal adviser, and when the patents were subse-

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quently surrendered in 1835, it was thought best to preserve the division into two; it was probably in fact necessary to pursue this course, as I am not aware of any precedent for uniting two patents into one, although one may be divided into two or more.

"Nearly ten years have elapsed since I first saw the specifications upon which these patents were first issued, and nearly six years since I last read them; and my recollection of them extends to certain prominent points only. The claim under the patent for turning short curves, as given in Vol. IX., p. 124, of my Journal is, I have no doubt, literally correct. There has been an omission in the printing of inverted commas ["] after the word 'turnabout,' &c. In this specification it was proposed to make the **384*]** extreme *edges of the flanches flat, and of greater width than ordinary; this, however, did not enter into the claim, and it is not probable that I should have recollected the fact, had it not been noted in my journal, or called up by some other collateral circumstance. The main defect, in my judgment, of the original specification, in the patent for turning short curves, was the omission of the mention of the groove in the inner rail. I believe, however, that it was alluded to in this specification, but the description of it was contained principally, if not wholly, in the specification of the patent for 'forming and using cast iron on wrought plates,' &c., above noticed; as may be inferred from a reference to my Journal, Vol. IX., p. 125, patent 39.

"Cross-interrogatories. 1. Did you or did you not prepare the papers of the plaintiff when his patent for short curves was surrendered and renewed? What was the object of such surrender and renewal? Was it or was it not that the claim of running over or across tracks at right angles might not continue any longer to be incorporated in the same patent with the claim for short curves, as it had been heretofore?

"To the first cross-interrogatory I answer, that I did prepare the papers of the plaintiff when his patent for turning short curves was surrendered for re-issue; that the object of such surrender and renewal was to limit and confine it to the turning short curves in streets, &c., by leaving out certain matters in it respecting the crossing of tracks or roads, and the passing over turnabouts; and to define the subject matter of the patent more clearly, without its being necessary to refer to that simultaneously obtained for 'forming and using cast or wrought iron plates,' &c.

The bill of exceptions taken by the plaintiff was to the following part of the charge of the court to the jury, namely:

"Having thus presented you with a view of the rules and principles of the common law applicable to the renewal of patents, as laid down by the Supreme Court, together with the provisions of the different acts of Congress on this subject, we will now state to you what is, in our opinion, their legal result.

"To authorize the surrender of an old patent and issue of a new one, consistently with the provisions of the original patent law of 1793, and the decisions of the Supreme Court, independently of any act of Congress conferring such power, there are these requisites indispensable to the power arising. (1.) The original patent must be inoperative or invalid for the causes set forth in the Act of 1832—the non-compliance with the third section of the Act of 1793, for the want of the proper specification of the thing patented, through inadvertence, accident, or mistake, without any fraudulent or deceptive intention. This being the only case embraced in the law to which the authority conferred applies. (2.) 1. The defect in the specification, which makes it incompetent to secure the rights of the patentee, must have arisen from inadvertence, accident, *or mistake, and 2, not from any fraud [***385** or misconduct. The re-issue of the patent by the appropriate officer in presumptive evidence that the requisites of the law have been complied with, on the production of such evidence or proof otherwise as justified it; but the question of the validity of the new patent is a judicial one, depending on the fact of inadvertence or fraud, as you shall find it; and the opinion of the court on matters of law involved in the inquiry. (14 Peters, 458; 6 Peters, 243; 7 Peters, 321; Act of 1839, 5 Litt. & Brown's ed., 853.) The reason why there must be an inquiry into both the inadvertence and fraud arises from the settled construction of the Act of 1793, that where the defect is not owing to fraud, the defendant is entitled to a verdict and judgment in his favor, but not to a judgment that the patent is void for the defect, unless he shows that the defect was owing to fraud. (1 Bald.; 6 Peters, 246.) You must then be satisfied, affirmatively, that the defect of the patent arose from the inadvertence of the patentee, and negatively, that it did not arise from his fraud or misconduct, or, in the words of the Acts of 1832 and 1836, 'without any fraudulent or deceptive intention.' The finding the fact of inadvertence may negative the fact of fraud, but in this, as in other cases, fraud may be inferred from gross inadvertence or negligence, such as may be the indication of a design to deceive the public. The defects in the old patent must be in the specification, when it does not comply with the requisites of the third section of the Act of 1793, calling for a correct description of the thing patented (6 Peters, 247); a new one may be issued on compliance with those requisites, which are there prescribed. But the new patent must be confined to the thing patented by the old one—the thing invented or discovered—'the same invention'; it cannot embrace another substantive and essential matter, which was not before patented; the thing, the invention, must be the same in both patents; the only object in the renewal being to cure a defect in the description, not to supply the omission of an essential part of the invention; the new patent cannot be broader than the old one. If the thing patented is the same in both patents, its public use did not, under the former laws, amount to an abandonement, or such an acquiescence as to effect the new patent on the ground of delay or negligence in the assertion of the right of the patentee, from the date of the old patent to its re-issue. But when an essential part is omitted, and the patentee suffers it to remain unpatented till it has come into public use, before the new patent issues, it will be subject to the same rules which apply to an original

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patent, making it incompetent to protect the patentee in his claim to such part in virtue of the patent re-issued, if it was not described in the one surrendered. The thirteenth section of the Act 1836 authorizes a new improvement, invented since the first patent, to be added in 386*] a renewed *one; no law gives any authority to add an improvement, which had been invented by the patentee before the original grant; for it is not and cannot be any part of the description or specification of another distinct improvement. A patent for the combination of the parts of an old machine must show wherein such combination exists; what parts compose it; how they are combined in their action; if the description is defective, it may be corrected by a new one; the correction, however, must not extend beyond the combination of the parts first specified, as the introduction of other parts, not before specified, makes an entire new combination; consequently the thing patented becomes essentially different, being not the same invention, but a new one, made by a combination of a part not combined before, which might be a proper subject of an original patent, yet would not be authorized in a renewed one.

"These are the tests which the law applies to the description of the thing patented, in order to ascertain whether, in the words of the Act of 1832, the old patent was 'invalid or inoperative' by reason that the conditions of the former law not having been complied with, or, in the language of the Supreme Court, the patent 'is found to be incompetent to secure the reward which the law intended to confer on the patentee for his invention.' In such case, the patent may be rurrendered for re-issue, in order to correct the defects which invalidated the first, but the law expressly makes the new patent 'in all respects liable to the same matter of objection and defense' as the old one, and imposes on the patentee the obligation 'of compliance with the terms and conditions prescribed by the third section of the Act of 1793.' This is done by showing, according to its requisitions, what was the invention, the thing patented, by a designation of the invention principally, made in fuller, clearer, and more exact terms than those used, so as to give it validity and effect, and secure the same invention, which is the only legitimate office of the renewed or re-issued patent. A specification consists of two parts—description and claim; the descriptive part is the explanation of the improvement in all the particulars required by the law; the claim or summary, at the close of the description or specification, is the declaration of the patentee of what he claims as his invention, by which he is bound, so that he can claim nothing which is not included in the summary, and could disclaim nothing which was included in it till the passage of the Act of 1837. But the summary may be referred to the description, and both will be liberally construed to ascertain what was claimed, and if the words will admit of it, both parts will be connected in order to carry into effect the true intention of the patentee, as it may appear on a judicial inspection of the whole specification. This makes it a question of law what is the thing patented, depending not on the actual or supposed intention of the patentee, but the conclusion of the law *on the language he has used to [*387 express it: a part of the description may be construed as a claim, and carried into the summary, and made a part of the thing patented, the effect of which is the same as if it was included in the summary in express terms. (*Cooper* v. *Matheys*, C. C., MSS.) To authorize a recovery for the violation of a patent right, the plaintiff must show that he is the inventor of everything he claims as new, that it is embraced in the patent, and that everything so claimed and patented has been infringed by the defendant; thus, where the patent is for a particular combination of the parts of an old machine, and the defendant has not used the whole combination as specified in the description, and carried into the summary, the plaintiff cannot recover. (*Prouty et al.* v. *Ruggles*, 16 Peters, 336.)"

The court then proceeded to state the substance of the plaintiff's declaration, and referred to the patent of 1835, and the specification hereto attached, in order to ascertain the thing patented by that patent which was stated therefrom; they then inquired what was the thing patented in 1831, by referring to the evidence of Thomas P. Jones, contained in the deposition aforesaid, in connection with the Journal of the Franklin Institute referred to by him. The court, remarking that there being in evidence no copy of the patent of 1831, any drawing or specification of the thing patented, or other proof of the contents of either than was contained in the deposition and Journal aforesaid, then gave their opinion to the jury, that, on this evidence, the use of grooves was not claimed, and was no part of the thing patented in 1831 for turning short curves, but was a part of the thing patented in 1835. That it was an essential part of this invention, as Jones testified, and without which all the witnesses agreed that the invention was useless; as without the groove the cars would run off the road, and that the patent was not for any parts of the machine which were new, but for a new combination of the old parts. It was then submitted to the jury, whether, on the evidence aforesaid, the omission of the groove in the patent or 1831 arose from inadvertence, and if it was done contrary to the advice of Jones, and in conformity with the opinion of the legal adviser of the plaintiff, and whether, without the groove, the description of the thing patented was sufficient, under the third section of the Act of 1793, which was read and commented on by the court, who then proceeded as follows:

"The Secretary of State is a ministerial officer, who must issue a patent if the requisites are performed. (6 Peters, 241.) The question of inadvertence or mistake is a judicial one, which the Secretary cannot decide, nor those judicial questions on which the validity of the patent depends. He issues the patent without inquiry. The correct performance of all the preliminaries to the *validity of the [*388 original patent are always examinable in the court where the fact is brought. (6 Peters, 242, 246, 247.)

"In the application of the law to the evidence before you, the first inquiry is into the state of facts existing at the time of granting the patent of 1835; did they present a case for renewal, under the rules of law on which we have given

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you our instructions? Whether the original patent was invalid or inoperative is more a question of law than fact, to be ascertained on a judicial inspection of the patent, specification, drawings, models, and the evidence of the contents; the court must construe all written evidence; but as depositions are considered merely as oral testimony, a jury must decide what parts are proved by them. The court must take as true the statements of witnesses as they are made, and lay down the law on the assumption of their credibility, and both court and jury must take an agreed or admitted uncontested state of facts to be their rule of action; a jury may deem a witness unworthy of credit, or not believe his statement, but ought to do neither without good cause. Whether the defects in the old patent arose from inadvertence or otherwise is also a mixed question of law and fact—of law so far as depends on written, and of fact as to parol evidence; on this subject you have the evidence of Dr. Jones, who officially examined the old patent, &c., and made out the new, and we are mainly left to ascertain the facts in relation to both patents from him. In laying down the law to you, we assume his verity in all he says, and, taking his statement as proof of the facts there existing, our opinion is, that, connected with the publication in the Journal of the Franklin Institute, in 1832, when the matter was fresh in his recollection, and the specification in the new patent, the old one was invalid and inoperative, by reason of noncompliance with the requisites of the Act of 1793. That it did not embrace the groove, which was essential to its validity, that the new patent is not for the same invention, and that the plaintiff has not made out a case of such inadvertence, accident, or mistake, as justified the issue of the new patent, inasmuch as it appears from the patent for plates on railroads, issued at the same time with the one for short curves, that he had known and described the grooves.

"It is for you to say whether you will take this evidence as we do; if you discredit it, in whole or in part, you will find accordingly.

"Another important question arises in this case, on the construction of the seventh section of the Act of 1839, taken in connection with former laws, which is, whether the plaintiff can sustain an action for the use of his invention, in the construction of his curves, before the granting of the patent of 1835.

"This section provides, 'That every person or corporation who has, or shall have, purchased or constructed any newly invented machine, manufacture, or composition of matter, **389*]** prior to *the application by the inventor or discoverer for a patent, shall be held to possess the right to use, and vend to others to be used, the specific machine, manufacture, or composition so made or purchased, without liability therefor to the inventor, or any other person interested in such invention; and no patent shall be held to be invalid by reason of such purchase, sale, or use prior to the application for a patent as aforesaid, except on proof of abandonment of such invention to the public, or that such purchase, sale, or prior use has been for more than two years prior to such application for a patent.'

"Though this act is retrospective in its effects on then existing patents, it is not void on that account; it was within the constitutional power of Congress to enact it as a rule for all cases to which its words and intentions apply, by its fair and legal interpretation, which we must ascertain by looking at the old law; the mischief and the remedy, which must be traced through the decisions of the Supreme Court; and the acts of Congress on the same subject.

"In 1808, an act was granted to Oliver Evans, renewing his patent, which had expired by its own limitation; in the interval, the defendant had constructed a machine of his invention, and continued to use it; after the new patent issued, he was held liable, according to the words of the law, for such subsequent use, but the Supreme Court thus express their opinion of the case, had it rested on general principles: 'The Legislature might have proceeded still further, by providing a shield for persons standing in the situation of these defendants; it is believed that the reasonableness of such a provision could have been questioned by no one, &c., &c. The argument, founded on the hardship of this and similar cases, would be entitled to great weight, if the words of this proviso were obscure and open to construction.' (*Evans* v. *Jordan*, 9 Cranch, 203.)"

And thereupon the counsel for the plaintiff did then and there except to the aforesaid charge and opinion of the said court.

The above not being enough of the charge of the court below to the jury, the counsel for the plaintiff in error applied for and obtained a writ of *certiorari* to bring up additional extracts.

The return was as follows:

On searching the record and proceedings of the Circuit Court of the United States, in and for the Eastern District of Pennsylvania, in the third circuit, in a certain cause therein lately depending between James Stimpson, plaintiff, and the Westchester Railroad Company, defendants, we find the following omission in the charge of the judge to the jury, which in obedience to the annexed writ of *certiorari*, is hereby certified, to wit:

"In *Morris* v. *Huntington*, *Judge* Thompson held that after a patent was surrendered, the invention would be open to public use without *hazard, so far as depends on such [***390** patent. (1 Paine, 355.) In *Grant* v. *Raymond*, the court notice the case of the use of the invention between the date of the old and before the new patent, but remark, that that defense is not made; and the Circuit Court did not say that such defense would not be successful; and they add, 'The defense, when true in fact, may be sufficient in law, notwithstanding the validity of the new patent.' (6 Peters, 243.) The court, in this and the subsequent case of *Shaw* v. *Cooper*, held, that the new patent was a continuation of the old, but gave no opinion on the question, whether damages could be recovered for the intermediate use of a machine constructed after the first.

"This question was, however, put at rest by the last clause of the Act of 1832, which, assuming that damages could not be recovered for a use of the patented invention, before the new patent, provides: 'But no public use or privilege of the invention so patented, derived from or after the grant of the original patent,

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either under any special license of the inventor, or without the consent of the patentee that there shall be a free public use thereof, shall in any manner prejudice his right of recovery for any use or violation of his invention, after the grant of such new patent as aforesaid.' The Act of 1836 is still more explicit, by providing for the right of recovering damages only for 'causes subsequently accruing.'

"It thus appears that the Act of 1839 goes only one step beyond those of 1832 and 1836, and is a dead letter, if it protects the person who has purchased, constructed, or used the machine invented by the patentee no further than from damages accruing prior to the new patent, for the same protection is given by those laws.

"To have any effect, it must be held to be, in the words of the Supreme Court, 'a shield,' which covers the party from all liability, and by so construing it, the Act of 1839 embodies the very principle, and none other, which, in *Evans* v. *Jordan* (9 Cranch, 203), that court declared to be one which they believed that no one could question its reasonableness, in order to prevent the hardship of a case precisely similar in principle to that presented. Such construction is the more reasonable, when it is considered that the protection is confined to the specific machine used before the patent, and cannot be extended to protect the use of any new or other machine, or construed to invalidate the patent, or justify the subsequent use by any other persons than those so protected.

"That such was the intention of Congress in relation to an original patent cannot be doubted, and we can perceive no reason why they should omit the very case on which the Supreme Court had so explicitly declared their opinions, if the words of the Act of 1808 would have permitted them to apply an unquestionable principle. The Act of 1839 not only does not exclude its application, but authorizes and requires it. In referring to the application for a **391*]** *patent, it was evidently intended to apply it to the patent on which the patentee sought to recover, the renewed one, on which alone his right rested, for the law cannot be presumed to be intended to apply to a patent which, being invalid or inoperative, as a ground of action, had been surrendered, cancelled, and cancelled by the act of the patentee himself, and was thus devested of all intrinsic efficiency by the Acts of 1832 and 1836. It could have no effect without the aid of the new one, and it would be absurd to suppose that the law overlooked the application for the only effective patent, and looked only to that which derived new life from it; besides, the Act of 1839 would take from a defendant the protection of the Acts of 1832 and 1836, by confining its operation to the old patent, for damages could then be recoverable for the use between the date and the renewal—a conclusion wholly inadmissible on a sound construction of either the acts in question.

"The Act of 1832 expressly declares that the new patent shall be subject in all respects to the same matters of objection and defense as the original one; from which it necessarily follows, that if the purchase or construction of a machine, before the application for an original patent, would protect a defendant from all liability to the patentee, the same defense is available when applied to the new one.

"This view of the Act of 1839 suffices for the purposes of the present case; a broader one has been taken of it, in all its bearings, in another district in this circuit, which it is not now necessary to examine to decide the point now under consideration.

"In the case before us, it clearly appears that the defendants constructed their railroad with the plaintiff's curves in 1834, one year or more before the plaintiff's application for his renewed patent; consequently, they may continue its use without liability to the plaintiff."

The case was argued by *Messrs. C. J. Ingersoll* and *J. R. Ingersoll* for the plaintiff in error, and *Mr. Miles* for the defendants in error.

The brief of the counsel on the part of the plaintiff in error was as follows:

This case comes up for argument upon a bill of exceptions taken by the plaintiff to the charge of the learned judge in the court below, by which, in effect, the jury were directed to find for the defendants, which they accordingly did.

The plaintiff took a patent, the 23d of August, 1831, for an invention or improvement in the application of the flanches of the wheels on one side of railroad carriages, and of the treads of the wheels on the other side, to turn short curves upon railroads.

It was surrendered in consequence of a defect in the specification, and a new patent taken by him the 26th of September, 1835.

"The object of such surrender and [***392** renewal (see deposition of Dr. Thomas P. Jones, a witness for the defendant, in answer to the first cross-interrogatory, *ante*, p. 384) was to limit and confine it to the turning short curves in streets, &c., by leaving out certain matters in it respecting the crossing of tracks or roads, and the passing over turnabouts, and to define the subject matter of the patent more clearly, without its being necessary to refer to that simultaneously obtained, for forming and using cast or wrought iron plates, &c."

The action was brought at the October session, 1840. The curves used by the defendants were said to have been constructed and first used by them between the dates of the first and second patents, the use being continued by them since the date of the second patent.

The learned judge, after considering at length the law touching this part of the case, said to the jury:

"It clearly appears that the defendants constructed their railroad with the plaintiff's curves in 1834, one year or more before the plaintiff's application for his renewed patent; consequently, they may continue its use without liability to the plaintiff."

In *Grant* v. *Raymond* (6 Peters, 244) the defendant made it a question, whether the patentee who took an amended patent could recover damages for the defendant's use, subsequent to the amendment of the patent of machinery which had been constructed prior to the amendment. The court did not decide the point, thinking it did not come directly up for decision. But they said of it: "This objection is more formidable in appearance than in reality. It is not probable that the defect in

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the specification can be so apparent as to be perceived by any but those who examined it for the purpose of pirating the invention."

Grant v. *Raymond* was decided early in 1832.

On the 8d of July, 1832, was passed (4 Litt. & Brown's ed., 559) the first act by which the amendment of patents for defective specifications was statutorily recognized. The third section of the act contains a proviso, that the new patent shall be open to all objections which existed against the old one, by virtue of which, if the phrase stood alone, a defendant, in this case, for example, might say, I used your curves before 1835, before the date of your patent, that is, between the new patent and the old one, and as a use by the public prior to the date of the patent would be fatal as against the old patent, so it is against the new.

Now, to meet such an argument, the same proviso goes on to say, that no use of the patented invention between the dates of the first and second patents, excepting under a surrender of the invention to public use, shall prejudice the patentee's right to recover damages "for any use" after the grant of the new patent.

We quote at length the proviso of the third section.

393*] *"Provided, however, That such new patent so granted shall in all respects be liable to the same matters of objection and defense as any original patent granted under the first mentioned act.

"But no public use or privilege of the invention so patented, derived from or after the grant of the original, either under any special license of the inventor, or without the consent of the patentee that there shall be a free public use thereof, shall, in any manner, prejudice his right of recovery for any use or violation of his invention after the grant of such new patent as aforesaid."

It is submitted, that, by the terms of this statute, to use, after the date of the second patent, the patented machinery, even though the specific machine used had been constructed and used between the dates of the first and second patents, is expressly denied to the public.

On the faith of this statute of the 8d July, 1832, the plaintiff, in September, 1835, surrendered the patent granted him the 23d August, 1831, and took an amended one.

Has any act of Congress changed the law in this particular since 1832?

As any such law, so far as regards this plaintiff, would be retroactive, it ought to be clearly expressed.

On the 6th of July, 1836, was passed the new Patent Act, by which the whole system was recast, but the 18th section, which relates to amended patents, says in broad terms:

"And the patent so re-issued, together with the corrected description and specification, shall have the same effect and operation in law, on the trial of all actions hereafter commenced, for causes subsequently accruing, as though the same had been originally filed in such corrected form before the issuing of the original patent."

It is submitted that the words "for causes subsequently accruing," are not to be strained from their natural construction, in order to be made to retroact against the rights already vested under the protection of a statute; and that the cause of action against these defendants, as far as concerns their use of the patented invention since the 26th of September, 1835, is a cause subsequently accruing, within the just and obvious meaning of the act.

In 1837, the 3d of March, was passed an amendment to the law of 1836.

The plaintiff submits that the seventh and ninth sections of the Act of 1837 bear on his case, by analogy. They permit a patentee who has patented too much, and more than he invented, to make disclaimer of the excess, with the same effect, as regards the validity of the patent, as if his disclaimer were part of his original specification. That is to say, the patentee shall recover as if his patent had been originally right instead of wrong; and no exception is made in favor of parties who, like the defendants here, use, *after disclaimer, one of the patented [*394 things, which they had constructed and begun to use while the patent was too broad; the Legislature being influenced, perhaps, by the suggestion of this court in *Grant* v. *Raymond*, that that party is not entitled to much favor, who scans a specification in order to pirate it.

On the 3d of March, 1839, the latest amendment of the patent laws was passed.

The seventh section of this act is cited by the learned judge, who asks what this section means if it do not mean that the use of a patented machine shall be free to a defendant after the patent, if he constructed it before. It reads thus:

"Sec. 7. And be it further enacted, That every person or corporation who has, or shall have, purchased or constructed any newly invented machine, manufacture, or composition of matter, prior to the application by the inventor or discoverer for a patent, shall be held to possess the right to use, and to vend to others to be used, the specific machine, manufacture, or composition of matter so made or purchased, without liability therefor to the inventor, or any other person interested in such invention; and no patent shall be held to be invalid by reason of such purchase, sale, or use, prior to the application for a patent as aforesaid, except on proof of abandonment of such invention to the public, or that such purchase, sale, or prior use has been for more than two years prior to such application for a patent."

It is admitted, in answer to the learned judge, that the seventh section of the Act of 1839 was intended to protect defendants, constructors of machinery prior to the patent, in the use of such machinery after the grant to the patentee. This section, which has no reference to renewed or amended, more than to all other, patents, is believed to provide for a case, till 1839 unprovided for—namely, the case in general, whether it arise under an original patent, or under one which has been amended, or which has been modified by disclaimer of the use by a defendant, after the issuing of the letters, of a machine such as they patent, but which specific machine was purchased or constructed before their date. But, it is respectfully submitted, that this prior use meant a use prior to the first or original application of the inventor for his patent, and that the Legislature had not in their contemplation the second application of the inventor, when they used the words "prior to the application of the inventor or discoverer for a patent." The last clause of the section has

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obvious reference to the original application alone, when it is declared that "such purchase, sale, or use, prior to the application for a patent," shall not (except under certain circumstances) make the patent invalid; for it was clear already, and quite independently of this statute, that no renewed or amended patent could be worth paying for, if the use of the patented machinery by third persons, prior to the renewal, could make it invalid.

395*] *Grant* v. *Raymond*, however, furnishes the best answer to the learned judge's position, that the plaintiff's patent is liable to be damaged by what has taken place since the date of the original letters. At page 244, 6 Peters, the court says:

"It has also been argued that the new patent must issue on the new specification, and on the application which accompanies it. Consequently, it will not be true that the machine was 'not known or used before the application.' But the new patent, and the proceedings on which it issues, have relation to the original transaction. The time of the privilege still runs from the date of the original patent. The application may be considered as appended to the original application."

The plaintiff in error contends that a true interpretation of the letter of these several acts, and a due regard to the spirit of all recent legislation on the subject of patent rights, which has been kind and liberal towards patentees, enforce the conclusion, that it was meant, when the new patent was granted, to give to the new, in all particulars, the character of the old, unless when restrained by express words to narrower limits. And further, that while, for obvious reasons, the acts deny to the patentee a right to recover damages, under the new patent, for the use of the invention of earlier date than the patent itself (which denial is in terms), no express words of the statutes, or fair or necessary implication from them, or leaning, can be found, in the whole course of the legislation since 1832, to warrant the conclusion that the new patent does not confer upon the grantee an entire monopoly of the fruits of his invention, from the date of the second letters to the expiration of the fourteen years from the date of the first.

The plaintiff in error, therefore, assigns for error the learned judge's instructions to the jury, recognizing the defendants' right to use the patented invention, after the date of the second patent, provided they had commenced its use prior to that date, and continued after that date to use only the specific machine at first used.

The learned judge also charged the whole case to be against the plaintiff upon another question, namely, that of the description of the "groove," in the original patent.

The judge was of opinion that the groove was not in the first patent, and was in the second; and therefore that the second was broader than the first, and not confined to the thing there patented, and thus was defective as an amended patent. The plaintiff's patent being, as he supposed, established fully by judicial sanction of the highest sort, in his contest with the Trenton Railroad Company, reported in 14 Peters, 448, had not even brought with him, when he came to try his cause in Philadelphia, the original letters patent, and the drawings which accompanied them. Nor was any notice given him by the defendant to produce them.

The result of this suit against the Baltimore and Susquehanna *Railroad Company, [*396 tried in the Maryland District, in April Term, 1848, when both the original patent and the drawings were produced in court, proved to be quite ill founded the attempt of the defendants, in the present case, to criticise his second patent as actually varying from the first, by the addition of this new matter, the groove.

He is aware, however, that he must sustain his case as it appears by this record, and he proceeds to do so.

The whole invention of the plaintiff consisted of a new method of attaining conical action in turning short curves on railroads. And the groove had no more to do with it than this: that when to attain this action the outer wheel was mounted upon its flanch, the groove, by receiving the inner wheel, prevented the car from slipping off the track—a very material consideration, it is true—in turning the corner; and so was the car, or the steam engine that drew the car; but neither of them had anything to do with the plaintiff's method of producing conical action. Without a groove, just as without steam, a horse, or other power, the corner could not be turned; and, therefore, in describing the plaintiff's invention, both this power and the groove must needs be referred to; but it is respectfully denied that more than the merest allusion to either is necessary, neither of them being any part of the invention, nor so occult as to demand, for even the most unenlightened observer, more than a mere allusion to it.

Now, it was in proof from the witness called by the defendant to testify to the contents of the original specification, that it alluded to the groove.

"I believe, however, that it (the groove) was alluded to in this specification." (Evidence of Dr. Jones.)

This allusion to the groove, in the first patent, the learned judge rules, in his charge, to be insufficient, and in the paragraph *ante*, pp. 387, 488, after so holding, he goes on to declare, that the groove should have been "claimed." It may be mentioned that it is not claimed in the new patent, nor even alluded to in the summary of the specification; so collateral is it to the invention.

The plaintiff in error further assigns for error, in this portion of the charge touching the groove, the learned judge's decision against the plaintiff's right to claim under his patent, because of his alleged omission in regard to the groove; and particularly to the judge's saying that, assuming the truth of Dr. Jones's deposition, the opinion of the court was that the old patent was "invalid and inoperative, by reason of non-compliance with the requisition of the Act of 1793. That it did not embrace the groove, which was essential to its validity; that the new patent is not for the same invention."

Also, the learned judge's taking from the jury the question, which came fairly up as a question of fact, namely, whether this mention *of, or allusion to, the groove, was [*397 or was not too slight a description of that part

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of the combination to enable one skilled as an engineer to make a curve, or to stand for a compliance, by the patentee, with the requisition of the statute touching the proper description of the invention.

Also, the learned judge's deciding it to be a matter of law, and not of fact for the jury, what the thing patented in 1831 was, when the evidence of what it was lay not in a written paper, which the judge could read and construe, but in parol evidence, and explanations *per testes*.

Also, the learned judge's not giving the due legal effect to the Secretary's seal and letters patent, as *prima facie* evidence that the second patent legitimately succeeded to the first, and to his assuming, on the contrary, that it was incumbent on the plaintiff, and not on the defendant (who assailed it), to show what the first patent contained, and what its character and defects were, and in the absence of the patent, and of any notice or call for it by the defendant, and in the absence of any satisfactory account of its contents to the learned judge, making the plaintiff, and not the defendant, responsible for the imperfectness of the proofs regarding the same.

The judge left nothing to the jury, as distinctly appears in his summing up, in regard to the groove (*ante*, p. 388), but the question whether Dr. Jones's testimony was to be believed or not. If believed, he told the jury they must find for the defendants, the old patent being defective, in not embracing the groove, and the new patent, which he said did embrace it, being, therefore, for a different invention altogether.

The plaintiff in error also assigns it for error that the learned judge ruled "mistake" in the statute about amending patents, to mean inadvertence or accident only, and excluded cases of honest mistakes of judgment.

Mr. Miles, for the defendants in error, filed the following brief:

Abstract of Case.

1. This is a writ of error to the Circuit Court for the Eastern District of Pennsylvania. The plaintiff in the Circuit Court is the plaintiff in error in this court. The verdict in the Circuit Court was for the defendants.

2. The action was brought to recover damages for an alleged infringement by the defendants of an exclusive right, alleged to belong to the plaintiff, to make, use, construct, and vend an improvement "in the mode of turning short curves on railroads," of which he claimed to be the original inventor, and alleged to have been secured to him by letters patent of the United States, according to the acts of Congress.

The plaintiff claimed under letters patent, **398*]** dated September 26th, *1835, which recited that letters for the same improvement were granted to him on August 23d, 1831, but which were "hereby cancelled on account of a defective specification."

3. The plaintiff declared on the letters patent of September 26th, 1835, in four counts (only varying in the allegation of different modes of infringement, namely, making, constructing, selling, and using), all setting forth that "the said letters patent (that is, of August 23d, 1831) were cancelled in due form of law, on account of a defective specification."

4. The defendants pleaded not guilty, gave due notice to the plaintiff, under the acts of Congress, of a defense based upon the want of originality of invention of the thing patented on the part of the plaintiff, under the several patents of 1831 and 1835, said notice including the prior use and knowledge of other persons, and of prior printed and published descriptions of the same, &c., and under such plea and notice gave evidence to the jury.

The original letters of the 23d of August, 1831, were not in evidence, they having been destroyed in the conflagration of the patent office in December, 1836, nor was there any copy of them given in evidence.

Their loss or destruction having been proved, secondary evidence was given of their contents. (Journal Franklin Institute, Vol. IX., p. 124, No. 37; and by deposition of Dr. Thomas P. Jones.)

The claim, by this evidence, under the patent of 1831, was "to the application of the flanches of railroad carriage wheels to turn short curvatures upon railroads or tracks, particularly turning the corners of streets, wharves, crossing of tracks or roads, and passing over turnabouts," &c. No mention was made therein of the use of a groove upon the inner circle for the flanch to run in, so as to enable the wheel on the inner circle to run on its tread, without which there was evidence tending to show that the whole alleged invention was useless.

The claim under the patent of 1835 was to "the application of the flanches of the wheels on one side of railroad carriages, and of the treads of the wheels on the other side, to turn curves upon railways," &c., "operating upon the principles herein set forth." The specification referred to in this summary describes the use of the flanch running on the surface of the outer rail, and of the tread running on the inner rail, which is formed with a groove to receive the flanch of the wheel on the inner rail, as the essential parts, which, combined together, form the improvement.

5. Upon the trial, several questions of law and of fact arose. His Honor, *Mr. Justice* Baldwin, charged the jury upon the law, and left the facts falling within the scope of the principles of the law, as laid down by him, to the determination of the jury.

**Points of law arising under the Charge* [*399 *contended for by Defendants.*

The third section of the Act of 21st February, 1793, in substance, provides that the applicant for a patent shall give a description, in full, clear, and exact terms, of the thing invented, and its modes of application.

By the sixth section of the same act, a defendant in a suit brought on letters patent may show that the description (that is, specification) does not contain the whole truth relative to his discovery, or that it contains more than is necessary to produce the desired effect, which concealment or addition shall fully appear to have been made for the purpose of deceiving the public, or that the thing secured by patent was not originally discovered by the patentee, &c.

The third section of the Act of July 3,

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1832, provides, in substance, that if any patent shall be invalid or inoperative by reason of non-compliance with the terms of the third section of the Act of 1793, by "inadvertence, accident, or mistake," and "without any fraudulent or deceptive intention," it may be lawful for the Secretary of State, on surrender of the original patent, to grant a new patent, on compliance with the conditions of the third section of the Act of 1793, for the residue of the term unexpired.

The thirteenth and fifteenth sections of the Act of 4th July, 1836, which supplied the former laws enacted on the subject, contain in substance the same provisions as to the inoperation of a patent by reason of the defective description, and allowing a surrender and re grant, where the defect arose from "inadvertency, accident, or mistake, and without any fraudulent or deceptive intention."

The seventh section of the Act of March 3, 1839, provides "that every person or corporation who has, or shall have, purchased or constructed any newly invented machine, &c., prior to the application by the inventor, &c., for a patent," may use and vend it at all times, without liability to the inventor or any person, &c.

Under these acts, the following points are submitted to have been judicially decided:

1. That where a patentee, under the Act of February 21st, 1793, has not complied with the terms of its third section, even through inadvertence, accident, or mistake, the plaintiff cannot recover for an infringement prior to a surrender and new grant. (*Grant* v. *Raymond*, 6 Peters, 244; *Shaw* v. *Cooper*, 7 Peters, 320; *Whitney* v. *Emmett*, 1 Bald., 303.)

2. That if the patentee under the Act of 1793 has not complied with the terms of its third section, through fraudulent and deceptive intention, by concealment of or addition to **400***] his real discovery, his *patent, by the sixth section, is absolutely void. (*Grant* v. *Raymond*, 8 Peters, 246, 247; *Whitney* v. *Emmett*, 1 Bald., 303.)

3. (1.) That a surrender under the Act of 1832 and a new grant are only sustainable where the defect in the description of the first patent was the result of inadvertence, accident, or mistake. (*Grant* v. *Raymond*, 6 Peters, 246, 247.) (2.) That a new grant, on such a surrender, is not sustainable, but is absolutely void, if it appear that the defect in the description of the first patent, whether of concealment or addition, was the result of a fraudulent and deceptive intention on the part of the patentee. (3.) That if a patentee surrendered his first patent, and, under pretense of an inadvertence, accident, or mistake in its description, obtained a new patent, adding thereto a new material or element of which he was not the original inventor, and which is necessary to make the thing patented useful, thus in the second patent specifying another combination, constituting a mode or machine substantially different from that described and claimed in the first, it is fraud in the patentee, and the patent is void. (*Grant* v. *Raymond*, 6 Peters, 218, 244; *Philadelphia Railroad* v. *Stimpson*, 14 Peters, 462; *Shaw* v. *Cooper*, 7 Peters, 292.)

Note. The Act of 1832 (July 3d), authorizing a surrender and re-grant, shortly followed the decision in *Grant* v. *Raymond* (6 Peters, January Term, 1832), and by express enactment provided for that which had before been allowed by practice and judicial construction only.

4. That an original patent, as well as that granted on a surrender of the first under these acts, are *prima facie* evidence only of the novelty and utility of the alleged invention, and of the compliance by the patentee with the terms of the several acts of Congress entitling him to a patent; but their validity is examinable in a judicial proceeding upon any such patent, part of the inquiry being within the province of the court where the construction of written documents is to be made, and part being for the determination of the jury where questions of fact are involved. (*Grant* v. *Raymond*, 6 Peters, 218; *Shaw* v. *Cooper*, 7 Peters, 292; *Philadelphia Railroad* v. *Stimpson*, 14 Peters, 448; *Prouty* v. *Ruggles*, 16 Peters, 336.)

5. If a patentee's first patent be inoperative for want of a full and exact description, and he stands by for a long and unreasonable period of time, without surrendering and remedying the defect by furnishing such a description, and obtaining a re-grant, and in the mean time permits others to use what he subsequently claims to be his invention, with a knowledge of such use without objection or asserting his right, this is evidence from which a jury may infer his acquiescence and abandonment to the public as a matter of fact. (*Shaw* v. *Cooper*, 7 Peters, 320–322.)

6. Under the Act of 1839, if the defendants purchased or constructed this mode of turning curves, before the application for the patent *of 1835, and this combination or mode [***401** described in that patent was newly invented by the patentee, the plaintiff cannot recover, notwithstanding the Act of 1839 was subsequent to the dates of such purchase or construction, and the patent of 1835. (*Shaw* v. *Cooper*, 7 Peters, 320–322; *McClurg* v. *Kingsland*, 1 Howard, 204; *Evans* v. *Jordan*, 9 Cranch, 201.)

Note 1. This statute was intended to provide expressly and in terms (designating a specific point of time) for all that class of cases of implied acquiescence and waiver in favor of the public resulting from the negligence of the patentee, by which judicial construction held that the patentee had no claim against persons using or constructing the alleged invention under such circumstances.

Note 2. This action was brought in the Circuit Court after the passage of the Act of 1839, to wit, at the October session, 1840.

The charge of the court left all the facts falling within the scope of the legal principles therein stated to the determination of the jury.

1. "The question of the validity of the new patent is a judicial one, depending on the fact of inadvertence or fraud, as you shall find it." "You must then be satisfied affirmatively," &c. "The finding of the fact of inadvertence may negative the fact of fraud," &c.

2. "It was then submitted to the jury, whether, on the evidence aforesaid, the omission in the patent of 1831 arose from inadvertence," &c.

3. "Depositions are considered merely as oral testimony: a jury must decide what facts are proved by them,.....a mixed question

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of law and fact; of law so far as depends on written, and of fact as to parol evidence," &c.

4. "It is for you to say whether you will take the evidence as we do; if you discredit it, in whole or in part, you will find accordingly."

Mr. Justice McLEAN delivered the opinion of the court:

The plaintiff brought an action against the defendant for an infringement of his patent, for a "new and useful improvement in the mode of turning short curves on railroads." The questions for decision arise on exceptions to the charge of the court to the jury. And here it may be proper to remark, that the exceptions are to the charge as published at length, and not to the points ruled by the court, as is the correct practice. Under the peculiar circumstances of this case, the court will not dismiss the writ of error upon this ground, but it is expected that a different course will hereafter be pursued.

On the 21st of August, 1831, the plaintiff obtained a patent for an invention or improvement in the application of the flanches of the wheels on one side of railroad carriages and of **402***] the treads of *the wheels on the other side, to turn short curves upon railroads. The specifications of this patent being defective, it was surrendered the 26th of September, 1835, and a renewed one obtained, in order, as proved, "to limit and confine it to the turning short curves in streets, &c., by leaving out certain matters in it respecting the crossing of tracks or roads, and the passing over turnabouts, and to define the subject matter of the patent more clearly, without its being necessary to refer to that simultaneously obtained, for forming and using cast or wrought iron plates," &c.

In his charge, the judge said to the jury: "It clearly appears that the defendants constructed their railroad with the plaintiff's curves in 1834, one year or more before the plaintiff's application for his renewed patent; consequently, they may continue its use without liability to the plaintiff."

The patent was surrendered, and a new one obtained, under the third section of the "Act concerning patents," of the 3d of July, 1832; and the correctness of the above opinion is to be ascertained by a reference to the proviso of that section. It is there declared: "No public use or privilege of the invention so patented, derived from or after the grant of the original patent, either under any special license of the inventor, or without the consent of the patentee that there shall be a free public use thereof, shall, in any manner, prejudice his right of recovery for any use or violation of his invention, after the grant of such new patent as aforesaid."

The charge of infringement, in the declaration, is laid some years after the new patent, so that the question does not arise whether an action could be sustained for a violation of the right prior to the corrected patent. The above proviso would seem to be susceptible of but one construction; and that is, that the patentee may sustain an action "for any use or violation of his invention after the grant of the new patent." Now, it is plain that no prior use of the defective patent can authorize the use of the invention after the emanation of the renewed patent under the above section. To give to the patentee the fruits of his invention was the object of the provision; and this object would be defeated if a right could be founded on a use subsequent to the original patent and prior to the renewed one.

The thirteenth section of the Act of the 4th of July, 1836, which remodeled the patent law in this respect, made no material change in the Act of 1832. The words in the latter act are: "And the patent, so re-issued, together with the corrected description and specification, shall have the same effect and operation in law, on the trial of all actions hereafter commenced for causes subsequently accruing, as though the same had been originally filed in such corrected form, before the issuing out of the original patent." Now, any person using an invention protected by a renewed patent subsequently to the date of this act is guilty [*403 of an infringement, however long he may have used the same after the date of the defective and surrendered patent.

The Circuit Court relied upon the seventh section of the Act of the 3d of March, 1839, as sustaining their construction in regard to the use of the invention after the renewed patent. But that section has exclusive reference to an original application for a patent, and not to a renewal of it. We think the court erred in their instruction to the jury above stated.

In their charge, the court said: "The use of grooves was not claimed and was no part of the thing patented in 1831, for turning short curves, but was a part of the thing patented in 1835." "That it was an essential part of the invention." And further, "in taking the statement" of Dr. Jones "as proof of the facts there existing, our opinion is, that, connected with the publication in the Journal of the Franklin Institute, in 1832, when the matter was fresh in his recollection, and the specification in the new patent, the old one was invalid and inoperative, by reason of noncompliance with the requisites of the Act of 1793. That it did not embrace the groove, which was essential to its validity, that the new patent is not the same invention, and that the plaintiff has not made out a case of such 'inadvertence, accident, or mistake,' as justified the issue of the new patent, inasmuch as it appears, from the patent for plates on railroads issued at the same time with the one for short curves, that he had known and described the grooves."

The original patent, as proved by Dr. Jones, was burnt with the patent office, and no part of the specifications is preserved, except that which was published by the witness in the Franklin Journal. That publication does not purport to give the whole of the specifications, and, consequently, the claim is not limited by the notice in that journal. Dr. Jones, speaking of the patent issued in 1831, says "the main defect, in my judgment, of the original specifications in the patent for turning short curves was the omission of the mention of the groove in the inner rail. I believe, however, that it was alluded to in the specifications, but the description of it was contained principally, if not wholly, in the specification of the patent for forming

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and using cast iron or wrought plates," &c.

That there was a defect in regard to the grooves in the specifications of the first patent is shown, and also that the patent was surrendered in order to remedy that defect. But whether this vitiated the patent is not a question in this case, as it does not affect the right now asserted, if the first patent were void. Whether the new patent was substantially for a different invention from the first one, was a question for the jury on the evidence. But the court ruled this point, withdrawing the facts from the jury. The witness thinks "that in the first patent the grooves were al-
404*] luded to," but the *terms used are not recollected by him, and as the patent has been burnt, they cannot now be proved. We think the Circuit Court erred in not leaving the jury to act upon the facts, as regards the difference between the original and the renewed patent. On the facts, we should draw a different conclusion from that which was given to the jury by the Circuit Court. An allusion to grooves in this specification, as more particularly described in the other patent, would at least show the intention of the patentee, if it did not make good his patent.

By the thirteenth section of the Act of 1836, "if the patent shall be inoperative or invalid, by reason of a defective or insufficient description or specification," &c., "if the error has or shall have arisen by inadvertency, accident, or mistake, and without any fraudulent or deceptive intention, it shall be lawful" to surrender it, &c. Now, as in granting the renewed patent, the officers of the government act under the above provisions, their decision must at least be considered as *prima facie* evidence that the claim for a renewal was within the statute. But this would not be conclusive against fraud in the surrender and renewal, which, on the evidence, would be a matter for the jury. And we suppose that the inquiry in regard to the surrender is limited to the fairness of the transaction. In whatever manner the mistake or inadvertence may have occurred is immaterial. The action of the government in renewing the patent must be considered as closing this point, and as leaving open for inquiry, before the court and jury, the question of fraud only.

The judgment of the Circuit Court is reversed, and the cause remanded to that court, with instructions to award a venire facias de novo.

Cited—15 How., 228; 17 How., 84; 7 Wall., 609; 11 Wall., 543, 545; 1 Cliff., 632; 2 Cliff., 282, 387; 3 Cliff., 583, 591; 2 Abb., U. S., 404; 5 Blatchf., 141, 149; 6 Blatchf., 200; 9 Blatchf., 27; 2 Wood. & M., 139, 157.

SAMUEL SMYTH, *Plaintiff in Error*,
v.
DANIEL P. STRADER, JAMES PERRINE, AND JOHN H. WOODCOCK, late Partners, under the firm of STRADER, PERRINE & Co.

***Alabama** statutes recognize the general law merchant as governing collection of bills &c.—note in firm name fraudulently given for individual debt of one member is valid in hands of* bona fide *purchaser for value before maturity—evidence of partner showing fraud inadmissible—of party to record—to note.*

The statutes of Alabama require the negotiability and character of bills of exchange, foreign and inland, and promissory notes, payable in bank, to be governed by the general commercial law.

If a partner draws notes in the name of the firm, payable to himself, and then indorses them to a third party for a personal and not a partnership consideration, the first indorsee cannot maintain an action upon them against the firm, if he knew that the notes were antedated.

But if the first indorsee passes them away to a second indorsee before the maturity of the notes, in the due course of business, and the second indorsee has no knowledge of the circumstances of their execution and first indorsement, he may be entitled to recover against the firm, although the partner who drew the notes committed a fraud by antedating them.

But if the second indorsee received the notes after their maturity, or out of the *ordinary [*405 course of business, or under circumstances which authorize an inference that he had knowledge of the fraud in their execution or first indorsement, he cannot recover.

These things are matters of evidence for the jury.

Evidence is admissible to show that, in an account current between the first and second indorsee, no credit was given in it for the notes when they were passed from the first to the second indorsee.

So, evidence of drawing and redrawing between the first and second indorsee, alluded to in the account current, is admissible.

The testimony of one of the partners, offered for the purpose of proving the fraud committed by the drawer of the notes, is not admissible. This court again recognizes the rule upon this subject established in the case of Henderson v. Anderson (3 Howard, 73).

The partner offered as a witness was a party upon the record, and thus, also, disqualified.

THIS case came up by writ of error from the Circuit Court of the United States for the Southern District of Alabama.

The facts in the case are stated in the commencement of the opinion of the court, which the reader is requested to turn to and peruse, before reading the argument of counsel.

The case was argued by *Mr. Parke* for the plaintiff in error, and *Messrs. Sherman* and *Willis Hall* for the defendants in error.

Mr. Parke, for the plaintiff:

The admission of Strader as a witness was an error. A portion of the funds of the firm belonged to him, and he was liable to a contribution if they fell short. (1 Esp. *N. P.* Rep., 103; Ryan & Moody, 31; 21 Com. Law Rep., 334; 2 Peters, 186.) He could not even be made a good witness by a release. (1 Wharton, 392, 398; 2 Penn. Rep., 138; 2 Watts, 347, 351.) He was not only interested, but a party to the suit on the record.

There is also an error in the opinion of the court below, that whatever would be a good defense to a suit brought by the first indorser was also to one brought by the second indorser; that all equities passed with a note as if it were a bond. But previous errors do not affect an innocent holder, where the note is taken in the ordinary course of commercial business. The free circulation and transmission of promissory notes is indispensable to commercial operations.

NOTE.—*As to power of partner, as agent, to bind the firm as party to negotiable instruments*, see note to LeRoy v. Johnson, 2 Pet., 186.

As to liability of principal for fraud of agent, see note to Parsons v. Armor, 3 Pet., 413.

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If any loss should happen it ought to fall upon the party who is negligent. (Collyer on Partnership, 241, 242.) A declaration of partnership implies confidence in the mutual integrity of the parties. (3 Kent's Com., 46.)

Partners are bound, as respects third persons, even by the fraudulent acts of a copartner. (Story on Part., sec. 108, 160; Collyer on Part., 241-243.)

In this case the evidence shows that the notes in question were transferred to Smyth for goods sold by him.

But the court say, that if Stinson & Campbell knew the circumstances attending the making and first indorsement of the note, the plaint-
406*] iff, *who is an innocent indorsee, shall not recover. We do not deny that these circumstances would constitute a valid defense, if the drawers were sued by Stinson & Campbell; but that is not the case. If the fraud were proved, it would not defeat our right to recover; but the only proof of fraud is in Strader's evidence, and he ought to be rejected as an incompetent witness. The court below must have founded its instructions upon his evidence. Gould says, in his testimony, that notice of the dissolution of the partnership was not published until the 23d of April, 1836, which was after the date of the notes in question. Smyth was not bound to discredit paper which bore date anterior to a public notice of the dissolution of the partnership.

Messrs. Sherman and *Willis Hall*, for defendants in error:

[The arguments of these two gentlemen are consolidated.]

The principle of this case has been stated by the plaintiff's counsel to be the highly equitable one, that, "of two innocent persons, the one whose laches occasioned the loss must bear it." But here the equity is all the other way; here there is no loss. Nobody has given credit to false paper. It is a bold attempt to make our client, Perrine, pay the plaintiff a debt of $20,000, due him by Stinson & Campbell, men with whom our client never had the remotest connection. The evidence in the case warrants me in saying it is a gross fraud, from beginning to end, and all that is required to make it a successful one, is a decision of this court favorable to the plaintiff.

This high court will struggle hard, before it will be made a link in this iniquitous chain—before it will be used as an instrument to effect one of the most palpable frauds ever exposed to the light.

The suit, though nominally against Strader, Perrine & Co., is really against Perrine alone. It is true he was a member of this unfortunate concern for "one little month" (from the 1st of November to the 5th of December, 1835), months before the notes on which this suit is brought are pretended to have been made. These notes are ostensibly dated in March, 1836, although really made by Stevenson, one of the partners, after the partnership was finally dissolved, and so advertised in the Mobile papers of the 23d of April, 1836. This quondam partner had, then, no more authority to sign the partnership name than any other person; but he antedated them to a time when the partnership was in existence, and he was authorized to sign the partnership name. This presents a case "on all fours," as the lawyers say, with the case of *Wright* v. *Pulham* (2 Chit. Rep., 121), where, in a precisely similar case, the court hold unanimously that the partnership is not bound by the note.

In the printed case, the plaintiff's only witness states that the notes sued upon were received on account of a debt which accrued in *1831, five or six years before the notes [***407** purport to be made. Other evidence shows clearly that they were received not in payment and extinguishment of the preceding debt, but for collection, the proceeds to be credited when received. This brings it within the case of *De la Chaumette* v. *The Bank of England* (9 Barn. & Cress., 208), where, under similar circumstances, the property of a note was held in fact to be in the assignor, and to be affected, in the hands of the assignee, with all the equities which existed against the assignor. On the strength of this admission by the plaintiff, we had prepared to submit an argument to the court almost exclusively on this point; not by any means because this was the only ground on which a conclusive defense could be made, but because the other grounds were too obvious to require comment.

But it now appears, on examining the original record, that 1831 is a misprint for 1836. The plaintiff has made no admission that the notes were received for a pre-existing debt, and though the evidence on that point is abundant, yet, the fact not being admitted by the plaintiff, it should have been submitted to a jury, and passed that ordeal, before it can properly be urged upon the consideration of this court. We are compelled, therefore, at this late moment to abandon our brief, and employ the few moments allowed us, at the close of the session, in commenting on the two points made by the plaintiff's counsel: 1st, the admissibility of Strader's testimony; 2d, the charge of the judge.

First. Strader is worth nothing, and resides in the State of Ohio. Under these circumstances, the great anxiety manifested by plaintiff, as admitted by his counsel, and disclosed by the numerous writs on the record, to make him a party to the suit, could have been stimulated by no motive but to deprive the defendant of the benefit of his testimony. Not having succeeded in that object, he now contends that his testimony was inadmissible.

1st. On the ground that he was one of the makers, and no man can be admitted to impeach his own name. To which it is replied, that he was in no sense a maker. The paper was, in fact, forged by one of the partners, after the partnership was dissolved. Again, it is replied, that Strader is not introduced for the purpose of discrediting the paper against the actual members of the firm at the date of the notes, but to show that Perrine had previously retired, and was in no respect liable.

2d. A second ground of objection to Strader's testimony is, that he was a partner in the firm of Strader, Perrine & Co., and that "one partner cannot be admitted as a witness for or against his firm."

That is certainly the general rule; but one of the exceptions is where, as in this case, it is proved by other witnesses that the transaction is by one of the partners, without the knowledge of the partnership, on his individual ac-

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408*] count, and the copartners are *not liable, as among themselves, to contribution, then they may be witnesses for the firm. (Story on Part., 386; Phil. Ev., 3d ed., 55; *Ridley* v. *Taylor*, 13 East, 175; *Le Roy et al.* v. *Johnson*, 2 Peters, 198.)

Besides, Strader was not a copartner of Perrine (the sole defendant) at any time during any part of this transaction. The rule is, that instantly, on the dissolution of a firm, the copartners become witnesses, the one for the other, like other persons. (Gow on Part., 202.)

Although, after the withdrawal of Perrine, the name continued the same, yet, by that act, the partnership was dissolved, and subsequently a new partnership, under the same name, was formed. Strader, Perrine & Co. represented very different firms in November, 1835, and in March, 1836.

But the great question which decides the competency of witnesses in our days is, "Has he an interest in the event?" To ascertain this, the test universally applied is, "Can the judgment be used in any other case for or against the witness?" (*Willings et al.* v. *Consequa*, Peters's C. C. Rep., 322; Chitty on Bills, 669; Gow on Part., 80.)

Suppose Smyth fails in this suit. It is no bar to another suit against Strader, nor can it be given in evidence by either party in any possible way. On the other hand, suppose Smyth gains this suit, Perrine has to pay the money. There is no principle which will enable Perrine to recover of Strader, or of any member of the firm of Strader, Perrine & Co. He cannot make them contribute, for they are not his partners; nor is there any privity between them. It is as if his house were burnt down; it is his misfortune, and he cannot divide it with his neighbors. He cannot make them pay the whole, for the recovery is had against him, if at all, on account of his laches, in not publishing his withdrawal to the world —a matter with which his quondam partners have nothing whatever to do. But granting that Perrine, if compelled to pay the note, can recover of the firm, it can only be on the ground of its being a genuine note, which they would have been bound to pay to Smyth. They cannot, by an *ex-parte* proceeding, be placed in a worse condition than they were. The constitution guaranties them a hearing, and the real parties would be deprived of this right in this case, not having been parties to the original suit brought by Smyth, if not allowed to make the same defenses against the note in the hands of Perrine, as they could have made in the hands of Smyth. These elementary principles forbid the judgment obtained against Perrine from being used by him against the firm, or any member of it.

We conclude, therefore, that the judgment in this case, whichever party may succeed, cannot be used by plaintiff or defendant against the witness Strader.

To illustrate this point still further. It is be-
409*] lieved to be settled *law, in this country, that one against whom a forgery is perpetrated is a competent witness to prove it, in any suit in which he is not interested in the event. (*Commonwealth* v. *Snell*, 3 Mass. R., 82; *The People* v. *Howell*, 4 Johns. R., 296, 302; *Pope & Hickman* v. *Nance & Co.*, 1 Ala., old series, 299.)

The facts proved on trial make a case of forgery. It is precisely analogous to the case supposed by Lord Coke, in 3 Inst., 169. "It is forgery to make a deed of feoffment to A, and then make another of prior date to B, which, at the time, he had no power to make."

We cordially unite with the learned counsel for the plaintiff in soliciting the court to give full instructions to the inferior tribunal, with respect to the admissibility of Strader's testimony, in the possible event of a new trial. We do not anticipate such a decision, nor comprehend upon what principles of law it can be made. But it is prudent in all cases to be prepared for the worst. In that spirit it is, that we ask the court, should they be induced by any technical view of the case to send it back for a new trial, to give minute directions as to the availability of notes received merely as contingent payment of a precedent debt.

The evidence in this case shows the notes were not transferred to the plaintiff in payment and extinguishment of anything, and that no credit, no new consideration, was given for them, but that they were in fact deposited with the plaintiff for collection, the amount to become payment on the double contingency, 1. That the notes should be collected by the plaintiff; 2. That in the mean time the original debt should not be paid. But this evidence not having been distinctly admitted by the plaintiff, or submitted to the jury, cannot be brought to the attention of this court, except in reference to the possibility of a new trial.

In all cases where notes are given in payment, but not extinguishment of a preceding debt, that is, where they are to become payment only in case of collection, the assignee is a mere agent of the assignor, and they continue his property, and at his risk, and subject to all equities against him, as much as if in his actual possession.

I am aware of the decisions in *Riley & Van Amringe* v. *Anderson* (2 McLean, 589), and *Swift* v. *Tyson* (16 Peters, 1). Both these decisions are in strict conformity with the principle. In the first case it was distinctly left to the jury to say whether the notes were received in payment or not; they returned that they were, and the court held, that though it was an old debt, yet the assignee, having received them in payment, held them for value. The same doctrine is held in *Swift* v. *Tyson*, which was an undisputed case of absolute payment of an old debt. All that is decided by those two cases is, that it is immaterial whether the note is given at the inception of a transaction, or subsequently, if it is given in *abso- [*410
lute payment. In that case, the assignee holds it for value. It is true that there are some *dicta* thrown out in the case of *Swift* v. *Tyson*, which require explanation and perhaps limitation; for example, at page 20, is said: "We are prepared to say that receiving a note in payment of, or as security for, a pre-existing debt is according to the known usual course of trade and business." This certainly cannot be intended to mean that if the note is received, not in payment, not in pursuance of an original arrangement, and not for any new consideration, it can be held against the true owner. The court certainly do not intend to overrule the doctrine of *Chief Justice* Marshall in the case of *Coolidge* v.

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Payson (2 Wheat., 66), which is quoted and relied upon in the *per curiam* opinion in this very case of *Swift* v. *Tyson*. That memorable judge says, that although a note may be taken for a pre-existing debt, yet "in all such cases the person who receives such a bill in payment of a debt will be prevented thereby from taking other means to obtain the money due him." That is, the payment must be an extinguishment of so much of the pre-existing debt. So in the case of *Brush* v. *Scribner* (11 Conn. R., 388), another case on which this court relies for their doctrine in *Swift* v. *Tyson*. Extinguishment as well as payment is considered essential to give validity to the transfer of a note assigned for a pre-existing debt. The *dictum*, therefore, in *Swift* v. *Tyson* is not to be understood as conflicting with the doctrine of these two cases.

The cases in 13 Wend., 505; 12 Wend., 593; 10 Wend., 85, and other cases in the New York courts, are considered by this court, in *Swift* v. *Tyson*, as maintaining the doctrine that notes transferred in payment of pre-existing debts were not valid in the hands of the holder. This, I apprehend, is not the doctrine they support. They must be taken in connection with the doctrine pre-established in the Court of Errors (*Murray* v. *Gouverneur et al.*, 2 Johns. Cases, 441), "that a bill shall not be a discharge of a precedent debt, unless so expressly agreed between the parties." Taken in this connection, the doctrine they decide is, that payment without extinguishment is not available to the holder against the equitable owner, which is precisely the doctrine of Marshall, in *Coolidge* v. *Payson*. The dispute is nothing but a revival of the old question. What is payment? That is, what is payment and extinguishment? And what is merely contingent payment? And the New York courts have taken Lord Holt's side of the question. In the case of *Ward* v. *Evans* (2 Ld. Raym., 930) that eminent judge remarked: "Taking a note is sometimes payment when a part of the original transaction, but paper is no payment when a precedent debt. I am of opinion and always was (notwithstanding the noise and cry that it is the use of Lombard Street, as if the contrary opinion would blow up Lombard Street), that the acceptance of such a note is not actual payment; for when such a note is given in payment it is **411*** always *intended to be taken on this condition, to be payment if the money be paid thereon in convenient time."

The *dictum* under consideration not only says receiving a note in payment, but "as security for a pre-existing debt, is according to the known usual course of trade and business." The court here must mean to restrict the receiving it as security to the cases, 1. Where it is a part of the original agreement; 2. Where some new consideration is given.

The peculiar province of this species of paper is, to facilitate the exchanges of value from place to place, and from person to person; to be deposited as collateral, though a possible, is not an appropriate or natural function of bills of exchange, any more than it is of money. (*Bay* v. *Coddington*, 5 Johns. Ch., 54; *Collins* v. *Martin*, 1 Bos. & Pull., 648; *Coggs* v. *Bernard*, 2 Ld. Raym., 917; *Harrisburg Bank* v. *Meyer*, 6 Serg. & Rawle, 537; *Evans* v. *Smith*, 4 Binn., 366.)

Whether money or bills of exchange are deposited as collateral security, the transaction is not governed by the laws which govern the payment of money, or the negotiation of bills, but by the ordinary laws which govern pledges or pawns. (Story on Bailments, p. 198, sec. 290; *Assigns of Horseman* v. *Eden*, 1 Bos. & Pull., 398.)

Three principles of that law apply:

1. The depositor or pledger can pledge no more or greater interest than he has in the property pledged. (Code., lib. 8, tit. 16, l. 6; *Hoare* v. *Parker*, 2 T. R., 376; 1 Dane's Abr., ch. 17, art. 4, sec. 7; Story on Bailments, p. 214, sec. 22; *Ibid.*, p. 215, sec. 324.) [Bills of exchange are said to be an exception to this rule. The exception is believed to relate to the power, not the right, of transferring the property.]

2. The absolute legal title is not changed, the pledger receiving nothing but a special property, amounting to a lien for his advance, together with a right of possession. (Story on Bailments, p. 197, sec. 287.)

An advance *bona fide* made upon property improperly pledged may be required to be returned. (*Cortelyou* v. *Lansing*, 2 Caines' Cas. Er., 200; *South Sea Co.* v. *Duncomb*, 2 Str., 919; 2 Kent's Com., 450; 1 Dane's Abr., ch. 17, art. 4, sec. 9.) But if no consideration be advanced, none can be required.

3. The contract of pledge is a distinct and substantive contract, and requires a legal motive or consideration to support it, as much as any other.

The conclusion is that the court, by the word "payment" in the *dictum*, in *Swift* v. *Tyson*, before referred to, mean payment and extinguishment, not contingent payment; and the expression "may be received as security," must be qualified by adding, but it cannot be held against the equitable owner unless it was part of the original contract or induced by some new consideration.

*But it is believed the court will not [***412** be called upon to investigate this subject. There are other sufficient grounds for affirming the judgment. We hasten, therefore, to reply to the objections to the charge of the court below.

The charge is, in substance, "that if Stevenson (one of the partners) made and assigned the notes on his own account, without the consent of his partners, and Stinson & Campbell (the assignors of the plaintiff) knew it, and if Perrine retired from the firm before the notes bear date, and Stinson & Campbell knew it when they took the notes, that the jury must then find for the defendant Perrine."

This charge is justified by three considerations.

1st. By the statute of Alabama, which authorizes the defendant to file a sworn plea denying the execution. (Toul. Dig., ch. 10, sec. 3, p. 462.) This is construed to operate as notice to the plaintiff, and throw the burden of proof upon him. (*Rolston* v. *Click et al.*, 1 Stew., 526.) The plaintiff has gone to trial without any replication, which is construed a direct denial of all the material facts stated in the plea. (*Lucas* v. *Hitchcock*, 2 Alabama R., 287.) What, then, were the facts put in issue by the plea and denial? 1. That Perrine withdrew from the firm in December, 1838, and Stinson & Campbell knew it. 2. That the note

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was not made at the time of its date. 3. That it did not come into the hands of Stinson & Campbell till after the 17th May, 1836. 4. That he did not make the note.

It was certainly incumbent on him to prove all the affirmative facts which he asserted by joining issue. For instance, he asserts that the notes were in the possession of Stinson & Campbell before the 17th of May. This is an essential fact; for if Stevenson delivered them after publication that the partnership was dissolved, made on the 23d of April, 1836, the notes never received any vitality from the firm. One of the partners had no more power to bind them after dissolution than one who had never been a partner. (*Bell* v. *Morrison*, 1 Peters, 371; *Tombeckbee Bank* v. *Dumell*, 5 Mason, 56.) He makes no attempt to prove his assertion. He does not make out his case. Of course the court would have been justified in nonsuiting him in the first place, or in subsequently telling the jury to find for defendant.

2d. The state of the pleadings warranted the charge. A plea denying the making is authorized by statute, but its form is not prescribed. He chooses to join issue instead of replying over. He thereby binds himself down to the single point that Perrine made the notes; to prove which he must show either that he signed them himself, or that he authorized some one else to do it. But, so far from proving this, the proof is they were made by Stevenson, without authority, long after Perrine had withdrawn from the firm. If he had intended to hold Perrine by reason of his laches 413*] in not *advertising his withdrawal, he should have replied that specially to Perrine's sworn plea of *non est factum*.

3d. The charge is justified by the statute of Alabama, which enables the defendant to set up the same defenses against the assignee of a note as he could have made against the assignor, if the note had not been assigned. (Toul. Dig., ch. 2, p. 69.) This extends to all legal defenses. (*Rolston* v. *Click et al.*, 1 Stewart, 526.) And the law has been construed to apply to notes negotiable and payable in bank, if not held by the bank. (*M'Murran* v. *Soria et al.*, 4 How. (Miss.) Rep., 154.)

A similar law prevails in most of the new and less commercial States and has been found to work well in practice. The business world has undergone a wonderful change within the last century. Bonds, bills single, and many other common law instruments have disappeared; their occurrence is almost as rare as that of the mammoth, or of the mastodons of old. All kinds of business are now transacted by notes of hand. The farmer gives his note to the merchant, the laborer to the farmer, the client to the lawyer; but the technicalities of commercial paper have not been so extensively introduced; and if the rigorous rules of the counting-house are to be applied to the notes of the farmer and of the roughhewer of the wilderness, the most widespread injustice will be the consequence.

Mr. Parke, in reply, said that the argument drawn from the construction of the statute of Alabama was not in the brief of the opposing counsel, and had been suddenly sprung upon the court. The volume containing the entire law not in court, and was produced very recently. But it did not cover the ground contended for by the other side, which was that an indorsee was placed precisely upon the same footing with a payee. The law of 1812, it is true, allows payments and set-offs to be pleaded if they existed before an assignment was made. But subsequent laws vary this.

It appears to be admitted by the argument upon the other side, that the case depends on Strader's evidence. But is he a good witness? It is said that we made great efforts to have process served upon him for the purpose of disqualifying him. But it was our interest to make him a defendant. He has never become a bankrupt, and ought to bear his share in paying the debts of the partnership. If he had withdrawn in fact from active participation in its affairs, others continued to carry on the same business under the same name until the 23d of April, 1836.

Mr. Justice McLEAN delivered the opinion of the court:

The plaintiff brought his action as the second indorsee of two promissory notes in favor of E. Stevenson, purporting to be signed by Strader, Perrine & Co., which partnership consisted of Daniel *P. Strader, James [*414 Perrine, E. Stevenson, and John H. Woodcock. The notes were assigned by Stevenson to Stinson & Campbell, of New Orleans, and by them to the plaintiff. Stevenson died before the commencement of the suit, and the process was served only on Perrine and Woodcock. At the fall term of 1842, Woodcock pleaded a discharge under the bankrupt law, and Perrine pleaded that the partnership of Strader, Perrine & Co. commenced in November, 1835, and that in December of the same year he withdrew from it. That at the time of leaving the firm he sold, for one thousand dollars, his interest to Stevenson, who, by Stinson & Campbell, through one Primrose, paid him the above sum; and that they knew of his withdrawal. That the notes were antedated, and were not in possession of Stinson & Campbell, or assigned to them, till after the 17th of May, 1836.

Issues being joined on these pleas, the case was submitted to a jury, who found in favor of Perrine, and that Woodcock had been discharged under the bankrupt law.

The questions for decision arise on a bill of exceptions, taken by the plaintiff.

The plaintiff proved by the deposition of Hood, that Stevenson was a member of the firm of Strader, Perrine & Co., and that he executed the notes, and that they are dated before any public notice was given of the dissolution of the firm. That the firm of Stinson & Campbell were indebted to the plaintiff, in a large sum, in the summer of 1831; and that in part payment, the notes, before maturity, were assigned to him, for which a credit on their account was entered. And here the plaintiff's evidence closed.

The defendant (Perrine) proved "that he withdrew from the firm the 6th of December, 1835, but that there was no public advertisement, giving notice of the dissolution of the firm, until the 23d of April, 1836, although the fact was known to Stinson & Campbell at the time of Perrine's withdrawal."

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The defendant also proved, by John Test, that in August, 1836, he saw in the hands of the plaintiff's agent an account current between him and the firm of Stinson & Campbell; that he made a copy of the same, which he produced, and from which it appeared that no credit had been entered for the notes sued on.

The plaintiff's counsel moved the court to exclude from the jury all testimony as to the transaction between Stevenson and the firm of Stinson & Campbell, or between Stevenson and the other members of the firm of Strader, Perrine & Co., there being no proof of any notice to the plaintiff of any of these matters insisted on by the defendant in his defense. But the court overruled the motion, and "instructed the jury, that if they believed the said notes were made by Stevenson, without the knowledge and consent of his partners, and that he passed them 415*] off to the said Stinson & *Campbell without the knowledge or consent of his partners, and that if the said Stinson & Campbell, at the time of their receiving the notes, knew that, prior to that time, to wit, on the 6th of December, 1835, Perrine had withdrawn from said firm, and was not then a partner, and that if it was also proved to them that the said notes were passed to the said Stinson & Campbell by Stevenson, for his individual benefit, and not for the interest and benefit of the said firm, and that this was known to the said Stinson & Campbell when they received the said notes, that then the jury must find for Perrine, the defendant." To the above ruling and instruction, exceptions were taken by the plaintiff.

From the instruction of the court, it appears the notes in controversy were considered as governed by the law merchant. By the Alabama statute of 1812 (Clay's Dig., 381), the assignee of "bonds, obligations, bills single, promissory notes, and all other writings for the payment of money," may sue in his own name; but all equities and grounds of defense remain open as fully as though the instrument had not been assigned, until the defendant had notice of the assignment. But by the Act of 1828 (Clay's Dig., 383), it is provided "that the same remedy on bills of exchange, foreign and inland, and on promissory notes payable in bank, shall be governed by the law merchant, as to days of grace, protest and notice"; and, by the succeeding section, all other contracts for the payment of money, &c., are made "assignable as heretofore, and the assignee may maintain such suit thereon as the obligee or payee could have done, whether it be debt, covenant, or *assumpsit*."

The phraseology of this section would seem to place all other instruments, for the payment of money, &c., on a different footing from those described in the preceding section. The provision of that section appears only to relate to the remedy on bills of exchange and promissory notes payable at bank under the law merchant, as regards the days of "grace, protest, and notice." But as the following section defines the rights of the assignee of "all other contracts in writing for the payment of money, &c., it may, perhaps, be fairly inferred that the Legislature intended the negotiability and character of the instruments above named should be regulated by the general commercial law. Such seems to be the opinion of the Supreme Court of Alabama. In the case of *McDonald* v. *Hunted* (3 Alabama Rep., 297), it was held, "that a note made negotiable and payable at bank is not subject to offset, in the hands of a *bona fide* indorsee, who has acquired it previous to maturity, although it has never been negotiated at the bank where it is made payable." Also in *Beal* v. *Bennett* (6 Alabama Rep., 156), the same principle is recognized.

However fairly Stevenson may have acted in the execution of these notes payable to himself, it is clear that he could not have *sustained on them an action at law. [*416 A partner of a firm cannot, at law, sue it, for that would be to sue himself. But a *bona fide* assignee of Stevenson might maintain an action. (*Jones et al., Assignees*, v. *Yates*, 9 Barn. & Cress., 532; *Bosanquet et al.* v. *Wray*, 6 Taunt., 597; *Aubert* v. *Maze*, 2 Bos. & Pull., 371; *Smith* v. *Lusher*, 5 Cowen, 688.) Stevenson, in executing the notes to himself, under the circumstances proved, committed a fraud against his partners; and this fraud was greatly aggravated, if, as alleged, he antedated the notes so as to charge Perrine as partner. That he assigned the notes to Stinson & Campbell, if for any consideration, for one that was personal to himself, and wholly disconnected with the partnership, is not controverted. These facts, or a part of them, of which Stinson & Campbell must have had knowledge, would have defeated a recovery by them. Every "contract in the name of the firm, in order to bind the partnership, must not only be within the scope of the business of the partnership, but it must be made with a party who has no knowledge or notice that the partner is acting in violation of his obligations and duties to the firm, or for purposes disapproved of by the firm, or in fraud of the firm." (Story on Partnership, 193.) This rule as well applies to the indorsement of negotiable instruments as to other contracts.

But the fraud of Stevenson and the knowledge of that fraud by Stinson & Campbell, do not necessarily defeat the plaintiff's action. And the charge of the court on this point was clearly erroneous. If, before the maturity of the notes, in the due course of business, and without any knowledge of the circumstances of their execution and first indorsement, the plaintiff received them, he may be entitled to recover, notwithstanding the fraud. By "forming a partnership, the partners declare themselves to the world satisfied with the good faith and integrity of each other, and impliedly undertake to be responsible for what they will respectively do within the scope of the partnership concerns." (Story on Partnership, 161.) On this principle, the firm is bound for the frauds committed by one of its partners. Where one of two innocent persons must suffer by the act of a third person, the rule is just, that he shall suffer who reposed the higher confidence and credit in such person.

But if the plaintiff received these notes after their maturity, he holds them subject to all the defenses which might have been set up against them in the hands of Stinson & Campell. Or, if he received them out of the ordinary course of business, without consideration, or under circumstances which authorize an inference that he had knowledge of the fraud in their

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execution or their first indorsement, he cannot recover. These are matters of evidence for the jury.

The testimony of John Test, which was ex-
417*] cepted to, we think *was rightfully admitted. He proved that, in August, 1836, he saw in the hands of an agent of the plaintiff an account current between him and the firm of Stinson & Campbell. That he copied the account, which copy he exhibited, and from which it did not appear that a credit had been entered for the notes in controversy. As this, compared with the evidence of the plaintiff, might conduce to disprove the consideration alleged to have been paid for the notes by the plaintiff, it was properly admitted. The relevancy of the deposition of Charles, which was also excepted to, is not very apparent. It shows that Stinson & Campbell, in 1836, drew a large amount of drafts on the plaintiff, in part payment of drafts which he had previously drawn on them. This drawing and redrawing constituted no part of the account current spoken of by Test, but at the foot of the account a memorandum was made of these drafts. As this deposition conduced to show the nature of the accounts between the plaintiff and the firm of Stinson & Campbell, no very strong objection is perceived to its admission as evidence. It could not have misled the jury.

The deposition of Strader, which was also excepted to by the plaintiff, was not admissible under the decisions of this court. He was one of the firm of Strader, Perrine & Co., and his testimony conduced to show the fraud of Stevenson in the execution of the notes. In the case of *The Bank of the United States* v. *Dunn*, (6 Peters, 57), this court said: "It is a well settled principle, that no one, who is a party to a negotiable note, shall be permitted, by his own testimony, to invalidate it. The same principle was held in *Bank of Metropolis* v. *Jones* (8 Peters, 12). This was decided in the case of *Walton et al., Assignees of Sutton*, v. *Shelley* (1 Term R., 296); and although that decision was overruled by the King's Bench in the case of *Jordaine* v. *Lashbrooke* (7 Term R., 601), this court, in the cases cited, and in several subsequent cases, have established the rule as above stated. In the State courts there is a great diversity of judgment on this point.

Strader was a party on the record, and that rendered him an incompetent witness. (*Scott* v. *Lloyd*, 12 Peters, 149; *Stein* v. *Bowman et al.*, 13 Peters, 219.)

Upon the whole, the judgment of the Circuit Court is reversed, and a venire de novo *awarded.*

Mr. Justice CATRON:

In this case my opinion is founded on considerations that differ so much from those proceeded on in the principal opinion, that I am under the necessity of stating my own views, or of dissenting, which I am not prepared to do.

In the first place, Stevenson had been one of the firm of Strader, Perrine & Co. He made the note payable to himself and signed the name of the firm to it. Being both a maker
418*] and the payee, the *note was void on its face, or at least could have no legal effect; when negotiated, that is, when it was indorsed by Stevenson, and sold to Stinson & Campbell, it could only become a binding instrument in their hands on Strader, Perrine & Co., as Stinson & Campbell could enforce payment. The time of negotiation, therefore, is the true date of the note.

It is in proof that the firm of Strader, Perrine & Co. was dissolved on the 23d of April, 1836, and that the usual advertisement was then made of the fact. This bound all persons who had not had previous dealings with the firm; nor is there any proof found in the record showing that either Stinson & Campbell, or Smyth, the plaintiff, had had any such dealings. If the note was negotiated, therefore, to Stinson & Campbell, after the dissolution of the partnership, it was void, and does not bind Perrine, inasmuch as Stevenson had no power to bind him.

2. Perrine is proved to have withdrawn from the firm in December, 1835. But as no regular notice was given of this fact, it rests on him to bring home knowledge of it to the holder of the paper. If Stinson & Campbell had knowledge, when they took the note from Stevenson, then they could not have recovered from Perrine on it.

So, again, if Stinson & Campbell took the note from Stevenson in discharge of the individual debt of the latter, they could not recover from Perrine, whether he was or was not a partner at the date of its negotiation. The proof of either of these events is imposed on the plaintiff. But having shown either of the two last circumstances, then the plaintiff is bound to prove "under what circumstances, or for what value, he became the holder." I need only refer to Chitty on Bills, 9th ed., 648, for the established rule. If the plaintiff fails to show, in such case, that he came by the note in the due course of trade, and before it fell due, then the defendant is entitled to a verdict.

3. In regard to the question of the competency of Strader's evidence, I have found much difficulty. The competency of Strader to depose, in the principal opinion, is held to be governed by the cases of *United States Bank* v. *Dunn* (6 Pet., 51), and *Bank of Metropolis* v. *Jones* (8 Pet., 12). In the one case, Carr, the first indorser, was introduced by the second indorser, Dunn, who was sued to make out a defense. In the second case, Jones, the indorser and defendant, introduces Mr. Blake, the maker of the note, to establish a defense; and, in each instance, this court held that the witness was incompetent to invalidate the negotiable paper to which he was a party; and the decision in *Walton* v. *Shelley* (1 Term R., 296) was followed. Of this case, Mr. Chitty says (669): "Though it was formerly held that no party should be permitted to give testimony to invalidate an instrument he had signed, a contrary rule now prevails"; and refers to *Bent* v. *Baker* (3 Term R., 36), and
Jordaine v. *Lashbrooke* (7 Term R., [*419
601). "The general rule is," says Chitty, "that it is no objection to the competency of a witness, that he is also a party to the same bill or note, unless he be directly interested in the event of the suit, and he be called in support of such interest; or unless the verdict, to obtain which his testimony is offered, would be admissible evidence in his favor in another

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suit." This was the principle on which the cases of *Bent* v. *Baker* and *Jordaine* v. *Lashbrooke* proceeded. By the statute of 3 and 4 Wm. IV., ch. 42, sec. 26, for the amendment of the law, the rule was enlarged, so as to let in parties to negotiable paper as witnesses for or against whom the verdict and judgment might be evidence, the statute providing that the record should not be evidence for or against them. And thus the law of evidence, in this regard, now stands in the courts of Great Britain. It is also settled, and had been, long before 1832, when the decision in *The Bank of the United States* v. *Dunn* was made, in a large majority of the States of this Union, in accordance with the principles laid down in *Jordaine* v. *Lashbrooke*, and *Bent* v. *Baker;* and the question now is for this court to determine how far the United States circuit courts, when acting in the States, shall enforce the doctrine laid down in *Dunn's* case, and which was very properly applied in that of *Jones*. The decision is, "That no man who is 'a party' to the note or bill shall, by his own evidence, invalidate it." But suppose he is no party to it, and that his name has been put on it, or to it, by forgery, and he is called on by another to establish that the defendant's name was forged, as well as that of the witness, is he then competent? He gave no credit to the paper; and, if the evidence of all those who could prove the defense is cut off by the mere name appearing, nothing more would be required to effectuate the fraud than to put on the names of all persons who could prove the fraud. In such an instance, I feel sure the rule laid down by this court does not apply. Nor can I, satisfactorily to my own mind, distinguish the case put from one where a fraudulent note is made in the name of a firm, by one of the original partners, after the dissolution of the partnership, when he had no authority to use the name of those he attempts to bind. Indeed, it is difficult to say that Stevenson was not guilty of forgery, if he made the notes, and passed them off to Stinson & Campbell, after the dissolution of the partnership, in discharge of his own debt, and with the intention to defraud his former partners. In the cases that have heretofore come before this court, the witnesses proved in advance that they gave credit to the paper, by signing their names; and that they were, beyond dispute, parties to it, as well as the defendant.

The principle assumed in *Walton* v. *Shelley* is in violation of one of the most familiar and general principles of evidence known to courts of justice; that is to say, that any person of **420***] sufficient *age and sanity can be a competent witness to depose in any cause where he is not directly interested in the event of the suit. To this rule there are exceptions, but they are almost uniformly favorable to the admission of the testimony, are of comparatively recent origin, founded on experience, and conducive to the due administration of justice in a high degree.

Again, the Act of May 19, 1828, declares that "the forms and modes of proceeding in suits in the courts of the United States (in States admitted into the Union since 1789), in those of common law, shall be the same in each of those States respectively as are now used in the highest court of original and general jurisdiction of the same."

That the court below proceeded, in the admission of Strader as a witness, according to the modes of proceeding in the circuit courts of the State of Alabama, is not questioned. The method and manner of administering justice in the State courts is the mode referred to in the act of Congress, as I understand it; and I cannot resist the conclusion that the modes prescribed by the act of Congress to the federal courts held in that State embrace the rules in regard to the competency of evidence; without evidence there can be no proceedings; rules for its admission are indispensable; these rules must be derived from some authority; from statutes they cannot be, and therefore Congress has said the State courts shall furnish them to the foreign tribunals administering the laws there; and this for the plain reason that the measure of justice shall be the same in the foreign that it is in the domestic tribunals, and evidence is the measure of justice in great part.

There can be no objection to the competency of Strader because he was a party of record. The original writ issued against him and Perrine jointly; but Strader was not found, and a *nolle prosequi* was entered as to him, and Perrine was declared against alone.

I concur that the charge of the Circuit Court was erroneous in so far as it assumed that the instruments sued on were subject to the same equities in the hands of Smyth that they were when held by Stinson & Campbell. The courts of Alabama have construed the statutes of that State affecting negotiable paper, and held they did not apply to notes payable in bank; of which description are the ones sued on. The charge, therefore, violated the commercial rule, that the innocent indorsee takes the paper discharged of a previous infirmity.

Cited—*Post*, 588.

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*ISABELLA L. MACKAY, Executrix [*421
of JAMES MACKAY; ZENO MACKAY, GEORGE ANTHONY MACKAY, JAMES BENNETT MACKAY, REUBEN COLEMAN AND ELIZA LUCY, HIS WIFE, WILLIAM COLEMAN AND AMELIA ANN, HIS WIFE, LOUIS GUYON AND MARY CATHERINE, HIS WIFE, DAVID BOWLES AND JULIA JANE, HIS WIFE, AND ISABELLA LOUISE MACKAY, by ISABELLA L. MACKAY, her Guardian.

v.

PATRICK M. DILLON.

Jurisdiction—decision of State courts on admissibility of evidence affecting titles—private survey not binding.

The jurisdiction of this court, when a case is brought up from a State court under the twenty-fifth section of the Judiciary Act, does not extend to questions of evidence ruled by that court, unless it is sought to give such evidence effect for

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other purposes over which this court has jurisdiction.

Under the Act of 1805, providing for the appointment of commissioners to examine and decide on certain claims to land, and the Act of 1812, confirming those claims, Congress did not intend to adopt the boundary lines of the claims according to the surveys which had been laid before the commissioners; nor adopt, for any purpose, the evidence which had been presented to the board.

A decision of the court below, cutting off all proof of the correctness or incorrectness of such surveys, was therefore erroneous.

A survey, made at the instance of the inhabitants of St. Louis, for the purpose of presenting their claim to commons, in due form, to the board of commissioners, was in its nature a private survey, not binding on the United States, and having no binding influence on the title of subsequent litigants.

By what description of surveys the United States are bound, and those claiming under them governed, reference is made to a preceding case in this volume, of Jourdan and Landry v. Barrett (*ante*, p. 169), and for the effect of a legal survey of the commons of St. Louis, to the succeeding case of Les Bois v. Bramell.

THIS case was brought up from the Supreme Court of the State of Missouri by a writ of error issued under the twenty-fifth section of the Judiciary Act.

The suit was originally brought in the Circuit Court (State court) for the County of St. Louis, but the venue changed to the County of St. Charles.

It was an ejectment, brought by the heirs of Mackay against Dillon, to recover a tract or parcel of land in the County of St. Louis, containing two hundred arpents or more, bounded on the north by land formerly belonging to Auguste Chouteau, called the Mill tracts; on the south by land formerly belonging to Anthony Soulard; deceased; on the east by the road leading from the city of St. Louis to the village of Carondelet; on the west by land formerly of the royal domain.

As the instruction asked by the defendant, and granted by the court, referred to the copy of the claim given in evidence, it is necessary to set forth the whole of this evidence upon which the claim of the defendant rested; and also to state the title of the plaintiffs.

The plaintiffs showed title as follows:

1st. Mackay's will, the production of which was afterwards rendered unnecessary, by the admission of the defendant, that the plaintiffs were the wife and children and sons-in-law of James Mackay, deceased.

422*] *2d. The admission of the defendant, that, at the commencement of the suit, he had in his possession thirty acres, part of the tract in the declaration described, all of which, thus in his possession, laid west of the eastern line of the tract claimed as the commons of St. Louis, and was embraced in the survey of the commons as made by James Mackay in the year 1806.

3d. Mackay's petition for a concession, and the order of the lieutenant-governor thereupon, both in 1799, and a survey in 1802.

4th. Proceedings of the board of commissioners established by the Act of Congress passed on the 2d of March, 1805.

5th. Proceedings under the Act of Congress passed on the 13th of June, 1812.

6th. Extracts from the decision of Mr. Bates, under the same act.

7th. Proceedings of the board of commissioners established by the Acts of Congress passed on the 9th of July, 1832, and 2d of March, 1833.

8th. The Act of Congress passed on the 4th of July, 1836.

9th. The certificate of the surveyor of the public lands, dated the 5th of December, 1840.

10th. The deposition of Soulard.

11th. Proof of the location and value of the land.

These points will be taken up in order. Nothing more need be said with regard to the first and second.

3. Mackay's petition for a concession, the order of the lieutenant-governor, and survey.

"*To Don Charles Dehault Delassus, Lieutenant-Governor and Commander-in-Chief of Upper Louisiana.*

"James Mackay, commandant of St. André, of Missouri, has the honor to represent, that, having often sundry reports to make to government, on which account his presence is required in this town, he would wish to have a place of residence in the same; therefore, considering that all the town lots are conceded, he has the honor to supplicate you to have the goodness to grant to him, to the south of this town, a vacant tract of land of about two hundred and some arpents in superficie, which tract of land is bounded as follows: To the north, by the land of Mr. Auguste Chouteau; to the south, by lands of Mr. Antoine Soulard; to the east, by the public road going from this town to Carondelet; and to the west, by his majesty's domain. The petitioner, confiding in your justice, hopes that his zeal for his majesty's service, and the small salary which he enjoys, shall be strong motives in the opinion of a chief who, like you, makes his happiness consist in distributing favors to the officers who have the honor to serve under his orders. *In this belief, he hopes to obtain of [*423 your justice the favor which he solicits.

"JACQUE MACKAY.

"St. Louis, October 9, 1799."

"ST. LOUIS, OF ILLINOIS,
October 9, 1799.

"Cognizance being taken of the foregoing memorial of Mr. James Mackay, and due attention being paid to his merits and good services, the surveyor of this Upper Louisiana, Don Antonio Soulard, shall put the interested party into possession of the land which he solicits, in the place designated in this memorial, and this being executed, he shall draw a plat of his survey, delivering the same to the party, with his certificate, in order that it shall serve to him to obtain the concession and title in form, from the intendant-general, to whom alone corresponds, by royal order, the distributing and granting all classes of lands of the royal domain. CARLOS DEHAULT DELASSUS.

"Truly translated.

"St. Louis, 20th February, 1833.

"JULIUS DE MUN."

NOTE.—*As to parol evidence to explain and limit, and to show mistake in surveys and plats of land*, see note to McIvor v. Walker, 9 Cranch, 173; and note to Watts v. Lindsey, 7 Wheat., 158.

As to when natural objects govern, and when needle in surveys, see note to Newsom v. Pryor, 7 Wheat., 7.

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Translation of the Spanish Survey.

"The bounds and corners are all indicated on the survey. All the line trees are marked with a blaze above, and two notches below, and the right and left blazed only. Marked in book A, fol. 55, No. 94.

"Don Antoino Soulard, particular surveyor of Upper Louisiana, certify that, on the 24th of this present year, in virtue of the decree which accompanies of the Lieutenant-Governor and sub-delegate of the royal estate, Don Carlos Dehault Delassus, in date of the month of October, of the year 1799, I went to the land of Don Santiago Mackay, the admeasurement of which I have taken in presence of the proprietor and of the neighbors who bound thereon, with the perch of Paris of eighteen feet long, according to the custom adopted in this province of Louisiana, and without regarding the variations of the needle, which is seven (7) degrees and thirty (30) minutes, as appears by the plat that precedes; which land is situate to the south of the little river of the mills, situate near the town of St. Louis, bounding north by the lands of Don Auguste Chouteau; south, in part, by another piece of land of Don Antonio Soulard and the royal domain; east, in part, by the land of Don Auguste Chouteau, and by the royal road from the town to the village of Carondelet; west, by the lands of the royal domain; and in order that it may appear when fitting, I give the present with the plat that precedes, in which are indicated the dimensions and natural and artificial limits which surround the said land. St. Louis, of Illinois, 17th of December, 1802.

"ANTONIO SOULARD, Particular Surveyor."

424*] *4. Proceedings of the board of commissioners established by the act of Congress, passed the 2d of March, 1805.

This act provided for the appointment of three persons, who should examine and decide on all claims submitted to them, and report the result to the Secretary of the Treasury, who was directed to communicate it to Congress.

"July 22d, 1806.

"The board met agreeably to adjournment. Present: The Honorable John B. C. Lucas, Clement B. Penrose, and James L. Donaldson, Esquires.

"James Mackay, claiming two hundred arpents of land, or thereabouts, situate in the fields of St. Louis, produces a concession from Charles D. Delassus, dated October 9th, 1799, and a survey of the same, dated the 24th of November, and certified the 17th of December, 1802.

"Auguste Chouteau, being duly sworn, says, that the said tract of land was surveyed in 1804 or 1805; that he never heard of a concession having been granted for the same until the survey was taken; that the said tract is adjoining a tract claimed by the witness, and that the same interferes with a tract claimed by the inhabitants of St. Louis as a common. The board, from the above testimony, are satisfied that the aforesaid concession is antedated. On motion, adjourned to to-morrow, 9 o'clock A. M. (See minutes, No. 1, pp. 412, 413, 417, and 419.)"

"Friday, July 31st, 1807. 8 o'clock.

"The board met agreeably to adjournment. Present: The Honorable John B. C. Lucas, Clement B. Penrose, and Frederick Bates, Esquires. James Mackay, claiming about two hundred and eighty-two arpents in the common of St. Louis, produces a concession from Charles Dehault Delassus, dated the 9th of October, 1799. Survey and certificate dated the 17th of December, 1802. Laid over for decision. The board adjourned until to-morrow, 9 o'clock.

JOHN B. C. LUCAS,
"CLEMENT B. PENROSE,
"FREDERICK BATES.

"(See book No. 3, pp. 19–21.)"

"Saturday, November 4th, 1809.

"Board met. Present: John B. C. Lucas, Clement B. Penrose, commissioners. James Mackay, claiming two hundred and eighty-two arpents of land, situate on the commons of St. Louis. (See book No. 1, p. 417; book No. 3, p. 21.) It is the opinion of the board that this claim ought not to be confirmed. Board adjourned till Monday next, 9 o'clock A. M.

"JOHN B. C. LUCAS,
"CLEMENT B. PENROSE.

"(See book No. 4, pp. 185–187.)"

*5. Proceedings under the Act of [*425 the 13th of June, 1812.

"ST. LOUIS, December 28th, 1813.

"James Mackay claims about thirty arpents of land near the town of St. Louis, produces a concession from Charles D. Delassus, Lieutenant-Governor, for about two hundred arpents, dated the 9th of October, 1799. Survey of two hundred and eighty-eight arpents, 17th of December, 1802 (certified).

"M. P. Leduc, as agent of claimant, abandons all but about thirty arpents; the part abandoned supposed to be comprehended by the survey of the commons. It appearing from the minutes, book No. 1, p. 417, that no testimony has been introduced on the merits of this claim. A witness is now admitted.

"Antoine Soulard, duly sworn, says that this claim was granted to claimant by C. D. Delassus, Lieutenant-Governor, on the recommendation of his successor, Z. Suedeau, who had promised the same. It was surveyed under the Spanish Government, and has ever since been considered as property of claimant; that corn was raised on premises for claimant, during three or four of the last years.

"*Note.* No more abandoned than may fall within the commons, should they be confirmed. (See Bates' minutes, pp. 116, 117.)"

6. Extracts from the decision of Mr. Bates under the same act, and Act of 3d March, 1813.

Plaintiffs then read in evidence extracts from Bates' decision, opinions of the recorder of land titles for Missouri territory, as to claims entered under Act of 13th June, 1812, and proven before 1st January, 1814, as provided by the Act of the 3d of March, 1813, comprehending also the claims in the late district of Arkansas, which, by Act of 2d August, 1813, were permitted to be entered until 1st January, 1814, and proven until 1st July, 1814, together with the extensions of quantity provided by fourth section of Act of

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3d March, 1813, and confirmations under the Act of 12th April, 1814.

Warrant or Survey.	Notice to the recorder by whom	Quantity claimed.	Where situated.	Poss'n inhab. or cultivation.	Opinions of the recorder.
Con. fr. C. Delassus, Lt. Gov., 9th Oct., 1779, for about 200 arps.	James Mackay.	30 arpents of the surplus abandoned commons of Saint Louis.	By cultivation as falling within the———	Cultivation in corn from 1810 to 1813.	Confirmed 30 arpents O. S. B. p. min. 1, p. 417, N. M. 117. No more abandoned than may fall within the commons should they be confirmed.
Order of survey, 17th Dec., 1802, for 288 arpents.					

426*] *"RECORDER'S OFFICE, ST. LOUIS, MO., December, 5th, 1840.

"I certify the above to be truly extracted from page 36 of book No. 2, except the caption, which is truly copied from page 1 of book No. 1, being two of the five small books, with the following indorsement on the first, and also on the fifth book, believed to be in the handwriting of Frederick Bates, to wit:

"These five small books are originals in the proper handwriting of the undersigned, being his decisions on land claims since the adjournment of the late board. These were arranged and fairly transcribed for report to the commissioner of the general land office, but not yet recorded in the books, because they have no authority till sanctioned by government. FREDERICK BATES,

"Recorder of Land Titles.

"St. Louis, November 1st, 1815.

"All on file in this office.

"F. R. CONWAY,

"U. S. Recorder of Land Titles in the State of Missouri."

This decision the plaintiffs alleged to have been confirmed by the Act of 29th April, 1816. (3 Litt. & Brown's ed., 328.)

7. Proceedings of the board of commissioners, established by the Acts of 9th July, 1832, and 2d March, 1833.

The Act of 1832 authorized commissioners to examine all the unconfirmed claims to land in Missouri, &c., to class them, and, at the commencement of each session of Congress during said term of examination, lay before the commissioner of the general land office a report of the claims so classed, &c., to be laid before Congress for their final decision upon the claims contained in the first class. The Act of 1833 directed the commissioners to embrace every claim to a donation of land, held in virtue of settlement and cultivation.

Plaintiffs then read in evidence, from the report of the recorder and commissioners for the adjustment of land titles in Missouri, under the Acts of Congress of the 9th of July, 1832, and 2d of March, 1833, printed by authority of Congress, all under the head of No. 54 (James Mackay claiming two hundred and more arpents), pp. 174–177 of said report.

"Monday, February 18th, 1833.

"F. R. Conway, Esq., appeared pursuant to adjournment, having been authorized, by a resolution of the board of commissioners of the 1st of December last, to receive evidence. James Mackay, by his legal representatives, claiming two hundred and more arpents—it being a special location. (See book B, pp. 433, 434; minutes, No. 1, p. 417; minutes of recorder, p. 117). The claimant further refers to book B, p. 486, in order to show that the claim for the commons of St. Louis does not interfere with this *claim; also, to book [*427 No. 5, p. 552. Produces a paper purporting to be a concession from Carlos Dehault Delassus, dated October 9, 1799. (See Bates' decision, p. 36.)

"M. P. Leduc, being duly sworn, saith, that the signature to concession is in the proper handwriting of the said Carlos Dehault Delassus. (Book No. 3, p. 21; No. 4, p. 186.) For further testimony of M. P. Leduc in behalf of this claim, see next claim below. Antoine Soulard, claiming two hundred and four arpents forty-eight perches, to wit: deponent further says that he informed Mr. Soulard that in case he would abandon the part of his claim which was included in the commons of St. Louis, Mr. Bates would confirm the balance of said claim; thereupon Soulard called upon Mr. Bates, and made the abandonment, upon which Bates confirmed the part of said claim which lies east of the common, and at the same time, Soulard, as agent for Mackay, made the same abandonment on Mackay's claim, and that since that time Soulard told the deponent that Mackay disapproved of said abandonment, and that he, the said deponent, never acted as agent for Mackay in said claim; that he does not know that Soulard ever was authorized by Mackay to make said abandonment; that since the time of said abandonment, Mackay remained as ostensible owner and claimant of said land; that he built thereon a house, and lived and died in it. The deponent further says, that what he understands by these claims interfering with the commons of St. Louis, is the part of said claims including in the survey of said commons, made by Mackay in 1806, as recorded. Deponent believes that taxes were paid by Mackay and Soulard on said lands until 1820; and that the part of Mackay's claim which was not confirmed was sold under an execution as being the property of said Mackay. Adjourned until to-morrow, at 10 o'clock A. M.

"F. R. CONWAY."

(See book No. 6, pp. 102–104, and 107.)

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"Thursday, November 7th, 1833.

"The board met pursuant to adjournment. Present: L. F. Linn, A. G. Harrison, F. R. Conway, commissioners. James Mackay claiming two hundred and more arpents. (See p. 103 of this book.) The board, after minutely examining the original papers in this case, see no cause for entertaining even the suspicion of the concession being antedated, as expressed by the former board, and they are unanimously of opinion that this claim ought to be confirmed to the said James Mackay, or to his legal representatives, according to the concession. The board adjourned until to-morrow, 9 o'clock A. M.

L. F. LINN,
"F. R. CONWAY,
"A. G. HARRISON.

(See book No. 6, pp. 304, 306, and 307.)

428*] *8. The Act of Congress passed 4th July, 1836.

By this act, Congress confirmed the decisions in favor of land claimants made by the above commissioners, saving and reserving, however, to all adverse claimants the right to assert the validity of their claims in a court or courts of justice; and the second section declared, that if it should be found that any tract or tracts thus confirmed, or any part thereof, had been previously located by any other person or persons under any law of the United States, or had been surveyed or sold by the United States, the present act should confer no title to such lands in opposition to the rights acquired by such location or purchase, &c., &c.

9. The certificate of the surveyor of the public lands, dated 5th December, 1840, accompanying which was a plat.

"ST. LOUIS, 5th of December, 1840.

"The above plat of survey No. 3,123, containing 225 and ten one hundredth acres, in the name of James Mackay, or his legal representatives, is correctly copied from the approved plat on file in this office. The said survey is the tract confirmed to said James Mackay, or his legal representatives, by the Act of Congress approved the 4th of July, 1836, entitled 'An Act confirming claims to land in the State of Missouri, and for other purposes,' it being No. 54 in the report of the commissioners referred to in the above designated act of Congress. No separate survey has been made of the thirty arpents of said tract, confirmed by an Act of Congress approved the 29th of April, 1816.

"WILLIAM MILBURN,
"Surveyor of the Public Lands of the States of Illinois and Missouri."

10. The deposition of Soulard.

Plaintiffs then read in evidence the deposition of Garlon Soulard, namely:

"We do hereby agree, that the deposition of James G. Soulard be taken on this 30th of November, 1839, to be read in evidence in the trial of a certain cause now pending in the Circuit Court of St. Charles County, State of Missouri, wherein the heirs of James Mackay, deceased, are plaintiffs, and Patrick M. Dillon is defendant. On the part of the plaintiffs, *L. E. Lawless; H. R. Gamble* for defendant. James G. Soulard, of lawful age, being produced, sworn, and examined on the part of the plaintiffs, on his oath says, I was very well acquainted with the late James Mackay, who died at his residence in St. Louis County, in the fall or winter of 1823 or 1824; I think in 1823. He left several children, who are still living; namely, Zeno, Eliza, wife of Reuben Coleman, Catherine, wife of Louis Guyon, Julia, wife of David Bowles, Antoine, James, Amelia Ann, wife of William Coleman, Louisa, lately married to some person in Kentucky, whose name is Baker, *as I am informed; he also [*429 left a widow, who is still living; her name is Isabella L. Mackay. The residence of James Mackay, and where he died, is part of the building now known as the convent, in the south part of the city of St. Louis. The confirmed part of the tract of land on which said house is built is outside and east of the line of the St. Louis Commons; that all the land there inclosed and occupied by Mr. Mackay, at the time of his death, was east of the commons. He had about three acres inclosed (as near as I can remember). The part occupied by him was understood to be that part of said land which was confirmed to Mr. Mackay. Mr. Mackay left a will and appointed executors; namely, Anthony Soulard, my father, Isabella L. Mackay, the widow, and Zeno Mackay, under certain conditions, and Gabriel Long. The widow of James Mackay remained in possession of the mansion house, after the death of her husband, two or three years, I think, by herself and her tenants; after she ceased to occupy it, I think Mr. Mullanply took possession; after which time neither my father nor Mr. Mackay ever had possession of any part of the said tract as executors of James Mackay.

"JAMES G. SOULARD.

"Sworn to and subscribed, before me, this 30th of November, A. D. 1839.

"P. W. WALSH, Justice."

11. Proof of the location and value of the land.

Plaintiffs then proved that land in the possession of Dillon was on the east end of the United States survey offered in evidence, west of the dotted line representing front line of commons; that the land on the extreme west end of said survey was worth three hundred dollars per acre, and increased in value as you proceed east in said survey, and that the monthly value of the premises in possession of Dillon was one cent per month. [Here the plaintiffs closed their case.]

The defendant, to sustain his title, gave in evidence the following documents, and referred to the following laws:

1. Proceedings of Syndics.

2. Survey of the tract claimed as commons, by Mackay, in 1806.

3. Proceedings of the board of commissioners under the Act of Congress passed in 1805, the same law which was referred to by the plaintiffs, as above mentioned.

4. Act of Congress passed 13th of June, 1812.

5. Act of Congress passed 26th of May, 1824, and the testimony taken under it.

6. Act of Congress passed January 27, 1831.

*7. Evidence of Pascal Cerre. [*430

8. Two deeds from the city of St. Louis to Dent and Dillon respectively.

1. Proceedings of Syndics.

"We, the undersigned, Syndics named by

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the meeting of inhabitants holden in the government chamber, the 22d of the month of September of this year, 1782, by Mr. Don Francis Cruzat, Lieutenant Colonel Grad, of infantry, Commander-in-Chief and Lieutenant-Governor of the western part and districts of the Illinois, to establish fixed and unalterable rules for the construction and maintenance of the streets, bridges, and canals of this village, clothed with the authority of the public, which have selected us for these ends, have determined in the said government chamber, and in the presence of the aforesaid Mr. D. F. Cruzat, this day, the 29th of the same month, the following, which is to be regularly conformed to, in future.

"1. There shall be held, the first day of every year, in the government chamber, and in the presence of Monsieur, the lieutenant-governor, a meeting of all the inhabitants of this post, wherein, by a plurality of voices, there shall be named two Syndics, who shall together ('unanimously') superintend the maintenance of the streets, bridges, and canals of the village, and who shall be obliged to cause to be observed and fulfilled strictly the following articles:

"2. The first duty of the Syndics, immediataly after their election, shall be, to examine for themselves the interior locality of the village, and to cause without delay the streets, canals, and bridges to be repaired by the persons who are bound so to do, and whom we indicate below; and that if anyone refuse to conform thereto, they have recourse to law to compel them to fulfill an object so indispensable for the public convenience.

"3. All the inhabitants fronting upon a street along which a run (streamlet) shall pass shall be obliged to give a course to the water to the Mississippi, to make the canals and bridges necessary to maintain them, and keep the streets at all times practicable for the convenience of carriages and public cars.

"4. Besides the specifications in the aforegoing articles, the streets in general shall be repaired and maintained in good condition by the proprietors of the grounds fronting on them, it being understood that those opposite to each other shall co-operate in equal portions, if the case require it.

"5. Finally, the little river bridge, as well as all the roads which are outside of the village, shall be made (and) maintained by the public.

"Done and passed in the government hall, **431*]** and in the presence *of Monsieur, the Lieutenant-Governor, who has signed with us the said day and year *ut supra*.

"PERRAULT.
"BRAGEAUX.
"CERRE.
"RENE KIERCERAUX.
"AUGUSTE CHOUTEAU.
"CHAUVIN.

"Ordinary mark of JOSEPH ⋈ TAILLON.
JOSEPH ⋈ MOINVILLE.

(Signed) "FRANCIS CRUZAT."

"We, the undersigned Syndics, named by the meeting of the inhabitants which was holden in the government chamber, the 22d of the month of September of this year, 1782, by Monsieur Don Francis Cruzat, Lieutenant-Colonel Grad, of infantry, Commandant-in-Chief and Lieutenant-Governor of the western part and districts of the Illinois, to establish fixed and unalterable rules for the construction and maintenance of the inclosures of the commons of this village, clothed with the authority which elected us for these ends, have determined in the said government chamber and in the presence of the aforesaid Mr. Don Francis Cruzat, this day, the 29th of the same month, the following, whereunto conformity for the future shall be regularly observed.

"1. The first day of every year there shall be named publicly in the government chamber in the presence of Monsieur, the Lieutenant-Governor, a Syndic, and immediately afterwards eight arbiters, who shall make the first examination of the inclosures of the commons.

"2. The inclosures of the said commons shall be made and completed every year by the 15th of April, at the latest, and shall be accepted by the eight arbiters the first Sunday after this fourth.

"3. The aforesaid arbiters shall not accept the inclosures, unless they be constructed in such manner that the animals cannot escape from the common and do damage to the seedings of the inhabitants.

"4. It shall be the duty of the said arbiters to render an account of the examination of the inclosures which they shall have made to the Syndic, who thereupon shall immediately nominate eight others, to verify the exactness or negligence of the first. And if there shall be found inclosures which are not in the condition required to be accepted, and the first arbiters shall not have made their report thereof to the Syndic, they shall be condemned to pay a fine each of ten pounds.

"5. Whensoever it shall come to the knowledge of the Syndic, that any inclosure is not in the state decreed by the third article of this *ordinance, it shall be his duty to give [***432** notice thereof to the proprietor, in order that, without delay, he may apply to it the proper remedy; and if the latter shall, through caprice or otherwise, neglect this first duty, the Syndic shall cause it to be repaired at his cost.

"6. If the last who shall have made the visit of examination to the inclosure shall not have given notice to the Syndic of the condition in which he shall have found them, and if, in the interval between his visit and that which is subsequently to be made, it shall be proved that the animals have escaped, and that they have done any damage, he shall be forced to pay for it; and if it happen that the Syndic, having been warned of the bad condition of the inclosures, shall have neglected to give notice thereof to the proprietors, then he shall be responsible for the damage, and be constrained to pay it himself. In like manner, in the case of the proprietors of the inclosures having been notified by the Syndic to go and repair them, and their failure to do so immediately, they shall undergo the same penalty.

"7. If it happen that at any time when the animals shall have escaped, and shall have done damage, that several inclosures are defective, in order to remedy the vexatious consequences which usually result from similar facts, it is ordered, that the damages be paid in equal portions by those whose inclosures are defective. Nevertheless, if it should occur that, in the interval between one visit and another, the in-

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closures having been found in good condition by the Syndic or other persons appointed for that purpose, the animals shall have escaped through any breach made by unknown malefactors, or from any other unexpected event, the damage following thereupon shall rest upon him upon whom it has fallen.

"8. If the animals which shall be turned loose come to be taken up in the fields, without the owners having co-operated in their egress, they shall not be held to pay either the caption or the supposed damage which they may have occasioned.

"9. Whensoever it shall be proven that the gate keeper shall have allowed animals of any sort whatever to escape, by his negligence or otherwise, he shall be forced to pay the damage which may be done.

"10. So soon as the inclosures shall have been accepted, it shall not be permitted to any person whatsoever to pass over them, upon pain of paying for the first offense ten pounds, and for the second twenty-four, and suffer an imprisonment of twenty-four hours.

"11. Malefactors surprised in making a breach in the inclosures, whether to pass themselves, or to allow the animals to pass, whatsoever be the motive, shall be condemned to pay, besides the damages they may have caused, a fine of fifty pounds, and to undergo an imprisonment of fifteen days.

433*] *"12. It is ordered, that all those who may find anyone committing the crime specified in the preceding article shall give the promptest advice thereof to Monsieur, the Lieutenant-Governor, and shall themselves conduct the criminal to prison, if it be possible for them to arrest him; but if anyone, through a mistaken indulgence, or any private interest, shall not strictly fulfill this duty, and if it shall be proven that he has stated to other persons that he had surprised anyone in such case, he shall be reputed an accomplice in the crime, and condemned to pay the same fine and damages, and undergo the same privation, as hereinbefore provided.

"13. The proprietors of each inclosure shall be obliged to place thereupon a stamp, with their name in full, under penalty of fifteen pounds fine.

"14. He who takes a horse in the prairie, to make use of him, without the consent of the master, shall be condemned to pay twenty-five pounds fine, and punished with twenty-four hours' imprisonment; and if any unlucky accident shall befall the horse, he shall pay therefor according to the estimate which shall be made thereof.

"15. If horses or animals tied in the prairies break their rope, and come to be taken up in the fields, he who takes them up shall receive five pounds per head; and the proprietor of the land whereon they are so taken shall demand the damages, which shall be assessed to him by the arbiters.

"16. Whensoever it shall be proven that anyone has taken the rope of an animal fastened in the prairie, he shall pay ten pounds therefor, without prejudice to the five pounds for the taking, and the damages which he shall have occasioned, according to the estimate of the arbiters, which shall be made thereof.

"17. It shall not be permitted to any person whatever to tie horses or other animals upon the lands of others, without their consent; otherwise the owner of the land shall seize the animals, and exact of him to whom they belong five pounds per head, and shall have the right to claim the supposed damages which they may have done.

"18. Whensoever any slaves shall be found to have violated any of the foregoing articles, their masters shall pay the fines, costs of taking up, and damages prescribed; and the aforesaid slaves shall be punished with the lash, according to the exigency of the case.

"19. All the fines shall be deposited in the hands of the Syndic, designated by the lieutenant-governor, of the two who shall be annually named, for the police and maintenance of the village, and they shall be convertible to the public works of the community.

"Done and passed in the government hall, in the presence of *the aforesaid lieu- [*434 tenant-governor, who has signed with us the same day and year *ut supra*.

(Signed) "PERRAULT.
"CERRE.
"RENE KIERCEREAUX.
"BRAGEAUX.
"Ordinary mark of "JH. ⋈ TAILLON.
"JH ⋈ MOINVILLE.
"CHAUVIN.
"AUGUSTE CHOUTEAU.
"FRANC. CRUZAT."

2. Survey of the tract claimed as commons, by Mackay, in 1806.

"I do certify that the above plat represents four thousand two hundred and ninty-three arpents of land, situated joining the town of St. Louis and surveyed by me at the request of the inhabitants of the said St. Louis, who claim the same as their right in common, and at whose request I have included in the said common seven different pretensions of different individuals, as appears on the above plot, besides those which are unknown to me, and not surveyed. Given under my hand at St. Louis, the 22d day of February, 1806.

"JAMES MACKAY.

"Received for record, St. Louis, 27th February, 1806. ANTOINE SOULARD.
"Surveyor-General of Territory of Louisiana."

3. Proceedings of the board of commissioners, under the Act of Congress passed in 1805 (2 Litt. & Brown's ed., 324), and in connection with this the second volume of American State Papers (Public Lands, 549, 377).

Copied from the original documents on file and of record, in book B, pages 486–488.

"May 10th, 1806.

"The board met agreeably to adjournment. Present, Honorable Clement B. Penrose, Esq.

"The inhabitants of the town of St. Louis, claiming four thousand two hundred and ninty-three arpents of land as a common, produce a certificate of survey of the same, dated 22d of February, 1806—a set of regulations of the inhabitants, having for object the keeping in order or repairing of the inclosure of said commons, and imposing penalties on such as should neglect or refuse to repair the same. Said regulations, signed by the then Lieutenant-Governor Cruzat, and dated September 22d, 1782. Auguste Chouteau, being duly sworn, says that the inhabitants never had a

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concession for said commons. That he has always known it as such, although of a much smaller extent at first; that it was first fenced in the year 1764, at the expense of the inhab-
435*] itants, who *always kept it in repair; and further, that every person, inhabitant of the village, was in the habit of pasturing his cattle in the same, and of cutting wood; and further, that he has known the said commons, as surveyed and fenced, for upwards of fifteen years hence. Gregoire Sarpee being sworn, says that he arrived in the country about nineteen or twenty years ago; that he has always known said commons as such; that the same had then acquired its present size; that when he arrived he found the same fenced in, and that every inhabitant was obliged, under certain penalties, to attend to and make such repairs as the said inclosure or fence required; and further, that Sylvester Labbadie having, in the year 1792, obtained a concession for lands forming part of said commons, and having, in consequence thereof, began his improvement of the same, the inhabitants remonstrated against it to the governor, who prevented him from cultivating the same, until such time as the intendant should have decreed otherwise.

"William H. Lecompte, being also sworn, says that he has been an inhabitant of the country for upwards [of] forty-four years; has known the commons from his first arrival in it. That said commons has increased in proportion to the population of the village; that he has known it of the size it now is for upwards of ten years; that the old commons is included in the present one, and that the regulations passed respecting the same were always considered as laws, and enforced as such; and further, that other regulations were had respecting the same, and also put in force. The board reject this claim, for want of actual inhabitation and cultivation, and a duly registered warrant of survey (carried to page 311 for remarks of the board). (See commissioner's minutes, book No. 1, pages 288–290.)"

"July 14th, 1806.

"The board met agreeably to adjournment. Present: The Honorable John B. C. Lucas, Clement B. Penrose, James L. Donaldson, Esquires.

"In the case of the commons of St. Louis, pp. 289, 290, the board remark, that this claim originated under the French government; that grants of commons were usual under the French and Spanish governments, and in conformity with their respective laws,—they deem it to be equitable under Spanish law. On motion, adjourned to Monday, the 16th instant, 9 o'clock A. M. (See minutes, book No. 1, pp. 310–312.)"

"Thursday, Jannary 2d, 1812.

"Board met. Present: John B. C. Lucas, Clement B. Penrose, Frederick Bates, commissioners. Inhabitants of the town of St. Louis, claiming 4,293 arpents of land as a common. (See book No. 1, pp. 289, 311.)

"It is the opinion of a majority of the board
436*] that this claim *ought not to be granted; Clement B. Penrose, commissioner, voting for a confirmation thereof under the usages and customs of the Spanish government. Board adjourned till Monday next, nine o'clock A. M.

JOHN B. C. LUCAS.
" CLEMENT B. PENROSE.
" FREDERICK BATES.

"(See commissioner's minutes, book No. 5, pp. 551–553.)"

4. Act of Congress passed the 13th of June, 1812 (2 Litt. & Brown's ed., 748).

This act, amongst other things, enacted: "That the rights, titles and claims to town or village lots, out lots, common field lots, and commons in, adjoining, and belonging to the several towns or villages of Portage des Sioux, St. Charles, St. Louis, &c., &c., which lots have been inhabited, cultivated, or possessed prior to the 20th day of December, 1803, shall be, and the same are hereby confirmed to the inhabitants of the respective towns or villages aforesaid, according to their several right or rights in common thereto; provided, that nothing herein contained shall be construed to effect the rights of any persons claiming the same lands, or any part thereof, whose claims have been confirmed by the board of commissioners for adjusting and settling claims to land in the said territory."

5. Act of Congress passed on the 26th day of May, 1824 (4 Litt. & Brown's ed., 5), and the testimony taken under it.

Testimony relating to town and village lots, out lots, and common field lots in, adjoining, or belonging to the several towns or villages of Portage des Sioux, St. Charles, St. Louis, St. Ferdinand, Villa a Robert, Carondelet, Ste. Genevieve, New Madrid, New Bourbon, Little Prairie, and Mine a Burton, in Missouri; and the Village of Arkansas in the Territory of Arkansas, as directed by an Act of Congress passed May 26th, 1824.

THEODORE HUNT,
Recorder of Land Titles.

(See Hunt's minute book, No. 1, p. 1.)

The mayor, aldermen, and citizens of the city of St. Louis produce Henry Douchonquette and Joseph Charleville, for the purpose of having their depositions recorded as relates to the St. Louis commons.

Henry Douchonquette, being duly sworn, says he is sixty-six years of age and has lived in St. Louis upwards of forty years, and during this time, until the change of government took place, he always knew there was a common belonging to the inhabitants of the town of St. Louis, and that there was a fence around it, and that he has often assisted to make and keep in repair the said fence. As near as he can describe it, it was bounded as follows: The fence began near to where Mr. Reynard now lives, above the town, and run back of the town; and from thence to a Carondelet field *fence, or to the River des Peres; [*437 and the ground thus taken in was considered the commons.

HENRY DOUCHONQUETTE.

Sworn to before me, November 22d, 1825.

THEODORE HUNT,
Recorder of Land Titles.

Joseph Charleville, being duly sworn, says he has resided thirty-five years in the town of St. Louis, and is fifty-five years old, and has had the deposition of Henry Douchonquette

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read to him, and of his knowledge he knows it to be true. JOSEPH CHARLEVILLE.

Sworn to before me, November 22d, 1825.
THEODORE HUNT,
Recorder of Land Titles.

Mackay Wherry, being duly sworn, says he has truly translated and read to Henry Douchonquette and Joseph Charleville the above depositions before they signed the same, and they said they were true. M. WHERRY.

Sworn to before me, November 22d, 1825.
THEODORE HUNT,
Recorder of Land Titles.

(See Hunt's MS. book, No. 3, p. 79.)

John Bap. Lorain, Sen., being duly sworn, as relates to the commons of St. Louis, says he is about eighty-four years of age, and it is about fifty years since he first came to reside in St. Louis, it being when Piernas was lieutenant-governor of this country; and he, this deponent says, when he first came to reside at St Louis, the land fenced in between the Mississippi and the common field fence (excepting the town and such small grants as were made within the said limits) was a common for the use of the inhabitants of the town of St. Louis; certain he is that it was always used as such by the inhabitants, from the time he first came to reside in St. Louis until he removed to Florisant, about twenty-five years ago; and this deponent further says, that when he first came to St. Louis the commons extended to the River des Peres; but after that, when Carondelet was laid out, there was an agreement made between the inhabitants of St. Louis and the inhabitants of Carondelet that the common field fence of St. Louis should join the common field fence of Carondelet, and that all east of the St. Louis field fence should belong to the inhabitants of St. Louis, and west, to Carondelet.

his
JOHN BAPTISTE ⋈ LORAIN, Pere.
mark.

Sworn to before me, November 23d, 1825.
THEODORE HUNT,
Recorder of Land Titles.

Baptiste Dominee, being duly sworn, says he is seventy-five years of age, and will have re-
438*] sided forty-six years in St. Louis *next February, and that he has had the deposition of John Baptiste Lorain, pere, read to him, and that he knows it to be true.

his
BAPTISE ⋈ DOMINEE.
mark.

Sworn to before me, November 3d, 1825.
THEODORE HUNT,
Recorder of Land Titles.

Alexander Gremaux, dit Charpentier, being duly sworn, says he is sixty-six years of age, and has resided in St. Louis forty-four years, and has heard read to him the deposition of John B. Lorain, Senior, and knows it to be true; and he further knows, that the commons was surveyed by Antoine Soulard, in the time of the Spanish government.

his
ALEXANDER ⋈ GREMAUX, dit Charpentier.
mark.

Sworn to before me, November 23d, 1825.
THEODORE HUNT,
Recorder of Land Titles.

Mackay Wherry, being duly sworn, says that he has truly translated and read to John Baptiste Lorain, Senior, the aforegoing deposition of his, before he signed the same, and that he said it was true; and that he likewise translated and read to Baptiste Dominee and Alexander Gremaux, dit Charpentier, the deposition of John Baptiste Lorain, Senior, and that they said it was, to their knowledge, true; and this deponent further says that he has translated and read the depositions of Baptiste Dominee and Alexander Gremaux to each of them before they signed the same.

M. WHERRY.

Sworn to before me, November 23d, 1825.
THEODORE HUNT,
Recorder of Land Titles.

(See Hunt's minutes, book No. 3, pages 82 and 83.)

Baptiste Rivieré del Bacané, being duly sworn, in relation to the St. Louis commons, says the bounds of the commons began where the ox-mill now is, and thence west, up the hill; thence southwardly, in the rear of where Joseph Papen now lives; after it crossed Mill Creek, it went to the Prairie des Noyer; thence southwardly, about an arpent or two below the place called the Pain Sucre, which place is a little in the rear of where the shot-tower now is; and eastwardly by the Mississippi, passing by the spring of Beneto Vasquez. And this deponent says that for upwards of sixty years the land contained within these limits was the St. Louis commons, and he believes was granted by St. Ange; and he does not live in St. Louis, nor has any lot there.

his
BAPTISTE ⋈ RIVIERE.
mark.

*Sworn to before me, November 23d, [*439
1825. THEODORE HUNT,
Recorder of Land Titles.

M. P. Leduc, being duly sworn, says he has truly translated and read the above to Baptiste Riviere. M. P. LEDUC.

THEODORE HUNT,
Recorder of Land Titles.

Pierre Chouteau, Senior, being duly sworn, as relates to the St. Louis commons, says that he came to this town about six months after the foundation of the same, and from that time he, of his knowledge, knows that the commons was recognized and allowed by the different lieutenant-governors, as well French as Spanish; and he further says, that as the town enlarged, there were meetings held of the inhabitants at the lieutenant-governor's, for the purpose of enlarging the commons. This was done more than once, and, as it was determined on at said meetings, the fence was removed, so as to enlarge the same for the use of the inhabitants of said town of St. Louis; and he further says, all land lying between the common field fence (excepting the ancient concession) and the river was considered as commons for the use of the inhabitants of St. Louis. He, this deponent, further says, that about twelve years ago he understood that Madam Laquaifee had a lot at the upper part of the town, adjoining the halfmoon battery, but before that time he never heard of such a claim, and he, of his knowledge, knows it never was possessed or occupied by any person before or at the

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time the change of government took place from France to the United States.

PRE. CHOUTEAU.

Sworn to before me, November 24th, 1825.

THEODORE HUNT,
Recorder of Land Titles.

(See Hunt's minutes, book No. 3, pages 84 and 85.)

Joseph Papen, being produced by Baptiste Douchonquette, was duly sworn, and says that he was born in the town of St. Louis, and is forty-five years of age, and has always lived in said town of St. Louis; that to the knowledge of this deponent there was no inclosure or common field lots below the town of St. Louis. This deponent further says, that he is the grandson of Veuve Chouteau, the mother of Auguste Chouteau, and recollects perfectly well, that, when a small boy, the hands of the then commandant drove the hands of his grandmother from off the land which his grandmother claimed, below the town of St. Louis, called the Little Prairie; and further this deponent says he never heard of the claims of Ortes, and Cambras, and Gervais, that is said was situated in this same prairie.

JOSEPH PAPEN.

Sworn to before me, August 29th, 1825.

THEODORE HUNT,
Recorder of Land Titles.

440*] *Francis Caillon, being duly sworn, says he has resided in the town of St. Louis for fifty-eight years, and to his knowledge there never was an inclosure in the Little Prairie south of the town of St. Louis. About thirty-five years ago, to the knowledge of this deponent, Madame Chouteau sent a man, Dubois, to cultivate the land she claimed in the said Little Prairie, and to the knowledge of this deponent, the then citizens of St. Louis complained to Perez, the then commandant [—] forbid that any inclosures or cultivation should be made there, and they immediately desisted; and this deponent says he never has heard of any attempt to cultivate or inclose *and* of the said Little Prairie, south of the town of St. Louis. This deponent further says, that he was well acquainted with Ortes, and Cambras, and Gervais, and, to his knowledge, they, nor either of them, ever did inclose, or cultivate, or claim any land in this said Little Prairie, south of the town of St. Louis.

his
FRANCOIS ⋈ CAILLON.
mark.

Sworn to before me, August 29th, 1825.

THEODORE HUNT,
Recorder of Land Titles.

Baptiste Dominé, being duly sworn, says he has resided in the town of St. Louis for forty-five years, being occasionally absent for three or four months at a time, and, to his knowledge, during these forty-five years, there never was any land inclosed or cultivated in the Little Prairie, south of the town of St. Louis.

his
BAPTISTE ⋈ DOMINE.
mark.

Sworn to before me, August 29th, 1825.

THEODORE HUNT,
Recorder of Land Titles.

Regis Vasseur, being duly sworn, says he has resided in the town of St. Louis for forty-eight years, and during the whole of this time the Little Prairie, south of the town of St. Louis belonged to the inhabitants of said town as a commons, and during this time never was cultivated or inclosed.

his
REGIS ⋈ VASSEUR.
mark.

Sworn to before me, August 29th, 1825.

THEODORE HUNT,
Recorder of Land Titles.

Horatio Cozens, being duly sworn, that he has translated and explained truly the above depositions to Joseph Papen, Francois Caillon, Baptiste Dominé, and Regis Vasseur, respectively, before they swore to the same.

HORATIO COZENS.

Sworn to before me, August 29th, 1825.

THEODORE HUNT,
Recorder of Land Titles.

(See Hunt's minutes, book No. 2, pages 171–173.)

*RECORDER'S OFFICE, ST. LOUIS, MISSOURI, 5th Sept., 1839. } [*441

I certify the foregoing, in part, to be truly copied from the original documents on file, and the balance to be truly transcribed from the books all on file and of record in this office, being a full and complete transcript of all that appears of record in this office in relation to the claim of the inhabitants of the town of St. Louis to a common. F. R. CONWAY,
United States Recorder of Land Titles in the State of Missouri.

To the admission of all this evidence the plaintiff objected, which objection the court overruled; to which decision of the court overruling the objection of plaintiff, and admitting said documents in evidence, plaintiff excepted, and prayed that said exception be allowed, signed and sealed by the court here, and made part of the record in this cause.

(Signed) EZRA HUNT. [SEAL.]

6. Act of Congress passed January 27th, 1831. (4 Litt. & Brown's ed., 435.)

This act declared: "That the United States do hereby relinquish to the inhabitants of the several towns or villages of Portage des Sioux, St. Charles, St. Louis, &c., &c., all the right, title, and interest of the United States in and to the town or village lots, out lots, common field lots, and commons, in, adjoining, and belonging to the said towns or villages, confirmed to them respectively by the first section of the Act of Congress, entitled, &c., passed on the 13th day of June, 1812.

In the course of the trial a transcript of a record and deed were offered in evidence on the part of the defendant, and objected to by the plaintiff. The court sustained the objection, to which opinion the defendant excepted; but the Supreme Court having no jurisdiction of the matter, it is unnecessary to notice it further.

7. Evidence of Pascal Cerre.

"Pascal Cerre, being sworn, on his oath stated: I have resided in St. Louis I may say since 1787. I was then fourteen years of age. I was a boy before then, and was in St. Louis before then; but cannot say that I remember anything except since 1787. I was pretty familiar with the tract of land called St. Louis Commons since 1787, and also acquainted with

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Mr. Mackay's claim from the time he built his brick house. The land lying south of the Chouteau mill tract was owned by the inhabitants of St. Louis, or most of them, as a common. I knew the situation of the Barriere des Noyers field; but not the situation of the common fence in relation thereto. I cannot tell whether common fence was west of Mackay's claim. The common fence began at the wind-mill, which is at the upper end of the town of **442***] St. Louis, at Menard *house, betwixt the wind-mill and ox-mill, and run up in a western direction, passing by a little mound south of Ashley's premises to the front line of the forty arpents tract; then south along that line, near Madame Leioux, now Colonel Johnson's premises; then took a west direction towards the mill-pond, and went by a place used to be called Motard's plantation, now from then it went west to the front line of the forty arpents in Prairie des Noyers, in a southeast direction from Fontaine's house, and running south passed by the spring in A. Gamble's, now McDonald's, plantation, ten or twenty feet east of said spring; then in a southern direction to the northeast corner of the Carondelet common field; and thence, I heard, the Carondelet fence joined in, and went to the River des Peres. From the northeast corner of the Carondelet field, the fence went eastwardly to , now the shot-factory. The house where Mackay lived and died is now the convent. The land that lies west, to wit, the land described in the United States survey as Mackay's claim, between the line there designated and dotted as front boundary of St. Louis commons and Motard, on the west of said claim, was used as common, as well as the balance of the common. Motard's place is in the Cul-de-Sac, north of the fence. Where the spring of Motard is and his house was north of the fence; and Motard had no improvement south of the fence. The common fence never went to Stokes' place before it turned south, but went more to the left. There was no improvement south of Motard's fence; but all was brush and commons. The western part of the United States survey was always used as commons for grazing, to separate the cattle from the common fields, which were open. The inhabitants of the village got their wood on said land used as commons, when there was timber on it. My father did so. The land included in Mackay's survey, which was shown to witness, was used as commons until 1796 until the reign of Zenon Trudeau, when they ceased fencing the same as commons. It was continued to be used as wood and pasturage from that till 1804, and since. I believe that after 1796 all the country around St. Louis was used as common and indiscriminately, whether within or without the limits of where the commons fence stood. I went within the commons to get horses and hunt while the fence stood. There were plantations on the bank of the Mississippi—Brazeau, Tayon, and others. Brazeau, Tayon, and others had separate fences, including all their cultivated ground, but did not go west further than the Carondelet Road, which run then more easterly than now. My father had property within the commons, seventy-two arpents; he had a fence on it at all times until now. Vasquez had formerly a cabin in the commons, east of A. Gamble's, in the commons where Carr Lane now owns. A negro man lived in the cabin, and had a small inclosure, and was called Benete's spring—*la fontaine à Benète*. He lived there in 1788 and 1789. I don't know *whether he had a concession. Brazeau,[*443 Joseph, had property within the commons, and his fence there, his family and stock. Settlement, I knew of none but the settlement the negro lived in, within the commons, west of the Carondelet Road. The other plantations went no further west than the Carondelet Road. The Soulard property, which came from my father, went back to the Carondelet Road, and no farther. I do not know that horses were continued to be pastured at liberty, except on the commons. I only heard of Mackay's claim till about twenty-four or twenty-five years ago, when he went and built his house. I have heard of Marie Nicol claim, which went by the name of Lefeore de Marie Ni Colle. It is in the commons on the northeast end of the commons, west of William Russell's, or rather northwest. The common fence was in good order in 1787. In 1782 I was in St. Louis, but can[not] say whether the fence was there."

8. Two deeds from the city of St. Louis to Dent and Dillon respectively. The deed to Dillon was dated on the 7th of April, 1836.

To the admitting of which in evidence plaintiffs objected; which objection the court overruled; to which judgment of the court overruling the objection of plaintiffs, and admitting said documents in evidence, plaintiffs excepted. Here the defendant closed this cause.

Thereupon defendant moved the court to give the jury the following instruction:

"That the claim of the inhabitants of the town of St. Louis to commons, as exhibited upon the copy of the claim given in evidence, was confirmed by the Act of Congress of the 13th June, 1812, to the inhabitants of said town according to the claim, and that the title to the land so confirmed is a valid title against the title of the plaintiffs under the confirmation, by the Act of Congress of the 4th July, 1836."

Given. To the giving of which instruction plaintiffs objected; which objection the court overruled; to which judgment of the court overruling plaintiff's objection, and giving the said instructions, plaintiffs excepted; and thereupon plaintiffs moved the court to give the jury the following instructions:

"That Mackay's survey of common, preserving Mackay's claim on the northeast part thereof, is conclusive that the claim of commons did not extend over Mackay's claim, as beween those claiming the common and Mackay or his heirs. That Mackey's survey of commons, including his claim, is good evidence to go to the jury that the claim of commons did not extend over and cover Mackay's claim. That the deed from the city to Dent conveyed no title under which defendant may justify in this action. That the deed from the city to Dillon conveyed no title under which defendant may justify in this action."

*Refused. All and each of which [*444 instructions the court refused to give: to

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which judgment of the court overruling plaintiff's motion, and refusing to give the said instructions, or any of them, plaintiffs excepted. These were all the instructions asked for, or given, or refused. And plaintiffs pray that their said several exceptions herein contained and set forth may be allowed, signed and sealed by the court here, and made part of the record in this cause. EZRA HUNT. [SEAL.]

The other bill of exceptions is in the words and figures following, to wit:

"ISABELLA MACKAY ET AL.
v.
PATRICK M. DILLON.
"*Ejectment.*

"ST. CHARLES CIRCUIT COURT:

"Be it remembered that plaintiffs moved the court for reasons filed, to wit:

"ISABELLA MACKAY ET AL.
v.
PATRICK M. DILLON.
"*Ejectment.*

"Plaintiffs move the court to set aside the verdict rendered in this cause, and grant them a new trial, because,

"1st. The court misinstructed the jury.

"2d. Because the court refused to give the instructions prayed for by plaintiffs.

"3d. Because the jury found against law and evidence.

"4th. Because the jury found against the weight of evidence.

"5th. Because the court admitted evidence that ought to have been excluded.

"6th. The allusions and instructions of the court operated as a surprise upon the plaintiffs.

"Isabella Mackay *et al.*, plaintiffs, by their attorney, Bryan Mullanphy, moved the court to set aside the verdict in this cause, and grant them a new trial, which motion the court overruled; to which judgment of the court overruling said motion, and refusing to set aside said verdict, and grant plaintiffs a new trial, plaintiffs excepted; all evidence and matters in the cause being preserved in a previous bill of exceptions in this cause, plaintiffs pray that this exception now here taken be allowed, signed and sealed by the court here, and made part of the record in this cause. EZRA HUNT. [SEAL.]"

Under these instructions of the court, the jury found a verdict for the defendant; and upon the bills of exceptions the case was carried up to the Supreme Court of Missouri, which, on the 24th of May, 1841, affirmed the judgment of the court below.

To review this opinion and judgment, a writ of error brought the case to this court.

445*] *The cause was argued by *Mr. Lawless* for the plaintiff in error, and *Messrs. Gamble* and *Bates* for the defendant in error. The great but necessary length of the statement by the reporter renders it impossible to report these arguments, which were printed, and occupied forty pages.

Mr. Justice CATRON delivered the opinion of the court:

The record before us is brought here by a writ of error to the Supreme Court of Missouri, under the twenty-fifth section of the Judiciary Act. The action was an ejectment for land, to which each party claimed title by virtue of an act of Congress confirming interfering Spanish claims.

The evidence on part of the plaintiffs having been introduced in the State court of original jurisdiction, the defendant offered to read copies of certain documents and depositions taken in 1806 and 1825, certified by the United States recorder of land titles in the State of Missouri, as truly copied from the originals on file and of record in his office. These were objected to, on the part of the plaintiffs, as incompetent to go to the jury; the objection was overruled, the evidence admitted, and an exception taken. And the first question is, was the evidence thus offered competent? It is set out in the report of the case, and need not be further described. As the objection draws in question the nature and character of the evidence, it is deemed proper to state here what they are; less for the purpose of disposing of the ruling of the court on this point, than as preparatory to the decision of others that follow, each involving the effect and character of the evidence more or less.

By the third article of the Treaty of 1803, by which Louisiana was acquired, the inhabitants were to be maintained and protected in the free enjoyment of their property in the ceded territory. To carry the treaty into execution, as regarded titles and claims to land, Congress, by the Act of March 2d, 1805, provided that a board of commissioners should be appointed by the President, and also a recorder of land titles; which was accordingly done. The board for Louisiana (now Missouri and Arkansas) sat at St. Louis, as at that place the recorder's office was established, and is yet kept.

By the fourth section of the act, all those asserting claims to land founded on concessions or other assumptions of right to obtain titles from the United States, and which claims originated with the French or Spanish governments prior to the 20th of December, 1803, were required, on or before the 1st day of March, 1806, to deliver to the recorder written notices of claim, stating the nature and extent thereof, together with a plat of the tract claimed, and written evidences tending to establish the right. The notice, plat, and evidences were to be recorded in books to be kept by *the recorder for that purpose. This [*446 recorded notice and evidence formed the foundation in each case for the action of the board; although other evidence might be required by it, or be adduced by the claimant. The board was to decide in a summary way, according to justice and equity, on all claims thus filed.

It was directed to appoint a clerk, whose duty it should be to enter in a book full and correct minutes of the proceedings and decisions of the board; together with the evidence on which each decision was made; the book, on the dissolution of the board, was to be deposited with the recorder of land titles; but the clerk was first to make two copies, one of which he was to forward to the Secretary of the Treasury, and the other was to be deposited with the Surveyor-General in said district. According to this law, the inhabitants of St. Louis filed their notice of claim, plat, and evi-

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dences, in 1806, asking to have the town common confirmed to them.

By the first section of the Act of 1812 (June 13th), Congress confirmed the claim to commons adjoining and belonging to St. Louis; with similar claims made by other towns. But no extent or boundaries were given to show what land was granted; nor is there anything in the Act of 1812 from which a court of justice can legally declare that the land set forth by the survey, and proved as commons by witnesses, in 1806, is the precise land Congress granted; in other words, the act did not adopt the evidence laid before the board for any purpose; and the boundaries of claims thus confirmed were designedly (as we suppose) left open to the settlement of the respective claimants, by litigation in the courts of justice, or otherwise.

The confirmation extended to town lots, out lots, common field lots, and commons in, adjoining, or belonging to the several towns or villages. And the Act of 1812 made it the duty of the principal deputy-surveyor of the territory, as soon thereafter as might be, to survey, or cause to be done, and marked, the out boundary lines of the several towns, so as to include the out lots, common field lots, and commons; of this out boundary survey, he was to make plats, and transmit them to the surveyor-general, who was to forward copies to the commissioner of the general land office and to the United States recorder of land titles in Missouri. The object of this proceeding on part of the government, was to sever the confirmed claims in a mass from the remaining lands of the United States, and others outside of the boundary, and nothing more.

The Act of May 26th, 1824, supplemental to that of 1812, authorized further proofs to be taken before the recorder in regard to town lots, out lots, and common field lots, confirmed by the Act of 1812, as respected inhabitation, cultivation, or possession, and the boundaries and extent of each claim; but the provision **447***] does not *extend in terms to the commons. In virtue of this act, however, the evidence found in the record, and taken before the recorder in 1825, was filed in the recorder's office further to establish the extent of the town commons.

The objection taken in the State Circuit Court was to the whole evidence certified from the recorder's office, without discrimination, and the question turns on its competency for any purpose.

The powers of the Supreme Court are limited in cases coming up from the State courts, under the twenty-fifth section of the Judiciary Act, to questions of law, where the final judgment or decree draws in question the validity of a treaty or statute of the United States, &c., or where their construction is drawn in question, or an authority exercised under them; and as the admission of evidence to establish the mere fact of boundary in regard to the extent of grant cannot raise a question involving either the validity or construction of an act of Congress, &c., this court has no jurisdiction to consider and revise the decision of a State court, however erroneous it may be in admitting the evidence to establish the fact. But when evidence is admitted as competent for this purpose, and it is sought to give it effect for other purposes which do involve questions giving this court jurisdiction, then the decisions of State courts on the effect of such evidence may be fully considered here, and their judgments reversed or affirmed, in a similar manner as if a like question had arisen in a supreme court of error of a State, when reversing the proceedings of inferior courts of original jurisdiction—and on this principle we are compelled to act in the present suit, when dealing with the instruction given on behalf of the defendant.

2. The following instructions were next asked on part of the plaintiffs, and refused: "That Mackay's survey of commons, preserving Mackay's claim on the northeast part thereof, is conclusive that the claim of commons did not extend over Mackay's claim, as between those claiming the common and Mackay or his heirs. That Mackay's survey of commons, including his claim, is good evidence to go to the jury that the claim of commons did not extend over and cover Mackay's claim."

The survey referred to was the one made in 1806, at the instance of the inhabitants of St. Louis, for the purpose of presenting their claim to commons in due form to the board. It was in its nature a private survey, not binding on the United States; and to avoid any implication to the contrary, the Act of February 28th, 1806, was passed, which extended the powers of the Surveyor-General of Louisiana over the land in controversy, and made it his duty to appoint principal deputies; over these, the commissioners at St. Louis had power given to them, by which surveys could be ordered of private claims. When the board desired surveys to be made, they ordered them to be executed at the expense of the party interested. *And the law declares that every such [*448 survey, as well as every other survey, by whatever authority heretofore executed (those of legal and complete titles only excepted), shall be held and considered as private surveys only; and all tracts of land, the titles to which may be ultimately confirmed by Congress, shall, prior to the issuing of patents, be resurveyed, if judged necessary, under the authority of the surveyor-general. It follows, that Mackay's survey of 1806 had no influence on the title of either party, and that the instructions asked were properly refused.

3. The following instruction was asked for, and given, on part of the defendants: "That the claim of the inhabitants of the town of St. Louis to commons, as exhibited upon the copy of the claim given in evidence, was confirmed by the Act of Congress of the 13th of June, 1812, to the inhabitants of said town, according to the claim, and that the title to the land so confirmed is a valid title against the title of the plaintiffs under the confirmation, by the Act of Congress of the 4th of July, 1836."

It assumes, as matter of law, that the Act of 1812 adopted Mackay's survey, and the evidence given in its support; that they are part of the grant, as to its extent and legal effect, and conclusive as against the plaintiff's confirmation. On the trial, both parties admitted that the land in dispute lies within the survey of 1806, and therefore the instruction took the

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case from the jury, and cut off all proof to the contrary of this being the true boundary; whereas the survey was a mere private act, as already stated, and concluded nothing for either side; and in holding the contrary the State court erred, and for which the judgment must be reversed.

By what description of surveys the United States are bound, and those claiming title under them governed, we have already, during the present term, been called on to decide, in the case of *Jourdan* v. *Barrett* (*ante*, p. 169), and need not repeat. Nor is it necessary to inquire here what the effect of a legal survey of the St. Louis common is, as the question has been directly presented in the cause of *Les Bois* v. *Bramell*, heard and decided concurrently with this, and on the same arguments, and to the opinion in which, in this respect, we refer.

Rev'g 7 Mo., 7.
Cited—7 How., 592, 594; 8 How., 339; 16 How., 508, 512; 14 Wall., 313.

449*] *MARIE NICOLLE LES BOIS, *Plaintiff in Error,*

v.

SAMUEL BRAMELL, *Defendant.*

Acts confirming commons in St. Louis and claims to land in Missouri—Upper Louisiana—political power is to determine between conflicting claims under defective Spanish title to lands in Missouri—bar.

A private survey of land, claimed under an old Spanish concession and presented to the board of commissioners appointed under the Act of 1805, is not conclusive against the party presenting it to show the boundaries of the claim, but is proper evidence to go to the jury, who are to decide upon its limits.

Under the acts of 1824, 1826, and 1828, the District Court of Missouri was authorized to receive petitions of claimants to land, until the 26th of May, 1829. In 1831, when claims which had not been presented were standing under a bar, Congress confirmed the title of the inhabitants of the town of St. Louis to the adjacent commons. This act was valid, unless the opposing claimant then possessed a vested interest which was protected by the Louisiana Treaty.

By the third article of that treaty, the inhabitants were to be protected in their property.

But land held under a concession and survey was not finally severed from the royal domain and converted into private property.

The power of granting the public domain was in Morales, who resided in New Orleans. His regulations were in force in Upper Louisiana, and by them the title to land held under a concession and survey was not perfected until ratified by him and a final grant issued.

This power was in a great degree a political power, and, by the treaty, the United States assumed the same exclusive right to deal with the title, in their political and sovereign capacity. The courts of justice cannot, without legislation, execute the power, because the holder of an incomplete title has no standing in court.

A confirmatory act, passed by Congress in 1836, does not reach back to the original concession, and exclude grants of the same land made in the intermediate time, either by Congress itself, or a board of commissioners, or the District Court, acting under its authority.

In the Act of 1836, Congress had in view the situation of persons whose titles were, by that act, confirmed to lands which had been previously granted to others, and, in order to meet the case, provided that such confirmed claimants might take up, elsewhere, an amount of public land equal to that which they lost.

The Confirmatory Act of 1836 must therefore be construed to exclude the commons which had been granted, by previous acts, to the town of St. Louis.

These acts, and a survey by the proper public officer in 1832, placed the title of the town in the same condition as if a patent had been issued.

THIS case was brought up by writ of error from the Circuit Court of the United States for the District of Missouri.

It was exactly the same, in most of its points, with the case of *Mackay et al.* v. *Dillon*, reported in a preceding part of this volume. Reference will be made to that case in all the points which are similar.

It was an action of ejectment brought by Les Bois, in the Circuit Court, to recover two hundred and forty-four arpents and fifty perches of land, claimed under a Spanish concession. The defendant, Bramell, claimed title under the acts of Congress of 1812 and 1831, granting a right of common to the town of St. Louis.

The plaintiff's title was as follows:

1. A petition, concession, and survey.

2. Proceedings of the board of commissioners, established by the Act of Congress passed on the 2d of March, 1805.

*3. Proceedings of the board of [*450 commissioners established by the Acts of July 9th, 1832, and March 2d, 1833.

4. The Act of Congress passed on the 4th of July, 1836.

5. A certificate of the surveyor of the public lands, dated September 6, 1838.

These will be taken up in order.

1. A petition, concession, and survey.

The petition was as follows:

"*To Don Charles Delault Delassus, Lieutenant-Colonel attached to the stationary regiment of Louisiana, and Lieutenant-Governor of the upper part of the same province.*

"Marie Nicolle Les Bois has the honor of representing to you, that, having lost her father and mother since her most tender years, in consequence of a well known disaster, which alone would be sufficient to render her situation interesting to all men of feelings, and having had for support since that moment an uncle and aunt, both respectable, who have taken care of her infancy, considering that time in his flight deprives her every day of some one of her protectors; that her brothers and sisters are all married, and loaded with family, and without fortune; that she remains as an isolated being, who cannot expect any assistance of anyone whomsoever; and who, without fortune, finds herself under several

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NOTE.—*Private land claims—Missouri.*

The early Statutes relating to lands and land claims in the territory now forming the State of Missouri are construed and applied in the following cases: Henderson v. Poindexter, 12 Wheat., 530; Ross v. Barland, 1 Pet., 655; Landes v. Brant, 10 How., 348; Burgess v. Gray, 16 How., 48; McCabe v. Worthington, 16 How., 86; Gamache v. Piquignot, 16 How., 451; Guitard v. Stoddard, 16 How., 494; West v. Cochran, 17 How., 403; O'Brien v. Perry, 1 Black., 132; Glasgow v. Hortiz, 1 Black., 595.

As to the construction and application of the Act of July 4th, 1836, confirming the decisions of the commissioners upon land claims in Missouri, see Stoddard v. Chambers, 2 How., 284; Bissell v. Penrose, 8 How., 317; Menard v. Massey, 8 How., 293; Landes v. Brant, 10 How., 348.

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points of view in a calamitous situation, which appears to her to be worthy to attract the attention of the good heart everybody knows you possess. Full of this idea, and convinced of the generosity of the government, which has never ceased to grant favors to the unfortunate, and to be particularly the protector of orphans, she hopes you will be pleased to grant to her the concession of a tract of land situated to the south of this town, and being vacant lands of his majesty's domain, and which may contain two hundred and thirteen arpents in superficie, more or less; which land shall be bounded as follows: to the north, south and west, by the vacant lands of the domain, and to the east by a concession of some width belonging to Mr. Antonio Soulard.

"Such is the statement of my misfortune and pretensions, and I presume to hope this favor of the generosity of a benevolent and generous government, and of a chief as worthy as you are to fulfill its benevolent intentions.

"MARIE NICOLLE LES BOIS.

"St. Louis, May 10, 1803."

The concession was as follows:

"ST. LOUIS, OF ILLINOIS, May 11th, 1803.

"Having seen the foregoing statement, I do grant to Marie Nicolle Le Bois, for her and her heirs, the land which she solicits, in case it is not prejudicial to any person; and the surveyor **451*]** of this *Upper Louisiana, Don Antonio Soulard, shall put the petitioner in possession of the quantity of land she solicits in the place designated; which, when executed, he shall draw out a plat of survey, delivering the same to the party, with his certificate, in order to serve to her to obtain the concession and title in form from the intendant-general, to whom alone corresponds, by royal order, the distributing and granting of all classes of lands of the royal domain.

"CARLOS DEHAULT DELASSUS."

Of Survey.—Upper Louisiana, District of St. Luis de Illinois.

The survey was as follows:

Note. The bounds set to all corners are shown on the plat.

All the line trees were marked with one blaze above two notches. The trees on both sides of the lines were blazed only.

Registered in Book B, of the surveys for said district, folio 17. No. 20.

Of Certificate of survey.

"Dan Antonio Soulard, Surveyor-General of Upper Louisiana: I do hereby certify that I have measured, run the lines, and bounded, in favor of Marie Nicolle Les Bois, a piece of land of two hundred and fifty-four arpents and fifty perches in superficie, measured with the perch of the city of Paris, of eighteen French feet in length, lineal measure of the said city, according to the agrarian measure of this province; which land is situated at about the distance of twenty-five arpents to the southwest of this town of Saint Louis, and is bounded to the north-northwest by lands of Don Santiago Mackay; to the east-southeast by lands belonging to me; to the south-southwest in part by lands of Don Jh. Brazeau, and by vacant lands of the royal domain; and by the west-southwest by vacant lands; which measurement and survey I took without regarding the variation of the needle, which is 7° 30' east, as is evident by the foregoing figurative plat, on which are noted the dimensions, directions of the lines and limits, and other boundaries, &c.

"Said survey was executed by virtue of the memorial and decree of the Lieutenant-Governor and sub-delegate of the royal fisc, Don Carlos Dehault Delassus, dated 11th May, 1803.

"In testimony whereof, I do give the present, with the preceding figurative plat, executed by my exertions on the 27th of May of the current year, in St. Louis, August 20, 1803.

"ANTONIO SOULARD, Surveyor-General.

"Truly translated, St. Louis, December 15, 1832. JULIUS DE MUN."

*2. Proceedings of the board of com- [*452 missioners established by the Act of Congress passed on the 2d of March, 1805.

Proceedings of Commissioners.

"Friday, October 7th, 1808.

"Board met. Present: The Honorable Clement B. Penrose and Frederick Bates.

"Marie Nicolle Les Bois, claiming two hundred and forty-four and one half arpents of land, situated in the commons of St. Louis, produces to the board a concession from Don Charles Dehault Delassus, Lieutenant-Governor for the same, dated May 11th, 1803; a plat and certificate of survey, dated 27th May, 1803, and certified 20th August, same year.

"Laid over for decision; board adjourned.

"CLEMENT B. PENROSE,

"FREDERICK BATES."

"Wednesday, August 21st, 1811.

"Board met. Present: Clement B. Penrose and Frederick Bates, commissioners.

"Marie Nicolle Les Bois, claiming two hundred and forty-four and one half arpents of land (see book No. 3, p. 282). It is the opinion of this board that this claim ought not to be confirmed.

"Board adjourned until to-morrow, eight o'clock A. M. CLEMENT B. PENROSE.

"FREDERICK BATES."

3. Proceedings of the board of commissioners, established by the acts of July 9, 1832, and March 2, 1833.

"Thursday, November 29, 1832.

"Board met pursuant to adjournment. Present: Lewis F. Linn [and] F. R. Conway, commissioners.

"Marie Nicolle Les Bois, by her legal representatives, claiming two hundred and forty-four and a half arpents of land (see book C. pp. 73, 74, and 75, No. 3, p. 283, No. 5, p. 328), produces a paper, purporting to be an original concession for two hundred and thirteen arpents of land, more or less, from Charles Dehault Delassus, dated 11th of May, 1803; also a paper, purporting to be a plat and certificate of survey for two hundred and forty-four arpents and fifty perches, taken 27th of May, and certified 20th of August, 1803, by Antonio Soulard.

"M. P. Leduc, duly sworn, saith, that the signature to said concession is in the proper handwriting of the said Charles D. Delassus, and the signature to said certificate of survey

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is in the proper handwriting of said Soulard.

"The board adjourned until to-morrow, at ten o'clock A. M. L. F. LINN.

"F. R. CONWAY."

453*] *No. 39.

"Tuesday, November 5th, 1833.

"The board met pursuant to adjournment. Present: L. F. Linn, A. G. Harrison, F. R. Conway, commissioners.

"Marie Nicolle Les Bois, claiming two hundred and forty-four and a half arpents of land. (See pp. 64 and 65 of this book, No. 6.) The board are unanimously of opinion that this claim ought to be confirmed to the said Marie Nicolle Les Bois, or her legal representatives, according to the concession.

"The board adjourned until to-morrow at nine o'clock A. M. L. F. LINN,

"F. R. CONWAY.

"A. G. HARRISON."

4. The Act of Congress passed on the 4th of July, 1836.

The purport of this act is set forth, under the eighth head of the plaintiff's title in the case of *Mackay v. Dillon*.

5. A certificate of the surveyor of the public lands, dated September 6, 1838.

This certificate is as follows:

Plat and Certificate of Survey, by Authority of the United States.

"Survey No. 3184.

"Plat and description of the survey of a tract of two hundred and four arpents and fifty perches, equal to two hundred and eight acres of land, situated in township forty-five, north of the base line, range seven, east of the fifth principal meridian, in the State of Missouri, executed on the twenty-fifth day of September, eighteen hundred and thirty-eight, by Charles De Ward, deputy-surveyor, under instructions from the surveyor of the public lands in the States of Illinois and Missouri, dated the sixth day of September, eighteen hundred and thirty-eight.

"This being the tract of land granted, on the eleventh day of May, eighteen hundred and three, to Marie Nicolle Les Bois, by Charles Dehault Delassus, then Lieutenant-Governor, for the government of Spain, of the Province of Upper Louisiana, surveyed on the twenty-seventh day of May, eighteen hundred and three, by Antoine Soulard, Spanish surveyor of the same province, and confirmed to the said Marie Nicolle Les Bois, or her legal representatives, by the Act of Congress of the United States approved the fourth of July, eighteen hundred and thirty-six, entitled 'An Act confirming claims to land in the State of Missouri, and for other purposes,' according to the decision, numbered thirty-nine, of the report of the board of commissioners appointed by the Act of Congress approved the ninth of July, eighteen hundred and thirty-two, entitled 'An Act for the final adjustment of private land 454*] *claims in Missouri; and the Act of Congress approved the second of March, eighteen hundred and thirty-three, supplemental thereto."

Then follows a minute description of the land by metes and bounds.

Defendant's Title.

The evidence offered by the defendant consisted of the first six heads of the title offered by the defendant in the case of *Mackay* v. *Dillon*.

He further offered a plat and survey of the common, made in November, 1832, under instructions from the surveyor of public lands in the States of Illinois and Missouri, and the following certificate:

"SURVEYOR'S OFFICE,
ST. LOUIS, 7th of April, 1841.

"The foregoing plat and description of the survey of the commons of St. Louis are correctly copied from pp. 74, 75, and 76 of record book C, in this office. The plat of the survey, No. 3, 184, subsequently made of the claim of Marie Nicolle Les Bois, within the survey of said commons, is this day laid down on the said foregoing plat of the common, according to the survey of the said claim of Marie Nicolle Les Bois.

WILLIAM MILBURN
"Surveyor of the Public Lands in the States of Illinois and Missouri."

The evidence being closed on both sides, the counsel filed the following agreement:

Agreement by Parties.

It was agreed by the parties, that, at the time of the commencement of this suit, the defendant was in the actual possession and occupation of twenty acres of land, parcel of the tract of land in the declaration mentioned, as tenant of the city of St. Louis, claiming the same as common belonging to the inhabitants of St. Louis, and further, that the matter of dispute in this action exceeds the value of two thousand dollars, exclusive of costs.

It was also admitted by the parties that, from a short time after the settlement of the village of St. Louis, there was a fence, commencing above the town of St. Louis, running westwardly a little west of the village, until it came to the hill near the court-house, and then ran in a direction south of west, until it reached the line of the Barriere des Noyer fields, and then running southwardly along the front of those fields, until it reached the Carondelet fields, and from that point extended to the river. The land on the eastern side of that fence was used by the inhabitants of the town for the pasturage of cattle, and for the supply of wood, and was always *called the common of the town, [*455 while the land on the western side was used for cultivation. The land in question lies on the eastern side of this fence, and within what was called the common. The fence above mentioned was destroyed in the year 1797, at which time the cultivation of the common fields west of said fence was discontinued.

The counsel for the plaintiff then moved the court to instruct the jury, that the survey offered by the inhabitants of St. Louis, in support of their claim, upon which survey was laid down, at the request of the claimants, the concession and survey of Marie Nicolle Les Bois, excludes and protects from the confirmatory operation of the acts of Congress of 18th June, 1812, and Act of Congress of 27th June, 1831, the title of said Marie Nicolle Les Bois to the tract granted to her.

Which instruction the court refused to give; to which decision the plaintiff, by her counsel, excepted.

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Instructions Given.

The court then instructed the jury as follows:

1. That the inhabitants of the town of St. Louis were confirmed in their claim to commons by the acts of Congress of 1812 and1 831.

2. That the notice of claim of said inhabitants, as filed with the recorder of land titles, and exhibited before the board of commissioners, read here to the jury, is evidence of the extent of the said claim to said commons.

3. If the claim of the plaintiff is included within the boundary of the lands confirmed to the town of St. Louis by the acts of 1812 and 1831, then the jury must find for the defendant; because those acts passed the title to the land in controversy to the inhabitants of said town.

To which opinion of the court, in giving the said instructions the plaintiff, by her counsel, excepted. And the plaintiff prays the court to sign and seal this bill of exceptions, which is done accordingly, this 14th day of April, 1841. J. CATRON. [SEAL.] R. W. WELLS. [SEAL.]

Under these instructions, the jury found for the defendant, and to review them the present writ of error was brought.

The cause was argued by *Mr. Magenis*, who made the following points:

1. That the grant and order of survey by the lieutenant-governor, in May, 1803, and the survey made in conformity thereto, raise a legal presumption, that at that date the land so granted and surveyed was royal domain.

456*] *2. That the evidence given on the part of the defendant was not sufficient to rebut that presumption.

3. That by virtue of said grant and survey, the plaintiff was, in contemplation of law, in possession of the land in dispute on May, 1803, and could not be devested thereof under the Act of 1812, except by actual exclusive adverse possession of the same as commons by the inhabitants of St. Louis up to the 20th of December, 1803.

4. That the grant and survey to the plaintiff gave her such a right to the premises as came within the term "property," under the treaty of Louisiana, and that notice of her claim having duly filed by the recorder, she could not be devested thereof by the Act of 1812 or 1831.

5. That by the Act of 1812, legal proof before the recorder of continued inhabitation, cultivation, or possession prior to and up to the 20th of December, 1803, was made a condition precedent to the confirmation of claims to lots or land under that act, and that unless the recorder, upon the proof made, confirmed the claims submitted to him for investigation, or reported them to Congress for confirmation, the same are not confirmed by the Act of 1812 or that of 1831.

6. That the plat and survey of Mackay, if received as evidence of the extent and boundaries of the land claimed as commons, are evidence also to show that the tract granted to the plaintiff was not claimed as commons, or confirmed to the inhabitants of St. Louis as such, by the Act of 1812 or 1831.

Mr. Justice CATRON delivered the opinion of the court:

This case comes up by a writ of error to the Circuit Court of the District of Missouri. It is an action of ejectment for two hundred and eight acres of land, lying within the commons of St. Louis, and confirmed to the plaintiff by the Act of Congress of July 4, 1836; and was surveyed by the authority of the United States, in September, 1838. The Act of 1836, and the survey, made out a good *prima facie* title for the plaintiff.

The defendant claims title under the city of St. Louis; and the title of the city depends on its grant of the commons by the acts of 1812 and 1831. The evidence of identity and boundary of neither claim being disputed, the plaintiff moved the court to instruct the jury, that the survey offered by the inhabitants of St. Louis in support of their claim, upon which survey was laid down, at the request of the claimants, the concession and survey of Marie Nicolle Les Bois, excludes and protects from the confirmatory operation of the Acts of Congress of 13th June, 1812, and Act of Congress of 27th June, 1831, the title of said Marie Nicolle Les Bois to the tract granted to her; which instruction was refused. The survey referred to was one made of the commons in *1806, by James Mackay; and on a [*457 plat of the survey, filed with a notice of claim before the board of commissioners organized by virtue of the Act of 1805, to examine and report on French and Spanish claims, this of Les Bois was laid down, with six others. Mackay's survey was a private one, made at the instance of the inhabitants of St. Louis, and was not binding on the rights of anyone; nor did it profess to exclude the pretensions laid down on the plat, as not being part of the town common, but the reverse. For our further views on the question presented by the instruction, we refer to what is said on it in the case of *Mackay's Heirs* v. *Dillon*, submitted to us at the same time with the present.

The court then instructed the jury as follows:

1. That the inhabitants of the town of St. Louis were confirmed in their claim to commons by the acts of Congress of 1812 and 1831.

2. That the notice of claim of said inhabitants, as filed with the recorder of land titles and exhibited before the board of commissioners, read here to the jury, is evidence of the extent of the said claim to said commons.

3. If the claim of the plaintiff is included within the boundary of the lands confirmed to the town of St. Louis by the acts of 1812 and 1831, then the jury must find for the defendant: because those acts passed the title to the land in controversy to the inhabitants of said town.

These were excepted to.

As to the first instruction given, it may be remarked, that by the Act of June 13, 1812, Congress provided, that the rights, titles, and claims to town or village lots, out lots, common field lots, "and commons," in, adjoining, and belonging to St. Louis (and other towns) should be, and the same were thereby confirmed to the inhabitants, &c.

That this was a general confirmation of the common to the town as a community no one has ever doubted, so far as the confirmation op-

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erated on the lands of the United States; and to which no individual claim or pretension was set up; and the question arising on the instruction is, whether the plaintiff's claim was excepted directly, or by reason of a prior right vested in the plaintiff. The only direct exception in the act is the proviso, "That nothing herein contained shall be construed to affect the rights of any persons claiming the same lands, or any part thereof, whose claims have been confirmed by the 'board of commissioners' for adjusting and settling claims to land in the said territory."

The board referred to was organized according to the Act of March 2, 1805, with powers to examine such claims as that of the plaintiff, and to decide on their validity; and although, by the act, no power was given to make a conclusive adjudication without the sanction of Congress, yet if any claim was declared good and 458*]*valid, and recommended for confirmation, it was of the class mentioned in the foregoing proviso, as we suppose, even when acted on under the Act of 1805; but by the Act of March 3, 1807, sec. 41, the powers of the commissioners were extended, and confirmations of various classes of claims were authorized to be made by the board conclusively, without the intervention of Congress; and for which patents were to issue, on surveys made by officers of the United States.

The foregoing were the only description of titles excepted from the Act of 1812; and as the plaintiff's was not one of them, the act did not apply to it in the saving clause.

The next inquiry on the first instruction given is, as to the operation of the Act of 1831 on the plaintiff's claim.

The Act of May 26, 1824, gave jurisdiction to the District Court of the United States for the Missouri District, to hear and adjudge, in a mode of proceeding according to the rules governing courts of equity, on all claims of the description, and that were in the situation, of the plaintiff's, the United States being defendants; and either party having the right of appeal to the Supreme Court.

The fifth section of the act declares, "That any claim not brought before the District Court within two years from the passing thereof shall be forever barred, both in law and equity; and that no other action at common law, or proceeding in equity, shall ever thereafter be sustained in any court whatever, in relation to said claim."

An act for the relief of Phineas Underwood, and for other purposes, passed the 22d May, 1836, sec. 2 (1 United States Land Laws, 924), declares, that the time for filing petitions under the Act of 1824 shall be, and is hereby extended to the 26th day of May, 1828.

The Act of May 24th, 1828 (4 Litt. & Brown's ed., ch. 90, 298), declares, that the district courts shall be open for the receiving petitions of claimants, under the Act of 1834, until the 26th day of May, 1829, and that the act shall continue in force for the purpose of enabling claimants to obtain a final decision on their claims until the 26th day of May, 1830, and no longer.

The plaintiff instituted no proceedings before the District Court under the Act of 1824; and on the 26th day of May, 1829, her claim stood and was barred. For further views of this court on the character of the bar, we refer to the cases of *Barry* v. *Gamble* (3 Howard, 55), and *Chouteau* v. *Eckhart* (2 Howard, 352).

In January, 1831, the city of St. Louis, and other towns, applied to have their rights of common further confirmed and regulated; and an act of Congress was passed, declaring "That the United States do hereby relinquish to the inhabitants of the several towns of St. Louis, &c., all the right, title and interest in and to *the town or village lots, out lots, com- [*459 mon field lots, and commons—to be held by the inhabitants of the said towns in 'full property,' and to be regulated, or disposed of, for the use of the inhabitants, according to the laws of the State of Missouri." This law vested in the city corporation the town common, in fee-simple, and gave full power to the Legislature of Missouri to incorporate it into the city, by extending the city charter over it. The importance of the act will be understood when we examine the plats and other evidences in the record; from which it will be seen that the city is spreading over the eastern lines of the common, and that it is in part sold out in lots by the corporation already, and fast becoming part of the city.

Les Bois standing barred when the Act of 1831 was passed, in November, 1832, the city caused the common to be officially surveyed, under instructions from the Surveyor-General of Illinois and Missouri, according to the Act of 26th May, 1834, sec. 2 (1 United States Land Laws, ch. 311). This survey was a public one, binding on the United States and the city corporation; and was duly recorded by the surveyor-general in his office. A copy of the plat is in the record, with a detailed description of landmarks, courses, and distances; and these were given in evidence to the jury in the Circuit Court. Thus stood the defendant's title. On July 9th, 1832, a law was passed by Congress, authorizing commissioners to be appointed to act on claims not confirmed previously; and on the 5th of November, 1833, the board organized under the act declared Les Bois' claim valid; and Congress confirmed it, July 4th, 1836.

To avoid the bar, under these circumstances, and to show that neither the Act of 1812, or that of 1831, could deprive the plaintiff of her right, it is insisted she had a vested interest to the land confirmed when the United States acquired Louisiana, which is protected by treaty stipulation, and that such right no act of Congress could defeat; that by the third article of the Treaty of 1803, with France, the inhabitants of the ceded territory were to be incorporated into the Union, to be admitted to the rights, advantages, and immunities of citizens of the United States, and in the mean time they were to be maintained and protected in the free enjoyment of their liberty, property, and religion. And this implied, that after their admission they should be equally protected, and that such would have been the measure of justice applicable to their rights of property by the laws of nations, had the treaty been silent on the subject. On this assumption the plaintiff mainly relies; that it is true in the abstract is not doubted, but it involves several opposing con-

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siderations applicable to her title: 1. Whether such a vested property in the soil existed in Les Bois, before the date of the treaty, as bound the government of Spain to perfect, by the execution of a complete title, the first incipient **460*]** step. 2. Whether *the judicial power has any jurisdiction to interfere and enforce such right, supposing it to exist.

That this government had imposed on it the same duty to perfect the title that rested on Spain before the country was ceded is not open to question; but this was all the United States were bound to perform. How, then, did the plaintiff's claim stand previous to the cession. Her first decree and order of survey bear date in May, 1802, and the survey was made in August, 1803; but there is no evidence that any part of the land was either occupied or cultivated. The lieutenant-governor's decree is in the usual style, and concludes, "that it is given to serve the interested party to obtain the concession and title in form, from the intendant-general, to whom alone corresponds, by royal order, the distributing and granting of all classes of the royal domain."

On the 22d of October, 1798, the King of Spain appointed Morales intendant-general and sub-delegate; he kept his office at New Orleans, and was charged with the superintendence and granting of the public domain in the provinces of Upper and Lower Louisiana, "to the conclusion of all other authority." On July 17th, 1799, Morales published his regulations to the inferior officers and the people of the provinces, so that (in his own language) "all persons who wish to obtain lands may know in what manner they ought to ask for them, and on what conditions lands can be granted and sold; that those who are in possession without the necessary titles may know the steps they ought to take to come to an adjustment; that the commandants and sub-delegates of the intendancy may be informed of what they ought to observe," &c. (2 White's Recopilacion, 284.)

By article eighteen, it is declared: "Experience proves that a great number of those who have asked for land think themselves the legal owners of it; those who have obtained the first decree, by which the surveyor is ordered to measure and put them in possession; others, after a survey has been made, have neglected to ask the title for the property, and as like abuses continuing for a longer time will augment the confusion and disorder which will necessarily result. We declare that no one of those who have obtained said decrees, notwithstanding in virtue of them the survey has taken place, and that they have been put in possession, can be regarded as owners of land until their real titles are delivered completed, with all the formalities before recited."

The formalities recited are found in the three preceding sections, which give precise instructions how the title is to be made out, and where it is to be recorded, by the officers of the general intendancy. The nineteenth article declares: "All those who 'possess' lands in virtue of formal titles made by the governors [such as Delassus was] shall be protected and maintained in their possessions." And by article twenty: "Those who, without the title or pos- **461*]** session *mentioned in the nineteenth article, are found occupying lands, shall be driven therefrom, as from property belonging to the crown," unless they have occupied the same more than ten years.

The board of commissioners who confirmed Les Bois' claim acted on the principle that the regulations of Morales were not in force in Upper Louisiana, more than those of the royal governors, O'Reilly and Gayoso. But as the Lieutenant-Governor, Delassus, referred the claimant in this case, and in all others so far as we know, to the general intendant for a title, and the instructions point out the terms on which a complete title can be had, and the formalities with which it must be clothed, it is difficult to say on what grounds the commissioners come to the conclusion that Morales' regulations were not in force. The rules of proceeding of the board will be found in 5 D. Green's State Papers, 707, and the instructions to which they refer in 2 White's Recopilacion, 228–244.

In an affidavit found in the public documents, and furnished by the same board (5 D. Green's State Papers, 708), Delassus states his practice to have been, that, when a petition was presented for land, if he considered the petitioner possessed merits to entitle him to the concession it was granted, subject to the confirmation of the intendant-general, and that he made an order of survey; these he delivered to the petitioner; but that he kept no books, nor did he make any registry of the decree or order of survey; and that whether the surveyor did so or not was no concern of his, the lieutenant-governor's, nor did he deem it material when the survey was made; as to this, there was no time limited.

From this loose mode of proceeding, it is manifest the whole matter of perfecting the title was referred to the intendant-general; and he, and those acting subordinate to him in this respect, were undoubtedly governed by the intendant's regulations. As the king's representative and deputy, he was to judge whether the considerations moving the lieutenant-governor were such as warranted the grant; next, whether conditions had been performed, &c. The granting power was in a great degree political, and altogether the exercise of royal authority, and of course subject to no supervision but by the same high authority itself. By the treaty, the United States assumed the same exclusive right to deal with the title in their political and sovereign capacity, nor could the courts of justice be permitted to interfere; if they could, and by their decrees complete the title, all power over the subject might have been defeated, not by the courts of the Union only, but by the State courts also. And therefore the contemporary construction and practical understanding of the treaty for forty years has been, that claims like the plaintiff's had no standing in a court of justice until confirmed by Congress, or by its authority.

Next, it insisted that the confirmation of 1836 established the *original validity of Les **[*462** Bois' title; that this stands as an adjudged and concluded fact, which a court of justice cannot controvert; and the confirmation having operated on the concession of 1802, therefore, by relation, it overreaches the confirmations of the town common of 1812 and 1831.

The doctrine of relation in an action of eject-

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ment, by which the legal title by patent is made to take date from the entry or inception of title, is familiar in some of the States, and has been acted on this court. It applies where both the litigant parties have a grant; the case of *Ross* v. *Barland* (1 Peters, 655) was of this description. There the younger patent was founded on the best right in equity, standing in advance of either patent, and the equities were tried at law. But if the elder or better entry had not been carried into a grant, a court of equity might have administered the same measure of justice, and decreed the land from the patentee, whose legal title was founded on the inferior equity. This is the constant practice in the State courts in similar cases. But when courts of law go behind conflicting patents, and contest the equities on which they are founded, it has never been held that the patent aided the equitable title; it must come in support of the grant, and stand on its own merits. So in this case; the plaintiff admits her grant, of itself, is insufficient to authorize a recovery, and that she must go behind it; and there she is met by the objection, that her claim had no standing in a court of equity or of law, up to the date of its confirmation, and depended on the political power. The plaintiff's assumption comes only to this, that the United States erred in granting the common first, in prejudice of her better right to have the first grant. To this assumption, the answer is, that if the sovereign power wronged her, she is without remedy in a municipal court.

The second instruction given by the Circuit Court was, that the notice of claim filed with the recorder and exhibited to the board was evidence of the extent of said claim to commons. The competency of the evidence was not objected to on part of the plaintiff; it was such as she herself resorted to, for the establishment of the extent and boundary of her own claim, and, aside from the legal and official survey of the commons made in 1832, is the only evidence of boundary that is likely to exist at no distant future day, and was the usual evidence introduced to prove the fact before the survey of 1832 was made. The court gave no opinion on its effect, but properly left it to the jury.

The third instruction is, that if the jury believed the land in dispute to lie within the bounds of the common confirmed by the acts of 1812 and 1831, then they should find for the defendant.

The first consideration on this instruction arises on the Act of July 4th, 1836, by which the plaintiff's claim was confirmed. The fact that claims embraced by the act interfered with 463*] lands *previously granted or sold by the United States, was well known to the commissioners, and in their report of 27th November, 1833 (5 D. Green's State Papers, 702), they state for the information of Congress, that "these are numerous cases of lands lying within these French and Spanish claims belonging to individuals whose right or claim originated under the government of the United States: some depend on purchases; some on the law allowing pre-emptions; some others on New Madrid locations; and some again upon settlement rights which had been confirmed; that most of these persons have been for a long time settled on their lands; their claims being of a *bona fide* character, derived from the government of the United States, they went on to improve their lands, making for themselves and families comfortable homes, without any belief that they would ever be interrupted in their possessions; that should the claims reported by the board be confirmed by Congress, in whole or in part, Congress will, in their wisdom, no doubt notice the suggestions here made, and carve out such a course as will quiet the uneasiness and anxiety which are felt, by doing everything which even the most scrupulous demands of justice could require."

In view of this report, Congress passed the aforesaid Confirmatory Act, which declares: "That if it shall be found that any tract or tracts confirmed as aforesaid, or any part thereof, had been previously located by any other person or persons, under any law of the United States, or had been surveyed and sold by the United States, this act shall confer no title to such lands in opposition to the rights acquired by such location or purchase; but the individual or individuals whose claims are hereby confirmed shall be permitted to locate so much thereof as interferes with such location or purchase on other lands of the United States," &c.

The officers of the government administering the Land Department had to construe this law with its exceptions; the matter was referred to the Attorney-General, and in September, 1842, he gave it as his opinion that the confirmations must yield to prior confirmations; school sections, ordinary sales prior to the Act of July 4th, 1836, &c.

A confirmation of a Spanish or French claim, either by a board of commissioners under the Act of 1807, or by Congress directly, or by the district courts by force of the Act of 1824, is a location of land by a law of the United States; surveys have been made and patents issued for such land in the great majority of instances, and it cannot be questioned, as we think, that a title thus protected by patent was intended to be carved out of the Act of 1836; nor is it perceived how the St. Louis common can be in a worse condition, as the acts of 1812 and 1831 did not contemplate any further grant than the acts themselves import, and this conclusion is greatly strengthened by the following considerations:

The plaintiff's claim, and all others of a similar character within *the St. Louis [*464 common, that is, such as the board of commissioners from 1806 to 1812 had examined and rejected, were well known to Congress when the act of that year, confirming the common, was passed; the report of the board had just then been returned to Congress, and Mr. Penrose, one of its members, and Mr. Reddick, the clerk, were at Washington, as appears by their letters. The two of Mr. Penrose were communicated to the House of Representatives, and that of Mr. Reddick to the chairman of the committee of public lands (2 American State Papers, 447–451); they gave the information on which Congress proceeded in acting on the report, as the letters plainly show. The same information was part of the public and printed documents of Congress when the second Confirming Act of 1831 was passed; and when it

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was known, Spanish and French pretensions to claim conflicting with the common stood barred. In 1832, the common was officially and legally surveyed, pursuant to the Act of May 26th, 1824, and the survey stood recorded in due form in 1836, when the plaintiff got her title. These laws, and the acts done by the United States in pursuance of them, we suppose, made and located the common's title as effectually as a patent could have done, and brought it within the exception of the Act of 1836; and that the plaintiff Les Bois' confirmation was intended to give her land elsewhere, without disturbing the opposing title.

For another reason, we think the instruction was proper. When the country was acquired, the title to the land in dispute passed from France to the United States; on this government was imposed the duty by the treaty to satisfy individual and unperfected claims. This was to be done in a due exercise of the political power, to whose justice alone the claimant could appeal, and to whose decision she was compelled to submit; and there being two adverse claims to the same land, equally inchoate, and the government, being unable to confirm both, was under the necessity of determining between them; and, having granted the land to one, necessarily rejected the pretension of the other to the same land; and therefore the first grantee took the legal and exclusive title. But where there is a second confirmation, as in the instance before us, then the justice of the government must be relied on by the second grantee for compensation; and this compensation the Act of 1836 has provided. The last ground is the one on which the decision in the case of *Chouteau* v. *Eckhart* proceeded, in regard to the St. Charles common; and which doctrine, we think, applies equally to the present controversy.

For the several reasons above stated, it is ordered that the judgment of the Circuit Court be affirmed.

Cited—4 How., 448; 7 How., 592; 8 How., 339; 9 How., 447; 10 How., 370; 16 How., 509; 19 How., 82, 337; 22 How., 341; 14 Wall., 313.

465*] *THOMAS BROWN, *Plaintiff in Error,*
v.
THE UNION BANK OF FLORIDA, *Defendant in Error.*

Motion to dismiss cause.

Where there has been no service of a citation, or no final judgment in the court below, the case must be dismissed on motion.

THIS case was brought up by writ of error from the Court of Appeals for the Territory of Florida.

A motion was made by *Mr. L. A. Thompson* to dismiss it, upon two grounds:

1. Because there was no service of the citation upon the defendant in error.

2. Because the judgment of the Court of Appeals of Florida, remanding the cause for a new trial below, was not a final judgment.

The case was this:

On the 5th of April, 1842, the Union Bank of Florida brought a suit against Thomas Brown, upon the following single bill:

"TALLAHASSEE, March 14th, 1841.
"Dolls. $22,266.34.

"One month after date I promise to pay to the Union Bank of Florida, at their banking house, in the city of Tallahassee, twenty-two thousand two hundred sixty-six dollars and thirty-four cents, for value received; for securing payment whereof, I do hereby pledge my shares in the capital stock of said bank. Witness my hand and seal. THOMAS BROWN. [L. S.]"

The defendant pleaded the general issue, four special pleas, and payment. To the pleas of the general issue and payment, the plaintiff filed a general replication; a general demurrer to the second, third, and fourth, and a special demurrer to the fifth plea. These demurrers were all sustained, and the cause came on for trial upon the general replication to the first and sixth pleas. The plaintiff made fourteen prayers to the court, ten of which were granted, and four refused. The defendant made two prayers, both of which were granted. The court then gave eight instructions to the jury. Under all these directions, the jury found a verdict for the defendant. The plaintiff excepted to the refusal of the court to grant his four prayers, to the granting of the two asked by the defendant, and to five out of the eight instructions given by the court.

The case went up to the Court of Appeals of Florida, which, on the 20th of February, 1844, gave the following judgment:

"It seems to the court here, that there is error in said judgment. Therefore, it is considered by the court, that the said judgment be reversed and annulled; and it is further ordered, that the verdict *rendered in this cause be *466 set aside, and that this cause be remanded to the court below, with instructions to said court to award a *venire facias de novo*, for a new trial of the issues to be had therein, and that the plaintiff in error recover against the defendant in error $, his costs by him about his said writ of error herein expended; which is ordered to be certified to the court below."

From this judgment a writ of error brought the case up to this court.

The motion to dismiss was made and sustained by *Messrs. Thompson* and *C. Cox* on behalf of the defendant in error, and opposed by *Messrs. Brockenborough* and *Eaton* on behalf of the plaintiff in error.

Mr. Thompson, to sustain the first ground of dismissal, namely, that no citation had been served, cited Conk. Pr., 446, and 1 Cranch, 365.

And in support of the second ground, namely, that the judgment was not final, cited, 3 Story's Laws, 2224; 8 Laws United States, 707; Bingh. on Judgments, 3; 4 Dallas, 22; 3 Wheat., 433; 12 Wheat., 135; 3 Dallas, 48; 4 Wheat., 73; 6 Wheat., 448.

Mr. Brockenborough, in opposition to the motion, contended that the writ of error was sued out in open court, in which case no citation was necessary; that the Act of 1832 placed writs of error and appeals on the same footing, and cited and commented on the acts of 1803 (4 Story, 2330), 1803 (3 Cranch, 349; 7 Peters, 220); Act of 1826 (3 Story, 2024).

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Mr. Justice McLEAN delivered the opinion of the court:

A motion is made to dismiss this writ of error, because the judgment of the court below was not final, and there has been no service of the citation.

The motion is granted. The judgment below reversed the judgment of an inferior court, and remanded the cause to that court, with instructions to award a *venire facias de novo;* it was, therefore, not a final judgment, on which only a writ of error can issue.

ORDER.

This cause came on to be heard on the transcript of the record from the Court of Appeals for the Territory of Florida, and it appearing on the motion of *Mr. Thompson*, of counsel for the defendant in error, that there has been no service of the citation in this cause, it is therefore now here ordered and adjudged by this court, that this cause be, and the same is hereby dismissed, with costs.

January 12th.

Cited—18 Wall., 588; 20 Wall., 654.

467*] *ASPDEN ET AL., *Complainants,*

v.

NIXON ET AL., *Defendants.*

Executor qualified in both Pennsylvania and England may be sued on same title at same time by administrator appointed in England and one in Pennsylvania—evidence of proceedings in one case not admissible in other.

Where a person domiciled in England died, leaving property both in England and Pennsylvania, and the executor took out letters testamentary in both countries, in a suit in England against the executor by the administrator of a deceased claimant, the parties were restricted to the limits of the country to which their letters extended.

The executor could not rightfully transmit the Pennsylvania assets to be distributed by a foreign jurisdiction.

So, the administrator of the deceased claimant, acting under letters granted in England, only represented the intestate to the extent of these English letters, and could not be known as a representative in Pennsylvania.

Two suits, therefore, one in England, between the executor and the administrator of a deceased claimant, acting under English letters, and the other in Pennsylvania, between the executor and another administrator of the claimant, acting under Pennsylvania letters, are suits between different parties. And neither the decree nor proceedings in the English suit are competent evidence in the American suit. The property in controversy is different in the two suits.

A judgment or decree set up as a bar by plea, or relied on as evidence by way of estoppel, to be conclusive, must have been made,

1. By a court of competent jurisdiction, upon the same subject matter.
2. Between the same parties.
3. For the same purpose.

On either ground, the evidence in the English suit is incompetent to prove anything with regard to the Pennsylvania assets.

Although, in cases peculiarly circumstanced, one jurisdiction administering assets may, as matter of comity, transmit them to a foreign jurisdiction, yet they cannot be sent to England where a suit is pending in this country for the American assets. A decree of the High Court of Chancery in England, purporting to distribute assets so situated, would be treated as void for want of jurisdiction.

The Circuit Court of the United States, sitting in Pennsylvania, is bound by the same rules which govern the local tribunals of that State, and would require a devisee to give security to refund in case a debt should afterwards be proved against the testator. Other provisions of the laws of that State would also embarrass a court in exercising the comity referred to.

Under the influence of similar laws, the courts of the several States have been so much restrained as to render the exercise of comity among each other little more than a barren theory. More could not be required between the courts of this country and England.

There having been no evidence introduced in the English suit to establish the heirship of the claimant, the decision of the court there, dismissing the bill, is not conlusive as to the title. What effect those proceedings ought to have in this country, this court will not now decide. It only decides that the evidence in support of the title is not barred in the Circuit Court of Pennsylvania.

The judgment of a foreign court upon a question of title cannot preclude a claimant from introducing evidence in a second suit, in another country, for other property. Such a proposition is not recognized either by the jurisprudence of the United States or of Great Britain; nor is the opinion of this court in conflict with the established comity of nations.

NOTE.—*Estopped by judgment.*

It is thoroughly well settled, that matters which have been once determined by judicial authority, cannot be again drawn into controversy as between the parties and privies to the determination. Etheridge v. Osborn, 12 Wend., 399; Smith v. Whiting, 11 Mass., 445; Rice v. King, 3 Johns., 20; Young v. Black, 7 Cranch, 567; Church v. Leavenworth, 4 Day, 274; Marvin v. Parker, 18 Ala., 241; Cole v. Connelly, 16 *Id.*, 271; Baker v. Rand, 13 Barb., 152; Niles v. Totman, 3 *Id.*, 594; Chapman v. Smith, 16 How., 14; Ellis v. Staples, 9 Humphreys, 238; Niles v. Totman, 3 Barb., 594; Bawell v. Hensy, 3 Levinz, 179; Lawrence v. Engleby, 24 Vt., 42; Farrar v. Olmstead, *Id.*, 123; Kelly v. Pike, 5 Cush., 484; Birkhead v. Brown, 5 Sandf., 154; Chapman v. Smith, 16 Pet., 114; Ketchum v. Campbell, 3 Wils., 304; Marsh v. Pier, 4 Rawle, 188; Whelan v. Hill, 2 Wharton, 119; Rice v. King, 7 Johns., 21.

The estoppel of an adjudication, made on grounds purely technical, and under such circumstances that the merits could not come in question, will be limited to the point actually decided, and will therefore not be a bar to a subsequent action, brought in such form as to avoid the objection which proved fatal in the first. Hughes v. Blake, 1 Mason, 519; Greely v. Smith, 1 W. & M., 181; Carmony v. Hoober, 5 Barr., 305; Perkins v. Moore, 16 Ala., 9; Quackenbush v. Ehle, 3 Barb., 469; Ezzell v. Milton, 6 Ga., 495; Stingley v. Kirkpatrick, 8 Blackf., 186; Kirkpatrick v. Stingley, 2 Carter, 269; French v. Meal, 24 Pick., 55; Greely v. Smith, 3 W. & M., 236; Johnson v. White, 13 S. & M., 584; Shields v. Taylor, 13 S. & M., 127; Eversole v. Plank, 17 Ohio, 61; Perkins v. Moore, 16 Ala., 17; The City Bk. v. Walden, 1 La. Ann., 46.

The estoppel of a judgment, extends to the whole matter in dispute. Parker v. Standish, 3 Pick., 288; Young v. Black, 7 Cranch, 565; Miller v. Maurice, 6 Hill., 114; Eastman v. Cooper, 15 Pick., 276; Gardner v. Buckbee, 3 Cowen, 120; Perkins v. Walker, 19 Vt., 144; Hayes v. Gudykunst, 1 Jones, 221; Lawrence v. Vernon, 3 Sumn., 20; White v. Coatsworth, 2 Seld., 137.

The nature of the question in dispute between the parties, may be shown by parol evidence, and thus brought within the estoppel of the judgment. Young v. Black, 7 Cranch, 565; Lawrence v. Hunt, 10 Wend., 89; Young v. Rumnell, 2 Hill, 478; McKnight v. Dunlap, 4 Barb., 36; Beebe v. Elliott, *Id.*, 457; Briggs v. Wells, 12 *Id.*, 567; Chapman v. Smith, 16 How., 114; Rogers v. Libby, 35 Maine, 200; Baker v. Raus, 2 Gilman, 355; Barrs v. Jackson, 1 Younge & Coll, *C. C.*, 585; 1 Phillips, 582; Wood v. Jackson, 3 Wend., 27; 8 Wend., 9; Wright v. Butler, 6 *Id.*, 289; Burt v. Sternburgh, 4 Cow., 559.

The proper mode of taking advantage of an estoppel is by pleading, and it will not be conclusive in evidence unless the circumstances are such as to prevent it from being placed on the record by a plea. Young v. Raincock, 7 C. B., 310; Howard v. Mitchell, 14 Mass., 242; Bartholomew v. Candee, 14

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THIS case came up by appeal from the Circuit Court of the United States for the District of East Pennsylvania, sitting as a court of equity.

The circumstances of the case are set forth in the following statement, which the reporter finds prefixed to the opinion of the court, and which supersedes the necessity of any statement of his own:

In 1791, Matthias Aspden, a subject of the 468*] King of Great *Britain, and domiciled there, being in the State of Pennsylvania, where he had formerly resided, made his will, whereby he devised his property to his heir-at-law, with the exception of some trifling specific bequests. He died in England in 1824 (which country continued to be his place of domicile), leaving much property there, and, also, much in Pennsylvania. The only surviving executor named in Matthias Aspden's will was Henry Nixon, of Philadelphia, who proved the will, and took out letters testamentary in the Orphans' Court of Philadelphia County, in November, 1824; and he did the same in the proper court in England, in 1825.

The testator left no children, and different persons claimed to be the true devisee, within the description of "heir-at-law."

In 1828 Samuel Packer filed his bill against the executor Nixon, in the Circuit Court of the United States for the Eastern District of Pennsylvania, alleging that he, Packer, was the devisee, and praying the estate might be distributed to him.

Under this bill, numerous complainants came in by petition, representing themselves to be the next of kin and the true devisees in Pennsylvania, and claiming parts of the estate; and in December, 1831, John Aspden, of the County of Lancashire, England, was admitted to come in as co-complainant, he claiming to be the rightful heir-at-law and devisee of Matthias Aspden.

In favor of this latter claimant a decree was made in 1833, and the bill ordered to be dismissed as to all other claimants. A portion of the latter appealed to this court.

In 1834 Janet Jones, Thomas Poole, and Mary, his wife, moved to file a supplemental bill and bill of review in the Circuit Court; the said Janet and Mary claiming to be heirs-at-law of John Aspden, of London, who was the heir of Matthias Aspden, at the time of Matthias's death, as they alleged. This motion was overruled, as coming too late. Thus stood the proceeding in the Supreme Court on the appeal taken in 1833.

At the January Term, 1835, when the cause came on for argument upon the merits, a question was presented by the counsel for the appellants, whether the bill taken by itself, or in connection with the answer, contained sufficient matter upon which the court could proceed, and finally dispose of the cause. It was submitted that the bill contains no averment of the actual domicile of the testator, at the time he made his will, or at any intermediate period before or at his death. The court directed this question to be argued before the argument should proceed on the merits.

The court, in their decision of this preliminary question, say, that an averment of the testator's domicile is indispensable in the bill, and that the case ought to be remanded to the Circuit Court, for the purpose of having suitable amendments made in this particular. And the court, on the question of the motion to permit the *petitioners for a review, to be heard [*469 before the Supreme Court, make the following remarks:

"It appears from the motions which have been made to this court, as well as from certain proceedings in the court below, which have been laid before us in support thereof, that there are certain claimants of this bequest, asserting themselves to be heirs-at-law, whose claims have not been adjudicated upon in the court below, on account of their having been presented at too late a period. As the cause is to go back again for further proceedings, and must be again opened there for new allegations and proofs, these claimants will have a full opportunity of presenting and proving their claims in the cause; and we are of opinion that they ought to be let into the cause for this purpose. In drawing up the decree, remanding the cause, leave will be given to them accordingly. The decree of the Circuit Court is therefore reversed.

Pick., 167; Fowler v. Halt, 10 Johns., 111; Brown v. Wilder, 12 *Id.*, 455; Coles v. Carter, 6 Cow., 691; Gilchrist v. Bale, 8 Watts, 355; Young v. Rummell, 2 Hill, 478.

An estoppel will be conclusive in evidence whenever there has been no opportunity to take advantage of it in pleading. Adams v. Barnes, 17 Mass., 370; Barber v. Elliott, 4 Barb., 457; Ward v. Ward, 2 Zabriskie, 691; Isaacs v. Clark, 12 Vt., 192; Perkins v. Walker, 19 *Id.*, 144; Burt v. Sternburgh, 4 Cow., 559; Wright v. Butler, 6 Wend., 284; Wood v. Jackson, 8 *Id.*, 9; Dane v. Wingate, 12 N. H., 291; Shelton v. Alcox, 11 Conn., 240; Bell v. Raymond, 18 *Id.*, 91; Wiles v. Howard, 5 Exchequer, 557.

The estoppel of a judgment only binds parties and privies, and does not extend to those who are strangers in person and estate (Decour v. Morrison, 2 Gratt., 250; Greely v. Smith, 1 M. & W., 181; Bk. of Oswego v. Babcock, 3 Hill, 152; Leland v. Tousey, 6 *Id.*, 327; Chirac v. Reinicker, 11 Wheat., 286; Alexander v. Walter, 8 Gill., 239; Sergent v. Salmond, 27 Maine, 539; Parsons v. Copeland, 33 *Id.*, 370; Sheldon v. White, 35 *Id.*, 253); save in those cases where the suit in which the judgment is rendered, partakes of the nature of a proceeding *in rem*. Coke's Litt., 352, a, 353, b; McLelland v. Ridgway, 12 Ala., 482; Stevens v. Buck, 1 Conn., 507; Wright v. Hodson, 24 Vt., 143; Chirac v. Reinicker, 2 Pet., 617; Chambers v. Lapsley, 7 Barr, 24; Coates v. Roberts, 4 Rawle, 104.

A principal will not be bound as a privy by the result of a suit brought for the debt, against a guarantor or surety (Brown v. Chancey, 1 Kelly, 410; Douglas v. Howland, 24 Wend., 35; Jackson v. Griswold, 4 Hill., 522; Morris v. Lucas, 8 Blackf., 9, to which he is not made a party, and may therefore contest the validity of the judgment. French v. Parish, 14 N. H., 496.

Yet he may, notwithstanding, be brought within the reach of the estoppel by a notice from the defendant, to come in and take part in the defense. Duffield v. Scott, 3 Term, 374: Jones v. Williams, 7 M. & W., 492; Kip v. Brigham, 6 Johns., 158; Kettle v. Life, 6 Barb., 467; Thomas v. Hubbell, 18 *Id.*, 9.

A similar rule applies as between a grantor of real, or vendor of personal property, and the grantee or vendee. Blasdale v. Babcock, 1 Johns., 518; Collinwood v. Irvin, 3 Watts, 311; Kelly v. The Church, 2 Hill, 115; Hamilton v. Cutts, 4 Mass., 349; Rawle on Covenants for Title, p. 199.

A judgment against the principal cannot be given in evidence in any subsequent proceeding against the surety. Douglass v. Howland, 24 Wend., 35; Jackson v. Griswold, 4 Hill, 522; Morris v. Lucas, 8 Blackf., 9.

It has, notwithstanding, been held in a number of the more recent decisions, that an engagement by one man to be responsible for another, creates such a privity between them as to render a recovery against the latter, *prima facie* evidence in a suit

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and the cause is remanded to the Circuit Court for further proceedings, in conformity to this opinion." (9 Peters, 505.)

On the mandate going down in June, 1835, John Aspden, of Lancashire, filed his amended bill, stating the domicile, &c., and John A. Brown, administrator of John Aspden, of London, together with Janet Jones and Mary Pool (then widows), the daughters of John of London, were let in to file their petition, claiming the estate of Matthias Aspden on the ground that John of London was the heir.

To this petition Nixon pleaded, that John of London, in 1825, had filed his bill against him, Nixon, as executor, &c., in the High Court of Chancery in England, for an account and distribution of the estate; which bill had been answered, and the answer replied to. That John of London died in 1828, intestate, his domicile being in England at the time; and that Thomas Poole, in right of his wife Mary, and Janet Jones, administered on said John's estate in England; that they, as such administrator and administratrix, proceeded to revive the suit in chancery against the defendant Nixon; which was brought to a hearing in the High Court of Chancery in 1830, and was heard, and the bill dismissed.

And that, afterwards, another bill was brought by said Thomas Poole and Janet Jones, as administrator and administratrix of John Aspden, against said Nixon, as executor of Matthias Aspden, for the same precise subject matter, in the Court of Exchequer in England; to which the decree in the High Court of Chancery was pleaded in bar; and which plea in bar was sustained, and the latter suit dismissed by the Court of Exchequer; and on these proceedings the defendant Nixon relied as a bar to any further proceedings on the part of the personal representatives of John Aspden, of London. The court permitted the latter to reply to the plea of Nixon. The replication alleges that the bill in the High Court of Chancery in England was dismissed "for want of prosecution," because the claimants were too **470*]** poor to prosecute the same, or to *procure their evidence of title; and that the bill in the exchequer was dismissed as stated in the plea.

A commission was awarded by order of the court, and evidence taken in England to establish the facts alleged by the replication. From this, it appears that the bills were filed, and the proceedings had, which are set forth by Nixon's plea; and also that the representatives of John Aspden, of London, failed to produce any evidence of their title by reason of their poverty. And on the "effect" of this evidence to support the plea in bar, the judges were divided in opinion.

The cause was argued by *Messrs. J. Hoffman* and *David Hoffman*, with whom was *Mr. Charles J. Ingersoll*, for John Aspden, of Lancashire, in support of the plea in bar, and by *Messrs. Reed* and *Williams* for Mrs. Poole and Mrs. Jones, and for John A. Brown, administrator of John Aspden, of London, against the validity of the plea.

The question upon which the judges of the Circuit Court were divided in opinion, as certified by the record, was this: "Is the evidence, touching the plea in bar, sufficient to support it?"

But after the argument was opened, the counsel were directed by the court to extend their inquiry, and examine the validity of the plea itself. As the decision of the court was, that the plea was insufficient, all the arguments of the counsel either for or against the competency of the evidence to support the plea are omitted.

Mr. J. Hoffman, in support of the plea:

There is no principle better settled than that the decree, sentence, or judgment of any court, having jurisdiction of the subject matter, whether foreign or domestic, is conclusive upon the rights of the parties in a subsequent proceeding between the same parties or their representatives. (*Bowles* v. *Orr*, 1 Younge & Collyer, 464; *Martin* v. *Nicolls*, 3 Simons, 485; 5 Cond. Eng. Ch. Rep., 198; 8 Peters, 308; 4 Conn. Rep., 85; 2 Kames on Eq., 3d edit. 1778, 365; 1 Gill & Johns., 492; 4 Maule & Selw., 20; *Phillips* v. *Hunter*, 2 H. Black., 410; 2 Kent's Com., 3d edit., Lect. 37, pp. 119, 120.) "A decree," says *Judge* Story, "by a foreign court, dismissing a claim, is conclusive against the plaintiff, and he cannot again

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brought on the guaranty given by the former. City of Lowell v. Parker, 10 Met., 314; Masser v. Strickland, 17 S. & R., 354; M'Laughlin v. The Bank of Potomac, 7 How., 220; Berger v. Williams, 4 McLean, 577; Brown v. Sprague, 5 Denio, 545; Parkhurst v. Summer, 23 Vt., 538.

A recovery against a master, for the tortious acts of his servant, or against a surety in consequence of a breach of contract by the principal, will be evidence of the amount of loss resulting from the default, although not that the default was committed. Fletcher v. Jackson, 23 Vt., 581; Green v. The New River Co., 4 Term, 22; The Bk. of Oswego v. Babcock, 5 Hill, 132; McClure v. Whitesides, 2 Carter, 573.

When a recovery in ejectment has been followed by actual entry, the judgment may be given in evidence against third persons, for the purpose of showing that the possession taken under is rightful, and therefore better evidence of right than can be afforded by a mere naked possession. Jackson v. Hill, 8 Cow., 264; Jackson v. Tuttle, 16 Johns., 525; Chirac v. Reinicker, 11 Wheat., 289; 2 Pet., 614; Lloyd v. Barr, 1 Jones., 41; Barker v. Cassidy, 16 Barb., 177.

A judgment on a question of title to land is binding on privies in estate as well as parties, that is, on all who claim by descent or purchase through or under the person for, or against whom the judgment is rendered. The same rule applies in case of chattels. Wood v. Jackson, 8 Wend., 18; 9 *Id.*, 107; Marsh v. Pier, 4 Rawle, 273; McGravey v. Remson, 19 Ala., 430; Farmers' Bank v. McKee, 2 Barr, 318; Boynton v. Willard, 10 Pick., 111; Mitchell v. Pease, 7 Cush., 350.

The estoppel of proceedings *in rem* is conclusive upon all the world. Parker v. Danforth, 16 Mass., 299; Peck v. Barnum, 24 Vt., 376.

A judgment in a court of admiralty, or prize court, condemning a vessel as enemies' property, or for a violation of international law, will be held final and conclusive in other courts, and a sale made in pursuance of such judgment will vest an indefeasible right in the purchaser, against all the world, however deficient the title of those who were in possession of the vessel when she was condemned, or whose acts gave occasion to the forfeiture. Rose v. Himely, 4 Cranch, 291; Croudson v. Leonard, 4 Cranch, 434; Bradstreet v. Neptune Ins. Co., 3 Sumn., 600; Penhallow v. Doane, 3 Dall., 54.

The same result will follow from a decree of forfeiture and sale of property for breach of municipal law (Hudson v. Guester, 4 Cranch, 295; Williams v. Armroyd, 7 Cranch, 424; Certain logs of Mahogany, 2 Sumn., 589; Hoyt v. Gelston, 13 Johns., 141; Gelston v. Hoyt, 3 Wheat., 246; Bradstreet v. Neptune Ins. Co., 3 Sumn., 600), or from a libel filed for repairs or supplies furnished to a vessel. The Bobert Fulton, 1 Paine, 620.

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renew the controversy in a foreign court or country." (Story's Conflict of Laws, 499.)

In *The Bank of the United States* v. *Beverly et al.* (1 Howard, 134), this court ruled "that an answer in chancery, setting up as a defense the dismission of a former bill filed by the same complainants, is not sufficient unless the record be exhibited." Here, the same matter is set up, by the defendants' plea, as a bar to the plaintiffs' bill or petition, and sustained by the exhibition of the record, and therefore is sufficient.

471*] *In *Wright* v. *Diklyne* (1 Peters's C. C. Rep., 199–202), it is held, "that the dismission of a bill in chancery is not conclusive against the complainant in a court of law; although the bill may have been brought for the same matter. But in a court of equity such dismission would be a bar to a new bill."

But it is contended that the decree by the Court of Chancery was not upon the merits, but simply a dismissal of the complainants' bill for want of proof, and therefore not conclusive. The record, however, shows that there was an answer to each of the several bills of the complainants, and the case regularly brought on for a hearing on the pleadings, and after argument by counsel for both parties, the court dismissed the bills, and decreed that the funds be paid to the defendant, and that the complainants pay the defendant his bill of costs. This being a final and absolute decision in the cause, may be pleaded in bar to a new bill. "A decree of dismission of the complainant's bill, signed and enrolled, may be pleaded in bar to a new bill." (1 Vernon, 310; 3 Atk., 809; *Rattenbury* v. *Fenton*, Cooper's Sel. Cas., 60; *Price* v. *Boyd*, 1 Dana, 486; 4 Johns. Ch. Rep., 142; 7 *Ibid.*, 1; The same, 286; 5 Littell, 514.)

Judge Story, in his treatise on equity (Vol. II., p. 739, sec. 1523, edit. of 1839), says: "A former decree in a suit in equity between the same parties, and for the same subject matter, is also a good defense in equity, even although it be a decree merely dismissing the bill, if the dismissal is not expressed to be without prejudice." (Cooper's Eq. Pl., ch. 5, pp. 269–271; Mitford's Eq. Pl., by Jeremy, 237–239.) This principle of equity was applied by the Court of Exchequer to the present plaintiffs' bill, referred to and incorporated in the plea in bar. (*Jones & Pool* v. *Nixon, Executor of Aspden*, 1 Younge's Exchequer Rep., 359.) The *syllabus* of that case reads thus: "A plea of a former suit and decree signed and enrolled in the Court of Chancery, in respect to the same matters, allowed, though the bill in that court was dismissed, not on the merits, but for want of evidence."

The same principle was recognized in *Pickett* v. *Loggon* (14 Vesey, 232, 233). The Chancellor remarks, in the course of his opinion, that if a party thinks proper to bring his cause to a hearing, &c., and the cause capable of being opened, and then makes default, it is very difficult, and would be rather mischievous, to treat such conduct merely as a nonsuit at law. "If," says the Chancellor, "the judgment in the former suit, such as it was, would have barred the proceedings in this suit, it was upon the defendant to set up that bar in some shape, either by a plea in bar, or by an answer insisting upon the same benefit as if it had been pleaded in bar. Whether, in either shape, that judgment or decree would have been an absolute answer to this proceeding, I profess to entertain some doubt. But I cannot see why, if a second suit is permitted, there *may [*472 not be a third, and so on. But the defendant may waive the benefit arising from pleading the former decree, or insisting upon it by answer, and proceed to answer the merits of the plaintiff's bill without reference to the former decree as a bar."

The case of *Holliday* v. *Coleman*, reported in 2 Munf., 162, is in some respects much like the present. No evidence in that case was given by either party. The defendants in the first suit demurred to the complainants' bill, and also answered at length. On the hearing, the Chancellor sustained the demurrer, and dismissed the bill. The complainants filed another original bill, and the defendants pleaded the decree dismissing the former bill in bar; and the court sustained the plea. "A decree," says the Chancellor, "by a court of competent jurisdiction, dismissing a bill upon the ground that the deed upon which the complainant claimed was fraudulent, is a complete bar to another original bill to try the validity of the same deed; the proper remedy, if such decree be erroneous, being by appeal, writ of error, *supersedeas*, or bill of review, and not by original bill."

The complainants, Mrs. Jones and Mrs. Pool, should have appealed from the decree of the Vice-Chancellor dismissing their bill, or petitioned for a review. Such was the course pursued by the parties in the case of *Kosciusko's Will*. (*Armstrong* v. *Lear*, 12 Wheat., 169.)

Equity will not entertain jurisdiction of a matter which the party has had an opportunity of litigating in another court, and which had there been decided against him, unless it appears that there existed circumstances, &c., which prevented his making his defense, or trying the question." (*M'Clure* v. *Miller*, 1 Baily's Eq. Rep., 170; *Henderson* v. *Mitchell*, *Ibid.*, 113.)

"When the party seeking relief, by a petition for a rehearing, had knowledge of the evidence before the decree, or by reasonable diligence or inquiry might have obtained it, he is not entitled to relief." (*Baker* v. *Whiting*, 1 Story, 218.)

"A direct final judgment or decree of a court of competent jurisdiction is forever conclusive and binding, as to the subject matter, between the same parties, and all who are privies in law or estate, although a contrary decree upon the same subject matter be subsequently made as to the other persons who were neither parties nor privies to the first decree, and who are not therefore bound by it." (*Marigarth* v. *Dess*, 1 Baily's Eq. Rep., 284.)

"When a matter has once been adjudicated by a competent jurisdiction, it shall not again be drawn in question; nor will parties be permitted again to litigate what they had once had an opportunity of litigating in the course of a judicial proceeding; but whatever might properly have been put in issue in that proceeding shall be concluded to have been put in issue and determined." (*McDowell* v. *McDowell*, 1 Baily's Eq. Rep., 324.)

*"When a party has had it in his [*473

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power to ascertain the importance of testimony before the hearing of his case, and has neglected to do so, and to obtain the testimony, a court of equity will not grant a rehearing of the case, on the ground that the importance of the evidence had been ascertained after the decision, although the justice of the case might be promoted by it." (*Prevost* v. *Gratz*, 1 Peters's C. C. Rep., 365–379; 1 Paige's Ch. Rep., 574; 1 McCord's Ch. Rep., 241; 1 Littell, 325 and 137.)

And the rule at law is the same as in equity. "Whatever was, or might have been, decided in a court of law or equity is conclusive in a second proceeding between the same parties or their representatives." (*Heller* v. *Jones*, 4 Binney, 60; *Heimes* v. *Jacobs*, 1 Penn. Rep., 152; *Fishle* v. *Fishle*, 1 Blacks. R., 360.)

"A former suit for the same cause af action, in which the defendant obtained a verdict, is a bar to a second suit, although such verdict was rendered on the erroneous ground that the plaintiff's cause of action had not then accrued, when in fact the plaintiff had at the time a good and perfect cause of action. (*Morgan* v. *Plumb*, 9 Wend., 287.)

"It is a principle universally acknowledged, that the judgment or decree of a court having jurisdiction is not only final as to the matter determined, but as to every other matter which the parties might litigate in the cause, and which they might have had decided."

Per Kent, *Justice*, on page 502. "Every person is bound to take care of his own rights, and to vindicate them in due season, and in proper order. This is a sound and salutary principle of law. Accordingly, if a defendant, having the means of defense in his power, neglects to use them, and suffers a recovery to be had against him by a competent tribunal, he is forever precluded."

"The general rule is intended to prevent litigation, and to preserve peace; and were it otherwise, men would never know when they might repose with security on the decisions of courts of justice, and judgments solemnly and deliberately given might cease to be revered, as being no longer the end of controversy and the evidence of right."

"The principle prevails both in courts of law and equity. In bills of review which are brought before the same tribunal to review a former decree, it is a settled maxim of equity, that no evidence of a matter in the knowledge of the party, and which he might have used in the former suit, shall be the ground of a bill of review." (*Le Guen* v. *Governeur & Kemble*, 1 Johns. Cas., 492 and 502.)

The application on the part of the petitioners for admission as parties, in this case, to claim the estate of the testator, in opposition to the representatives of John Aspden, of Lancashire, 474*] whose title *to the same, as the heir-at-law of the testator, was declared by the Circuit Court, in their decree, on the 26th of December, 1833, is made under circumstances little calculated to obtain the favorable consideration of a court of equity. From August, 1825, to July, 1830, the complainants' bill was pending, and no attempt on their part was made to prove their relationship to the testator, and establish their right to the estate, as his heirs-at-law. They had the most ample opportunity to establish their claim to the estate; and having neglected to do so, they are concluded by the decree of the court, dismissing their bill.

In April, 1830, John Aspden, of Lancashire, appeared in the Circuit Court, and obtained leave to issue a commission, in the case of *Packer* v. *Nixon, Executor of Matthias Aspden*, of April session, 1828, No. 1, to England, to prove his relationship to the testator. Numerous witnesses were examined, both in England and America, proving his relationship to the testator. And a report by the master, upon the evidence, declaring him to be the heir at common law, on the paternal side of the testator; and on the 26th of December, 1833, a decree in his favor of the personal estate of the testator, as his heir-at-law. During a period of many years, these claimants watched the progress of a tedious and most expensive litigation, between the heir-at-law and next of kin to the testator; the former claiming the estate under the will, and the latter under the intestate laws of Pennsylvania. And immediately after the decision of the Circuit Court giving a construction to the will, by which the heir-at-law became entitled to the personal estate of the testator, they appeared in court, ready and willing to deprive the said John Aspden, of Lancashire, of the character of heir-at-law, and to substitute themselves as such, by an attempt to revive a claim which had been twice decided against them, and that, too, after neglecting, from 1825 to 1834, to offer a particle of evidence in support of it. It would be most iniquitous to suffer them to do so. *Vigilantibus non dormientibus servit lex.*

Upon general principles, and upon a review of the equitable circumstances in favor of John Aspden, of Lancashire, who stands in the place of the defendant, the plea in bar by the defendant to the plaintiff's petition ought to be sustained, and judgment rendered for the defendant.

The counsel for Mrs. Poole and Mrs. Jones, and for John A. Brown, administrator of John Aspden, of London, made the following points:

I. The plea in bar is not sufficient in law:

1. Because the bills in this case, and the decrees in chancery and in the Exchequer, in England, pleaded in bar to them, are not between the same parties.

2. Because they are not in relation to the same subject matter.

*3. Because they are not of the same [*475 quality, or in the same right.

4. Because the decree of dismission was not made by a court having competent jurisdiction, under the circumstances of the case, to conclude the appellees.

II. These pleas are not proved:

1. Because there is no evidence to support them.

2. Because the evidence does not show them to be *ad idem* with the bills filed in this case.

3. Because there is no proof that the letters taken out by John A. Brown are ancillary to those obtained by Mrs. Jones and Mrs. Poole, in London.

4. Because the decrees are neither signed nor enrolled.

III. The dismission, if proved, is no bar to the appellees:

1. Because there was no decision on the merits.

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2. Because no proofs were taken.

3. Because there has been no construction given to the will of M. Aspden, either by the Court of Chancery or the Exchequer.

4. Because the various objections made to the sufficiency of the plea show it to be invalid as a bar.

IV. The plea is to the whole of the bills or petitions of the appellees; and as part of the defense is bad, the whole must be overruled.

Mr. Reed, after examining the second of the above points, relating to the sufficiency of the evidence, proceeded.

The question of evidence need not be further referred to. The question now is, is the plea in bar sufficient, assuming its averments to be proved. We do not come here to dispute any general principle as to the conclusiveness of competent foreign judgment. It is a doctrine, in its general application, of "repose," and hence of high morality. It is not technical, as distinguished from reasonable. On the other hand, its application is sometimes exquisitely technical. A decree in chancery, dismissing a bill" "for want of evidence," is a bar. A decree dismissing a bill" for want of prosecution," is no bar. In *Rosse* v. *Rust* (4 Johns. Ch. Rep., 300) no party appeared, and the bill was dismissed for want of prosecution, and held to be no bar, "because the merits were never discussed." "Yet, substantially, there is no difference between that case and this, but as much discussion of merits in one as in the other. In the case now before the court, it is in evidence that Sir Edward Sugden advised the solicitor of petitioners to stay out of court and have his bill dismissed ("struck out of the paper") for technical want of prosecution. He refused, went into court to make an effort to have it referred to a master, and it was dismissed for want of evidence. No discussion of merits. The decrees of dismissal here pleaded were not **476***] on hearing, not on evidence, not *on merits, but on default of peculiar nature, from extreme poverty of parties. This poverty is clearly proved.

The rule of conclusiveness of a foreign decree becomes technical in the extreme when thus applied, and courts are bound, before they apply it to the exclusion of meritorious claimants from a hearing, to see that every technical requisite exists.

These decrees, then, it is contended, have none of the technical requisites.

They are not, 1. Between the same parties. 2. Not on the same subject matter. 3. Not, in one sense, by competent tribunals. These points, in one aspect, must be considered together. In another, they are distinct.

There are two parties, petitioners, before this court. 1. Janet Jones and Mary Poole, as heirs of John Aspden, of London. 2. John A. Brown, administrator of John Aspden, of London. To each there is a separate plea in bar.

1. The first petition is of two co-heiresses of a decedent, widows. The decree pleaded is a decree of dismissal of the bill, Janet Jones, and Thomas Poole, and Mary, his wife, administrators of J. Aspden. Putting out of view, for the present, this character as administrators, can a decree against husband and wife be pleaded in bar to a bill by the wife surviving the husband? (*Reeve* v. *Dolly*, 2 Simons & Stuart, 464; Calvert on Parties in Equity, 272, 17 Law Library.) This was a bill by wife, by her next friend, against husband and trustees of wife's separate property. Plea, a bill pending by husband and wife against the trustees. Held to be no bar, because dismissal of husband and wife's bill is no bar to wife's separate bill. The bill of husband and wife is the husband's bill, which he may bar by release. (*Duvall* v. *Covenhoven*, 5 Paige, 581.) If Thomas Poole had released this claim, it would have been a defense to bill by him and his wife in England. Yet a decree against them in England on such a defense would surely be no bar to suit here by his widow. This suit is against a different fund. Joint decree and order of payment vests property in husband. (Calvert, 271; Ward on Legacies, 64, 18 Law Library.) In this view these proceedings not between same parties.

2. A far more serious and interesting question arises on application of this plea to Mr. Brown's petition. He sues here as the American administrator, under letters granted in Pennsylvania, of John Aspden, of London.

The parties to the English bills were the British administrators of J. Aspden, under a different commission, and with different responsibilities, and the question then is distinctly and for the first time presented, whether a judgment of any sort, by confession, default, or on hearing, against an administrator in one country bars the suit of an administrator in another and foreign jurisdiction. The law of Pennsylvania on the subject of foreign administrations is clear. From 1705 to 1832, a suit by an administrator in a sister *State could [***477** be maintained. (*McCullough* v. *Young*, 1 Binney, 63.) But never by a British or foreign administrator. (*Græme* v. *Harris*, 1 Dallas, 456.) In 1826, estates of decedents were made the subject of taxation, and in 1832 (Purdon, 911), all extraterritorial letters of administration were invalidated. At no time in Pennsylvania has there been any privity between a British and a domestic administration. If John Aspden or his English administrators had obtained a decree in England, it would be inoperative here. No privity between them and Mr. Brown, no privity between Nixon in England and Nixon in the United States. (*Brodie* v. *Bickley*, 2 Rawle, 431.) The administrator with will annexed of one domiciled in England, proves the will in Massachusetts; he is not to account for English assets. (*Boston* v. *Boylston*, 2 Mass. R., 384.) The Pennsylvania act of Assembly in terms is the same. (Purdon, 913.) If J. Aspden's British administrators had suffered a judgment against them in Pennsylvania, it would have no effect, the foreign administration being a nullity. (*Borden* v. *Borden*, 5 Mass. R., 67.) Administration confers rights and creates liabilities co-extensive with jurisdiction that confers it. (*Mothland* v. *Wireman*, 8 Penn. Rep., 185.) An Irish administrator releases a bond of intestate, no bar to suit by English administrator. (3 Dyer, 305.) Same principle here (*Vaughan* v. *Barret*, 5 Vermont R., 333.) If J. Aspden's English administrators had sued in Pennsylvania, and had judgment and execution, it would be no bar to suit by Pennsylvania administrator. (*Pond* v. *Makepeace*, 2 Metcalf, 114.) To a suit by Pennsylvania administrator,

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foreign executors come and make defense, the plaintiff entitled to recover by virtue of his distinct domestic office. (*Willing* v. *Perot*, 5 Rawle, 264. So *Vaughan* v. *Northup*, 15 Peters, 1; *Morrel* v. *Dickey*, 1 Johns. Ch. R., 153; *Doolittle* v. *Lewis*, 7 Johns. Ch. R., 47; *Woodin* v. *Bagley*, 13 Wendell, 455.) Creditors must be protected. (*Jenkins* v. *Freyer*, 4 Paige, 51.) In Pennsylvania, Commonwealth always a creditor.

From these authorities, it clearly results that there is no privity between English administrator whose bill was dismissed, and Pennsylvania administrator who now sues. A decree of dismissal of their bill cannot bar ours in so different a right. It is no answer to say the English decree was a decision of John Aspden's right. It was the decision of no right. It was a dismissal through neglect of English administrators—a default from poverty. Suppose American administrator to be a creditor, such a dismissal could be no bar. This court will not inquire whether he is or not. Pennsylvania administrator represents the Commonwealth, which always is a creditor.

But again, Matthias Aspden, at his death, had property in England, France, and the United States. Of the French funds we know nothing. They never were in England. On his death, and Nixon's probate of will in England, the 478*] English funds vested in him *as English executor. As American executor, Nixon had American funds. His rights were wholly distinct. (2 Mass. R., 384; 3 Penn. R., 185.) The funds were distinct. The British courts had no jurisdiction over the American funds. Their jurisdiction tested by power to enforce their decrees. That confined to England. Mr. Nixon never was in England, and not, therefore, liable to attachment. The British proceeding, therefore, strictly *in rem*, and the furthest extent of its conclusiveness is as to English funds. Hence not decree of competent tribunal, and no bar. (*White* v. *White*, 7 Gill & Johnson, 289.)

No requisite of a conclusive decree pleaded in bar exists here, and this without questioning any general principle. No case has, however, been cited, except one (*Phillips* v. *Hunter*, 2 H. Bl., 410) in bankruptcy, nor can one be found, where British courts have gone to the extent now contended for, or held an American judgment absolutely conclusive. All are cases of British colonial decrees, and in that case doubt is expressed whether a different rule ought not to prevail. (*Henderson* v. *Henderson*, 3 Hare, 117.)

Mr. Williams, on the same side with *Mr. Reed*, and against the plea:

I. The pleas filed by Nixon, executor of Aspden, as defensive bars to the petitions of the appellees, are not sufficient in law.

1. Because the bills filed in the courts of chancery and of the Exchequer and the present suit are not between the same parties.

The bill in the English Court of Chancery was originally filed by John Aspden, of London, became abated by his death, and was revived by Janet Jones and Thomas Poole, and Mary, his wife; the said Janet, Thomas, and Mary having taken out letters of administration to the estate of said John Aspden, from the Prerogative Court of Canterbury. (Record, 790.)

The bill subsequently filed in the Court of Exchequer was also brought by Janet Joncs and Thomas Poole, and Mary, his wife, administratrix of said John Aspden. (Record, 79, 80.)

By the death of John Aspden, the bill in chancery ceased to be his bill. It became the bill of the parties for whose benefit it was revived (Comyn's Dig., Vol. II., pp. 410, 411, title Chancery, F, Bill of Reviver; Story's Eq. Plead., sec. 367, p. 298, and cases there cited); and the whole interest existing in Mrs. Poole, both by virtue of letters of administration and as next of kin of the intestate, being, by operation of law and his marital privilege, vested in her husband, Thomas Poole, the bill in fact became the bill of Janet Jones and Thomas Poole. (2 Williams on Executors, 633, 634, and cases there cited.)

The bill in the Exchequer, for the same reasons, was also the bill of Janet Jones and Thomas Poole.

Both these bills were thus bills filed under the authority conferred *by the English [*479 ecclesiastical courts upon the English administrators.

As the right of the parties at the time of the decree regulates that decree (2 Howard, 466), the dismissions in both those courts were dismissions of the bills of Janet Jones and Thomas Poole, administrator and administratrix of John Aspden.

The parties to the present suit are, 1. Janet Jones and Mary Poole, both widows, and next of kin of John Aspden; 2. John A. Brown, administrator of John Aspden, in Pennsylvania.

The parties to the English bills are thus English administrators. Those in the present suit are the next of kin of the intestate and the Pennsylvania administrator.

Are these English administrators and the Pennsylvania administrator the same parties, either in fact or in law? They are in fact different persons. Are they in law the same parties?

In Pennsylvania the law is settled that foreign letters of administration give no rights whatever within that State. (*Græme* v. *Harris*, 1 Dall., 456; *McCullough* v. *Young*, 4 Dall., 292; same case, 1 Binn., 64.)

An old act of 1705 was supposed to have given some rights to foreign administrators, but the cases cited rule that it only applied to the then English provinces, and, after the Declaration of Independence, to the United States. (See Justice Nelson's opinion in *Schulz* v. *Pulver*, 11 Wend., 361.)

In 1832 the law now in force was passed (Purdon, 911, Act of 1832, sec. 6), declaring that no letters granted out of this Commonwealth shall confer upon any person any of the powers or authorities of an executor or administrator under letters granted in Pennsylvania. This act was merely declaratory, and made no change in the law of Pennsylvania except as regards letters of administration granted within the United States. The same rule prevails in England. (1 Will. on Executors, 204, 205.)

India, Scotch, or Irish letters, are of no avail in England. (*Allison* v. *Murphy*, Hard., 216; administration in Canterbury void in York; see *Lowe* v. *Farlie*, 2 Madd. Ch. R., 101; *Tour-*

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ton v. *Flower*, 3 P. Wms., 369; *Vanthuysen* v. *Vanthuysen*, Fitzgib., 204; Toller, 70; *Beirn* v. *Cole*, Ambler, 416; *Pipon* v. *Pipon*, Ambler, 25; 1 Com. Dig., Administrator, B 3, p. 494; *Jenkins* v. *Freyer*, 4 Paige, 50; *Woodin* v. *Bagley*, 13 Wend., 453.)

The principles of all these decisions will be found stated in 1 Will. on Executors, 236, 237.

The powers of these different administrators extend only to the limits of the sovereignties creating them, and neither allows the other to intermeddle with any assets within their respective jurisdictions. See bond required of an executor of non-resident testator in Pennsylvania, which applies only to assets within the Commonwealth, Act of 1832, sec. 15. (Purd., 913.)

480*] *They are not, then, in law, the same parties.

Nor are they privies. (*Adams* v. *Savage*, Salkeld, 40.)

Administrator in Devonshire cannot have *sci. fa.* on a judgment in Westminster. (*Higgins* v. *York Buildings Company*, 2 Atkyns, 44.)

Beames's Pleas, 300, administrator *de bonis non* cannot revive a bill filed by a former administrator, because there is no privity between them. (Story's Conflict, sec. 523, p. 436; *Tallmage* v. *Chappel*, 16 Mass. R., 71., see p. 73; *Grout* v. *Chamberlain*, 4 Mass. R., 611, 618.)

There is no privity between an executor and an administrator *de bonis non cum test. ann.*, and the latter cannot sue out a writ of error on a judgment recovered by the former.

The administrator *de bonis non* may have a new action. C. J. Parsons rests this decision upon the English authorities. (Yelverton, 33, 83; Latch. 140.)

It required a statute (17 Car. II., ch. 8) to enable such succeeding administrator to obtain the fruits of a judgment obtained by his predecessor; and therefore, even in this case, where letters are granted by the same ecclesiastical court, there is only a privity by statute, not by the common law.

So, in Pennsylvania, the succeeding administrator completes the administration of the former by virtue of an express authority conferred by Act of 1834. (Purd., 440; see *Allen* v. *Irwin*, 1 Serg. & Rawle, 554.)

But this statute in England and the act of Pennsylvania applies only to administration granted by these respective countries; neither relates to foreign letters. (Bohun, Cur. Can., 186; *Tourton* v. *Flower*, 3 P. Wms., 369.)

Lee v. *Bank of England* (8 Vesey, 44). In this case Sir William Grant says, that the persons (executors) in America are not the personal representatives of the testator, within the meaning of the laws of this country. And this was where the executor refused to prove the will in England, the M. R. saying, if he refuses and is absent, you may have administration here. (*Arnold* v. *Arnold*, 2 Mylne & Craig, 271. Acc.)

The American cases are equally strong. (*Goodwin* v. *Jones*, 3 Mass. R., 514; 2 Mass. R., 384; 9 Mass. R., 347; *Doolittle* v. *Lewis*, 7 Johns. Ch. R., 46; *Morrel* v. *Dickey*, 1 Johns. Ch. R., 153; *Chapman* v. *Fish*, 6 Hill, 555.)

In this court, the same law has been laid down repeatedly. (*Fenwick* v. *Sears*, 1 Cranch, 259; *Dixon's Executors* v. *Ramsay's Executors*, 3 Cranch, 319; *Kerr* v. *Moon*, 9 Wheat., 56; *Smith* v. *The Bank of United States*, 5 Peters, 529; *Vaughan* v. *Northup*, 15 Peters, 1; see Judge Story's opinion, pp. 5, 6.)

But as the law of the forum in which the bar is set up must regulate its effect, it is particularly with Pennsylvania law we have to do *here; and the authorities in this State [*481 are conclusive. (*Brodie* v. *Birkley*, 2 Rawle, 436; *Mothland* v. *Wireman*, 3 Penn. R., 186; *Willing* v. *Perot*, 5 Rawle, 264; Purdon, 443, Act of 24th February, 1834, sec. 47, requiring executors to pay legacies under the direction of the Orphans' Court.)

From these authorities, it results,

1. That administration granted by each jurisdiction is paramount.

2. That administrators are, even within the same jurisdiction, privies only by virtue of statutory enactments, and in no case by the common law.

3. That they are not the general representatives of the intestate, but only as respects his estate in the country from which they derive their authority.

4. And that, therefore, foreign administrators cannot be in any sense the same parties or privies with those in the State of Pennsylvania.

On this ground, the plea in bar is insufficient.

Again, the parties in these suits are different, because the English bills are bills by a husband and wife, which are always considered bills of the husband only. (*Smith* v. *Myers*, 3 Madd., 474; *Reeves* v. *Dolby*, 2 Sim. & Stu., 464; *Hughes* v. *Evans*, 1 Sim. & Stu., 185; *Mole* v. *Smith*, 1 Jac. & Walk.; *Paulet* v. *Delaval*, 2 Ves., Sen., 666; *Griffith* v. *Hood*, 2 Ves., Sen., 451.)

Bill by husband and wife is the husband's bill. Where anything is for the separate use of the wife, the bill should be brought by a *prochein amy*, otherwise it is the husband's bill. (*Ovden* v. *Campbell*, 8 Sim., 551.)

Suit by husband and wife is suit of husband, and if bill be dismissed or decree made adverse to her interests, the wife may bring a fresh bill by her next friend. (*Wake* v. *Parker*, 2 Keen, 73; *Grant* v. *Vanshoonhoven*, 9 Paige, 257; *Duvall* v. *Covenhoven*, 5 Paige, 581.)

The husband, when he sues in right of his wife, must make her a party, but he sues for his own benefit, and he may release or assign his claim for a valuable consideration; and if a decree is made for the payment of money, or if the claim is otherwise reduced into possession, it will pass to his representatives. (*Wintercast* v. *Smith*, 4 Rawle, 183; *Lodge* v. *Hamilton*, 2 S. & R., 493.)

As there is no *prochein amy* a party in the English bills, they are then the husband's bills, and the dismission cannot be pleaded in bar to a fresh bill by the wife, even in England, much less in a foreign jurisdiction.

For this reason, then, the English and American bills are not between the same parties.

II. The English bills and the suit in Pennsylvania are not for the same subject matter.

*These were *bona notabilia* both in [*482 England and Pennsylvania. (Record, 116, 16.)

The assets in Pennsylvania are subject only to the control of the Pennsylvania administra-

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tor, and those in England to that of the English administrator; neither can effect any portion of the estate of the decedent not within the jurisdiction from which they receive their appointment.

1. By suit; or

2. By assignment.

3. And each must account to, and are responsible only for the assets within the State, province, or diocese which appoints them.

1. They cannot effect these assets by suit. (*Borden* v. *Borden*, 5 Mass. R., 77; *Pond* v. *Makepeace*, 2 Metcalf, 114); judgment recovered by a Rhode Island administrator in Massachusetts, and an execution returned satisfied. Still this judgment was no plea in an action for same debt by the Massachusetts administrator, because that debt was *bona notabilia* in Massachusetts. (See cases referred to at p. 117.)

The same rule prevails in England. (1 Dowl. & Ryl., 35, 16 E. C. L. R., 15; *Attorney-General* v. *Dimond*, 1 Cromp. & Jervis, 356, 370; 2 Wms. on Executors, 1020.)

2. Nor by assignment. (*Cutter* v. *Davenport*, 1 Pick., 80, sec. 83, 84); administrator in Vermont cannot assign a mortgage debt due by a citizen of Massachusetts. It is *bona notabilia* in Massachusetts, and must be administered there. So are simple contract debts, and they must be collected where the debtor lives. (*Chapman* v. *Fish*, 6 Hill, 554.)

The release of a note dated at Albany by a foreign administrator is no bar to a suit by a New York administrator, because it is *bona notabilia* in that State. The release is inoperative. (*Vaughan* v. *Barret*, 5 Vermont R., 333; 3 Dyer, 305.)

New York administrator releases a debt due from a resident of Vermont. No plea to a suit by Vermont administrator. (*Thomas* v. *Wilson*, 2 N. Hamp. R., 291.)

Foreign administrator can not indorse a note so as to enable the indorser to sue in New Hampshire in his own name. (*Hearns* v. *Burnham*, 5 Greenleaf, 261; *Lee* v. *Harens*, 1 Brayton, 93 Vermont; *Willing* v. *Perot*, 5 Rawle, 264.)

This last case was a controversy between the Pennsylvania administrator and the assignee of a foreign administrator, and it was held that the former must always prevail.

3. Administrators are bound to account within the jurisdiction appointing them, but only for the *bona notabilia* within that jurisdiction. (*Boston* v. *Boylston*, 2 Mass. R., 394; *Dawes* v. *Boylston*, 9 Mass. R., 337.)

Suit on probate bond for assets in administrator's hands, he being also administrator *cum test. ann.* in England. Held, that he was **483*]** *accountable in Massachusetts only for the goods, &c., collected there. (*Stevens* v. *Gaylord*, 11 Mass. R., 257; *Hooker* v. *Olmsted*, 6 Pick., 9, 482, 483.)

Plaintiff not entitled to execution against Massachusetts administrator for sums collected in Connecticut, under letters granted to same person there. Distribution of these assets must be made in that State, though the estate of decedent was insolvent in Massachusetts and solvent in Connecticut. (*Fay* v. *Haven*, 3 Metcalf, 114, 115; *Peck* v. *Mead*, 2 Wendell, 471; *Orcut* v. *Orms*, 3 Paige, 465.)

Administration granted in New York and Vermont to the same person. He must account in each State for the goods inventoried, as found in them, respectively, at the death of the intestate. (*Harrison* v. *Sterry*, 5 Cranch, 289; *Smith* v. *Bank*, 5 Peters, 523–525; *Vaughan* v. *Northup*, 15 Peters, 1, 5, 6; *Vrom* v. *Vanhorne*, 10 Paige, 555.)

If, then, foreign administrators cannot effect the assets in Pennsylvania by suit, or by assignment, directly, how can they be affected by mere omission on his part to prosecute a claim to other assets, out of the jurisdiction of Pennsylvania, beyond the control of the Pennsylvania administrator, who could not interfere with, become a party to, or regulate in any way his proceedings abroad?

The three cases cited above, from 2 Rawle, 436, 5 Rawle, 264, and 3 Pennsylvania, 188, show it to be the law of Pennsylvania that such proceedings cannot be a bar, as the assets are to be retained by the Pennsylvania administrator, to be administered there.

The fact that Nixon appeared to the suits in England does not vary the case. He appeared only as English executor, under letters from the Prerogative Court to protect the English funds. Such appearance is co-extensive only with his authority as English executor. As American executor, he could not have been heard. (*Stevens* v. *Gaylord*, 11 Mass. R., 257; *Vaughan* v. *Northup*, 15 Peters, 1.)

In both these cases, and in several others previously cited, the administrators were actually served with process; yet the courts held that circumstance gave them no jurisdiction over foreign *bona notabilia*.

The Pennsylvania act of Assembly is as strong in its terms as that of any other State and country, and excludes every possible mode of interference, either by acts or omissions; consent on his part could not prevent its operation.

III. The bills in this case, and the decrees in England, are not in the same rights.

The former are by Pennsylvania administrator, who is trustee, 1. For creditors in Pennsylvania. 2. For the Commonwealth, as respects taxes, &c. 3. For distribution, under direction of our orphans' courts. The latter are by the administrators in England, *who are trustees. 1. For the credit- [***484** ors in England. 2. For the government there, to pay duties, &c. 3. For distribution under direction of the courts there.

The cases previously cited establish these positions. (See Story's Conflict, 439, sec. 524.)

Dodge v. *Perkins* (4 Mason, 436); the right to sue in the United States courts depends on the citizenship of the administrator, not on that of the decedent; for administrator is the real, not merely the nominal party.

If it is said that the administrator is a trustee for next of kin, and therefore the dismission of the English bills must be a bar, the answer is, that a decree against a *cestui que trust* is no bar to a suit by a trustee who was not a party to the former case. (*Thomas's Trustees* v. *Brashear*, 4 Monroe, 65, 68.)

IV. This decree not made by a court of competent jurisdiction, either as respects the parties or the subject matter.

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To bind parties, they must be within their jurisdiction. To bind the property, it must be within their power.

The English courts had no jurisdiction over the administrator or the property in Pennsylvania.

The cases already cited establish this. The American adminstrator of Aspden was never summoned, could not appear, could not defend or protect his own rights, or the rights of those whom he represents.

The Pennsylvania property was not within their power—could not have been collected or disposed of by virtue of any authority from them. Their decree in favor of the complainants, then (if it had been given), could not have been enforced. The process of sequestration and attachment would have been fruitless.

The American administrator could not have set up a decree in favor of the English administrators, if such a decree had been made, as the foundation of a suit in this country, nor as a bar to the claims of others as distributees.

It would certainly have been no evidence against John Aspden, of Lancashire. (*Picquet* v. *Swan*, 5 Mason, 40.)

General principles restrain jurisdiction of all courts within their local limits. In cases of non-residents, judgments are never *in personam*, they are *in rem*, and bind only the goods attached. (*Bond* v. *Briggs*, 9 Mass.)

Even under the act of Congress, judgments must appear to be rendered by courts having jurisdiction of the parties, as well as the cause, to have full faith and credit given them. (Story's Conflict, 458, sec. 547.)

Douglass v. *Forest* (4 Bingham, 686) takes a distinction between cases where parties owed allegiance to the country where judgment was given; but American administrator owed none to England.

7 Gill & Johnson, 210. Chancery proceeds **485*]** *in rem*, or *in personam*, *and the power of enforcing their decrees is the test of their jurisdiction. They had here no power over J. A. Brown.

In admiralty cases the world are parties, and the whole world is, therefore, bound, because notice is served upon the thing itself, and all interested have, therefore, notice. But those who have no interest which could be asserted in a court of admiralty have no notice of the seizure, and cannot be considered as parties. The decree, as respects them, can therefore be re-examined. (Case of *The Mary*, 9 Cranch, 126, 144; Marshall, *Ch. J.*)

But if the sentence appears to be for a cause which involves no violation of the law of nations, even admiralty sentences are not conclusive on the question of neutrality. (2 Wend., 64; 2 Bay, 239; *Salucci* v. *Johnston*, 4 Douglass, 224.)

In this case the American administrator had no interest in the English funds, was not present there, owed no allegiance, had no notice—in fact, became administrator only in 1834, after the decrees were pronounced. He can be, therefore, upon no principle, considered a party; nor can the decrees be considered, as respects him, *in personam*. If they are not so, they are no defensive bar. (*Bates* v. *Delavan*, 5 Paige, 305, is clear to this point; *Picquet* v. *Swan*, 5 Mason, 40.)

V. This plea is not proved, no evidence being taken by respondent. But even our evidence shows that,

1. It is not proved that the bills in England and the present suit are *ad idem*. See former part of this argument.

2. It is not proved that Brown's letters were ancillary to those in England; not that Brown acted as attorney for Poole and Jones.

3. It is not proved that the decrees were signed and enrolled; and without being so they are no bar. Witnesses clearly establish that they were not. (Record, 96, 100.)

Only two cases have been cited against this position:

Prettyman v. *Prettyman* (1 Vern., 310) has been overruled. (See Beames's Pleas, 319, 320.)

Dodson v. *Oliver* (1 Eagle & Jones) is a tithe case, and in these cases the practice of the courts is peculiar, not governed by the rules of equity practice. The book cited is not in this country; a note of it is found in Seaton's Decrees.

The English cases are clear. The American are equally strong. (*Bennet* v. *Winter*, 2 Johns. Cas., 205; *Gill* v. *Scott*, 1 Gill & Johns., 393; Halsted's Digest, 176; *Minturn* v. *Tomkins*, 2 Paige, 102; *Thomas* v. *Harvie*, 10 Wheat., 148.)

The replication denies the fact of the enrollment, and every other fact except what are specially set forth in it.

VI. The dismission under the circumstances proved is not a bar. The only discussion was in relation to a reference to the master; no pretense that any took place in relation to the merits.

Parties were poor. (Record, 101.) Gregson died insolvent. *(Record, 98.) Appli [*486 cation made to Dugdale for a loan. (Record, 101.)

No construction of the will was given. (*Brandlyn* v. *Ord*, 1 Atk., 571; 1 Smith's Chancery Prac., 246; Lord Bacon's Orders, 4; Bacon's Works, 511; *Rosse* v. *Rust*, 4 Johns. Ch. R., 300; 15 Vesey, 231.)

Lord Eldon doubts whether, when cause has not been heard on its merits, and an opportunity to be heard has been given, a decree will be any bar. (*Can* v. *Can*, 1 P. Wms., 723.)

These decrees are no bar, because they do not bind the party for whose benefit they are pleaded.

The next of kin have no interest in this question.

John Aspden, of Lancashire, alone will be benefited by a decision in favor of these pleas.

He is not a party to, nor bound by the proceeding in the English courts. (*Henderson* v. *Henderson*, 3 Hare, 117; *Atkinson* v. *Turner*, Barnard, 77; *Rees* v. *Lawless*, 4 Littell, 319. *Thompson* v. *Clay*, 3 Monroe, 361, 363; *Davis* v. *Hunt*, 2 Bailey, 412, 415.)

VII. This plea is to the whole bill; and if part of the defense is bad, the whole must be overruled. (Beames's Pleas, 42, 44; *Chamberlain* v. *Agar*, 2 Ves. & B., 259; *Jones* v. *Davis*, 16 Ves., 262.)

Mr. David Hoffman, in support of the pleas and in conclusion:

[All those parts of *Mr. Hoffman's* argument which do not apply to the point decided by the court are omitted.]

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The British and American cases in support of such pleas in bar are quite too numerous to be further dwelt on, in the general view I am now taking of the *exceptio rei judicatæ;* but the opinion of *Chief Justice* De Grey, in *The Duchess of Kingston's* case (11 State Trials, 201), and of *Chief Justice* Willes, in the case of *Prudham* v. *Phillips* (Ambler, 763), are leading decisions, and show that the doctrine had made its foundations deep in the British system of jurisprudence, long before the prize courts had carried it to an iniquitous extent. The whole current, also, of our own authorities go the same length; and whether the decision be a domestic or a foreign one, the matter decided is equally respected. Having dwelt sufficiently upon the general nature, grounds, and just application of the weight accorded to the *exceptio rei judicatæ*, I now proceed to inquire into,

II. This doctrine, as practically enforced, under various sound distinctions, in British and American courts.

In the case now before the Supreme Court, the pleas in bar of former judgments in foreign courts are fortified by the following evidence: 487*] *Authenticated copies of the records, together with the evidence taken under the defendant Nixon's commission, showing,

1. A final decree upon a regular hearing of the cause, before the counsel on both sides, in the British High Court of Chancery.

2. That this decree of dismissal was for want of any evidence on the part of the complainants, from 1st August, 1825, to 17th July, 1830.

3. No *caveat* was entered against the signing and enrolling of said decree.

4. No rehearing, or review, or appeal, was prayed.

5. A new original bill was filed in the Exchequer, twenty-three days after the dismissal; no evidence there produced, and no attempt to procure it; bill dismissed from the Exchequer, a year after it was filed, upon the express grounds, 1st. That this was a final decree in chancery. 2d. That the *exceptio rei judicatæ* filed by Nixon was a flat bar to any further proceeding, although the merits as to heirship had been in no way litigated in the Court of Chancery; and 3d. That a decree of dismissal, for want of evidence, after a hearing, according to the rules of court, and the practice in chancery, was conclusive upon the Court of Exchequer, and therefore the complainant's bill must be dismissed. Was that decision correct, according to the English law? And does the American conform thereto? And if so, will not the American courts deal with these records, and with all the attendant circumstances (especially as between British subjects) in the same way as British courts would deal, and have dealt in the matter? An affirmative answer to these questions seems the unavoidable result of what has already been stated, and of all the circumstances of the case; for courts are competent to look at the entire judicial and extrajudicial *res gestæ*. But, as I have undertaken to consider the subject more in detail, in this second division of my argument, I shall now proceed to refer to a number of British and American cases, and to comment upon some of them.

The correctness of the decision in the Exchequer will appear from the following cases and books, in addition to those already cited: 2 Ld. Kames on Equity, 365; *Martin* v. *Nicolls* (3 Simons, 485); *Bowles* v. *Orr* (1 Younge & Collyer, 464). "A decree of dismission of complainant's bill, after it is signed and enrolled, is a bar to a new bill, between the same parties, and for the same matter." (Cooper's Eq. Pl., ch. 5, 269, &c., and authorities there cited.) "A plea in bar, stating a dismissal of a former bill, is conclusive against a new bill, if the dismissal was upon hearing, and if that dismissal be not in direct terms 'without prejudice.'" (1 Vernon, 310; 1 Bro. Parl. Cases, 281; 1 Chancery Cases, 155; Mitford's Pleadings in Eq., Jeremy's edit., 237, &c.)

In *Pickett* v. *Loggon* (14 Vesey, 232) the Chancellor says: "If a party thinks proper to allow his case to come to a hearing, &c., and *the cause is capable of being opened, [*488 it is very difficult, and would be rather mischievous, to treat such conduct merely as a nonsuit at law." How a nonsuit necessarily differs from a dismissal of a bill, after answer and hearing, will be noted hereafter.

I will now advert to some American authorities and cases, which speak the same language; and then again return to British authorities, and apply them both to the case at bar.

1. Where a bill in equity states certain things, and not sufficient proof is offered by complainant to sustain his allegation, the bill must be dismissed; so, if neither denied nor admitted, but complainant be left to his proof, the bill must be dismissed, if there be no proof at the rule day. (2 Ohio Rep., 22; 3 Ohio Rep., 291.)

2. Equity will not grant a new trial at law, where the party seeking it has been guilty of any neglect in obtaining his evidence, even though such neglect were occasioned by the ill-judged advice of his counsel, and though his bill charges positively that the demand against him has been fully discharged. (2 Ohio Rep., 312; 6 Ohio Rep., 82.)

3. Where a second bill is filed to obtain a second injunction (the first being dismissed), in relation to the same transaction, and between the same parties, it will not be enough to allege in that second bill a new ground of equity not suggested in the former bill. It must also be shown that the new matter alleged did not exist at the time of the first bill; or that, if it existed, it was unknown to the complainant. (*Bank of The United States* v. *Schultz*, 3 Ohio Rep., 62.)

4. No matter can be taken *ad aliud examen*, which has been finally acted on by another competent jurisdiction. The only remedy is by appeal, or error, or by a rehearing, or review (4 Ohio Rep., 330); or unless there has been fraud in the opposite party; or finally pure accident, without any fault or negligence of himself, or of his agents. (4 Ohio Rep., 492; 5 Ohio Rep., 183.)

5. A decree which puts an end to the suit is not the less final because it is subject, within a limited time, to be reversed upon a bill of review. (5 Ohio Rep., 460.)

I have alluded several times to the admitted fact in this case, that both of the parties litigant are British subjects, claiming this property as heir at common law, both claiming descent from a

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common ancestor, both related to the testator in the degree of second cousins, and both claiming as eldest sons through those, respectively, whom each avers to have been the eldest son of Thomas Aspden, the common ancestor—John Aspden, of London, claiming through John Aspden, 1st, of Kent, whom he alleges to have been the eldest son of that Thomas; and John Aspden, of Lancaster, claiming through William Aspden, whom he alleges was the eldest son of that Thomas Aspden, the admitted common
489*] *ancestor. In respect to proof, the London Aspdens have not only utterly failed to give any, either legal or moral, but no less than three decrees have been pronounced against their claim; one in the British chancery, as has been often stated, the second in the British Court of Exchequer, and the third in the Circuit Court of the United States, upon their first application. John of Lancaster, on the other hand, gave such evidence of his pedigree and heirship, as satisfied the master in his two reports, and also the court, after the most diligent inquiry. Thus, then, the matter now stands, as between these two British subjects. But Aspden of London, after nearly ten years of merely nominal prosecution, has now planted himself in such a position in an American court of equity as to call upon that court utterly to disregard all that was done in the British tribunals, and to take no cognizance of his neglects there; and yet further, that John of Lancaster's advantageous position, after all his proofs, and the decree in his favor, should also be wholly disregarded, and that he of London should be now as favorably dealt with in the American court as if nothing had ever been done either in that court or in the tribunals of his own country!

Passing by, for the present, all that has been done in the Circuit Court in support of John Aspden of Lancaster's claim, and looking exclusively to all that John Aspden, of London, has not done in England during ten years, and in this country during ten years more, the inquiry naturally is (when we find these two British subjects interpleading in this court), shall John of London, when conteading merely with John of Lancaster, be regarded by this court in precisely the same light as if he had been originally and regularly prosecuting his claim in this court, and had never been in any way concluded in the tribunals of his own country? For to that extent does he now claim! Nixon, and now Trotter, are to be regarded, at all times, as mere stakeholders. The executor of Matthias, the testator, was called on to account for this estate to one or the other of two British subjects; John Aspden of London's claim to heirship was pronounced by chancery to be without proof; not, indeed, that he had brought some proof, and there stopped, and that the court pronounced that proof worthless, but that, after five years, he could produce no proof at all; and hence the court regarded that as an irresistible presumption that none existed, and so decreed. Another forum, of his own voluntary selection, also decreed that the first decree was valid, final, and conclusive; and shall not these two decrees avail here to the same extent as there? Are they not *res judicata*, that the fact of John Aspden's heirship does not exist? That in England this fact is forever established is beyond all question, every court in that island would at once decide that this fact was *res judicata*. This being clearly so, why shall John of London *be now permitted to cast all this [*490 to the winds, and say to his relative and co-subject: "Here are copies of my former bills in British courts; I file them now in an American court, with a few verbal alterations; we must now have another ten years of litigation here!" for such, in truth, is the alleged right of John Aspden, of London! Is it not, therefore, fit, moral, and legal to accord to John, of London (seeking equity here), exactly that, and no more nor less, than what the tribunals of his own country would give, and have given? Why should one British subject have a measure of justice extended to him against another British subject, which the tribunals of their common country have refused to give? And why should the court here close its eyes to all past neglects, to all the presumptions of actual want of proof involved in the fact of those neglects? *Inter ipsos*, the decrees are not foreign, but domestic; and, whether the one or the other, the decision at least of the Exchequer ought to close the controversy.

And here I am reminded of the very sensible and pertinent language of the late excellent *Judge* Washington, in the case of *Green* v. *Sarmiento* (1 Peters's C. C. Rep., 80). "But it is objected," says the judge, "that the judgment may be unjust upon the merits of the case, or erroneous in point of law; and it is asked, shall such a decision be submitted to by the courts of another State? I answer, that the contrary of all this ought to be presumed; and let me ask in return, what state (or nation) stands so pre-eminent for knowledge and virtue as to say, with confidence, that the judgments of her courts would be more just, or more consonant to law, than those that have already passed on it? I concede that the objection may sometimes be well founded, but I am far from admitting that in all cases the evil would be remedied by a re-examination before another tribunal, and the general good forbids that this should be done."

These foreign judgments, then, which stand unimpeached by fraud, or irregularity, or by any internal infirmity, should have accorded to them (especially when the matter of controversy rests between subjects of the same nation) precisely that effect, and no more, which would be given were the matter interpleaded by them in the courts of their own country; what that is, we know, and has been decided in this very case, and should be everywhere: for if a contrary doctrine be adopted, foreigners would have nothing more to do than to litigate their rights vexatiously and dilatorily for years in the equity tribunals of their own country, and when there ousted, carry on an equally annoying procedure in our tribunals, hoping to gain at length a portion of that, a title to the whole of which they have utterly failed to establish at their home, and in the midst of that very evidence which would have served them had it in fact existed.

I shall now proceed to cite some further of the leading cases *and authorities, and [*491 to remark upon a few; all of which, as it seems to me, can leave no doubt that such de-

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crees as are relied on in the present pleas in bar will be regarded by this court, and all other courts, as conclusive; and therefore that the pleas will be sustained.

1. In regard to foreign judgments, a distinction was early taken between a suit directly upon the judgment to enforce it in another tribunal, and the case where a party sets up a foreign judgment merely in bar and defensively; and, in the former case, it has been held that the foreign judgment is only *prima facie* correct, as no nation should be bound actively to enforce the decision of a foreign tribunal; but that in the latter case, where it is used in defense only, the losing party has no right to institute a suit for the same matter elsewhere, and that if he does so, the judgment shall be regarded as *res judicata*, if exempt from fraud, and the jurisdiction were competent that pronounced it. Admitting this distinction, *argumenti gratia*, the present case belongs to this second class; the decrees are used defensively, and the *exceptio rei judicatæ* is said by the same authorities to be entitled to that full measure of respect everywhere. (*Boucher* v. *Lauson*, Cases temp. Hardw., 89; *Phillips* v. *Hunter*, 2 Hen. Black., 410; Story's Conflict of Laws, 500.)

This distinction, however, just as it may be, has been much questioned ever since, and in favor of a less extended doctrine of conclusiveness. Mansfield, Buller, Blackstone, Eyre, and others sustain the doctrine of revision; Nottingham, Hardwicke, Kenyon, Ellenborough, and the current of more modern authorities, down to the present hour, repudiate the distinction, and are disposed to inquire into no foreign decrees, or judgments further than, first, as to the competency of the court; second, the absence of all fraud; third, whether (admitting the decree to the fullest extent) it does, in point of fact, embrace the matter in controversy. To this third class of admissible inquiries belongs the ordinary case of a foreign sentence of condemnation as prize, which is no bar to proof that the property was in fact neutral, as there may be many other grounds of condemnation than that of enemy's property. To the same class, also, belong all of those cases at law which do not regard decrees in equity, in certain cases; because equity may well reject a claim which the law would enforce, and *e converso*. But, with the exception of these three classes of inquiry, the sound doctrine would seem to be, that the decree is *res judicata*, whether used affirmatively and to be enforced by a plaintiff, or defensively as against the claim of a plaintiff. But still, without now insisting upon an extension of the doctrine, which our case does not need, we repose with great confidence on the opinion of *Lord Chief Justice* Eyre, who, though he takes side with Lord Mansfield in the case of *Walker* v. *Witter*, in permitting a **492*]** foreign decree to be looked into, *when directly sued on, and asked to be enforced, is equally strong in his rejecting all such right when the foreign decree is used (as in the present case) only as a defensive bar. "If we had the means," said that able judge, "we could not examine a judgment of a foreign court, that is brought before us in this manner by the defendant as a bar. It is in one way only that the decree or judgment of a foreign court is examinable in our courts, and that is, when the party who claims the benefit of it applies to our courts to enforce it. When it is thus voluntarily submitted to our jurisdiction, we treat it as a matter *in pais*, respect it *prima facie*, but examine as we do a promise; but in all other cases we give entire faith and credit to foreign judgments, and consider them as conclusive upon us." (*Phillips* v. *Hunter*, 2 Hen. Black., 410.) Our case, however, needs no more than this very doctrine; and, if we produce yet stronger cases, it is only to manifest more clearly the earnestness with which courts, at this day, sustain every means of terminating vexatious litigation, and cherish that repose so essential to the security of property and the peace of society.

And here I cannot avoid citing the remarks of Lord Kames, when he is arguing in favor of a distinction between foreign decrees that sustain a claim, and those which dismiss a claim. He thinks the former more examinable than the latter; and though the distinction is in favor of the decree at this time in controversy, as he regards a dismissal as more exempt from inquiry than a decree that sustains a claim, yet, as I cannot but regard his argument as rather more specious than solid, I now cite with pleasure the remarks with which he closes his discussion of the distinction alluded to. "Public utility," says he, "affords another argument extremely cogent. There is nothing more hurtful to society than that lawsuits be perpetual. In every lawsuit there ought to be a *ne plus ultra;* some step should be ultimate; and a decree dismissing a claim is in its nature ultimate." (2 Kames on Equity, 364.) To apply, in a word, these remarks to the present case, let it be born in mind, as has been often remarked, that the dismissal was for a total want of proof, after five years of litigation—raising, as the court justly thought, *a presumptio juris et jure* of the non-existence of the alleged fact of heirship; that decree, moreover, was confirmed as *res judicata* by a tribunal of the present claimant's own election; and lastly, all subsequent time has confirmed the wisdom of the preceding decisions, as the Aspdens of London are still proofless.

2. In the case of *Bowles* v. *Orr* (1 Younge & Collyer's Exch. Rep., 464), it was held that a foreign judgment is equally conclusive as an English judgment; but that it, like all other judgments, may be set aside here in equity, for fraud, &c., and the Lord Chief Baron, at page 468, observes, that "As the bill does not state under what circumstances the judgment was recovered, I must presume it was in respect of the same matters as are contained in the *bill. Then, if so, it will be conclu- [*493 sive against the account sought. According to modern decisions, a foreign judgment is as conclusive against the debtor as an English one can be; and *Martin* v. *Nicholls* (3 Simons, 458) is an authority to show that a foreign judgment is conclusive against the plaintiff."

3. I will now state the case of *Martin* v. *Nicholls*, relied upon in the above case of *Bowles* v. *Orr*.

That case, in 3 Simons, 458, seems to go the whole length of abolishing the distinction taken by some judges between a proceeding to enforce a foreign decree, and where it is used only defensively, that is, in bar. The case was this: A bill was filed for discovery, and also

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for a commission to take proof to impeach a foreign judgment rendered in favor of the present defendant who was then a suitor in the Common Pleas to enforce that judgment. Upon demurrer by the defendant in equity, he argued that, unless the foreign judgment can be questioned in England, and the grounds taken be such as would be a defense to an action on that judgment, the complainant's bill cannot be sustained. The Vice-Chancellor stated that the present defendant had recovered a judgment in Antigua, and complainant relies upon the case of *Walker* v. *Witter* (Doug. R., 1), as authority for questioning that judgment, which is sought to be enforced in the Common Pleas. "Were I to allow this bill," says the Chancellor, "it would be in effect saying that the judgment in Antigua may be overruled by the Court of Common Pleas," and therefore he sustained the demurrer.

Now, here it will be seen, that the Vice-Chancellor, finding the court of Antigua a competent tribunal, and that no fraud, or want of jurisdiction was alleged, deals with the foreign judgment as *res judicata*, and as conclusive even where sought to be enforced. He regarded the doctrine of *Walker* v. *Witter* as advancing a frivolous distinction; and he preferred the old opinions, and the doctrine of conclusiveness sustained by Nottingham, Hardwicke, Kenyon, Ellenborough, &c., to that of Lord Mansfield. Happily we have no occasion, in the case now before the Supreme Court, to take sides in this controversy; for, whether *Walker* v. *Witter* be the sound law, or *Martin* v. *Nicholls*, and *Bowles* v. *Orr*, &c., be the better law, is to us quite immaterial, since in our case we seek not to enforce a foreign decree; but only to rely upon it as a defensive bar; and for that purpose there seems to be a great unanimity of opinion; for Lord Chief Baron Eyre, who entirely adopted Lord Mansfield's distinction, is yet very emphatic in his expression, as we have just seen, that foreign decrees are final and conclusive when defensively relied on; and this is all we have occasion to invoke. The stronger and more thorough cases, in which the earlier judges, as well as those of the present day, have agreed with Lord Hardwicke—and his is a lustrous name—"that where any court, foreign or domestic, that has the proper jurisdic-
494*] tion of the *case, makes the determination (and it be free from fraud) it is conclusive on all other courts," are nevertheless cases that need not be urged by us in the present case; and are only now referred to in earnest support of the doctrine to the medium extent of our own case, and with no tilt of legal knight-errantry in support of one class of judges against another class. Both classes entirely concur that, relied on as a defensive bar, foreign decrees are, and of right ought to be, conclusive. The doctrine, to that extent, is surely one of repose, of judicial policy, and even necessity; it is a doctrine of justice, and of public policy also, since it inculcates vigilance, and teaches suitors, and those cited into courts, that they should not sleep over their rights, and must not deal with the tribunals of justice as mere organs of legal delay, to exhaust the patience and worry out the life and purse, in order ultimately perhaps to obtain, by compromise, a portion of that which the indolent or unjust know they can never obtain by proofs.

In the case of *Tarlton* v. *Tarlton* (4 Maule & Selw., 20) the court goes to the full extent, and beyond what we have need for. In that case, which was at law, a decree in a foreign court was relied on. The defendant stated that the decree had been obtained against him *pro confesso*, for want of an answer, whereupon sequestration had issued, and the amount levied on the property of the plaintiff, who had been his partner in trade; but that the account had been erroneously taken, &c., &c. Lord Ellenborough ruled that the decree was conclusive, and that the defendant could not be permitted to question the accuracy of the account taken; that a decree *pro confesso*, for want of answer, was *res judicata;* and that, as such, it was binding and conclusive—his lordship emphatically adding, that "I had not thought I was sitting at *nisi prius* to try a writ of error to correct the proceedings of a foreign court!"

Also, in the case of *Richard Raynel Keen* v. *John M'Donough* (8 Peters's S. C. Rep., 308), a decree was pronounced by a Spanish tribunal in Louisiana, after the cession of that dominion, but whilst it was, *de facto*, in possession of Spain. The court held, that, as the tribunal still had jurisdiction, the decree was valid and conclusive.

In 2 Story on Equity Jurisprudence, p. 911, sec. 1528, it is stated, that "A former decree in a suit in equity, between the same parties, and for the same subject matter, is also a good defense, even although it be a decree dismissing the bill, if the dismissal is not expressed to be without prejudice. Here, the courts of equity act in analogy to the law in some respects, but not in all—for the dismissal of a suit at law, or even a judgment at law, is not, in all cases, a good bar to another action."

We here see that, although equity may follow the law, and deal with a naked dismissal of a bill, "for mere want of prosecution," as a nonsuit, and hence no bar, yet that a dismissal of the other kind, such as, in the present case, the dismissal on hearing, and for *want [*495 of proof, is a decree, and conclusive; and so the Court of Exchequer pronounced this very decree in chancery to be, and accorded to it the entire weight of *res judicata;* and the same learned author, in his treatise on the Conflict of Laws, p. 515, remarking upon the doctrine of conclusiveness adopted by Holland, on the basis of reciprocity, seems to entirely approve of the doctrine upon that substantive ground, even were the authorities silent on the subject, and the matter, instead of being so often decided, were at this time, as I suppose, an open question. If, then, reciprocity be an additional reason, as it certainly is, there seems to be a very special fitness in regarding the present decrees as conclusive, seeing, 1st, the thoroughness of the present British doctrine, and how great would be the respect accorded by their courts to the decisions of our tribunals; 2d, adverting also to the fact that the present controversy is solely between British subjects; 3d, bearing also in mind that this is a question of British law, and of British chancery practice, and that the complainant, Aspden, of London, after his five years' tarrying in chancery.

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and dismissal for want of proof, submitted to another tribunal of his own country the legal effect of that dismissal, which second tribunal pronounced it to be *res judicata*, and conclusive. On every principle, then, even of reciprocity and of comity, in addition to all the other reasons that have been urged, it is not doubted but that the Supreme Court will sustain those pleas in bar, and with the greater alacrity, as it may well be asked, *cui bono* overrule them, as there is every moral certainty that it can only tend to another series of proofless delays?

4. The dismissal of bills in equity in our own courts have often been held conclusive, as in the case of *Holliday* v. *Coleman* (2 Munf. Rep., 162). In that case no evidence was exhibited on either side; defendant demurred to complainant's bill, and also answered in detail; the demurrer was sustained, and the bill dismissed. The complainant filed another bill, and the decree of dismissal was pleaded in bar. The court sustained the plea in bar, and said: "A decree by a court of competent jurisdiction, dismissing a bill, is a complete bar to another original bill to try the same deed; the proper remedy, if such decree be erroneous, being by appeal, writ of error, *supersedeas*, or bill of review.

Again. In the case of *The Bank of the United States* v. *Beverly* (1 Howard's S. C. Rep., 134) it was held that "An answer in chancery, setting up as a defense the dismission of a former bill between the same parties, and for the same matter, is not sufficient, unless the record be exhibited. The conclusion from this nonproduction of the record must be, that, if the record be exhibited, the dismissal is conclusive. So likewise, in the case of *Wright* v. *Diklyne* (1 Peters's C. C. Rep., 199), the court held that "the dismission of a bill in chancery is not conclusive against the complainant in a court of law, but that in a court of equity such **496***] *dismissal would be a bar to a new bill"; and the obvious reason is, because there are cases at law that will not be sustained in equity, and therefore the dismissal of a bill in equity could only be evidence that, as an equitable demand, it was not sustainable; but where the decree of dismissal is defensively used in a court of equity, such dismissal is final and conclusive, and for the reverse reason, unless impugned on the ground of fraud. To the same effect is the case of *McDowell* v. *McDowell* (1 Bailey's Eq. Rep., 324). "When a matter has once been adjudicated by a competent jurisdiction, it shall not again be drawn in question; nor will parties be permitted again to litigate what they had once an opportunity of litigating; and whatever might properly have been put in issue in that proceeding shall be concluded to be a thing determined." "The cases of *McClure* v. *Miller*, *Henderson* v. *Mitchell* and *Marigarth* v. *Deas* (1 Bailey's Eq., Rep., 170, 113, 284) are all confirmatory, and strongly in point. Even upon a petition for a rehearing, if the party had knowledge of the evidence, or, by reasonable diligence or inquiry, might have obtained it, he will not be entitled to relief. (*Baker* v. *Whiting*, 1 Story's Rep., 218; *Heller* v. *Jones*, 4 Binney, 60; *Heimes* v. *Jacobs*, 1 Penn. Rep., 152.) Many hundred cases might be shown, all evincive of the determination of courts, as a fundamental rule of judicial policy and necessity, to sustain the vigilant, and to manifest no special favor, at least, to the grossly negligent. With what pretense of claim, then, can the Aspden family of London expect from this court the high and very special favor of litigating this case, which would not be retained a moment in the courts of their own country, after it could reach the Chancellor's eye in judgment, and also when this court has a mountain of proof that here, as well as there, they have played a part of most vexatious delay for nearly the fourth of a century! In the language, then, of a distinguished American lawyer, *Mr. Justice* Kent, I will now conclude, taking to myself no little shame for the great length and the too immethodical character of the observations I have made on this case—a case, I confess, that has greatly interested me, because of the shameful delays that have been produced by the London Aspdens—a case, too, in which no legal alchemy, even, could extract a scintilla of evidence of right on their part! "Every person is bound," says *Judge* Kent, "to take care of his own rights, and to vindicate them in due season, and in proper order. This is a sound and salutary principle of law. Accordingly, if he neglects to use them, and suffers a recovery to be had against him by a competent tribunal, he is forever precluded." The general rule is intended to prevent litigation and to preserve peace; and were it otherwise, men would never know when they might repose with security on the decisions of courts of justice; and judgments solemnly and deliberately given might cease to be revered, as being no longer the end *of controversy and the [***497** evidence of right. (1 Johns. Cases, 492, 502.)

Mr. Justice CATRON, after having stated the facts of the case as they are recited in the commencement of this report, proceeded to deliver the opinion of the court:

We understand the true question submitted to this court to be, whether the decree dismissing the bill, made by the High Court of Chancery in England, bars and precludes John A. Brown, the Pennsylvania administrator of John Aspden, of London, from prosecuting his claim as administrator for the Pennsylvania assets of the estate of Matthias Aspden, found in the hands of Joseph Trotter, the present administrator, with the will annexed. Nixon having died, the contest in the British court was between an executor there, and administrators also there; the complainants sued and the defendant resisted the claim alike in a representative capacity, and were restricted by the authority under which they respectively acted to the limits of the country to which their letters extended. Under his English letters testamentary, Nixon could do no act as executor beyond England; so neither could he voluntarily transfer the Pennsylvania assets to the foreign jurisdiction, there to be distributed, as this would have been in violation of his letters in this country; by these he held the assets here as trustee, and in subordination to the laws of Pennsylvania and the orders of the Orphans' Court executing those laws, as well as in subordination to the suit pending in the Circuit Court.

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So, on the other hand, on the death of John Aspden, of London, the bill in chancery ceased to be his bill, and became the suit of the parties for whose benefit it was revived; when this was done, they represented John Aspden, of London, as administrator of his estate, and the same rules applied to them as to Matthias's executor; they only represented the intestate by virtue of, and to the extent of, their English letters, and could not be known as representatives in Pennsylvania. Again, the representative character of Nixon in England was altogether distinct from his character as executor in Pennsylvania. And so, also, the English administrators of John Aspden's estate are equally distinct from Brown, who is the administrator of his estate in Pennsylvania. It follows, the English suit was between different parties from those prosecuting and defending the American suit; and therefore neither the decree, nor the proceedings on which it is founded, are competent evidence between the parties to the present suit, for this reason; and yet more conclusively for another, which is, that the property in controversy here is distinct from that sued for in England.

As applicable to such a state of facts, the rules of evidence governing courts of justice are, that a judgment or decree set up as a bar by plea, or relied on as evidence by way of estoppel, to **498*]** be conclusive, *must have been made, 1. By a court of competent jurisdiction upon the same subject matter; 2. Between the same parties; 3. For the same purpose; and, on either ground, the evidence submitted to our judgment is incompetent to prove anything in regard to the Pennsylvania assets.

But these conclusions are resisted by those setting up the bar on this ground—that the administration of the domicile is the principal administration on the estate of Matthias Aspden, and this being in England, and the assumed devisee's residence also being there, the Pennsylvania administration was auxiliary to the foreign one; that in the British suit the American assets might have been recovered from the executor Nixon, the bill having gone for the Pennsylvania assets as well as the English.

However true it may be, in cases peculiarly circumstanced, that one jurisdiction administering assets may, as matter of comity, transmit them to a foreign jurisdiction, there to be distributed; still, the doctrine can have no application here, as no assets had been transmitted to England from Pennsylvania, and a suit was pending, and in no part decided, in this country for the American assets, before and at the time the decree in England was made; and therefore an assumption to distribute the assets in this country by the High Court of Chancery in England must necessarily have been treated by the Circuit Court as merely void for want of jurisdiction of the subject matter in the foreign court. Even up to this date, the American court could exercise no comity, as is manifest from the state of the proceedings before us; nor will there be any occasion for its exercise hereafter, as all the parties claiming the estate are before the Circuit Court, anxiously litigating their claims, and seeking distribution at its hands.

It is proper, however, to remark, in this connection, that the courts of the United States held in Pennsylvania are administering the laws of that State, and bound by the same rules governing the local tribunals; and that by these laws a devisee, before he can take a legacy, must give security that if any debt or demand should afterwards be recovered against the estate of the testator, the devisee shall refund. (Purdon's Dig., Ex. & Ad., secs. 41, 47.) So, also, there are many other provisions in the laws of Pennsylvania governing the distribution of estates that would embarrass the orphans' courts in exercising the comity referred to. The like laws exist in other States of the Union; and, under the influence of such laws, the courts of the States have been so much restrained, as to render an exercise of comity among each other little more than a barren theory; nor could more be required in a case like the present, where part of the assets were administered abroad, under independent letters granted there, and by a tribunal that was under no obligations to extend comity to the probate courts *of [*499 this country, whatever might be done in the exercise of a sound discretion.

The next ground, and that relied on with most confidence in support of the bar, is, that John Aspden, of London, and those representing him after his death, were British subjects, residing in Great Britain, and that the contest and only matter litigated in the High Court of Chancery was, whether John Aspden, of London, was or was not the heir and consequent devisee of Matthias Aspden; and that this fact having been found by the decree against the complainants established and concluded all proof to the contrary of such adjudication, directly on the single fact of title; and that the representatives of John of London could not be heard in another jurisdiction to disavow the conclusiveness of the finding by a court of their own government, to which they had resorted.

That the English bill involved directly the question of heirship, and that nothing else was contested, is undoubtedly true; but it is equally true that no evidence was introduced by the complainants there to establish their title, nor was there had any adjudication on the merits of their claim; so that no equitable considerations are violated by our present judgment, in any aspect that the evidence may be viewed.

What effect the decree has in England is a question for the courts of that country to settle; nor will we now determine whether, in our judgment, by the comity of nations, the proceedings should have a similar effect here; or what effect they should have. The question for us to dispose of is, whether the administrator and distributees of John Aspden, of London, shall be heard in the Circuit Court, or whether their evidence of title is barred? We have already stated that the Pennsylvania assets stand unaffected, and will only add, that the assumption that a complainant or plaintiff is estopped by a judgment against him, from introducing evidence in a second suit, and in another country, for other property, on the ground that the fact of title had been adjudged and concluded by a former judgment or decree (thus separating the title from the property), is an abstract proposition, inconsistent with the due administration of justice, and not recognized in our system of jurisprudence, or that of Great Britain, and is aside from any question affecting the comity of nations.

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Giving the British decree all the force and effect that could be accorded to it if it had been made in a State of this Union, it yet establishes no fact, as respects any title to the Pennsylvania assets; nor would the rules of evidence be sufficient in separate suits, pending in the same court, for different parcels of property, even between the same parties. And therefore we certify to the Circuit Court, that the evidence introduced "touching the plea in bar" is no estoppel to the representatives of John 500*] Aspden, of *London, in so far as they seek to recover the assets of Matthias Aspden's estate in the course of administration by the Orphans' Court of Philadelphia County. Further than this, we do not pretend to determine on the effect of the evidence, as we are not aware that any controversy now exists in the Circuit Court in regard to any other assets.

ORDER.

This cause came on to be heard on the transcript of the record from the Circuit Court of the United States for the Eastern District of Pennsylvania, and on the point and question on which the judges of the said Circuit Court were opposed in opinion, and which was certified to this court for its opinion, agreeably to the act of Congress in such case made and provided, and was argued by counsel; on consideration whereof, it is the opinion of this court that the evidence introduced "touching the plea in bar" is no estoppel to the representatives of John Aspden, of London, in so far as they seek to recover the assets of Matthias Aspden's estate in the course of administration by the Orphans' Court of Philadelphia County; whereupon it is now here ordered and decreed by this court, that it be certified to the said Circuit Court accordingly.

Dissenting—*Mr. Chief Justice* TANEY and *Mr. Justice* MCLEAN.

Cited—5 How., 262; 6 How., 58; 7 How., 123; 13 How., 467; 24 How., 342; 7 Wall., 102; 1 Wood. & M., 176, 376; 2 Wood. & M., 133, 135, 533; 3 Wood. & M., 176; 1 Cliff., 130, 132; 3 McAr., 230, 240, 243.

RICHARD CHARLES DOWNES, *Plaintiff in Error*,

v.

WILLIAM S. SCOTT, *Defendant*.

Jurisdiction — Pre-emption Act — partition by State court between parties taking patent as tenants in common, not reviewed under Judiciary Act.

The second section of the Act of the 29th of May, 1830, providing, that "if two or more persons be settled upon the same quarter-section, the same may be divided between the two first actual settlers, if by a north and south, or east and west line the settlement or improvement of each can be included in a half quarter-section," refers only to tracts of land containing one hundred and sixty acres, and does not operate upon one containing only one hundred and thirty-three acres.

Therefore, where tenants in common of a tract of one hundred and thirty-three acres applied to a State court for a partition under the above act, the judgment of that court cannot be reviewed by this court, when brought up by a writ of error under the twenty-fifth section of the Judiciary Act, because the right asserted does not arise under an act of Congress.

The writ of error must be dismissed.

THIS case was brought up from the Ninth Judicial District Court of the State of Louisiana, by a writ of error issued under the twenty-fifth section of the Judiciary Act.

Mr. Crittenden, for the defendant in error, moved to dismiss the writ for the following reasons: Because,

*1st. Said writ of error is directed to [*501 the "Judge of the Ninth Judicial District Court of the State of Louisiana," when in truth no writ of error lies from this to that court.

2d. Said writ is for alleged error in a judgment of the said District Court of Louisiana, when in truth this court has no jurisdiction to judge of or correct said error if it exists, and no power to reverse said judgment upon writ of error.

3d. That the record filed in this case, or what purports to be such, is not duly certified, or legally authenticated or verified—the certificate of "John T. Mason, clerk of the Ninth District Court, Parish of Madison, La.," being no evidence of the truth or verity of any record which this court has power to judge of on writ of error.

4th. The subject matter of said suit and judgment, and the parties thereto, were proper matters and subjects of the jurisdiction of the courts of the State of Louisiana, and there is nothing therein to give this court any cognizance or right to revise or reverse said judgment, and the same is final and conclusive.

The motion was argued by *Mr. Crittenden* for the defendant in error, and *Mr. Mason*, Attorney-General, for the plaintiff in error.

Mr. Justice MCLEAN delivered the opinion of the court:

This writ of error brings before us a judgment of the Supreme Court of Louisiana, under the twenty-fifth section of the Judiciary Act of 1789.

On the 15th of June, 1837, a patent was issued by the United States to Elijah Evans and Levi Blakeley for one hundred and thirty-three acres and eight hundredths of an acre, being lots numbered one and three of section six in township sixteen of range thirteen east, in the district of lands subject to sale at Ouachita, Louisiana. The patentees having settled upon the above tract, and each having made improvements thereon, claimed a pre-emptive right under the Act of the 29th of May, 1830. The second section of that act provides, "That if two or more persons be settled upon the same quarter-section, the same may be divided between the two first actual settlers, if by a north and south, or east and west line the settlement or improvement of each can be included in a half quarter-section."

The plaintiff applied, by petition, to the Ninth District Court of Louisiana for a partition of the above tract, which, it seems, was submitted to a jury, and on the trial of which "the judge charged the jury that the Act of Congress of May 29th, 1830, entitled 'An Act to grant pre-emption rights to settlers on the public lands,' was not applicable to the case before the court and jury; that the said act had no binding force as to the dividing or

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502*] partitioning *lands granted to settlers on the same quarter-section or fractional quarter-section after issuing a patent therefor, but that such division and partition must be in conformity with the laws of Louisiana and the principles of equity and justice." To which charge an exception was taken, and on which an appeal was prosecuted to the Supreme Court of the State, which affirmed the judgment of the District Court.

How the parties to this suit became interested in the tract of land above patented does not appear from the record. In the petition and answer they are represented as owners of the premises, and they are treated as such by the district and supreme courts of Louisiana.

The second section of the pre-emption law above cited refers to a quarter of a section, which contains one hundred and sixty acres; and as the tract of which partition is demanded is less than a quarter, it does not come within the law. Had application been made for a division of the tract to the proper department of the government, before the emanation of the patent, it could not, as we suppose, have been considered as coming within the act, so as to authorize a partition and a patent to each of the claimants. A patent having been issued to the claimants for the tract jointly, as tenants in common, and they having conveyed the land, which has become vested in the parties to this record, it is now a question on what principle a division shall be made.

If the parties entitled to the pre-emptive right might have applied for a partition under the act of Congress, but preferred taking the patent as issued, it is difficult to perceive how the present claimants could go behind the patent, in the assertion of a right which was waived by those with whom it originated. The patent vested in the patentees a joint interest as tenants in common, and the same interest was conveyed through their grantees down to the present owners. It does not appear, and the court cannot presume, that any greater or different right was conveyed than that which is shown on the face of the patent.

In this view, we think the decision of the Louisiana court was correct. It directed a partition on equitable principles, under the local law, reserving to each claimant his improvements. And it appears from the facts in the case, that this could not be done by straight lines running north and south or east and west.

As the right asserted in this case by the plaintiff does not arise under an act of Congress, this court has no jurisdiction by the twenty-fifth section.

There seems to have been no allowance of the writ of error, and it was directed to the district instead of the Supreme Court of Louisiana. As this court can only revise the judgment of the highest court in the State which can exercise jurisdiction in the case, the writ of error should be directed to such 503*] court; unless *the record shall have been transmitted to an inferior tribunal. But, independently of these irregularities, we think that this court have no jurisdiction under the act of Congress, and on this ground this suit is dismissed.

ANTOINE MICHOUD, JOSEPH MARIE GIROD, GABRIEL MONTAMAT, FELIX GRIMA, JEAN B. DEJAN, AINÉ, DENIS PRIEUR, CHARLES CLAIBORNE, MANDEVILLE MARIGNY, MADAM E. GRIMA, WIDOW SABATIER, A. FOURNIER, E. MAZUREAU, E. RIVOLET, CLAUDE GURLIE, THE MAYOR OF THE CITY OF NEW ORLEANS, THE TREASURER OF THE CHARITY HOSPITAL, AND THE CATHOLIC ORPHANS' ASYLUM, *Appellants*,

v.

PERONNE BERNARDINE GIROD, Widow of J. P. H. PARGOUD, residing at Aberville, in the Duchy of Savoy, ROSALIE GIROD, Widow of PHILIP ADAM, residing at Faverges, in the Duchy of Savoy, acting for themselves and in behalf of their co-heirs of CLAUDE FRANÇOIS GIROD, to wit, LOUIS JOSEPH POIDEBARD, FRANÇOIS S. POIDEBARD, DENNIS P. POIDEBARD, Widow of P. NICOUD; JACQUELINE POIDEBARD, Wife of MARIE RIVOLET; CLAUDINE POIDEBARD, Widow of P. F. POIDEBARD; and M. R. POIDEBARD, Wife of ANTHELME VALLIER, and also of FRANCOIS QUETAND, JEAN M. F. QUETAND, MARIE J. QUETAND, Wife of J. M. AVIT; FRANCOISE QUETAND, Wife of J. A. ALLARD; MARIE R. QUETAND, MARIE B. QUETAND; also of J. F. GIROD, JEANNE P. GIROD, Wife of CLEMENT ODONINO, F. CLEMENTINE GIROD, Wife of P. F. PERNOISE, and JEAN MICHEL GIROD, *Defendants*.

Purchase by executor of testator's property through a third person is void—acquittance given without knowledge of fraud not binding—time of bar of constructive trust—circumstances always examinable—the decisions of State courts and maxims of civil law on this subject examined.

A person cannot legally purchase on his own account that which his duty or trust requires him to sell on account of another, nor purchase on account of another that which he sells on his own account. He is not allowed to unite the two opposite characters of buyer and seller.

A purchase, *per interpositum personam*, by a trustee or agent, of the particular property of which he has the sale, or in which he represents another, whether he has an interest in it or not, carries fraud on the face of it.

This rule applies to a purchase by executors, at open sale, although they were empowered by the

NOTE.—*That trustee, or agent, cannot purchase trust property, or property confided to his care; cannot buy from himself, nor act for both parties*, see note to Massie v. Watts, 6 Cranch, 148; and note to Wormley v. Wormley, 8 Wheat., 419.

That deed from cestui qui trust to trustee is void, see note to Harding v. Handy, 11 Wheat., 103.

That length of time is no bar to a trust, and when time begins to run, see note to Prevost v. Gratz, 6 Wheat., 481.

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will to sell the estate of their testator for the benefit of heirs and legatees, a part of which heirs and legatees they themselves were.

A purchase so made by executors will be set aside.

The decisions of the courts of several States, upon this subject, examined and remarked upon.

Relaxations of this rule of the civil law, which were made in some countries of Europe, were not adopted by the Spanish law, and of course never reached Louisiana. Nor were those relaxations carried so far as to allow a testamentary or dative executor to buy the property which he was appointed to administer.

The maxims and qualifications of the civil law, upon this point, examined.

Although courts of equity generally adopt the statutes of limitation, yet, in a case of actual fraud, they will grant relief within the lifetime of either of the parties upon whom the fraud is proved, or within thirty years after it has been discovered or become known to the party whose rights are affected by it.

Within what time a constructive trust will be barred must depend upon the circumstances of the case, and these are always examinable.

Acquittances given to an executor, without a full knowledge of all the circumstances, where such information had been withheld by the executor, and menaces and promises thrown out to prevent inquiry, are not binding.

504*] *THIS case was brought up by appeal from the Circuit Court of the United States for the Eastern District of Louisiana, sitting as a court of equity.

The widow Pargoud and others, defendants in this court, were complainants in the court below, and obtained a decree in their favor, from which the other parties appealed. They alleged that a series of fraudulent transactions occurred, commencing in 1813, by which they had been deprived of their fair share of the estate of Claude François Girod, whose heirs they were, and that the chief agent in this fraud was Nicolas Girod, a brother of the deceased Claude François Girod, and also a brother of some of the complainants, and relative of the rest.

Claude François Girod was a resident of the parish of Assumption, in the State of Louisiana, and died in the month of November, 1813, leaving a last will and testament, dated on the 30th of November, 1812, and a codicil, dated on the 4th of November, 1813, which will was admitted to probate, with the codicil, on the 8th of November, 1813. He never was married, and left eight brothers and sisters, and the children of a predeceased sister. These surviving brothers and sisters, with the exception of Jacques, otherwise called Jacques Antoine Girod (who was excluded by the terms of the will), were the legal heirs of the deceased Claude François Girod, each for the one eighth part of his estate and the succession; and the heirs and legal representatives of the said predeceased sister, the legal heirs by representation of their deceased mother, for the remaining eighth part of the estate.

The proceedings in the case were exceedingly complicated. There was a bill, and an amended bill, and a supplemental bill, and another amended bill, and then another amended bill. Instead of pursuing the case through all these details, the simplest course will be to state the charges in the bill, and the documents brought forward to sustain them.

The will of Claude François Girod was as follows:

"I, Claude François Girod, the legitimate son of François Silvestre Girod, deceased, and of the late François, born Dubois, native of Thône, in Savoy, diocese of Geneva, province of France, and now a resident of the parish of Assumption, on Bayou Lafourche, in the State of Louisiana, being about sixty years of age, and desirous to die in the Roman Catholic and Apostolic religion, under which I have ever lived, with a firm belief in the mysteries of our holy religion, do ordain this my last will or testament, in case I should be overtaken by death, the hour of which I am uncertain of; and as it behooves all living beings to settle their temporal affairs when they are in the full enjoyment of their health and reason, in order to avoid thereby the difficulties which arise when we are laboring under a dangerous disease, which takes from us the use of our reasonable faculties, and consequently deprives us of the *understanding and memory neces- [*505
sary to the faithful and peaceable settlement of our family affairs, with a view to avert from our heirs the difficulties always prejudicial to those that are absent. Now, therefore, under these circumstances, I invoke the grace and clemency of God, to whom I recommend my soul when separated from my body; and I wish and ordain, that the latter be buried among faithful Christians, with all the usual rites of our mother church, leaving with my testamentary executors, herein after named, the performance of all pious works, such as causing three masses to be said on my behalf to my holy patron, as also funeral services, masses, &c., &c.

"1. I declare that the property I am now possessed of are the earnings of my labor and savings, and consist of the following items, to wit: Three houses and several lots situated in suburb St. Mary, above the city of New Orleans, and one in Chartres Street, now occupied by my brother, Nicolas Girod; one main plantation, whereon I reside, situated in said Bayou Lafourche, with all the buildings, improvements and appurtenances thereof, and being thirty-one and a half arpents front, together with the utensils, implements of husbandry, animals of all kind, and one hundred and odd slaves of different ages belonging to me; also, a quantity of lands situated in the different parishes of the bayou, the titles to which I hold in my possession; also, a certain sum of money is due to me, which I cannot ascertain at present, but which will be made to appear by the books and obligations in my power; also, I am the owner of upwards of two hundred and seventy bales of ginned cotton, now in my stores; also I declare that I am indebted unto divers persons by obligations, and little by accounts, in a sum of about thirty thousand dollars.

"3. I give and bequeath to my parish of Thône, in Savoy, to have a solemn mass annually said on my behalf, and to contribute to the repairs of said church, a sum of two thousand dollars, such being my will.

"4. I give to the poor of my said parish, to be distributed among them so as to meet their most pressing wants, a sum of one thousand dollars, such being my will.

"5. I give and bequeath to the cousins, Dodos Gollié, of said parish, a sum of five hundred dollars, such being my will.

"6. I give and bequeath to the brothers and sisters, Joseph Suard, Senior, and Antoine

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Suard, Junior, sons of Antoine Suard, deceased, since about thirty years, residing at Cluse, in Fonsigny (Savoy), the sum of two thousand dollars, such being my will.

"7. I give and bequeath to my distant relations of said parish a sum of five hundred dollars, to be distributed among them, such being my will.

"8. I give and bequeath to the Charity Hospital of Thône, in Savoy, a sum of one thousand dollars, such being my will.

[*506] *"9. I give and bequeath to the children of my deceased sister, Françoise, wife of Poidebard, without prejudicing their rights in and to my succession, the sum of two thousand dollars, to be divided between them by equal portions, such being my will.

"10. I give and bequeath to my sister Teresa, wife of Quetant, without prejudice to her rights in my succession, a sum of one thousand dollars, such being my will.

"11. I give and bequeath to my god-daughter and sister, Rosalie, married at Taloire, her husband's name being unknown to me, a sum of one thousand dollars, without prejudice to her rights in my succession, such being my will.

"12. I give for once to my brother James Girod, a sum of four thousand dollars, without any other rights or pretensions whatever in and to my succession, such being my last will.

"13. I give and bequeath to my brother Claude, married, the sum of two thousand dollars, without prejudice to his rights in my succession, such being my last will.

"14. I give and bequeath to the parish of Assumption, for the church wardens in Lafourche, where I now reside, a sum of five hundred dollars, for contributing to the construction of a church, such being my will.

"15. I give and bequeath to the mulatress Françoise Vils, for the faithful services she has rendered to me at my house, during a long space of time, a sum of six thousand dollars, which shall be paid to her (after my death) one, two, and three years, such being my will.

"16. I give and bequeath to my god-daughter Françoise, a free colored woman, the daughter of Rosette, a negro woman, a sum of fifteen hundred dollars, such being my last will.

"17. I give and bequeath to the mulatress Belanie, wife of Colas Méillen, a sum of two hundred dollars, such being my will.

"18. I give likewise to her younger sister Polline a sum of two hundred dollars, such being my will.

"19. I give and bequeath to my mulatto slave Dominic, who is a blacksmith and rum distiller, his freedom, which he shall be put in possession of six months after my death, for his good and faithful services to me.

"20. I nominate for my testamentary executors the following persons, my brother Nicolas, who is my senior, and Jean Françoise, my junior, the former being a merchant in New Orleans, and the second is a planter, residing at Washita, and in their default, Mr. Phillipon, Senior., merchant, at New Orleans, to whom I give, by the present olographic testament, full power and authority as required by law to take possession of all my property present and to come, to inventory, sell, and cause them to be sold, as to him will seem best for the heirs of all my brothers and sisters, present and absent, without intervention of justice, hereby annulling and *declaring void all other [*507 testaments, codicils, and donations, *mortis causa*, and other acts of last will which I may have made previous to and to the prejudice of the present, which is the only one I adopt as being my last will, in order that my heirs may inherit and enjoy my property with the benediction of God and mine, &c.

"Done and passed on my plantation, at Lafourche, the 30th of November, 1812.

(Signed) "C. F. GIROD.
"J'H COURRIE, witness.
"SAINT FELIX, witness.
"Ne varietur———"

"STATE OF LOUISIANA, PARISH OF ASSUMPTION:

"Monday, the 8th of November, } in the year 1813. }

"At the request of Mr. Nicolas Girod, I, F. Corvaisier, judge of this parish, did repair to the plantation of the late C. F. Girod, where a bundle written over having been presented to me as the testament or last will of the said C. F. Girod, signed by him under date of the thirtieth of November, eighteen hundred and twelve as also an open codicil signed by the deceased, in the presence of Messrs. Prevot, St. Felix, and François Bernard de Deva, I proceeded to the proof at said testament by swearing to that effect Messrs. St. Felix, and J'h Courrie, witnesses to said testament, in the presence of Mr. Nicolas Girod, and then proceeded to open the same.

(Signed) "N. GIROD,
"J. L. COURRIE,
"SAINT FELIX BECHE,
Justice of the Peace.
"F. CORREJOLLES, witness.
"F. CORVAISIER, Judge."

"And by the opening of said testament we saw that Messrs. N'as Girod and F'ois Girod, brothers of the deceased, were appointed testamentary executors.

(Signed) "F. CORVAISIER, Judge."

There were four inventories made of the property of the deceased, namely:

November 12th 1813. In the parish of Assumption.

February 3d, 1814. In the parish of Assumption.

February 18th, 1814. In the parish of Assumption.

February 26th, 1814. In the city of New Orleans.

The amount of all these inventories was $124,594.45. In the fourth inventory was included the half of a house and lot at the corner of St. Louis and Chartres streets, in the city of New Orleans, whereas the complainants alleged that the whole of it *belonged to the [*508 deceased, and ought to have been included in the inventory.

The bill then charged that the executors plotted and contrived to obtain possession, for their own use and benefit, and to the wrong and injury of their co-heirs of the entire succession and estate of their deceased brother, by virtue of the following proceedings, which were charged with being illegal and fraudulent, namely:

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On the 19th of January, 1814, the executors presented the following petition:

"To the Honorable Fran's Corvaisier, Judge of the Court of Probates of the Parish of Assumption, Lafourche.

"The petition of Nicholas and Jean François Girod, both merchants, residing in the State of Louisiana, and testamentary executors of the late Claude François Girod, deceased, in the said parish, humbly showeth:

"That their deceased brother, Claude François Girod, by his testament dated the 30th of November, 1812, has appointed them his testamentary executors and detainers of his estate, and, as such, given to them full power and authority to cause an inventory of all his property to be made, without intervention of justice, to sell or cause to be sold his property in whole or in part, as to them will seem best for their own interests, and for those of the absent heirs named in said testament.

"Wherefore petitioners pray the honorable court to order, that the sale of the movables, movable effects, and of the main plantation, as also of the slaves of both sexes employed thereon, and other lands adjoining thereto, and making part thereof in the lifetime of the deceased, be made at public auction, for cash, as consisting in part of perishable objects, and for the purpose of paying the debts of the succession, after the usual delays, advertisements, and publications required by law.

"The 19th of January, 1814.

(Signed) "N. GIROD,
Testamentary Executor.
"JN. FS. GIROD,
Testamentary Executor."

On the 16th of February, 1814, the following bond was executed:

"Whereas, the honorable judge, François Corvaisier, thinks that he is not authorized to sell the several properties situated in the parish of Lafourche, interior, as being without the jurisdiction of his said parish; and whereas, we are desirous to remove all the liabilities which the said honorable judge might subject himself to, by selling said lands in the same manner, and at the same time, as those situated within his jurisdiction; now, therefore, as testamentary 509*] *executors of the late C. F. Girod, we do bind ourselves, by these presents, to protect and warrant said honorable judge against all the troubles and difficulties which might be the consequence of his thus selling the lands of the succession situated out of this parish.

"In faith whereof, we have signed these presents, to be by him used as of right. Parish of Assumption, the 16th of February, 1814.

(Signed) "JN. FS. GIROD,
"JN. FS. GIROD, Executor."

On the 18th of February, 1814, a sale took place, as evidenced by the following paper:

"State of Louisiana, Parish of Assumption, the eighteenth day of February, in the year 1814.

"On the day and year aforewritten, upon the request of the testamentary executors of the late C. F. Girod, I, François Corvaisier, judge of the said parish, did repair to the sugar plantation of the deceased, and we there proceeded to the sale and adjudication (as requested) of the property, both movable and immovable, belonging to the succession, to wit:" (Then follows an enumeration of plantations, tracts of land, and personal property.)

"N. B.—A certain lot of ground situated at Donaldsonville, which, through error, was included in the original inventory, has not been sold, because it does not belong to the succession, but to one F'se Wiltz, a free woman of color. And the present sale being concluded on the day and year aforewritten, we have closed these presents, amounting to the total sum of eighty-four thousand seven hundred and fifty-five dollars and forty cents, omissions and errors of calculations excepted. And the witnesses, the last appraisers, and the parties interested, have signed, before the judge of the aforesaid parish of Assumption, on the 18th of February, 1814.

(Signed) "JN. FS. GIROD, Testamentary Executor, for self, and by procuration of his brother, Na's Girod.
"ETIENNE BOUDREAUX, witness.
"JACQUES-TERIOT, do.
"L. RICHE, do.
"P. L. LAURET, do.
"FS. CORREJOLES, do.
"Ordinary mark of PIERRE CANCIEL, do.
"JUAN VIVES, do.
"J. BERN'DO DE DEVA, do.
"Before me, F. CORVAISIER, Judge."

*On the same day, namely, the 18th [*510 of February, 1814, the following judicial adjudication of the property was made, being in the nature of a deed:

"State of Louisiana, Parish of Assumption, the 18th of February, 1814.

"At the request of the testamentary executors of the late C. F. Girod, J. F. Corvaisier, judge of the aforesaid parish and of the Court of Probates, did repair to the sugar plantation of said deceased, where, the customary formalities being complied with, and the sale having been announced by the public crier, I proceeded, as requested, to sell at auction, and for cash, to the highest and last bidder, on account of said succession, or those interested therein, all the lands, slaves, and other property situated in this parish and county of Bayou Lafourche, to wit: Thirteen tracts of land or plantations, cultivated or otherwise, including thereon the sugar plantation [and] three small islands lying at the mouth of said bayou; also one hundred and seventeen slaves, employed on said sugar plantation, said slaves being of different ages and sexes, in good health, sick, infirm, crippled, and such as they are or may be, and no warranty being given to the purchaser against the redhibitory vices and maladies prescribed by law, said warranty being on the contrary absolutely and totally refused; also a cotton gin adjoining said sugar plantation; also a distillery in operation, with its implements and appurtenances; also all the horned cattle, mules, horses, carts, and wagons; also all the implements of husbandry of said sugar plantation; as also all the furniture [and] old silver plate; also twenty-two hundred gallons of Tafra, in the distillery aforesaid; also fifty-five thousand pounds of brown sugar lying on cisterns; also sixty-three bales of cotton

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(nine of which are damaged), weighing together twenty-three thousand one hundred and thirty pounds. All the above articles were sold separately, and cried by the public crier, with the exception of the sugar plantation, which was sold, with the furniture thereof, as appears by the judicial sale, detailed and deposited in the clerk's office of the said parish of Assumption; and the whole, amounting together to the sum of eighty-four thousand seven hundred and fifty-five dollars and forty cents, was adjudicated for cash to Mr. Charles Saint Felix, who is satisfied therewith, for having seen, visited, received, and taken possession of same. And the aforesaid Nas. Girod and Jn. F. Girod, here present, declare, by the present act, that they have received from the said Charles Saint Felix the aforesaid sum of $84,755.40, for which acquittance is hereby given, and that they quitclaim and release him, and his heirs and assigns, of and from all claims and demands whatsoever.

"In testimony whereof, the aforesaid parties 511*] have signed the *present judicial sale, the day and year first above written, in presence of the undersigned witnesses, and of the parish judge.

"(Signed), per procuration of Nas. Girod,
"JN. F. GIROD.
"JN. F. GIROD.
"SAINT FELIX.
"T. COURRIE.
"Witness, F. CORREJOLLES.
"Before me, J. CORVAISIER, Judge."

On the 23d of February, 1814, by a similar deed to the above, Saint Felix conveyed the whole of the property to Nicholas Girod and Jean F. Girod, describing it in the language above quoted, and for the same consideration. The deed concludes in the following language:

"All which articles, the said Saint Felix does, by these presents, retrocede to the said purchasers, Nas. Girod and Jean François Girod, for themselves, their heirs and assigns, without any reservation or reclamation whatever, for the price and sum of eighty-four thousand seven hundred and fifty-five dollars and forty cents, which the said vendor acknowledges, by these presents, to have received, in ready money, from the said purchasers, Nas. Girod and Jean Frs. Girod, and for which the present sale will operate as an acquittal and release against all and every person or persons whatever; the said Saint Felix herein declaring, that he is not bound to furnish the said purchasers with any other titles for the said lands and slaves, than those which have been given and delivered to him at the judicial sale aforesaid, and which he now delivers to said purchasers, who acknowledge to have received them, and to be satisfied therewith. Wherefore, the contracting parties agreeing both to these presents, have set their names to the same, the day and year aforewritten, in the presence of the undersigned witnesses, and of the parish judge aforesaid.

(Signed) "NAS. GIROD, per procuration.
"SAINT FELIX.
"JN. F. GIROD.
"JN. F. GIROD.
"Witness, (Signed) "J. COURRIE.
"FS. CORREJOLLES."

On the 4th of March, 1814, the following petition was presented, and order given for the sale of the property in New Orleans:

"To the Honorable James Pitot, Judge of the Court of Probates, the petition of Nicolas and Jean François Girod, testamentary executors of the late Claude François Girod, humbly showeth:

"That in conformity with the order rendered by this honorable *court, they [*512 have caused an inventory to be made by the register of said court of all the property left by the deceased in this parish, and amounting, according to the appraisement made thereof, to the sum of twenty thousand seven hundred dollars, being the amount of eight lots, and a piece of ground, situated in this city, at the corner of St. Louis and Chartres streets, as the whole appears from said inventory deposited in the clerk's office of said court. Petitioners further show, that the succession of their late brother Claude François Girod is indebted in a sum of sixty thousand dollars, or thereabouts, being the amount of the legacies and debts left by the deceased, which it is necessary to pay without delay. Wherefore petitioners pray this honorable court to order that the said piece of ground and eight lots be sold for cash, as also the said house, which, belonging in common to the succession and one of the petitioners, cannot be conveniently divided without loss or inconvenience to the owners; and petitioners further pray that the present petition be served upon the attorney appointed to represent the absent heirs, so that the law be complied with, and justice will be done.

(Signed) "N. GIROD, Mayor."

Copied from the original in English.

ORDER.

"Let Mr. C. R. Caune, attorney appointed by the court to represent the absent heirs of said Claude François Girod, be notified to show cause why the prayer of this petition should not be granted. (Signed) JS. PITOT.

"New Orleans, March 3d, 1814."

"As attorney representing the absent heirs of the said late Claude François Girod, I have no objections to the petitioners' demand.

(Signed) "R. CAUNE,
"Attorney for absent heirs.
"New Orleans, March 4th, 1814."

ORDER.

"Let the sale be made as prayed for.
"New Orleans, March 5th, 1814.
(Signed) JS. PITOT, Judge."

On the 9th of April, 1814, a sale was made of the property in the city of New Orleans in conformity with the above order, which was inventoried on the 26th of February, as appeared by the following paper:

"And on this ninth day of the month of April, in the year of our Lord one thousand eight hundred and fourteen, and of the *Independ- [*513 ence of the United States of America the thirty-eighth, at the hour of ten A. M., I, Jean Baptiste Marc Brierre, deputy-register of wills for the city and parish of New Orleans, did repair to suburb Saint Mary, for the purpose of selling to the highest and last bidder the houses and lots belonging to the succession of the late Claude François Girod, and there being, we did find

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and meet with Mr. Nicolas Girod, one of the testamentary executors of the deceased, and Charles Robert Caune, attorney at law, appointed by the court to represent the absent heirs. Whereupon, in their presence, and in that of Prosper Prieur and Sebastian Blondeau, witnesses hereto required, I did proclaim the said sale in a loud and audible voice, and on the following terms and conditions, to wit:

"*Cash.*"

The paper then enumerated the lots of ground and concluded as follows:

"And there remaining nothing else to be sold belonging to said succession, I, deputy-register, aforesaid, closed and terminated the present process verbal. And after reading thereof, we ascertained the amount of said sale to be twenty-seven thousand seven hundred dollars, which sum was left by us in the hands of the said Nicolas Girod, testamentary executor aforesaid, who acknowledges the same, takes charge thereof, and has signed with the parties, the witnesses, and me, deputy-register, the day, month, and year aforewritten.

(Signed) "BLONDEAU.
"PROSPER PRIEUR.
"R. CAUNE, Attorney
"N. GIROD,
Testamentary Executor.
"BRIERRE, Dep.-Register."

On the 28th of April, 1814, Laignel conveyed to Nicolas Girod, as follows:

Sale of House and Lots from Simon Laignel to Nicolas Girod.

"Before me Michel de Armas, a notary public, residing in New Orleans, State of Louisiana, United States of America, and in the presence of the witnesses hereinafter named and undersigned, personally appeared Mr. Simon Laignel, merchant, residing in suburb St. Mary, who has, by these presents, sold, transferred, and conveyed, from this day and forever, with no other warranty than that of his own acts and deeds, unto Mr. Nicolas Girod, of this city, merchant, here present and accepting purchaser for himself, his heirs and assigns.

"1st. Six lots of ground," &c., &c., enumerating the lots, and concluding as follows: "To have and to hold said property unto 514*] *the said purchaser, who may use, enjoy, and dispose of the same, in full and complete ownership, by virtue hereof. The property herein sold and described belong to the vendor, for having acquired the same at public sale which the said Nicolas Girod as testamentary executor of the late Claude François Girod, caused to be made on the 9th of April, instant, by the register of wills, of the property belonging to said Claude François Girod's succession, as the whole appears by the act of sale confirmatory of the adjudication aforesaid, passed before the notary undersigned on the 25th instant. By the certificate of the recorder of mortgages in this city, bearing even date herewith, it appears that there is no mortgage in the name of the vendor on the property herein bargained and sold.

"The present sale is made for and in consideration of the total sum of thirty-five thousand eight hundred dollars, which the said vendor acknowledges to have received cash, before the signing hereof, and out of the presence of the notary and witnesses undersigned, from the purchaser, to whom he grants full and ample acquittance and release of the same, renouncing the benefit of the exception, *non numerata pecunia*, and the two years' delay which the law accords to enforce said exception. Thus it was, &c., promising, obliging; renouncing, &c.

"Done and passed at New Orleans, in my office, in the presence of Messrs. Michel J. B. L. Fourcesy and Charles Robert Caune, both witnesses hereto required and domiciled in this city on the twenty-eighth of April, in the year eighteen hundred and fourteen, and of the Independence of America the thirty-eighth; and the said appearers, notary and witnesses, have signed these presents after reading thereof.

(Signed) "N. GIROD.
"SIMON LAIGNEL.
"FOURCESY.
"R. CAUNE.
"MICH'L DEARMAS, Not. Pub."

The bill of the complainants in the court below also charged that the executors, in order to appropriate, wickedly and fraudulently, to their own use and benefit, the funds of the succession, did, in their account of the 23d of May, 1817, place themselves as creditors of said succession for a sum of nearly forty-nine thousand dollars, to wit, said Nicolas Girod for forty thousand four hundred and eighteen dollars and nine cents, and said Jean François Girod for eight thousand two hundred and fifty-three dollars and twenty cents, although no sum was due to them.

The proceedings upon which this charge was founded are as follows:

*"STATE OF LOUISIANA: [*515

"NICHOLAS GIROD
v.
J. F. GIROD, Executor of C. F. Girod, and R. C. Caune, &c. } No. 604—Parish Court.

"*Petition, filed November 26th, 1814.*

"To the Honorable James Pitot, Judge of the Parish Court for the Parish and City of New Orleans.

"The petition of Nicolas Girod, of the said city and parish, merchant, showeth, that Claude Francis Girod, of Lafourche, was indebted to your petitioner in a large sum of money, previous to his decease; that hereto annexed is a detailed account of the money due by his estate, at this time, to your petitioner; which account, amounting to the sum of forty thousand five hundred and seventy-seven dollars and twenty cents, principal [and] interest, the executors of the said Claude F. Girod has refused to pay, though thereto frequently required. Wherefore your petitioner prays, that John François Girod, now residing in the city of New Orleans aforesaid, one of the executors of the said Claude F. Girod, and R. C. Caune, the attorney appointed to represent the interest of the absent heirs, may be cited to appear and answer this petition.

"And your petitioner further prays, that they may be condemned to pay your petitioner the above sum of $40,577.20, with interest and costs.

"And your petitioner further prays all such other relief as the case may require, and to justice and equity may appertain.

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"Received the annexed document, New Orleans, September 9th, 1816.

(Signed) "N. GIROD.

"A copy thereof being annexed to the award of the arbitrators in the premises.

"*Citation.*

"Mr. J. F. Girod, Executor of C. F. Girod, and C. R. Caune:

"You are hereby summoned to comply with the prayer of the annexed petition, or to file your answer thereto in writing with the clerk of the parish of Orleans, at his office at New Orleans, in ten days after the service hereof; and if you fail herein, judgment will be given against you by default.

"Witness the Honorable James Pitot, judge of the said court, this 26th day of November, in the year of our Lord 181 .

(Signed) "SAM. P. MOORE,
"Deputy-Clerk.

"*Sheriff's Return.*

"Served a copy of petition and citation on **516***] each [of] the *defendants, November 28th, 1814; returned November 28th, 1814.

"J. H. HOLLAND, Deputy-Sheriff.

"*Answer of J. F. Girod, filed November 29th, 1814.*

"To the Honorable James Pitot, Judge of the Court for the Parish and City of New Orleans, the answer of Jean F. Girod, one of the testamentary executors of the late C. F. Girod, to the petition of Nicholas Girod, humbly showeth:

"That all and singular the items in the accounts presented by said Nicholas Girod, in his said petition, must be proved, to justify his claim against the succession of C. F. Girod, and for that purpose this respondent prays this honorable court to order what shall seem the best for the common interest of parties, and moreover to be hence dismissed with costs. And, &c.

(Signed) "J. F. GIROD, Ex., Jr.

"*Answer of R. Caune, filed November 29th, 1814.*

"To the Honorable James Pitot, Judge of the Parish Court, the answer of C. R. Caune, in his capacity of attorney representing the absent heirs of the late C. F. Girod, to the petition presented by Nicholas Girod, against the estate of the late aforesaid C. F. Girod:

"Your respondent denies all facts mentioned in the plaintiff's petition, and he says that the plaintiff must be proven his claim before court, and prays the court to dismiss him, with costs of the suit; in duty bound, your petitioner shall ever pray.

(Signed) "R. CAUNE, Attorney.

"*Order appointing Arbitrators, Parish Court for the Parish and City of New Orleans, November 27th, 1814.*

"Present: the Honorable James Pitot.

"NICOLAS GIROD v. J. F. GIROD, Ex. of C. F. Girod, and C. R. Caune, attorney for the absent heirs.

"Upon motion of Alfred Hennen, Esquire, of counsel for the plaintiff, it is ordered that F. Percy and F. M. Rouzan be appointed arbitrators in this case, to decide on the claim of the plaintiff, and in case of their not agreeing, that the court appoint a third person as umpire. I do hereby certify the above.

"In testimony whereof I have hereunto set my hand and affixed the seal of the said court at the city of New Orleans, the day and year first above written, and of the Independence of the United States the thirty-ninth.

(Signed) "SAM. P. MOORE,
"Deputy-Clerk, (swearing.)

"Personally appeared before me, one of the justices of the peace in and for the city and parish of New Orleans, Ferdinand Percy *et* F. *M. Rouzan, of this city, who were [*517 duly sworn according to law as arbitrators as above named, that they will examine the accounts between the parties with impartiality, and give the report according to law.

(Signed) "F. MEFFER ROUZAN.
"F. PERCY, Jun.

"Subscribed and sworn to before me, at New Orleans, the 10th day of December, 1814.

(Signed) "J. L. LAPANSE,
"Justice of the Peace.

"The undersigned arbitrators, appointed by a decree of the honorable the court of the city of New Orleans, under date of the 25th of November last, to verify and examine the accounts and demands of Nicolas Girod, a merchant residing in New Orleans, against the succession of the late Claude François Girod, his brother, who was a resident of the parish of Lafourche, in this State, said succession being represented by Jean François Girod, one of the testamentary executors thereof, and C. R. Caune, attorney for the absent heirs, and to make a report thereon to said honorable court, do declare, under the sanctity of the oath they have taken, on the tenth of December instant, and which is hereto annexed, that after hearing the parties interested in this affair, and the witnesses by them introduced, after being sworn by John L. Laparge, a justice of the peace in this city, they have proceeded to the examination and verification of the documents, titles, accounts, and books exhibited to them by the parties interested in the manner following, to wit: First, they have examined the sworn account produced by Nicolas Girod, on the 25th of November last, which consists of thirteen items, which the arbitrators have verified in the manner following:

The first item, amounting in capital to $1,602 for 801 hides, which the said Nicolas had left in the stores of Claude François Girod, is established by the declaration of Jean François Girod, who affirms positively that the said 801 hides had been left in the stores of said Claude François Girod, who disposed of the same for his private account; the said Jean François Girod declares likewise, that two dollars was the price for hides in 1794, and that he himself had purchased some at that price for his own account. - - - - $1,602 00

The second item, amounting in capital to $1,500, is the produce of an account which Mr. Pierre Bousignes, then clerk of the house of Claude F. Girod, had collected and paid in the hands of said Claude F. Girod, as making part of the funds

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518*] *belonging to Nicolas Girod. Mr. Bousignes declared under oath that he does not remember the precise amount of that sum, but that it must have been something like fifteen hundred dollars; he recollects that that account was paid in before the fire of 1794, and that several cash payments for the private account of C. F. Girod were made out of the funds belonging to said Nicolas Girod. - $1,500 00

The third item, amounting in capital to $6,222.18, proceeds from the following remittances and effects, to wit: Jean François Girod paid in specie to Claude François Girod, Nicolas Girod's interest, say two-thirds in a shipment of furs made in March, 1795, on board the brig Jane, bound to Philadelphia, and amounting to $3,593.37, as appears from a copy-book or register, marked A, No. 40, written by Guilhempan, and signed by the said Claude François Girod, which book or register has been produced by the said Jean François Girod, who further declared that the said Claude François Girod was at that time authorized to settle the accounts of Nicolas Girod with this deponent, and that the said C. F. Girod has never rendered to Nicolas Girod an account of this transaction. - 2,395 63

For so much paid by Jean François Girod to said Claude François Girod, for Nicolas's interest, say two thirds in another shipment of furs made in April, 1795, on board the brig L'Archedimoi, bound to Philadelphia, as appears from the aforementioned copy book or register, marked A, No. 40. - - 432 75

For the amount of a barrel of wine, with which the private account of said C. F. Girod was debited on the 17th of October, 1795, but never since credited with, as appears from the aforementioned copy book or register. - - 50 00

Amount of a bill of exchange drawn by Claude François Girod, on the 7th of April, 1796, payable eight days after sight, at New York, to his brother, Nicolas Girod, for $2,000, which he had received from Jean François Girod, for $2,000, which he had received from Jean François Girod; said bill has never been accepted or paid, as appears from the bill itself, which has been exhibited to us by said Nicolas Girod. - - 2,000 00

For the half of the amount of twenty-six barrels of gunpowder, shipped in the month of April, 1796, on board the ship the Two
519*] Friends, bound to N. *York, and consigned to Th. Thebane, by Jean François Girod, on joint account with Nicolas Girod. The proceeds whereof amounting to $1,193.75, as appears from the copy book aforesaid, were received, as also the profits of said Th. Thebane by the said Claude François Girod, who never accounted for them to the parties interested. This being established by the declaration of said Jn. F. Girod, - - - - - - $596 87

Amount of sundry merchandises belonging to Nicolas Girod, and by Jean François Girod intrusted to Claude François Girod, as appears from the copy book aforesaid, was exhibited to us by said Jean François Girod, who declared that Claude François Girod had never accounted for the merchandise to said Nicholas Girod, - 210 06

Amount of sundry debts which Claude François Girod had undertaken to collect for account of Nicolas Girod, as appears from the statement produced by Jean François Girod, and corroborated by the aforesaid copy book or register A, - - - - - 476 87

Amount of a barrel of wine, sold to Mr. de Vangine, by the said Jn. François Girod, which was paid to said Claude François Girod, as is proven by a written declaration of said Jn. F. Girod in said copy book or register, - - - - 60 00

The 4th item, amounting in capital to $186, is established by the declaration of Jean François Girod, who affirms that it is within his knowledge that the articles composing said item were delivered to Claude François Girod, whoshipped them from Havana on his private account, - - - - - 186 00

The 5th item, amounting in capital $651.50, consists of the net proceeds of the sale made by Claude Frs. Girod of 2 bales of blue drilling, shipped for New York, in 1801, on board the ship South Carolina, Stick, master, by Thibaut, for account of Nicolas Girod, and consigned to Claude F'ois Girod, as appears from book No. 1, which was exhibited to the arbitrators, who ascertained that it was in the handwriting of Guilhempan, then the clerk and agent of C. F. Girod, - - 651 50

The 6th item, amounting in capital to $229.06, consists likewise of the net proceeds of the sale of a cask of manna, shipped by Nicolas Girod when in New York, in 1797, on board of schooner Despatch, Clark, master, to the consignment of said Claude François *Girod, as the whole was made [*520 to appear by copy book No. 1, mentioned in the foregoing article, - - - - - - - $229 06

The 7th item, amounting in capital to $379.12, consists of a lot of

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merchandise, consigned by Jean François Girod to Claude François Girod, at the time of said J'n F. Girod's departure for the United States in 1797, which said merchandises belonged to said Nicolas Girod, and were sold by said Claude François Girod, as appears from a waste or copy book in the handwriting of said Guilhempan, marked B, No. 42, and produced by said Jean François Girod, - - - - $379 12

The 8th item, amounting in capital to $818.82, consists of the proceeds of the sale made by Claude Frs. of divers merchandises belonging to Nicolas Girod, which the latter had left in the hands of Jean François Girod, who delivered them in kind to Claude François Girod at the time of said J. F. Girod's departure for the United States, in 1797; said merchandises are enumerated in a copy or waste book in the handwriting of the late Guilhempan, marked B, No. 41, and likewise produced by the parties interested, - - 818 82

The 9th item, amouting in capital to $899, consists of the net proceeds of twelve barrels of wine shipped by Nicolas Girod when in New York, 1797, on board the brig Success, Dinsmore, master, to the consignment of Claude François Girod, who sold the same, as was shown by the sales book No. 1, aforesaid, - - 899 00

The 10th item, amounting in capital to $489.63, consists also of the net proceeds of sale made by Claude F'ois Girod, of 498 sextains of cards shipped by N'as Girod when in New York, 1797, on board of the brig Success, Rathbone, master, to the consignment of said Claude F'ois Girod, as was shown by the sales book No. 1, aforesaid, - - - - - - 489 63

The 11th item, amounting in capital to $991.38, consists also of the net proceeds of the sale made by C. F. Girod of 762 sextains of cards, shipped in 1795 by Nicolas Girod, then in New York, for his account and risks, on board the schooner Active, Wilcox, master, and consigned to said Claude Frs. Girod, as appears from the sales book No. 1, aforesaid, - - 991 38

The 12th item, amounting in capital 521*] to the sum of *$13,901.94, consists of diverse lots of merchandises and jewelry belonging to N. Girod, which the said Claude François Girod sent into the provinces of the interior, and there sold, or caused to be sold. The accounts of those sales were never settled between Claude François and Nicolas Girod, which fact is attested by the declaration of Jean François Girod and several other witnesses, who testify that Claude Frs. Girod has constantly avoided to render said account. The several articles composing the present item are enumerated and detailed in the aforementioned sales book No. 1, which the arbitrators have ascertained to be in the handwriting of Guilhempan, $13,901 94

The 13th item, amounting in capital to $6,574.30, consists of the balance of an account between Nicolas and Claude F. Girod, adjusted on 1st August, 1818, by Mr. Phillippon, Jr., who was authorized for that purpose by the said Claude F. Girod. The arbitrators, after examining that account and the one preceding it are satisfied that the articles mentioned in said accounts are foreign to the affairs which existed between the said Nicolas and Claude Frs. Girod - 6,574 30

$34,489 98

Secondly. The arbitrators have examined and verified the account of interests also making part of the claims of said Nicolas Girod, as follows, viz.:

Interests on $1,602, amount of the first item of the account produced by Nicholas Girod, from November, 1794, to the date hereof, making in all, 20 years, at 6 per cent. per annum, - - - - $1,922 40

Interests on $1,500, amount of the 2d item, from the year 1794 to the date hereof, that is, 20 years, at 6 per cent. per annum, - - 1,800 00

Ditto, on $6,222.18, the amount of the 3d item; the arbitrators have examined the eight parts whereof this item is composed, and found that the interests calculated on each part amounted to $7,087.92, wherefore they have been of opinion to leave the item as it was presented, - - - - 6,657 61

Ditto, on the $186, amount of the 4th item, from January, 1797, to this day, making 17 years, 10 months, at 6 per cent. per annum, 199 02

Ditto, on $651.50, amount of 5th item. The arbitrators have reduced the amount claimed, to wit, *$664.02, to $504.91, because [*522 the interest ought to have been calculated only from the 1st of January, 1802, when the 2 bales of drilling shipped by Thibaut, were sold; this gives 12 years and 11 months, at 6 per cent. per annum, 504 91

Ditto, on $229.06, amount of the 6th item. The arbitrators have verified the calculation, which they have found correct, - - - 233 38

Ditto, on $379.12, amount of the 7th item. The calculation was verified, and found correct, - - 382 78

Ditto, on $818.82, amount of the 8th item. The calculation was

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verified, and found correct, - -	$817 90
Ditto, on $899, amount of the 9th item. The calculation was examined and found correct, - -	876 52
Ditto, on $489.63, amount of the 10th item; after examination, found correct, - - - -	477 75
Interests on $981.88, amount of the 11th item; examined and found correct, - - - - -	966 22
Ditto, on $13,901.94, amount of the 12th item; examined and found correct, - - - - -	12,998 80
Ditto, on $6,574.30, amount of the 13th and last item of the account presented by Nicolas Girod. The arbitrators, after examining the calculation, found that it fell short of what it ought to have been, but as the difference is trifling, and in favor of the heirs, they left the item as it was presented, -	493 06
Capital and interests due, after examination, - - - - -	62,769 98
The arbitrators next proceeded to verify and examine the sums with which the said Nicolas Girod has credited the account he has produced, which sums amount, in capital and interests, to $ 22,351.89, and were found correct,	22,351 89
Balance in favor of Nicolas Girod,	$ 40,418 09

"So, that the balance in favor of Nicolas Girod is reduced to $40,418.09 instead of $40,579,20, as claimed in his account, this difference being produced by the reduction made on the interests of the 5th item of said account. The arbitrators, after having examined and heard the declarations of Messrs. Pre. Bousignes, M. Pacaud, Joseph Guillot, and Jean François Girod, witnesses introduced by the parties, and sworn by John S. Lapauze, a justice of the peace, who positively assert that Claude François Girod has always refused to settle his accounts with his brother, Nicolas Girod, and after a scrupulous examination of the books, accounts, titles, and other documents 523*] which were produced in this *affair, are of opinion that the sum of forty thousand four hundred and eighteen dollars and nine cents, claimed by the said Nicolas Girod, is lawfully due to him. In faith whereof, we have signed the present award, that it may have its legal effect given to it.

"New Orleans, this fourteenth day of the month of December, eighteen hundred and fourteen.

(Signed,) "F. MEFFRE ROUZAN.
"F. PERCY, JUN'R."

"On this, the twelfth day of the month of December, 1814, in the thirty-ninth year of the Independence of the United States of America, before me, one of the justices of the peace for the city and parish of New Orleans, personally appeared, as requested by the parties, Mr. Joseph Guillot, a witness in the case of *Nicolas Girod* v. *Jean François Girod*, one of the testamentary executors of the late Claude François Girod, and Charles Robert Caune, attorney for the absent heirs, who, being duly sworn according to law, declared and said, that he has always been a friend of the Girods, and that sometime in the month of July, 1813, the late Claude François Girod, being in town, came to deponent's house, and requested him to call upon him in his room, saying that he had something to confide to him; and that having repaired thither, said Claude François Girod communicated his intentions of preventing all difficulties after his death, saying that he was desirous to settle with his brother Nicolas, that he had been to church, where he had knelt before the Holy Virgin, beseeching her to assist him in terminating his affairs with his said brother Nicolas; deponent, knowing nearly all their affairs, asked him in what manner he intended to settle them; then the said Claude François Girod told him: "Here are my propositions: I will sell my house in St. Louis Street for cash to my said brother Nicolas, with a view to settle with him, reserving for the term of my natural life, the use of one of the back rooms of said house; and if there be any balance remaining due to him, he will grant me a delay to pay the same; and he requested deponent to submit those propositions to Nicolas Girod's consideration, which deponent did; but the said Nicolas Girod answered him surely, No; and added, that he requested deponent not to interfere in that affair, saying that he himself had made proposals to Claude François Girod, his brother.

"Deponent further says, that he knows well that said affairs between Nicolas and Claude François Girod were never settled; and he has signed with us.

(Signed)
"JN. FRS. GIROD, Test'y Executor.
"JOSH. GUILLOT.
"N. GIROD.
"R. CAUNE, Attorney for absent heirs.

"*Sworn to and subscribed before [*524
me, at New Orleans, this 12th day of December, 1814.

(Signed) "JH. L. LAPANGE,
"Justice of the Peace."

Order, 15th December, 1814.

"NICHOLAS GIROD,
v.
JEAN FRANOÇIS GIROD, Ex. of C. F. Girod, and C. R. Caune, Att'y, &c. } 604.

"Upon motion of Alfred Hennen, Esq., counsel for the plaintiff, and upon reading and filing the report of the arbitrators appointed in this case, it is ordered that the defendants do show cause on Saturday next, the 17th instant, if any they have or can, why the said report should not be homologated, and made the judgment of this court in the premises."

Sheriff's Return on Copy of the above Order.

"Served copy of the within order on each of the defendants, December, 15th, 1814.
(Signed) "J. H. HOLLAND, Deputy-Sheriff."

Order and Judgment.

"It is ordered that the report of the arbitrators be homologated, and made the judgment of the court in this case, and that the said defendants do pay to plaintiff, in conformity to the said award, the sum of forty thousand four hundred and eighteen dollars and nine cents, with costs of suit to be taxed.

"New Orleans, May 6th, 1815.
(Signed) "J. PITOT, Judge."

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"I do hereby certify this to be a true copy of all the records, documents, and [SEAL.] proceedings had in this case. Clerk's office of the Parish Court, New Orleans, January 10th, 1844.

(Signed) "ALFRED BODIN, Deputy-Clerk."

In the preceding March, Jean François Girod had brought in an account against the succession, and passed it through a similar process, which resulted in a judgment in his favor for the sum of $8,253.20.

The bill of the complainants in the court below then charged, that nearly all the co-heirs, having full faith and confidence in the honesty and integrity of Nicolas and Jean François Girod, did intrust them with their powers of attorney, authorizing them to represent the interests of such co-heirs in the settlement of the succession; in virtue of which the executors approved the account rendered by themselves. And that afterwards, by concealment of facts which they knew to exist, and were bound, as 525*]agents, to communicate, the *said executors obtained from some of them an acquittance or transfer of all claims against the succession.

The bill then recited that Nicolas Girod had died, in possession of all the real estate of Claude François Girod except some parts which were mentioned as having been sold, all of which property thus remaining with Nicolas Girod the complainants claimed as the original co-heirs of Claude François Girod, and also an account of the rents and profits. All claim against the other executor, Jean François Girod, was released.

Amongst the matters introduced in evidence was the following letter, which is inserted because it is referred to in the opinion of the court; and was sent by Girod at the same time that he obtained from his two sisters the receipts which are mentioned in another part of this statement:

"NEW ORLEANS, 27th May, 1817.

"My sister Quetend: To-morrow, our brother Jean François embarks for Havre; from thence he will proceed home, for the purpose of delivering to each one of you what is coming to him from the succession of our late brother, Claude François. I assure you that if I had not been anxious to protect the honor of this brother, everything would have been absorbed in settlement of accounts with me, and by other debts; besides, whether you have it now or later, the greater part cannot escape you; this is to be understood of those who shall not cease to merit our friendship and esteem. Beware not to imitate the example of Jacques, who has forever lost our regard by his iniquities toward our whole family. Hereafter, when I shall have, in some measure, recovered from my losses by different bankrupts, I will send you some assistance from time to time. At present J. F. has orders to regulate his conduct towards you all by your conduct towards him. Farewell.

"I cordially embrace you all.

"Your brother and friend,

(Signed) "N. GIROD.

"I have not time to write to you more at length, having much to attend to before the departure of my brother."

The original is indorsed:

"Recorded in consular book G, page 94.

"PARIS, 22d January, 1844.

(Signed) "LORENZO DRAPEZ, [SEAL.]

"Consul United States."

Proved and admitted in evidence, April 29th, 1844.

On the 19th of January, 1830, Jean Ffançois Girod executed to his brother and co-executor, Nicolas, the following deed:

"On this nineteenth day of the month of January, of the year *eighteen hun- [*526 dred and thirty, and of the Independence of the United States of America the fifty-fourth, before me, Louis T. Caire, a notary public in and for the parish and city of New Orleans, duly commissioned and sworn, and in the presence of the witnesses hereinafter named and undersigned, personally appeared Mr. Jean François Girod, Jun., residing at Paris, in the kingdom of France, and now in this city, herein acting for himself and in his own right, of the one part, and Mr. Nicolas Girod, his brother, residing in this city, and herein acting for himself, and in his own right, of the other part, who declared that they own, in common, for a moiety each, several landed properties, and, among others, a sugar plantation, situated on Bayou Lafourche, parish of Assumption, in this State, which they have for several years cultivated as partners, the said Nicolas Girod having the exclusive administration of the same, and being clothed with the necessary powers to that effect; but that from the date hereof the partnership between them is amicably dissolved, by consent of both parties.

"And the said Jean François Girod moreover declared that he sells, abandons, transfers, and sets over, without any other warranty than that arising of his personal acts and deeds, but with substitution and subrogation to all the warranties which have been given to them by their original vendors, unto the said Nicolas Girod, his brother, here present, and accepting purchaser, for himself, his heirs and assigns:

"1. The undivided moiety of a sugar plantation, seven leagues distant from the river Mississippi, situate on Bayou Lafourche, in the parish of Assumption, as it now is, or may be, together with the undivided moiety of the improvements, slaves, animals, ameliorations, implements of husbandry, and all other objects or things whatever appertaining thereto.

"2. The undivided moiety of all the lands belonging to them in common, and situated on Bayou Lafourche.

"3. The undivided moiety of three islands lying at the mouth of said bayou, and known as Timballier, Bross, and Caillon islands.

"The whole of which had been acquired, on joint account, by the said appearers, by purchase from the late Joseph St. Felix, as per act executed before F. Courvaisier, judge of the aforesaid parish of Assumption, on the eighteenth of February, eighteen hundred and fourteen, the said St. Felix had purchased the same at the judicial sale of the property belonging to the succession of the late Claude François Girod, who in his lifetime had acquired the same by purchase from divers persons; the said purchaser acknowledging that he is fully satisfied with the said titles, and declaring that

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he is well acquainted with the said plantation, lands, animals, slaves, and improvements, which are the subject matter of this act, and requires nothing further.

"But it is well understood and agreed upon, 527*] by and between the *parties hereto, that the sugar and molasses now on said plantation and in the sugar house are not included in this sale, and that the net produce thereof shall be equally divided between the parties.

"And the said Jean François Girod moreover declared, that he also transfers and abandons unto the said Nicolas Girod, his brother, all and singular the debts due to said plantation, as also all such sum or sums as now are, or may hereafter be, due to said partnership or community, under what title, and for what reason or reasons soever, hereby giving unto his said brother full power and authority to sue for and enforce the payment thereof, but without recourse against the transferer.

"The present sale and transfer of debts are made and accepted by the contracting parties for and in consideration of the price and sum of seventeen thousand dollars, in payment whereof the said purchaser, Nicolas Girod, has presently subscribed to the order of the said Jean François Girod, his brother, three promissory notes, each for a like sum of twenty-three thousand three hundred and thirty-three dollars thirty-three and one third cents, the first payable on the first of March, eighteen hundred and thirty-one, the second on the first of March, eighteen hundred and thirty-two, and the third on the first of March, eighteen hundred and thirty-three, with power and faculty, however, to postpone the payment of said notes, or of parts thereof, from year to year, by paying to the said Jean François Girod, or to the holder of the notes the payment whereof shall have been postponed, a yearly interest, at the rate of eight per centum per annum, until final payment; which said notes, after being marked *ne varietur* by the notary undersigned, to identify them herewith, were handed over to the said Girod, who acknowledges the receipt thereof, and gives full and ample acquittance for the same.

"By means of the foregoing, but provided the aforesaid notes be paid, the said Jean François Girod transfers and abandons unto the said Nicolas Girod all the rights of ownership whatever which he had, has, or may have, in and to the plantation, lands, slaves, animals, implements of husbandry, in a word, in and to all the property which they owned in common, wishing that the said Nicolas Girod be seized of the same, and may enjoy, use, and dispose thereof, as of things to him well and lawfully belonging, from this day and forever.

"And the said appearers have furthermore declared, that by act before G. R. Stringer, a notary in this city, bearing date the fifteenth of May, eighteen hundred and twenty-nine, Mr. Nicolas Girod, acting for himself, and in the name and with the consent of his brother, sold to Messrs. Abner Robinson and Benjamin Ballard a tract of land situated in the parish of Assumption, and belonging to the community aforesaid, for the price of fifteen thousand dollars, five thousand whereof were paid cash, 528*] and converted to *the use of said sugar plantation and other property; that the ten thousand dollars payable at one, two, and three years from the date of the act aforesaid belong to them for a moiety each, but that the said Jean François Girod assigns to Nicolas Girod his share of five thousand dollars in said debt, on condition that the latter shall credit his running account with a sum of twenty-five hundred dollars, as for money had and received, and without recourse to the assignor, who moreover transfers to said Nicolas Girod, without exception or reservation any, all the rights, actions, privileges, and mortgages accessory to the aforesaid debt of five thousand dollars, being the transferer's share in the price of the sale aforesaid.

"And the notary undersigned having made known to the parties hereto article 3328 of the new Civil Code of Louisiana, which reads as follows: 'Every notary who shall pass an act of sale, mortgage, or donation, of an immovable or slave, shall be bound to obtain from the office of mortgages of the place where the immovable is situated, or where the seller, debtor, or donor has his domicile, if it be of a slave, a certificate declaring the privileges or mortgages, which may be inscribed on the object of the contract, and to mention them in his act, under penalty of damages towards the party who may suffer by his neglect in that respect,' they, the said parties, declared, that, as tenants in common, they are fully aware of the state of things in relation to the immovables and slaves, object of this sale, and that they do hereby, jointly and separately, relieve and free the notary undersigned from all liability on that subject.

"Done and passed in my office, at New Orleans, the day, month, and year first above written, in the presence of Messrs. Charles Darcantel and Jose Antonio Bermudez, witnesses hereto required, and domiciled in this city, who have signed with the said appearers and me, notary, after reading hereof.

(Signed) "JN. FS. GIROD.
"N. GIROD.
"CHARLES DARCANTEL.
"J. ANTONIO BERMUDEZ.
"LOUIS T. CAIRE,
Notary Public."

About the 1st of September, 1840, Nicolas Girod died, in New Orleans, leaving the following will:

"*Will of Nicolas Girod.—Filed 30th January, 1841.*

"*Ne varietur.*

"NEW ORLEANS, 30th January, 1841.

(Signed) "J. BERMUDEZ, Judge.

A due bill to the Mayor of New Orleans, for the sum of $100,000.00, to be employed in the construction of a building called by the name of 'N. Girod,' in the parish of Orleans, to receive *and come to the re- [*529 lief of the French orphans inhabiting the State of Louisiana,	$100,000 00
A due bill to the treasurer of the Charity Hospital, - - -	30,000 00
A due bill to the president of the Catholic Asylum, - - -	30,000 00

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No. 4.	A due bill to	Mrs. Bouvard, born Poidebard, of Bordeaux,	$100,000 00
5.	do.	Mr. Vollier Poidebard, at Chamberry,	30,000 00
6.	do.	Mr. Joseph Girod,	100,000 00
7.	do.	Mr. G. Montamat,	50,000 00
8.	do.	Mr. A. Michoud,	50,000 00
9.	do.	Mr. F. Grima,	30,000 00
10.	do.	Mr. Dejan, Senior,	20,000 00
11.	do.	Mr. D. Prieur,	40,000 00
12.	do.	Mr. Chs. Claiborne,	15,000 00
13.	do.	Mr. M'ville Marigny,	15,000 00
14.	do.	Mrs. Widow Sabatier,	20,000 00
15.	do.	Mr. A. Fournier,	20,000 00
16.	do.	Mr. E. Rivolet,	20,000 00
17.	do.	Mr. E. Mazureau,	20,000 00
18.	do.	Mr. C. Gurlie,	20,000 00
			$710,000 00

"I certify that the eighteen due bills, above mentioned, are, and constitute, my sole and last will.

"New Orleans, the 23d of December, 1837.
(Signed) "N. GIROD."

The following is a specimen of one of these due bills:

"Good for the sum of fifty thousand dollars, payable to Mr. A. Michoud, at the settlement of my estate.

"$50,000. No. 8.
(Signed) "N. GIROD."

All these legatees were made defendants to the bill.

In the course of the suit an injunction was issued against Antoine Michoud, the executor of Nicolas Girod, to prevent him from making any payment or distribution of the funds received or to be received.

The defendants all answered; the principal answer being that of the legatees. They denied that Claude François Girod enumerated in his will and codicil all the debts due by him, but averred that he owed other and much larger debts; insisted that the authorization granted to the executors by the will, for the sale of the property, was legal; that no law of Louisiana, then existing, contained a provision by which a judge *ex officio* auctioneer was rendered incompetent, any more than any other auctioneer in the State, to sell any property whatsoever, situated within or without the limits of his jurisdiction; averred that, as no complaint was **530*]** *made of the price of the property so sold by the judge, the circumstance that a portion of the property was beyond his jurisdiction was of no consequence, and the price thereof must be regarded as fair, and the sale as having been duly made; admitted the sales of property to St. Felix and Laignel, but denied that any retrocession of the property to the executors ever took place, inasmuch as no retrocession could take place between the parties, unless the executors had been previously the sole and exclusive owners of the property; denied that any fraud or breach of trust was committed by the executors.

The respondents, in their answer, also admitted that the executors had placed themselves as creditors, in their account of the succession, but averred that they had a right lawfully and justly to do so; that Nicolas Girod was creditor by virtue of a final judgment of a competent tribunal, namely, the Parish Court of the Parish and City of New Orleans, rendered on the 6th of May, 1816; they further aver, that this judgment has, for upwards of twenty-six years past, acquired the force of *res adjudicata*, and cannot be disturbed; that the account presented by the executors was duly homologated by the Court of Probates, and that judgment of homologation has also acquired the force of *res adjudicata*. The respondents also deny that the executors, in placing themselves as creditors of the succession in their account, and in ratifying that account under the power of attorney entrusted to them by their co-heirs, abused the trust and betrayed the interest confided to them for their own advantage, and to the wrong and injury of their constituents.

The respondents further denied that Nicolas Girod, by means of false and fraudulent representations, or concealment, had induced the complainants to sign acquittances; averred that they were signed freely, after being well informed of all the circumstances; that Hyppolite Pargoud, the son of Madame Pargoud, had been in New Orleans, &c., &c.

The respondents inserted in their answer a number of family letters, from which they inferred that Nicolas Girod was a charitable man, and had constantly been the supporter of his distant relations, and concluded by pleading prescription.

To these answers there was a general replication.

In the progress of the suit the following admissions were filed by the respective parties:

"*Admissions of Plaintiffs.*

"PARGOUD *v.* MICHOUD.

"1. Jean François Girod, senior, died, leaving a will in favor of Jean François Girod, Junior, of Paris, and the share of the complainants, M'mes Pargoud and Adam, in the estate of Claude François Girod remained as it previously was, to wit, one eighth.

*"2. The complainants will contest [*531 no portion of the account rendered by the testamentary executors of C. F. Girod to the Court of Probates in 1817, except the individual claims of the said two executors, and the judgments obtained on them.

"3. The heirs of Claude François Girod, with the exception of Nicolas Girod and Jean François Girod, Junior, resided in Europe.

"4. All the legatees of Claude François Girod resided in Europe, except the Parish Church of Assumption, Françoise Wiltz, Françoise, the daughter of Rosette Celan, the wife of Mellion, and Pauline and Dominick, who resided in Louisiana.

"5. The lots of which Nicolas Girod has made a donation to the Poydras Asylum were worth, at the time of said donation, $35,000, or thereabouts.

"6. Nicolas Girod always resided in Louisiana, and never went to Europe after his settlement in this city under the Spanish government.

"7. All the letters mentioned in the printed answer, from pp. 27 to 38 inclusive, are ad-

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mitted to be genuine, and the translations of parts thereof, in said answer, are admitted to be correct; but the complainants will require complete translations of them to be prepared, and they reserve the right of objecting to their admissibility on other grounds, if any they have.

"8. Hyppolite Pargoud was brought to Louisiana by his uncle, Jean François Girod, Jr., and has resided with him in Ouachita up to the year 1821, when said uncle went to Paris.

"9. The residence of M'me Adam, of M'me Quetand, and of Jacqueline Poidebard, the wife of Joseph Rivolet, was at Thônes, in Savoy.

"10. The age of Jean Françoise Girod, Jr., now residing at Paris, is seventy-two. He is unmarried. He has no other heirs-at-law except the complainants, and some relatives of the same degree, or their legal representatives. He is on good terms with the complainants, and he and Hyppolite Pargoud, the attorney in fact of the complainants, are intimate friends, and Antoine Michoud is his attorney in fact.

"11. The two acquittances of M'mes Pargoud and Adam, mentioned in the answer, and since deposited in court, are admitted to be genuine, and the said complainants were, in executing them, authorized and assisted by their husbands.

"12. Hyppolite Pargoud is a man of good business habits, attentive and intelligent. He visited his family in 1827 and 1835, but at each visit stayed but a very short time with them. In 1837 he obtained a power of attorney from his mother, authorizing him to claim and recover her share in the estate of Claude François Girod. It was shown to Antoine Michoud, to be by him attested or legalized, as Sardinian consul, but it was not made use of. Hyppolite Pargoud demanded and obtained 532*] another, which was executed *before a notary public on the 18th of May, 1840. From the time he received the first power, he made no secret of his intention of bringing a suit against his uncle Nicolas, and after receiving the second power, when making the inventory at Lafourche, where he was present, he said, that if there had been a will or testament made by his said uncle, he would have sued his succession in the name of his mother.

"13. The letters which have been heretofore deposited by the defendants in the hands of the clerk of the court are genuine, and all signed by the parties in whose names they are written. But the complainants reserve all other objections to their admissibility, and if they are admitted in evidence, they must be translated.

"14. The will of Nicolas Girod was not known when the said inventory was made at Lafourche; it was discovered to exist sometime thereafter.

"15. By the laws of the Duchy of Savoy, Hyppolite Pargoud is a forced heir of his mother, Peronne Bernardine Pargoud, one of the complainants.

"16. Nicolas Girod was the eldest of the family. He was —— years old when he died.

"17. In November, 1833, Nicolas Girod made a present to Philippine Poidebard, his niece (widow Nicoud), of the sum of 3,240 francs, equal to $648; and in March, 1834, he made her another present of 22,000 francs, equal to $4,400, both which presents she received.

(Signed) "J. P. BENJAMIN,
" For complainants."

And on the 29th of April, 1844, the following admissions of defendants were filed.

Admissions of Defendants.

"PARGOUD *v.* MICHOUD.

"1. Denise Philippine Poidebard, the widow of Pierre Nicoud, died in August, 1841, leaving three legitimate children, viz.: Benoite Colline Nicoud, Maurice Emilie Nicoud, and Jeannie Benoite Nicoud, the last of whom is a minor; Jean Berger is her tutor. All these parties, as well as Louis Joseph Poidebard, never where in the United States.

"2. The allegations in the answer of Jean Firman Pepin, as syndic of Jean François Girod, Jun., concerning the transmission of the latter's interest in the subject matter of this suit, are correct, viz.: that Pierre Nicolas Girod died at New Orleans on the 1st of September, 1841, leaving a testament, by act, before Joseph Cuvillier, notary public, of the 6th of February, 1841, by which he bequeathed all his property to the said Jean François Girod, Jun., his brother; the said Jean François Girod, Jun., made a cession of property in the District Court of the First Judicial District, on the 25th of January, 1842; that thereby the interest of both Pierre *Nicolas and [*533 Jean François Girod, Jr., is vested in the creditors of the said Jean François Girod, Jr., and that said Jean Firman Pepin is the syndic of the said creditors.

"3. All the property described in the inventory of the estate of Nicolas Girod, as being situated in the second municipality, is derived from the estate of Claude François Girod. Nicolas Girod never improved this property, but leased it to John F. Miller, by two acts passed before L. T. Caire, notary public, on the 9th of May, 1829, and the 30th of April, 1831; each of these leases is for the space of twenty years, and for an annual rent of $3,000.

"4. The age of Jean Baptiste Dejan, ainé, is sixty-seven years, and that of Claude Gurlie, seventy-two years. The former is a native of New Orleans, the latter has resided in New Orleans forty-eight years, and was intimate with Nicolas Girod as early as 1814.

"5. Nicolas Girod never cultivated or occupied any of the lands mentioned in the bill as situated on Bayou Lafourche, except the plantation, but made levees on those lands.

"6. The Bouvard family resided, in 1813, and has ever since been residing, at or near Bordeaux, in France.

"7. The age of Etienne Rivolet, one of the legatees of N. Girod, is forty years. He is not related to the Girod family, except by his brother, who married Jaqueline Poidebard, one of the nieces of Claude François Girod, the testator, and who is therefore his sister-in-law.

(Signed) "MAZUREAU, for defendants."

And on the 29th of April, the following was offered in evidence and filed:

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"UNITED STATES CIRCUIT COURT.

"WIDOW PARGOUD and others, } In Chancery
v.
ANTOINE MICHOUD and others. }

"*Admissions and Agreements between the Parties.*

"1. Admitted that one Joseph Gaubuan, and one —— Corrino, witnesses on the part of the defendants, would, on being examined upon their oaths, declare, that it was to the perfect previous knowledge, and with the consent and authorization of Jean François Girod, Jun., one of the testamentary executors of Claude François Girod, that Simon Laignel did bid and become the purchaser, at the public sale made by the register of wills, in the city of New Orleans, of the faubourg and city property belonging to said Claude François Girod, after his death; and further, that it was also to the perfect knowledge, and with the consent and authorization of said Jean François Girod, that afterwards the said Simon Laignel sold the same property to Nicolas Girod, the co-testamentary executor of said Jean François.

534*] *"2. All objections are waived, which might have been made in consequence of the answers of the defendants, to whom interrogatories have been administered and propounded, being sworn to before Justice Jackson; and it is agreed that the said answers, so sworn to, shall have the same force and effect as if they had been sworn to before the proper officer.

(Signed) "L. JANIN.

"New Orleans, 29th April, 1844."

On the 29th of July, 1844, the court made a decree, of which the following is a copy.

"This cause came on to be heard this term, and was argued by counsel; and thereupon, upon consideration thereof, it is ordered, adjudged and decreed, as follows: That the plaintiffs are the residuary legatees of Claude François Girod, deceased, in the following proportion, viz. Peronne Bernardine Girod, the widow of Jean Pierre Hector Pargoud, for one eighth; Rosalie Girod, the widow of Louis Adam, for one eighth; Françoise Peronne Quitand, the wife of J. A. Allard, for one forty-eighth; Marie Philippine Rose Quitand, for one forty-eighth; Marie Bernard Quitand, for one forty-eighth; Louis Joseph Poidebard, for one forty-eighth; Benoite Colline Nicoud, for two two-hundred and eighty-eighths; Maurice Emilie Nicoud and Jenny Benoite Nicoud, represented by Jean Berger, their tutor, each for two two-hundred and eighty-eighths; Jean François Girod, the nephew, in his own right, and as testamentary heir of Pierre Nicolas Girod, his brother, and represented by Jean Firman Pepin, the syndic of his creditors, for one twentieth; and Françoise Clementine Girod, wife of Pierre François Pernond, for one fortieth.

"That the adjudication of landed property, with the slaves thereto attached, situated on Bayou Lafourche, made on the 18th of February, 1814, to Charles St. Felix; the retrocession of said property by said Charles St. Felix to Nicolas and Jean François Girod, on the 23d of February, 1814; the adjudication of the property situated in the parish of Orleans, made to Simon Laignel on the 9th of April, 1814, and the notarial seal made to the same on the 26th of April, 1814, in pursuance of said adjudication; and the conveyance of said property to Nicolas Girod, of the 28th of April, 1814, be set aside and annulled, saving, however, the just rights of third persons, to whom two tracts of land on Bayou Lafourche, two slaves, and a piece of ground in the city of New Orleans were conveyed by the said Nicolas Girod in his lifetime, as appears from the admissions in the pleadings.

"That the dative testamentary executors of the late Nicolas Girod do execute to the plaintiffs, or to their legal representatives, good and valid notarial conveyances and assignments of such undivided portions of the aforesaid property as correspond to the proportions in which *they are residuary legatees of the late [*535 Claude François Girod, as hereinbefore declared; which conveyances and assignments are to be settled by Duncan N. Hennen, as master in chancery of this court, in the event of a difference between the parties in relation thereto.

"And for greater certainty, it is hereby declared, that the property, of which undivided portions are to be conveyed and assigned to the plaintiffs as aforesaid, is all the property and slaves which were inventoried in the parishes of Ascension, Assumption, and Lafourche Interior, after the death of said Nicolas Girod, as belonging to his estate; and all the property which was inventoried, after the death of said Nicolas Girod, as situated in the Municipality No. 2 of the city of New Orleans, including the property which is an alluvion, and accessory to the property derived from the estates of Claude François Girod, was abandoned to Nicolas Girod by the heirs of Bertrand Gravier, by an act of compromise executed on the 29th day of March, 1823, and also the house and lot situated at the corner of St. Louis and Chartres streets, in Municipality No. 1 of the city of New Orleans.

"That the account filed by Nicolas Girod and Jean François Girod, in the Court of Probates of the parish of Orleans, in May, 1817, be opened and set aside; that the sum of $40,418.09, claimed by Nicolas Girod in said account, and the sum of $8,253.20, claimed by Jean François Girod for himself in said account, be disallowed and rejected; that the two judgments which were obtained in the Parish Court of the parish of Orleans, in the year 1815, for the aforesaid two sums of $40,418.09 and $8,253.20, be declared satisfied, and that no allowance be made to the defendants on account of said judgments.

"That the two acquittances and releases given, in 1817, by the plaintiffs, Madame Adam and Madame Pargoud, to Jean François Girod, be set aside, and be allowed no other force or effect than as acknowledgments of the receipt by Madame Pargoud for 5,242.75 francs, and by Madame Adam for the sum of 10,342 francs 75c., making respectively the sum of $975.15 and $1,905.15 in the currency of the United States, as stated in said receipt.

"And it is ordered, that a reference be made to the said master in chancery, to take an account of what is due from the estate of Nicolas Girod to the plaintiffs on account of the property belonging to the estate of Claude François Girod and alienated by said Nicolas Girod, for rents and profits, and for interest; and of what

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may be due by the complainants to the estate of Nicolas Girod, for payments made by the said Nicolas on account of the debts of the said Claude François Girod, and of the legacies made by him, and of permanent improvements; and in taking said account, said master shall charge the said estate with the value of 536*] the crop *alleged to have been on hand when the property in Lafourche was adjudicated to Charles St. Felix, with interest thereon; with the amounts which, by the aforesaid account of 1817, the said executors acknowledged to have received, or for which they consented to become responsible, from the time the same were received; with the price at which the two tracts of land on Bayou Lafourche and the two slaves were sold, and which are mentioned in the pleadings as having heretofore been sold, with interest thereon, from the time when, according to the bill of sale, said price was payable; with the sum of thirty-five thousand dollars, this being the admitted value of the price of the ground donated by Nicolas Girod to the Female Orphan Asylum, with interest thereon from the time said donation was made; with the rents and profits of the plantation and slaves, the house at the corner of Chartres and St. Louis streets, and the property in Faubourg St. Mary, now called the Second Municipality, from the adjudication of 1814, and at the rate which might reasonably, and with a proper administration, have been obtained for the same, it being understood that from the years 1829 and 1830, when the property in Faubourg St. Mary, or Second Municipality, still undisposed of, was leased to John F. Miller, the rents and profits thereon are to be charged at the rate at which the rent was stipulated in the lease to said Miller.

"And the said master shall credit the estate of Nicolas Girod in said account with the amount with which said executors credited themselves in their account of 1817, with interest thereon, except their aforesaid two personal claims of $40,418.09, and $8,253.20; with any payments that have been made on account of legacies left by the said Claude François Girod, with interest thereon; and also with one half of the rents and profits of the plantation and slaves of Bayou Lafourche, up to the time when Jean François Girod sold his interest in the same to Nicolas Girod, the plaintiffs having in their bill consented to abandon the half of these rents and profits supposed to have been received by the said Jean François Girod; and also with the actual cost in money to Nicolas Girod, but without interest, of the permanent improvements made by said Nicolas Girod, and still in existence, on the lot at the corner of St. Louis and Chartres streets, and on the lands on Bayou Lafourche, deducting therefrom the value of the labor of the slaves of the said plantation, and of the materials procured from the same, and making, also, proper deductions for the diminution in value of said improvements by wear and tear; and all the interest to be charged in said account shall be so charged at the rate of five per cent.

"And the said master shall compute what amount of the balance so to be found against the estate of Nicolas Girod shall be paid to each of the plaintiffs, according to their declared proportionate interest in the estate of Claude François Girod, and said balance shall be paid to them, with interest, from the date up to which the *master's report may present [*537 a calculation of interest, unless, on application of the parties, the court shall otherwise direct; and said payment shall be made by the dative testamentary executors of Nicolas Girod, out of the funds of said estate, in preference to any legacies. And for the better discovery of matters aforesaid, the parties are to produce before the said master, upon oath, all books, papers, and writings, in their custody or power, relating thereto, as the said master shall direct. And the said master shall, when necessary, examine said parties upon written interrogatories.

"And it is further ordered, that the said dative testamentary executors pay out of the funds of said estate the costs of this suit which have hitherto accrued. And it is further ordered, that either party, if so advised, be at liberty to apply to the court for a partition in kind, or by sale of the above mentioned real estate of Nicholas Girod. And all further directions are reserved until the master shall bring in his report.

"Decree signed, July 30th, 1844.

(Signed) "THEO. H. MCCALEB, [SEAL.]
"United States Judge."

From this decree the defendants appealed to this court.

The cause was argued by *Mr. Eustis* for the appellants, and *Mr. Janin* for the appellees.

The following is a synopsis of the argument of *Mr. Eustis* for the appellants:

The facts necessary to an understanding of this case are few and not complicated; most of them are admitted in the answer, and others are established by documentary evidence.

The action is founded on an alleged purchase of the effects of the succession of Claude Girod by his executors.

Claude Girod died in 1813, leaving a will made in 1812.

The sales complained of took place in 1814.

The commencement of the adverse possession, and the uninterrupted, exclusive, and notorious enjoyment of the revenues of the estates being fixed by the complainants' own bill, we proceed at once to the matters of defense which those facts present, and which are set forth formally in the answer.

1. The first ground of defense is the entire want of equity in the complainants' case, arising from the silence, acquiescence, and laches of the complainants since 1814.

The principles on which courts of equity refuse their assistance to parties under circumstances like the present are familiar to the court. The most recent cases are the following: *McKnight* v. *Taylor* (1 Howard, 168); *Bowman* v. *Walthen* (1 Howard, 193); *Smith* v. *Clay* (3 Brown's Ch. R., 640, *n.*); *Stearns* v. *Page* (1 Story, 215); *Giles* v. *Baremore* (5 Johns. Ch. R., 550); **Piatt* v. *Vattier* (9 Peters's [*538 R., 417); Story's Equity, secs. 1519, 1520, *et seq;* Fonblanque's Equity (last edition), notes to Book 1, ch. 4, sec. 27.

2. The allegations and evidence adduced by the complainants are not reasonably definite as to the time, occasion and circumstances of the alleged concealment, misrepresentation, and frauds; nor is any account given of the time of the discovery. Of the fact of the adverse pos-

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session, it is not even alleged in terms that the plaintiffs were ignorant; the allegation of ignorance of the real situation, &c., is not sufficient for a court of equity to base its action upon. (*Stearns* v. *Page*, 1 Story's R., 215.)

The allegations of ignorance, concealment, &c., are expressly denied and put at issue by defendants.

By the testimony of J. F. Girod, J. M. Girod, Michoud, and Rivolet, receipts, &c., the fact of knowledge is put beyond a reasonable doubt.

3. The allegations of the complainants in their amended bill afford strong evidence that the relief sought by them will not be a matter of equity, but a speculation upon events.

The will of the testator, Nicolas Girod, and the large amount of legacies, was the cause of the suit, not the injustice and wrongs of 1814.

The release of the co-executor, J. F. Girod, and their conduct towards him, point to the same conclusion. He is rich and alive. The chances of inheritance offer a greater benefit than the result of litigation. They acquiesce, discharge him, and await his bounty. N. Girod is dead, and all their vials of wrath are opened upon his grave.

4. The defendants rely upon prescription as a defense.

There is a marked difference between prescriptions and statutes of limitation. The former create rights; the latter merely reach remedies, and in a very qualified and artificial manner.

Prescription is a manner of acquiring property and of discharging debts by the effect of time. It is a title as much so as that of inheritance or sale is. All are on the same footing, and a court can no more interfere with rights under the one than under the others. (Louisiana Code, 3421; Code of 1809, p. 482, art. 32.)

By the civil law, prescription is a mode of extinguishing obligations, and is classed with payment, novation, &c. The obligation itself is extinguished *in foro conscientiæ*, as well as *in foro legis*. (Louisiana Code, art. 2126; Code of 1809, p. 286, art. 134; Troplong on Prescription, c. 1, secs. 2, 31; Code Napoleon, 1234, 2219; Institutes of the Civil Law of Spain, p. 103, lib. 2, tit. 2, p. 108.)

Under the civil law, from motives of public policy, great weight in matters of property is given to possession. The oldest legal maxims of which we have record establish the principles, which modern nations, so far from deviating from, have rather restricted. The policy
539*] *has stood the test of experience and of time. Possession is at once the object, the attribute, and the proof of property; hence it forms the basis of a title, that of prescription.

Nicolas Girod purchased and possessed the estates mentioned in the bill since 1814.

He acquired to them a complete title, by prescription, under the laws of Louisiana. His acts of conveyance were public and authentic, and duly recorded in the proper offices. There are several articles of the Code providing prescriptions, which cover this case. Article 2218, and 204, p. 302, of the Code of 1809, provide, that in all cases in which the action of nullity or of rescission of an agreement is not limited to a shorter period by a particular law, that action may be brought within ten years. In cases of error or deception, the time of the prescription dates from the day on which either was discovered. In this case, there was no secrecy or concealment, and there could be no discovery, in relation to the fact of the sales to N. Girod. The property was not kept concealed under the name of a third person, but in his own, and placed on the public record as belonging to him. The adverse possession alone was full notice to the complainants. It was sufficient to put them on the inquiry, and they had all the means of information to lead them to a knowledge of the facts, and in law are deemed consonant of them. (Sugden on Vendors, 542; 1 Atkyns, 489; 1 Johns. Ch. R., 267; 2 Binney, 466; 15 Johns. R., 555; *Wilkison* v. *Watkins*, 3 Peters, 52; 10 Peters, 222, 228; 1 Howard, 196; see also the opinion of Pothier on prescription, as affecting absentees, Treatise on Obligations, No. 649; Institutes of the Civil Law of Spain, lib. 2, tit. 2, p. 108.)

The only fraud in relation to the sales which can be pretended is, that the executors purchased at the public sales. This fact, if it was so, is as apparent when the titles were put in their names as it is now.

But, if the only fraud in the sales arises from the incapacity of the party to purchase, the prescription of the article 3507 applies with great force. That provides that the action of nullity, or rescission of contracts, testaments, or other acts for the rescissions of partitions, &c., is prescribed by five years against persons living in the State, and ten years against absentees.

Is not the agreement between J. F. Girod and Me. Pargoud, of November 10, 1817, a contract—an act? Is it not, under the decisions of our courts, a partition? It is stated in the instrument that it is for her share in the succession reduced into movable effects, *mobilia*, turned into money. "Whatever may be the form of the act, it is well settled that every first settlement between heirs or partners, by which a state of indivision is terminated, is in substance a partition," say the Supreme Court. And an action to set aside, on the ground of lesion and fraud, an agreement by which six *slaves were given in consideration [*540 of a relinquishment on the part of an heir of all her right and interest in the succession of her mother, in favor of her father-in-law, was held to be barred by the prescription of five years under this article 3507. (See 3 Robinson's R., 317; 14 Louisiana R., 22; 15 *Ibid.*, 517; 16 *Ibid.*, 252; *Tippet and Husband* v. *Jett.*) Here the court hold that even fraud is prescribed against under this article, without any reference as to the time of the discovery of it.

The prescription of actions for lesion, in contracts generally, is only four years. (Code, 1870.) There is another prescription which protects the defendants—that of twenty years under a just title: that is, a title by which property can be transferred. (Louisiana Code, 3442; Code of 1809, p. 488, arts. 60–72.)

After the 10th of November, 1817, the date of the receipt of the funds of the succession, in which it is stated that the property is *mobilia*—converted into money—there was nothing to impugn the justice of the title to the property sold, which could not be affected by any misappropriation of the purchase money. This

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would constitute a claim, and give rise to a personal action, which would not affect the title to the property, which must rest on the state of things in 1814. The heirs in Europe must be considered as being satisfied with the price the property sold for, and constituted themselves creditors for their respective shares. The complaint that they have been wronged out of the proceeds presupposes that the sales were made; and though it may or [may] not be true that they have been hardly dealt with, as the complainants allege, it by no means follows that the property was, in 1814, sold or purchased in bad faith. In matters of prescription by possession, good faith is presumed; bad faith, in a possession, must be proved. (Art. 3447.); on the form of the title, see Toullier, Vol. VIII., No. 508, 509, art. 3453, *et seq.;* Merlin, Questions de Droit, *verbo* Mineur.

There is a statute on this subject which clearly points out the policy of the law, which is decidedly against stale claims, and reduces the prescription in previous sales to administrators, executors, &c., to two years from its passage, and recognizes their right to purchase in all cases in which they have an interest in the property sold, as heirs, legatees, or partners. This law is very important in the consideration of this case. (Laws of Louisiana of 1840, p. 123, No. 112, passed on the 28th of March, 1840.)

5. The answer contains an argument on the facts. The letters offered by defendants are found at pp. 200–215; theanswers under oath from pp. 91 to 101. The most important deposition, that of the co-executor, J. F. Girod, taken in Paris, at p. 139. It was offered in evidence by the complainants.

The complainants call upon the defendants to explain all the affairs of this succession, which was opened in 1813. The defendants **541*]** *are all strangers to them. They are the dative executors, appointed by the Court of Probates, and not by the will of the testator and legatees. (*Vide* the will.)

Why did they not call upon him who alone could give them information—upon N. Girod, in his lifetime?

But they called upon J. F. Girod, the co-executor of Claude Girod, and the alleged confederate in these marvelous frauds. Let his deposition speak. Does he say the sales were fraudulent, or that his co-heirs were wronged? It is decisive of the case. One sentence alone closes it:

"Then (1817) it was that N. Girod, who had settled the estate, handed me a copy of the account rendered to the Court of Probates, and a copy of C. F. Girod's testament, and it was on the faith of these documents, presented to the heirs in Europe, that I paid to each of them and to the legatees what accrued to them."

J. F. Girod was sent to Europe by his brother to pay the heirs who resided in Savoy. The act in the bill of complaint, signed by Me. Pargoud, was made at Annecy, in Savoy. He met his brother, the priest, in Paris. He refused to examine the accounts in Paris. (*Vide* his letter.) The account on which the heirs were paid by J. F. Girod is found at length at pp. 125–128; the will of Claude Girod, pp. 163, 164. In the account are stated the amounts due N. Girod and J. F. Girod, namely, of $40,413.09, and of $8,253.20. These items are charged as paid, and the succession is credited with the proceeds of the property sold. The account is a settlement of the affairs of the succession, on which the payment was made in Savoy in 1817.

A strict examination of the evidence must result in the conviction of an entire want of evidence to establish anything like fraud on the part of N. Girod.

There are some matters of law which it may be well to consider under this head.

a. By the will the executors were empowered to sell, without the intervention of justice, as to them should seem best for the interest of the absent.

b. The executors were bound to cause the property to be sold. (Code of 1809, p. 246, arts. 173, 174; p. 174, art. 128.)

c. The heirs present had a right to insist on a sale for cash. (*Ibid.*, p. 174, art. 129.)

d. The law requires the estate to be settled within the year, where it can be done. The possession of the executor does not continue after a year and a day. (*Ibid.*, p. 244, arts. 166, 169, 173, *et al.;* 4 Martin's R., 340, 609; *Norwood's* case, 10 *Ibid.*, 723.)

e. After a considerable lapse of time, the presumption *omnia rite acta esse* applies; besides, by the law of 1834 (p. 128 of pamphlet acts), all informalities growing out of a public sale by a *parish judge, or other public [***542** officer, are prescribed by the lapse of five years. (2 Robinson, 377; 16 Louisiana Rep., 554.)

f. But the executors did not sell; the judge sold at public auction, and in the most public, fair, and formal manner.

Code of 1809, pp. 174, 127–129. The judge sells, not the executor or curator. The sale was complete without any act of the executors. (8 Martin, 592.)

g. No decree of the court was necessary to authorize the sale. If there was, one must be presumed after this lapse of time; for the judge himself sold. But none was necessary. (Commentary of Gregorio Lopez on Law, 62, tit. 18, part 3. which treats of sales made by executors, and only requires them to be made at auction.

6. The decisions of the Supreme Court went far beyond the law in establishing incapacities to purchase at judicial sales under the old laws; the legislative interpretation of 1840, before cited, puts this fact beyond question. In interpreting the Spanish laws, the decisions of the Supreme Court of Louisiana are very unsafe guides, as everyone knows who has scrutinized them.

It is a great mistake to suppose that purchases made by an executor, at a public sale made by a judge of the property of a succession, are absolutely null and void. The inhibition is, at best, a matter of precaution, to prevent abuse, and is established in the interest of the heirs, and for their benefit exclusively. The authorities cited by the complainants prove this beyond question. (13 Louisiana R., 396.) This they may renounce or enforce, after a reasonable time, according to their own peculiar views. (Louisiana Code, art. 11; 7 Toullier, 562, *et seq.*, 665, *et seq.;* Sugden on Vendors, ed. of 1834, 436.) In all cases where a purchase is made by a trustee, it is optional with the *cestui que trust* to set it aside. (Story's Equity, secs. 322,

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308.) The *cestui que trust* has a right to set aside the purchase, and have the estate resold, if he choose, within any reasonable time, to dissent from the purchase. (5 Vesey, 678; 18 Vesey, 600.)

The purchase by a curator or trustee is *malum prohibitum*, and not *malum in se*. (8 Toullier, sec. 517, p. 713; 2 Sugden on Vendors, edition of 1836, 143; notes to page 125, No. 329.) In *Randall* v. *Ermington* (10 Vesey, 428), the fact of the purchase was not clear, the possession of Ermington was equivocal; but, in all cases where there is a continued public adverse possession, the party dissenting must apply within a reasonable time for relief; he must not lie by and speculate on events. (5 Vesey, 678 and 680; Newland on Contracts.)

The court cannot permit the parties in this case to speculate on the chances of war. The appraisement, the basis of the mortuary proceedings, is not impugned, nor is the adequacy of the price. The complainants were satisfied with it, even in 1817. They have **543***]*waited until the growth of the country has given an increased value to real property, and now ask the court, not to do justice, but to accomplish for them a speculation. Had Louisiana been reduced to colonial vassalage, and enjoyed the advantages of negrophilism, or had the father of the floods, instead of adding to the extent of the suburban estates, reduced, by its frequent abrasions, their extent and value, and burdened it with riparian works and charges, we should have been held accountable for the price—at their option the thing or the price, as it is most advantageous to the claimants. What is this but a speculation on events, which law and good faith repudiate?

7. There has been a ratification of the sales by receiving the price, or part of it. This is what is called the voluntary execution of the contract of sales. The article 2252 of our Code, and 238 of the Code of 1809, p. 310, say it is sufficient that the obligation be voluntarily executed, to throw the proof of ignorance of the party ratifying on him who alleged it. Where there is an execution of the contract by receiving the price, the party executing it is presumed to know any defects or grounds on which it could be annulled, and ignorance of them must be proved, which can be very easily done where there has been any misrepresentation or deceit. And if part of the price be received, the remedy of the party if by a personal action against the executor or trustee for any abuse of his functions.

(8 Toullier, 508–510, 513, cit. Merlin, Questions de Droit, *verbo Mineur*.)

The case of *Rivas*, relied on by complainants, contains no new doctrine. The question there was, whether the party had received part of the price of the plantation in dispute knowingly, that is, knowing that the money he received came from the sale. The court, not being satisfied of the fact, of course held that there was no ratification, but asserted the principle maintained in 8 Toullier, 519, art. 2252 of the Louisiana Code.

The law never permits a person to mislead another by his silence, where, by the relations between them, he is bound to speak. This property had been sold, the executors were the agents of complainants, the accounts were before them, the price which the property brought was laid before them, and if they thought proper to receive their proportion, they certainly ratified the sales. Their claim for a further portion of the price remains to be considered. (Story on Agency, sec. 255, and cases cited.)

The application of these principles to the payment and discharge in Europe, as explained in the testimony of J. F. Girod, requires no observation.

8. An examination of the articles of the Code of 1809 cited by complainants will satisfy the court that the parish judges of the place where the property was situated were competent to make the *inventories, ap- [*544 praisements, and sales. (Page 246, art. 174; page 174, art. 127–129.)

The French text of art. 127, cited, puts the matter beyond controversy—*le juge de la paroisse ou des paroisses*, in which the deceased had property, shall make the inventory; and art. 128 provides that the judge making the inventory shall make the sales. The art. 137, p. 178, refers to curators appointed by a judge. The executor is appointed by the will, and not by the judge.

It is not alleged in the bill or supplementary bills, that the parish judges who made the inventories and sales acted without authority, except as to the sale of the land in the parish of Lafourche Interior by the judge of Assumption. Nor is it alleged that the Court of Probates of New Orleans was without jurisdiction as to the settlement of the executor's accounts and liquidation of the succession.

The only allegation as to the defect of jurisdiction of any of the courts is found in the amended bill (p. 102), in which it is charged that the Parish Court of New Orleans, which rendered the two judgments alleged to be fraudulent, is incompetent. How incompetent? By reason of what? *Quære*, for want of jurisdiction, or for want of proper parties?

Questions of jurisdiction, under the old judicial system of Louisiana, particularly of the courts of probates, have been difficult; and, after this lapse of time, every presumption must be in favor of what has been done in courts of justice. (2 Robinson's R., 377; *Drent's* case, 8 N. S., 705.)

As to the undoubted jurisdiction of the court of the parish and city of New Orleans, which rendered the judgments attacked as fraudulent, *vide Tabor's* case (3 Martin, N. S., 676); 6 Martin, N. S., 676; 8 *Ibid.*, 241 and 705; 7 *Ibid.*, 378. The Code of Practice, enacted in 1825, vested the jurisdiction in the courts of probate exclusively of all claims for money against successions.

The jurisdiction of the Court of Probates of New Orleans, which homologated the executor's account, not having been questioned in the bill, this court will not disturb its decrees. the jurisdiction existed *ratione materiæ*, the creditors assented thereto; the succession was solvent, and the vesting of the jurisdiction in any other court by the articles quoted is merely a matter of implication, and by no means exclusive. (*Vide Tabor's* case, cit. 3 Martin, N. S., 680.)

9. Respecting the effect given to judgments homologating proceedings, tableaus, accounts,

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&c., *vide* 6, N. S., 133, 654; 11 Louisiana R., 571; 7 N. S., 133, 433; 4 Louisiana R., 174. The settlement established by the judge in a judgment against a curator or executor. (Code of 1809, p. 180, art. 145.)

As to the appointment of a denfensor to represent absent heirs in suits and vacant successions, *vide* 4 Martin, 666; 10 Martin, 17; 545*] *4 Louisiana R., 259; 6 Martin, N. S., 17; *Seymour's* case (9 Louisiana R., 79).

10. Homologations, like other judgments, must be annulled by a judgment of the court which rendered them. (12 Louisiana R., 406.)

Every judgment in Louisiana is subject to an action of nullity, but it must be brought before the court by which the judgment was rendered. (1 Louisiana R., 21; Code of Practice, article 606, and *notes*.)

If the court would not give the party relief, then, and only then, can relief be sought before the courts of the United States. The doctrine established by this court in the *Gaines* case, concerning relief against the effect of a will, is similar in all respects to that which is here invoked.

11. It appears that in the account filed by the executors in the Court of Probates of New Orleans, and exhibited, with the will, to the heirs in Europe by J. F. Girod, on which he made the payments to the heirs, were two sums with which the executors charged the succession of Claude Girod; one was for $40,413.09, as paid to Nicolas Girod; and the other was for $8,258.20, paid to J. F. Girod. The sums are stated to be by account annexed, approved by the judge. (*Vide* Code of 1809, p. 180, article 145.)

The complainants, acting uniformly on the principle of one course of conduct for the living and another for the dead, have discharged J. F. Girod, and seek to make N. Girod's succession responsible for both debts.

It appears that the judge of the Court of Probates did not approve these accounts against the succession of Claude Girod until they had been litigated on, and settled judicially, in a court of law. Judgments were rendered on each claim in the court of the parish and city of New Orleans; on that of N. Girod on the 5th December, 1814, and on that of J. F. Girod on the 6th May, 1815. On these judgments the vials of wrath are poured forth by the complainants. (Rec., 163–182.)

Recourse is had to conjecture, when nothing would have been easier than to prove any fact in relation to these judgments by J. F. Girod himself, who, so far from being interrogated concerning these debts, is provided with a complete and full discharge.

The consequences and effect of this discharge of the plaintiff in one of the suits, and the recipient of the money and the defendant in the other, will certainly have an important bearing on the equity of the complainants' case; and the absence of this proof, which is at hand, will show that they rely more on confusion and conjecture for success than on evidence.

The court of the parish and city of New Orleans had jurisdiction of the cases, as has been shown.

An objection has been made, that there were not proper parties. What prevented an executor, who had a disputed claim on a succession, *establishing in an ordinary tribunal, [*546 as the laws stood before the Code of Practice? The art. 137 (p. 248, Code of 1809) gives the power of one executor to represent the succession, where there are more than one executor who has accepted. (Code, 1674; *vide* 3 Martin's R., 247.) The appearance and answer of the defensor of absent heirs strengthens the validity and fairness of the proceedings.

The judgments, being valid in point of form, must stand until they are annulled and declared void by a proper tribunal. (7 Martin, N. S., 257; 11 Martin's R., 607; 5 Martin, N. S., 664.)

These judgments are attacked as fraudulent. Unfortunately for the complainants, there is no circumstance by them even conjectured which may not have been removed by evidence.

The testimony and evidence on which these judgments were rendered is not before us; but let us take up that in favor of N. Girod, which is the only one we have any interest in maintaining, since the release of J. F. Girod.

Claude Girod was a trader, and left at his death various accounts, books, papers, &c., which were inventoried at his death.

He had transactions with his elder brother Nicolas, who was a merchant at New Orleans. The witnesses examined by the arbitrators were Boussignes, Pacaud, Guillot, and J. F. Girod.

The arbitrators, as will be seen by the reasons appended to each item, founded their opinion on the testimony of witnesses, and the examination of books, documents, and vouchers.

It is complained that the case was referred to arbitrators; was it not a case of old and complicated accounts? (7 Peters, 625; 1 Martin's Digest, *verbo* Accounts, 405.)

Arbitrators, by our code, are to decide according to the strictness of the law. (Louisiana Code, 3077, Code of 1809, p. 442, art. 12; Law of 1805, *verbo* Accounts; 1 Martin's Dig., 405.)

The interest may well have been due. Suppose that C. Girod, in his books, charged interest on his accounts with his brothers; was he not bound to allow it?

The prescription may have been proved to have been interrupted by acknowledgment and promises. The interruption is proved positively by the testimony of Guillot. It was only in the case of *Gddard and Urquhart*, in 1834, that the prescriptions under the Spanish law were established. In *Lobdell's* case (7 Martin, N. S., 109), the Supreme Court held that the prescription of a promissory note, under the Spanish law, was thirty years. It is a mistake that Claude Girod says in his will that he leaves no debts but to the amount of $30,000. He says, "I am indebted to divers persons by obligations, and little by accounts, in a sum of about $30,000." He may have meant to persons other than his brothers — to persons out of his family. Debts, epecially old ones, between brothers, *are lightly thought of by debtors; but [*547 creditors have better memories.

The declarations, indefinitive as these, in a man's will, are bad arguments against the existence of a debt, and no proof at all.

Nor did N. Girod, in his petition for the sale of the property of Claude Girod's succession in New Orleans, limit the legacies and debts to $60,000. He says the amount of legacies and debts which it is necessary to pay without delay is that sum, or thereabouts.

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Several of the persons who are parties to these suits are still living; the respectable counsel for the plaintiff is still at the bar, and the gentlemen appointed arbitrators were persons whose characters were of the highest consideration.

But this court will enter into no such inquiry in a matter in which the presumption is *omnia acta rite esse*.

Supposing there were no judgments, were not the amounts exhibited to complainants, when the payments were made to them, and the will, with its contents, shown to them, and does not the claim for these amounts resolve itself into a personal action to recover money unlawfully retained, as they allege; and is not an action of this kind prescribed by ten years, according to complainants' own showing? (*Goddard's* case, Louisiana R., 660.)

It is believed that the grounds of defense to this action are so obvious as to require little else from the court than an examination and scrutiny of the facts. To aid in this examination, this summary has been prepared, and is respectfully submitted.

Assignment of Error.

The appellants assign for error in the decree rendered against them in the court below—

1. That there is a total want of equity throughout the complainants' bill, and in the evidence adduced in support of it.

2. That, under the evidence and allegations of the bill, the complainants have no claim in a court of equity, by reason of their long silence, laches, and asquiescence in the acts complained of since 1814.

3. That the cause of action, as set forth by the complainants, is barred and prescribed by lapse of time under the laws of Louisiana.

4. That the disallowance of the sums of $40,418 and of $8,253, and the decree concerning the judgments for said amounts, is contradictory and in violation of law.

5. That the agreements made by two of the complainants with the defendant in 1817 are valid, obligatory, and conclusive upon the parties; that the declaration of the co-executor, J. F. Girod, has the same effect.

6. That the discharge of J. F. Girod, the co-executor, destroys all claim in equity against the defendants.

548*] **Mr. Janin*, for the appellees, relied upon the following points and authorities:

1. Although the will authorized the executors "to sell the property, or cause it to be sold, as to them would seem best for the heirs of the testator, without the intervention of justice," the Spanish law, then in force in Louisiana, yet required that the property should be sold at public sale, by order of court, and after thirty days' advertisement. (*Gayoso* v. *Garcia*, 1 Martin's R., N. S., 324.)

2. A succession sale, made by the register of wills in the Parish of New Orleans, or by the parish judges in the country parishes, who there perform the functions of the register of wills (Code of 1808, p. 182, art. 153), is null and void, if not preceded by an order of the Court of Probates. (*Elliott* v. *Labarre*, 2 Louisiana R., 326.)

3. Probate sales, sheriff's sales, or judicial sales of any kind can be set aside by the parties in interest, and treated as nullities, if the formalities prescribed by law are not complied with. (*Psyche* v. *Paradol*, 6 Louisiana R., 366; *Mc-Donough* v. *Gravier's Curator*, 9 Louisiana R., and cases there cited.)

4. The Act of the Legislature of Louisiana of March 10, 1884, by which certain irregularities in judicial sales are cured by the lapse of five years, applies only to irregularities in the advertisements. (*Morton* v. *Reynolds*, 4 Louisiana R., 28; *McCluskey* v. *Webb*, *Ibid.*, 206.) And even so far as the statute is applicable to the facts of this case, it cannot avail the defendants, because it was not pleaded.

5. By the civil law, as well as by the law of chancery, an executor cannot purchase the property of the estate which he administers. (*Harrod* v. *Norris's Heirs*, 11 Martin's R., 298; *Longbottom's Ex'r* v. *Babcock et al.*, 9 Louisiana R., 48; *Scott's Ex'rs* v. *Gorton*, 14 *Ibid.*, 114, 122; *McCluskey* v. *Webb*, 4 Rob R., 201; 1 Story's Eq. Jurisp., 315; *Prevost* v. *Gratz*, 1 Pet. C. C. Rep., 368; *Wormley* v. *Wormley*, 8 Wheat., 421; *Case* v. *Abeel*, 1 Paige, 397; *Davoue* v. *Fanning*, 2 Johns. Ch. R., 252; *Rogers* v. *Rogers*, 1 Hopk., 525.)

6. The judgments obtained by Nicolas Girod for $40,418.09, and by J. F. Girod for $8,253.20, were the result of the fraudulent contrivances disclosed by the evidence. It is well settled that chancery will relieve collaterally against frauds in judgments. (1 Story's Eq. Jurisp., sec. 252; 2 *Ibid.*, sec. 1252; 1 Maddock's Ch. Pr., 300; Mitford's Eq. Plead., 266; *Brashear* v. *West*, 7 Peters, 616; *Pratt* v. *Notham*, 5 Mason, 103; *Garnett* v. *Mason*, 2 Brock., 213; *Marine Ins. Co.* v. *Hodgson*, 2 Cond. R., 526; *Bateman* v. *Willoe*, 1 Sch. & Lef., 205; *Winthrop et al.* v. *Lane*, 3 Desaus., 323; *Irby* v. *M'Crae*, 4 Desaus. 429; *Barnsly* v. *Powell*, 1 Ves., Sen., 289.)

7. Even without fraud, these judgments could not be binding upon *the heirs, for they [*549 were not parties to them, and the executors did not represent them or the estate in these proceedings. These were indeed judgments without parties. Co-executors are bound jointly and severally. (Code of 1808, p. 248, art. 177; 2 Story's Eq. Jurisp., secs. 1280, 1281.) One of them may act for all. (Same article of the Code of 1808.) They are considered in law as one person. (2 Williams's Executors, 620.) Hence, if one confess the action, judgment shall be given against them all. (*Ibid.*, 621.) And they cannot sue one another, if they have accepted the trust. (*Ibid.*, 685, 818.)

8. Though the attorney of the absent heirs was made a party to these suits, the judgments are not binding on the heirs. The duties of such an attorney are merely conservatory—he never represents the estate. In cases of mere neglect, and free from fraud, judgments obtained contradictorily with the attorney of the absent heirs have been treated as nullities. (*Stein* v. *Bowman*, 9 Louisiana R., 282; *Collins* v. *Pease's Heirs*, 17 *Ibid.*, 117.) As a general rule, the courts disregard entirely judgments opposed to parties who were not cited or not properly represented. (*Psyche* v. *Paradol*, 6 Louisiana R., 366; *Marchand* v. *Gracie*, 2 *Ibid.*, 148.)

9. The homologation of the account of 1817 is not *res judicata*. It appears from the petition of the executors, and from the order thereon, that the heirs were not at all represented in this proceeding; the executors themselves

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preferring to represent them. An attorney was indeed appointed to represent the three heirs of the Poidebard family, who had not sent their powers of attorney to the executors, and who were, together, entitled to one sixteenth of the estate. But they, also, will be relieved from the effects of the homologation on account of the fraud of the executors, and the neglect, if not worse, of the attorney of the absent heirs.

10. The proof of fairness, in dealings between trustee and *cestui que trust*, lies upon the former. (8 Cond. Ch. R., 495; 1 Story's Eq. Jurisp., sec. 218.)

11. By the civil law, a purchase, by an executor of the property, of the estate administered by himself is radically null, and cannot be cured by prescription. His possession as executor is called, in that system of jurisprudence, a "precarious" possession; by no act of his own can he alter its character; he cannot sell to himself; notwithstanding an attempted purchase, the law considers his possession as the precarious possession of an executor, and a precarious possession cannot prescribe by any lapse of time. (*Macarty* v. *Bond's Administrator*, 9 Louisiana R., 355; *McCluskey* v. *Webb*, 4 Rob. R., 201; *Montamat* v. *Debon*, 4 Martin's R., N. S., 152; Troplong on Prescription, Nos. 509, 517; 1 Vazeille on Prescription, Nos. 148, 149; Porthier's Treatise on Possession, Nos. 64–66.)

550*] *12. If any prescription was applicable to the purchases of the executors, it would be the prescription of thirty years, which protects purchasers in bad faith. (Code of 1808, p. 486, art. 66; Code of 1825, art. 3438, 3465; *Francois* v. *Delaronde*, 8 Martin's R., 629; Troplong on Prescription, Nos. 905–907, 915, 918; 21 Duranton, Nos. 352–354.)

13. The prescription of ten and twenty years relied on by the defendants, that is, of ten years between present, and of twenty years between absent persons, can be pleaded only by those whose possession was acquired—first, honestly; second, by virtue of a just title; third, by a title not defective in form. (Code of 1808, p. 486, art. 67; *Devall* v. *Choppin*, 15 Louisiana Rep., 566; Code of 1825, art. 3442, 3445, 3449–3454.)

But this prescription was not pleaded by the defendants.

14. The only prescription which the defendants plead in their answer is the prescription of the action of nullity (p. 81 of the answer). This is a prescription of ten years, established by art. 204, p. 303, of the Code of 1808, which is literally the same as article 2218 of the Code of 1825, and article 1304 of the Napoleon Code.

The answer rests this prescription on the receipts given in 1817 by Mme. Pargoud and Mme. Adam, representing two of the five branches of heirs on whose behalf this suit has been brought.

The terms of the law show that this prescription applies only to actions of nullity or rescission to set aside an "agreement." This is not an action of nullity, but an action of revendication, or petitory action, which, as has been seen, is barred only as between absent persons by the prescription of twenty or of thirty years, according as the purchaser was in good or in bad faith.

The receipts were not "agreements," but an acknowledgment of the reception of a sum of money, which the executors represented as all that was coming to those two heirs from the succession.

Even if these receipts were "agreements," in the sense of the article, the right to set them aside would be barred only by the term of ten years "from the discovery of the fraud." The evidence shows that the complainants had not the slightest knowledge of the fraudulent act now proved before 1837.

15. The defendants also contend that these two receipts imply a ratification of the acts of the executors. The definition and attributes of acts of confirmation and ratification are given in article 238, p. 310, of the Code of 1808, which is a literal copy of article 1338 of the Napoleon Code, and which was retained in the Code of 1825 as article 2252.

But no ratification or confirmation exists in this case, because,

1st. The original sales, being absolute nullities, are not susceptible *of ratification. [***551** If it was the intention of the injured party to sanction them, nothing less than a new sale would have been required to accomplish this object. Acts infected with a radical nullity cannot be ratified; they must be made anew. (Solon, Théorie sur la Nullité, Vol. II., pp. 262, 292, 294, 296, 301, 321, 327, 328, 373 *et seq.*, 406; Troplong on Prescription, *n.*, 905–907.)

2d. If considered as an express ratification of its fraudulent sales and judgments, the receipts are inoperative, for they do not contain, in the words of the law (Code of 1808, p. 310, art. 238), "the mention of the motive of the action of rescission, and the intention of supplying the defect on which that action is founded."

3d. If considered as a tacit ratification, all the authorities concur that all the facts and circumstances must be fully and completely known, and that the act relied on as a tacit ratification can be susceptible of no other interpretation. (*Rivas's Heirs* v. *Bernard*, 13 Louisiana R., 175, and authorities there cited; *Copeland* v. *Mickie*, 17 *Ibid.*, 293; 2 Solon, p. 370; Perrin, Traité des Nullités, p. 350.)

16. The defendants also rely, in their printed argument, on the prescription of five years, established by art. 3507 of the Code of 1825. This prescription was not pleaded by them. Had it been, the answer would be, that it applies, in terms, to "contracts, testaments, and other acts," like art. 204, p. 303, of the Code of 1808; and that it does not extend to cases of fraud, which are exclusively provided for in the last mentioned article.

17. If the case be tested by the rules of chancery, the resale would be the same.

In chancery, a purchase by a trustee can be cured by lapse of time.

The cases on this subject are nowhere better reviewed than in *Kane* v. *Bloodgood* (7 Johns. Ch. Rep., 90). But the statute of limitations begins to run only from the open disavowal of the trust.

In this case, the possession was not known to the heirs to be adverse to the trust, except from the time when they were informed that the sales to Laignel and St. Felix were simulated. Until then, they believed the executors

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to be, as the executors pretended themselves to be, *bona fide* purchasers from Laignel and St. Felix, who, it was believed and represented, were themselves serious purchasers from the estate.

The courts of the United States, sitting as courts of equity, apply the statutes of limitations of the respective States. (6 Peters, 291; 16 Peters, 455, 495; 11 Peters, 869, 393, 406.)

When the statute limits not at law, the same length of time is not a bar in equity. (*Boone* v. *Chiles*, 10 Peters, 177; *Cook* v. *Ankam*, 6 Cond. Rep., 287; *Baker* v. *Whiting*, 3 Sumner, 486.)

"In a case of trusts of lands, nothing short 552*] of the statute period *which would bar a legal estate or right of entry would be permitted to operate in equity as a bar of the equitable estate." (*Judge* Story, in *Baker* v. *Whiting*, 3 Sumner's Rep., 486.)

It has been seen that no other prescription but that of thirty years would, by the law of Louisiana, bar the action of revendication.

Nothing is better settled, in the law of chancery, than that, in cases of fraud, the statute of limitations does not begin to run until a full discovery of the frauds practiced. (*Boone* v. *Chiles*, 10 Peters, 223; *Aylward* v. *Kearney*, 2 Ball & Beat., 476; *Murray* v. *Palmer*, 2 Sch. & Lef., 486; *Hovenden* v. *Lord Annesley*, 2 Sch. & Lef., 632; *Bond* v. *Hopkins*, 1 Sch. & Lef., 413; 1 Hovenden on Frauds, 480; *Croft* v. *Adm'rs of Townsend*, 3 Desaus., 239; *Wamburzee* v. *Kennedy*, 4 Desaus., 474, 485, 489; *Randall* v. *Errington*, 10 Ves., 423.)

And vague rumors and reports do not constitute that kind of knowledge of the fraud which will give course to the statute of limitations. (*Flagg* v. *Mann*, 2 Sumner, 491, 551, 563; *Irby* v. *M'Crae*, 4 Desaus., 431; *Randall* v. *Errington*, 10 Ves., 423; 11 Louisiana R., 139; *Conway* v. *Williams's Adm'r*, 10 *Ibid.*, 568; *Tyson* v. *McGill*, 15 *Ibid.*, 145.)

The acquiescence and ratification of two of the complainants is attempted to be inferred from their receipts. These parties assuredly knew nothing of the frauds of the executors when they signed the receipts, and acted with blind confidence. In equity, as long as the injured party does not know the full extent of his rights, and that the transaction is impeachable, any act done by him subsequently will not amount to a ratification or confirmation. As long as the dependence of the *cestui que trust* upon the trustee and the fiduciary relation continues, an alleged ratification will always be scrutinized with the utmost jealousy; and a party possessing only imperfect information cannot be held guilty of laches. (1 Story's Equity, sec. 345; *Butler* v. *Haskell*, 4 Desaus., 651, 709, where the principal cases are reviewed; *Murray* v. *Palmer*, 2 Sch. & Lef., 486; 1 Hovenden on Frauds, 152, 484; *Purcell* v. *McNamara*, 14 Ves., 107, 120; *Cole* v. *Gibbons*, 3 P. W., 293; *Brooke, Ex'r*, v. *Gally*, 2 Atkyns, 34; *Cole* v. *Gibson*, 1 Ves., Sen., 507; *Taylor* v. *Rockfort*, 2 Ves., Sen., 281; *Roche* v. *O'Brien*, 1 Ball & Beat., 230; *Morse* v. *Royall*, 12 Ves., 364; *Wood* v. *Downes*, 18 Ves., 120.)

Mr. Justice WAYNE delivered the opinion of the court:

The conclusions to which we have come in this cause do not require from us any comment upon its facts.

We concur with the learned judge in the Circuit Court in setting aside the purchases by which Nicolas Girod and Jean François Girod became the possessors of their testator's entire estate. *But the morality and policy of [*553 the law, as it is administered in courts of equity, induce us to add, that those purchases were fraudulent and void, and may be declared to be so, without any further inquiry, upon the ground that they were made by the intervention of persons who were nominal buyers of the property for the purpose of conveying it to the executors. Such a transaction carries fraud upon the face of it. (*Lord Hardwicke* v. *Vernon*, 4 Ves., Jun., 411; 14 Ves., Jun., 504; 2 Bro. C. C., 410, *note*.) It matters not, in such a case, whether the sales are made with or without the sanction of judicial authority, or with ministerial exactness. The rule of equity is, in every code of jurisprudence with which we are acquainted, that a purchase by a trustee or agent of the particular property of which he has the sale, or in which he represents another, whether he has an interest in it or not—*per interpositam personam*—carries fraud on the face of it. In this instance, Laignel and St. Felix were the instruments of the executors. They bid off the property, paid nothing, received titles, and conveyed what they nominally bought to the executors. In this way Nicolas Girod became the purchaser of all the testator's property in New Orleans, and himself and his brother Jean François, the other executor, were joint purchasers of the lands and slaves in the parish of Assumption, and of the testator's lands elsewhere. Jean François, some years afterwards, sold out his half of their joint purchase to Nicolas, for seventy thousand dollars. Thus the latter became the possessor of the entire estate, and held it until he died, to the exclusion of all the other testamentary heirs. Some of those heirs, and the representatives of others of them, now sue the representatives of Nicolas Girod, and seek to set aside the purchases of the executors. They allege that they were fraudulently made, ask that they may have assigned to them their respective portions of the estate, with an account of rents and profits, excepting from their claim for the latter the moiety which had been received by Jean François Girod. The defendants reply, and deny fraud in fact or in intention on the part of the executors. They declare that the sales were judicially ordered and conducted, that the purchases were rightfully made, for a fair price, at public auction, that the complainants have no standing in a court of equity by reason of their long silence, laches, and acquiescence in the acts of which they complain, and that their rights are barred by lapse of time, under the laws of Louisiana. They also say that receipts or acquittances were given to the executors by two of the complainants, which are valid and obligatory upon them. The bill and answers, and the arguments of the learned counsel for the appellants, then, involve the question of the right of executors to purchase any part of the estate which they administer, for a fair price, at a public sale judicially ordered and conducted. Remarking, first, that an executor or administra-

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554*] tor *is in equity a trustee for heirs, legatees, and creditors, we proceed to give our opinion of the law in respect to purchases of the estate represented by them, and of purchases made by other trustees and agents, and all persons *qui negotia aliena gerunt.* The rule as to persons incapable of purchasing particular property except under particular restraints, on account of the rules of equity, is compendiously given by Sir Edward Sugden, in his second section of purchases by trustees, agents, &c. It has been adopted by almost every subsequent writer, and we cite the passage with confidence, having verified its correctness by an examination of all the cases cited by him; by an examination, also, of other cases in the English courts, and of cases in the courts of chancery of several of the States in our Union, sustaining the doctrine, to the fullest extent, of the incapability of trustees and agents to purchase particular property, for the sale of which they act representatively, or in whom the title may be for another. He says, "it may be laid down as a general proposition, that trustees (unless they are nominally such to preserve contingent remainders), agents, commissioners of bankrupts, assignees of bankrupts, solicitors to the commission, auctioneers, creditors who have been consulted as to the mode of sale, or any persons who, by their connection with any other person, or by being employed or concerned in his affairs, have acquired a knowledge of his property, are incapable of purchasing such property themselves, except under the restraints which will shortly be mentioned. For if persons having a confidential character were permitted to avail themselves of any knowledge acquired in that capacity, they might be induced to conceal their information, and not to exercise it for the benefit of the persons relying upon their integrity. The characters are inconsistent. *Emptor emit quam minimo potest, venditor vendit quam maximo potest.*" (2 Sugd. Vendors and Purchasers, 109, London ed., 1824.)[1] The principle has been extended to a purchase by an

555*] *attorney from his client whilst the relation subsists. (*Bellew* v. *Russell*, 1 Ball & Beatty, 96; 9 Ves., Jun., 296; 13 Ves., Jun., 133; as to gifts, *Lord Selsey* v. *Rhoades*, 2 Sim. & Stu., 41; *Williams* v. *Llewellyn*, 2 You. & Jer., 68; *Champion* v. *Rigby*, 1 Russ. & Myl., 539.) Nor can an arbitrator buy up the unascertained claims of any of the parties to the reference. (*Btennerhasset* v. *Day*, 2 Ball & Beatty, 116; *Cane* v. *Lord Allen*, 2 Dow., 289.) Where a person cannot purchase the estate himself, he cannot buy it as agent for another. (9 Ves., Jun., 248; *Ex-parte Bennet*, 10 Ves., Jun., 381.)

The general rule stands upon our great moral obligation to refrain from placing ourselves in relations which ordinarily excite a conflict between self-interest and integrity. It restrains all agents, public and private; but the value of the prohibition is most felt, and its application is more frequent, in the private relations in which the vendor and purchaser may stand towards each other. The disability to purchase is a consequence of that relation between them which imposes on the one a duty to protect the interest of the other, from the faithful discharge of which duty his own personal interest may withdraw him. In this conflict of interest the law wisely interposes. It acts not on the possibility that, in some cases, the sense of that duty may prevail over the motives of self-interest, but it provides against the probability in many cases, and the danger in all cases, that the dictates of self-interest will exercise a predominant influence, and supersede that of duty. It therefore prohibits a party from purchasing on his own account that which his duty or trust requires him to sell on account of another, and from purchasing on account of another that which he sells on his own account. In effect, he is not allowed to unite the two opposite characters of buyer and seller, because his interests, when he is the seller or buyer on his own account, are directly conflicting with those of the person on whose account he buys or sells. (2 Burge's Com., 459.) Cases have been frequently decided in the courts of Louisiana which maintain the rule in all its integrity. In Pennsylvania it is enforced, though, on looking over its reports, we find a case, but unsustained by any reference to adjudged cases, in which it is said that an executor might buy at a sale of the testator's effects, if he did so for a fair price, at public auction. In Maryland, the courts of chancery carry out the rule to the fullest extent of the principles upon which it is founded, and as they have just been stated by us. In the case of *Wormley* v. *Wormley* (8 Wheat., 421) this court declared that no rule is better settled than that a trustee cannot become the purchaser of the trust estate. He cannot be, at the same time, vendor and vendee. It had been previously ruled, in the case of *Prevost* v. *Gratz* (6 Wheat., 481), and this court afterwards, in *Ringo et al.* v. *Binns et al.*, re-affirmed the rule, by its application to an agent who had bought land to which *his principal was in [*556 equity entitled. It said: "The proposition laid down by this court is, that if an agent discov-

1.—*Trustees.*—Fox v. Mackreth, 2 Bro. C. C., 400; 4 Bro. P. C. (Tomlins'), 258; Hall v. Noyes, 3 Bro. C. C., 483, and see 3 Ves., Jun., 748; Kellick v. Flexny, 4 Bro., C. C., 161; Whitcote v. Lawrence, 3 Ves., Jun., 740; Campbell v. Walker, 5 Ves., Jun., 678, and Whitackre v. Whitackre, Sel. Chan. Cases, 13.

Remainders.—See Parks v. White, 11 Ves., Jun., 228.

Agents.—York Buildings Company v. Mackenzie, 8 Bro. P. C., 42; Lowther v. Lowther, 13 Ves., Jun., 95; see Watt v. Grove, 2 Sch. & Lef., 492; Whitcomb v. Minchin, 5 Madd., 91; Woodhouse v. Meredith, 1 Jac. & Walk., 204.

Commissioners of Bankrupts.—*Ex-parte* Bennet, 10 Ves., Jun., 381; *Ex-parte* Dumbell, Aug. 13, 1806, Mort., *notes*, 33, cited; *Ex-parte* Harrison, 1 Buck, 17.

Assignees of Bankrupts.—*Ex-parte* Reynolds, 5 Ves., Jun., 707; *Ex-parte* Lacey, 6 Ves., Jun., 625; *Ex-parte* Bage, 4 Madd., 459; *Ex-parte* Badcock, 1 Mont. & Mac., 231.

Solicitors to the Commission.—Owen v. Foulkes, 6 Ves., Jun., 630, *note b*; *Ex-parte* Linwood; *Ex-parte* Churchill, 8 Ves., Jun., 343, cited; *Ex-parte* Bennet, 10 Ves., Jun., 381; *Ex-parte* Dumbell, Aug. 13, 1806, Mont., *notes*, cited; see 12 Ves., Jun., 372; 3 Mer., 200.

Auctioneers, creditors consulted as to mode of sale, or any persons who by their connection with, or concern in, the affairs have acquired a knowledge, &c.—See *Ex-parte* Hughes, 6 Ves., Jun., 617; Coles v. Trecothick, 9 Ves., Jun., 234; 1 Smith's Rep., 233; Oliver v. Court, 8 Price, 127.

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ers a defect in the title of his principal to land, he cannot misuse it to acquire a title for himself; and if he does, that he will be held as a trustee holding for his principal." (10 Pet., 269, 281; see, also, the case of *Oliver* v. *Piatt*, 3 How., 333.) It is also affirmed, in *Church* v. *Marine Insurance Company* (1 Mason, 341), that an agent or trustee cannot, directly or indirectly, become the purchaser of the trust property which is confided to his care. We scarcely need add, that a purchase by a trustee of his *cestui que trust, sui juris*, provided it is deliberately agreed or understood between them that the relation shall be considered as dissolved, "and there is a clear contract, ascertained to be such, after a jealous and scrupulous examination of all the circumstances, and it is clear that the *cestui que trust* intended that the trustee should buy, and there is no fraud, no concealment, and no advantage taken by the trustee of information acquired by him as trustee," will be sustained in a court of equity. But it is difficult to make out such a case, where the exception is taken, especially when there is any inadequacy of price, or any inequality in the bargain. (*Coles* v. *Trecothick*, 9 Ves., 246; *Fox* v. *Mackreth*, 2 Bro. Ch. R., 400; *Gibson* v. *Jeyes*, 6 Ves., 277; *Whichcote* v. *Lawrence*, 3 Ves., 740; *Campbell* v. *Walker*, 5 Ves., 678; *Ayliffe* v. *Murray*, 2 Atk., 59.) And therefore, if a trustee, though strictly honest, should buy for himself an estate from his *cestui que trust*, and then should sell it for more, according to the rules of a court of equity, from general policy, and not from any peculiar imputation of fraud, he would be held still to remain a trustee to all intents and purposes, and not be permitted to sell to or for himself. (1 Story's Com. on Equity, 2d ed. 317; *Fox* v. *Mackreth*, 2 Bro. Ch. R., 400; S. C., 2 Cox, 320, 327.)

In New York there has been no relaxation of it, since the decision in the case of *Davoue* v. *Fanning* (2 Johns. Ch., 252). It is a critical and able review of the doctrine, as it had been applied by the English courts of chancery from an early day, and has been received, with very few exceptions, by our State chancery courts, as altogether putting the rule upon its proper footing. Indeed, it is not too much to say that it has secured the triumph of the rule over all qualifications and relaxations of it in the United States, to the same extent that had been achieved for it in England by that great Chancellor, Lord Eldon. *Davoue* v. *Fanning* was the case of an executor for whose wife a purchase had been made by one Hedden, at public auction, *bona fide*, for a fair price, of a part of the estate which Fanning administered, and the prayer of the bill was, that the purchase might be set aside, and the premises resold. The case was examined with a special reference to the right of an executor to buy any part of the estate of his testator. And it was affirmed, and we think rightly, that if a trustee, or person 557*] acting for others, sells the *trust estate, and becomes himself interested in the purchase, the *cestuis que trust* are entitled, as of course, to have the purchase set aside, and the property re-exposed to sale, under the direction of the court. And it makes no difference in the application of the rule, that a sale was at public auction, *bona fide*, and for a fair price, and that the executor did not purchase for himself, but that a third person, by previous arrangement with the executor, became the purchaser, to hold in trust for the separate use and benefit of the wife of the executor, who was one of the *cestuis que trust*, and who had an interest in the land under the will of the testator. The inquiry, in such a case, is not whether there was or was not fraud in fact. The purchase is void, and will be set aside at the instance of the *cestui que trust*, and a resale ordered, on the ground of the temptation to abuse, and of the danger of imposition inaccessible to the eye of the court. We are aware that cases may be found, in the reports of some of the chancery courts in the United States, in which it has been held that an executor may purchase, if it be without fraud, any property of his testator, at open and public sale, for a fair price, and that such purchase is only voidable, and not void, as we hold it to be. But with all due respect for the learned judges who have so decided, we say that an executor or administrator is, in equity, a trustee for the next of kin, legatees, and creditors, and that we have been unable to find any one well considered decision, with other cases, or any one case in the books, to sustain the right of an executor to become the purchaser of the property which he represents, or any portion of it, though he has done so for a fair price, without fraud, at a public sale. Why should the rule be relaxed in the case of persons most frequently exposed to the temptations of self-interest, who may yield to it more readily than any others, with a larger impunity, if the day of equitable retribution shall ever come for those who have been defrauded? Is it not better that the cause of the evil shall be prohibited, than that courts of equity shall be relied upon to apply the remedy in particular cases, by inquiring into all the circumstances of a case, whether there has or has not been fraud in fact? Is the rule to be relaxed, in the case of executors, in respect to all persons interested in the estate, or only to such of them as are *sui juris*? And if only to those who are *sui juris*, why in case of an executor as to such persons, when the rule has never been relaxed by any court of equity to permit purchases by any other trustee or agent of one who is *sui juris*? Shall it be relaxed in cases of those who are interested in the estate, and who are not *sui juris* or minors? Then other remedies must be devised to protect their interests than that which experience has shown to be alone efficacious. It is, that when a trustee for one not *sui juris* sees that it is absolutely necessary that the estate must be sold, and he is ready to give more for it than anyone else, that a bill should be filed, *and he [*558 should apply to the court by motion, to let him be a purchaser. This is the only way he can protect himself. There are cases in which the court will permit it. (*Campbell* v. *Walker*, 5 Ves., Jun., 478; 13 Ves., Jun., 601; 1 Ball & Beatty, 418.)

Such is the proceeding adopted in Louisiana, when property in which a minor is interested is offered for sale, as may be seen by the case in 5 Louisiana R., 16 (*McCarty* v. *Steam Cotton Press Company et al.*) The property was sold at auction, and the mother of the minor became the purchaser. It was contended that this

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purchase was nuil and void, because the property had descended to the children immediately after the death of the father, and the mother, who, by the effect of the law, was their natural tutor, could not buy it. The court said it was a general rule. But it having been shown that the mother and purchaser had petitioned the Court of Probates for a ratification of the sale, and that the court had ratified it upon the advice of a family meeting, the sale was confirmed. And the court held, that under the Spanish law (20) a tutor could purchase the property of his ward, with the permission of the judge.

We have said more upon the relaxation of the rule in the case of executors than we would have done, if the learned counsel for the appellants had not pressed, as an exemption from the rule, purchases made by executors without fraud at open sale, especially when by the will they were empowered to sell the estate of their testator for the benefit of heirs and legatees, and were heirs or legatees themselves. And if it had not been urged that the decisions of the Supreme Court of Louisiana were unsafe guides in interpreting the Spanish laws in respect to the incapacity of persons to purchase at judicial sales particular property, on account of the official or financiering relation in which they stood to the persons who owned the property. It was supposed that the qualifications of the rule by the civil law embraced executors, or might do so by the reason upon which those qualifications were sustained. It imposes upon us the task of showing that the relaxations of the rule of the civil law were never permitted by the Spanish law which prevailed in Louisiana, and were never extended under the civil law, to permit the executor *testamentarius* or executor *dativus* to buy the property which he was appointed to administer. It is a subject of curious and instructive examination to trace the rule or prohibition, in the course of its application under the jurisprudence of different nations. In all of them, there were limited and occasional relaxations of the rule in particular cases, in what are sometimes called hard cases, but in no one nation have purchases by executors been permitted, as a relaxation of the civil law rule. For a general historical examination of the subject, we have not time; we wish we had. A brief examination, however, of the qualifications of the rule by the civil law will not be inappropriate upon an appeal from a court held 559*] in Louisiana, where the civil *law exists in a modified form, and is still often the rule of decision by its enlightened jurists. The prohibition of the civil law is thus expressed: "Tutor rem pupilli emere non potest; idemque porrigendum est ad similia, id est, ad curatores, procuratores, et qui negotia aliena gerunt." (Dig. lib. 18, tit. 1, l. 34; Inst., lib. 1, tit. 21, 23:)

The rule as expressed embraces every relation in which there may arise a conflict between the duty which the vendor or purchaser owes to the person with whom he is dealing, or on whose account he is acting, and his own individual interest. Nor was it ever relaxed or qualified by the civil law, further than to allow the guardian to purchase the property of the ward, *palam et bona fide*, at public auction. "Cum ipse tutor nihil ex bonis pupilli, quæ distrahi possunt comparare palam et bonâ fide prohibetur: multo magis uxor ejus hoc facere potest." (Cod., lib. 4, tit. 38, l. 5.) But foreseeing the mischief which might grow out of the relaxation, it required that the purchase must be made by the guardian himself, *palam et bona fide*, and not *per interpositam personam*. "Sed si per interpositam personam rem pupilli emerit, in eâ causâ ut emptio nullius momenti sit, quia non bonâ fide videtur rem gessisse. Et ita est rescriptum a D. Severo et Antonino." (Dig., lib. 26, tit. 5, l. 5, sec. 3.) A purchase by a guardian from his co-guardian was permitted, if it took place in public, and *bona fide*. "Item ipse tutor et emptoris et venditoris officio fungi non potest. Sed enim si contutorem habeat, cujus auctoritas sufficit, proculdubio emere potest. Sed si malâ fide emptio intercesserit, nullius erit momenti, ideoque nec usucapere potest. Sane, si suæ ætatis factus comprobaverit emptionem, contractus valet. (Dig., lib. 26, tit. 8, l. 5, sec. 2.)

The guardian might purchase at a sale made at the suit of a creditor. "Si creditor pupilli distrahat, æque emere bonâ fide poterit." (Dig., lib. 26, l. 5, sec. 5.) Such is the extent of the qualification of the rule of the civil law. And, its limitation not being well understood, persons have often been misled to apply it to what they supposed to be analogous agencies, such as executors, when there was no authority either in the text of the civil law, or in the practice under it, for doing so. But, further, those qualifications of the rule mentioned were confined in practice to those territories in Europe in which the civil law prevailed without modification. And it is remarkable, considering what were the influences upon Christendom of the civil law, after its discovery in the twelfth century, and when not until some time after it began to be used as a rule of law by which public and private rights were determined, when in the fifteenth and sixteenth centuries it was the study of the wisest men, it is remarkable that the qualifications of the rule, as they have been stated, were considered imperfections, and were rejected by every nation in Europe whose codes are generally admitted to have been compiled from the civil law, with an intimate *knowledge of human [*560 nature, as it has always shown itself in the business of life. Here, appropriate to what has been just said, is the language of Pothier. "Nous ne pouvons acheter, ni par nousmêmes, ni par personnes interposées, les choses que font partie des biens dont nous avons l'administration; ainsi un tuteur ne peut acheter les choses qui appartiennent à son mineur; un administrateor ne peut acheter aucune chose de bien dont il a l'administration." (Tr. du Contrat de Vente, part 1, *n.* 13.) The rule of the civil law, without qualification, is adopted in the codes of Holland. "Quæ vero de tutoribus cautâ, ea quoque in curatoribus, procuratoribus, testamentorum executoribus, aliisque similibus, qui aliena gerunt negotia probanda sunt." (Voet., lib. 18, tit. 1, *n.* 9; 2 Burge's Com., 463.) In Spain, the rule was enforced without relaxation, and with stern uniformity. *Judge* McCaleb cites in his opinion, from the Novissima Recopilacion, the rule, in the following words: "No man, who is testamentary executor or guardian of minors, nor any other

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man or woman, can purchase the property which they administer, and whether they purchase publicly or privately, the act is invalid, and on proof being made of the fact, the sale must be set aside." This was the law of Louisiana when the executors in this instance made their purchases, and it is conclusive of the invalidity.

We have thus shown that those purchases are fraudulent and void, from having been made *per interpositam personam*, and if they were not so on that account, that they are void by the rule in equity in the courts of England, and as it prevails in the courts of equity in the United States. It has also been shown that they are void by the law of Louisiana, as it was when they were made by the executors, and that such purchases never were countenanced in that State by any qualification of the civil law rule prohibiting purchases by those who stood in such fiduciary relations to others; that the act could not be generally done, without creating a conflict between self-interest and integrity. In every aspect in which we have viewed this case, we are called upon to direct that the purchases made by Nicolas and Jean François Girod of their testator's estate should be set aside. We shall order it to be done. Nor do we think that the complainants have lost their rights by negligence, or by the lapse of time. We can only see in their conduct the fears and forbearance of dependent relatives, far distant from the scene of the transactions of which they complain, desirous of having what was due to them, and suspecting it had been withheld, but unwilling to believe that they had been wronged by brothers, with whom they had been associated in a common interest by another brother who was dead. In a case of actual fraud, courts of equity give relief after a long lapse of time, much longer than has passed since the executors, in this instance, purchased their testator's estate. In general, **561***] length of time is no *bar to a trust clearly established to have once existed; and where fraud is imputed and proved, length of time ought not to exclude relief. (*Prevost* v. *Gratz*, 6 Wheat., 481.) Generally speaking, when a party has been guilty of such laches in prosecuting his equitable title as would bar him if his title were solely at law, he will be barred in equity, from a wise consideration of the paramount importance of quieting men's titles, and upon the principle that *expedit reipublicæ ut sit finis litium;* although the statutes of limitations do not apply to any equitable demand, courts of equity adopt them; or at least generally take the same limitations for their guide, in cases analogous to those in which the statutes apply at law. (10 Ves., 467; 1 Cox, 149.) Still, within what time a constructive trust will be barred must depend upon the circumstances of the case. (*Boone* v. *Chiles*, 10 Peters, 177.) There is no rule in equity which excludes the consideration of circumstances, and, in a case of actual fraud, we believe no case can be found in the books in which a court of equity has refused to give relief within the lifetime of either of the parties upon whom the fraud is proved, or within thirty years after it has been discovered or becomes known to the party whose rights are affected by it. In this case that time has not elapsed since the executors made their purchases, and it is not pretended that they were known to any of the complainants until the year 1817, and not then, except by the exhibition of an account by the executors to some of the complainants, with declarations that everything had been fairly done with a view to save the honor of the testator, and the interests of those who were the objects of his bounty. In this view of the case, it is not necessary for us to consider the time within which remedies are barred, or property may be acquired by prescription, under the laws of Louisiana. We would willingly otherwise do so, for the result would show the same harmony in the application of the rules of the civil law and those of Louisiana upon prescription with the rules prevailing in courts of equity in England and the United States, as we trust has been shown to exist between them in the prohibition of an executor to buy the estate of his testator.

The receipts or acquittances given by two of the complainants to the executors do not affect their rights. They were obviously given without full knowledge of all the circumstances connected with the disposal and management of the estate. Indeed, it is plain that such information had been withheld by the executors. It is true that an account was presented to them, with official signatures to it, but without vouchers of any kind to verify its correctness, and it was accompanied by a letter from Nicolas Girod, in which menaces of displeasure are mingled with intimations of future kindness.

We shall also direct the official proceedings which were had *upon the account of [*562 Nicolas Girod, against the estate of Claude, to be set aside and annulled. But there will be allowed to the representatives of Nicolas, in the settlement of the estate, the sum of $6,574.20, with interest at five per cent. The proofs in the cause show that a few months before the death of the testator there had been a settlement of accounts between him and Nicolas, and we allow that amount, as it is charged in the general account, disallowing all the other items. We suppose it to be an inadvertency in drawing up the decree, that the sum just mentioned was not allowed, as the learned judge, in his opinion, states that a settlement had taken place with that result.

We shall also direct that the actual cost of all permanent improvements which were made upon any part of the estate by Nicolas Girod shall be allowed to his representatives, with interest at five per cent. in the settlement which shall be made with the complainants and the other persons having an interest under the will of Claude. And also an allowance for taxes, and the expenses and cost paid in recovering the property gained by alluvion. A reference to a master will be directed. We regret to perceive from the record that all the persons who are interested in the estate of Claude F. Girod are not parties to this proceeding. We shall direct that they shall be permitted to make themselves parties, if they please to become so. But in giving the order, it is not intended to delay those from receiving their portions in whose behalf this decree is made. The fruits of their vigilance can be apportioned according to their respective

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rights in the estate, when one of the original testamentary heirs claims, and the Circuit Court, in the further proceedings in the cause under the mandate of this court, will, of course, take care to ascertain who are the representatives of others of them who are dead.

Jean François Girod is not a party in this cause, and therefore we can give no decree against him, but should he offer to become a party for the purpose of claiming what under the will was his portion of the estate of Claude, or should it be claimed by any representative of his, we think it right to remark, for the purpose of preventing further litigation in this matter, that such claim will be subject to all the equities subsisting between Jean François and Nicolas, and especially to the allowance to the representives of Nicolas of the purchase money which was given by Nicolas to Jean, for the one half of their joint purchase of the property of their testator, with interest at the rate according to their contract up to the times when the purchase money was paid, and afterwards at five per cent.

ORDER.

This cause came on to be heard on the transcript of the record from the Circuit Court of the United States for the Eastern District 563*] *of Louisiana, and was argued by counsel. Whereupon it is considered by the court—

1. That the plaintiffs are residuary legatees of Claude François Girod, deceased, in the following proportion, namely: Peronne Bernardine Girod, the widow of Jean Pierre Hector Pargoud, for one eighth; Rosalie Girod, the widow of Louis Adam, for one eighth; François Peronne Quitand, the wife of J. A. Allard, for one forty-eighth; Marie Philippine Rose Quitand, for one forty-eighth; Marie Bernard Quitand, for one forty-eighth; Louis Joseph Poidebard, for one forty-eighth; Benoite Colline Nicoud, for two two hundred and eighty eighths; Maurice Emilie Nicoud, and Jenny Benoite Nicoud, represented by Jean Berger, their tutor, each for two two hundred and eighty-eighths; Jean François Girod, the nephew, in his own right, and as testamentary heir of Pierre Nicolas Girod, his brother, and represented by Jean Firman Pepin, the syndic of his creditors, for one twentieth; and Françoise Clementine Girod, wife of Pierre François Pernond, for one fortieth.

2. That the adjudication of landed property, with the slaves thereto attached, situated on Bayou Lafourche, made on the 18th of February, 1814, to Charles St. Felix; the retrocession of said property by said Charles St. Felix to Nicolas and Jean François Girod, on the 23d of February, 1814; the adjudication of the property situated in the parish of Orleans made to Simon Laignel on the 9th of April, 1814, and the notarial seal made to the same on the 26th of April, 1814, in pursuance of said adjudication; and the conveyance of said property to Nicolas Girod, on the 28th of April, 1814, to be set aside and annulled, saving, however, the just rights of third persons, to whom two tracts of land on Bayou Lafourche, two slaves, and a piece of ground in the city of New Orleans were conveyed by the said Nicolas Girod in his lifetime, as appears from the admissions in the pleadings.

3. That for the purpose of giving to the residuary legatees of the late Claude François Girod their proportions respectively of the estate of the testator, the said Circuit Court should direct either a sale of the said property, both real and personal, at such time and manner as said court shall see fit, or cause a partition in kind to be made of said property, as in the judgment of the said court might be deemed most advisable; and that in either case the said court should direct all the proper conveyances to be made accordingly.

4. And for greater certainty it is hereby declared, that the property, of which undivided portions are to be conveyed and assigned to the plaintiffs as aforesaid, is all the property and slaves which were inventoried in the parishes of Ascension, Assumption, and Lafourche Interior, after the death of said Nicolas Girod, as belonging to his estate; and all the property which was inventoried after the death of said Nicolas Girod, as situated in the Municipality *No. 2 of the city of New Orleans, including the property which is an alluvion, and accessory to the property derived from the estates of Claude François Girod, and which was abandoned to Nicolas Girod by the heirs of Bertrand Gravier, by an act of compromise executed on the 29th day of March, 1823, and also the house and lot situated at the corner of St. Louis and Chartres streets, in Municipality No. 1 of the city of New Orleans. [*564

5. That the adjudication made in the Parish Court of the parish of Orleans, in the year 1815, in favor of Nicolas Girod, for $40,418.09, and claimed by the said Nicolas in the account filed in the Court of Probates by Nicolas and Jean François Girod, in May, 1817, be set aside, and instead thereof that the representatives of said Nicolas Girod be allowed, in the settlement of the accounts by the master in this cause, the sum of $6,576.20, with interest thereon at the rate of five per cent. per annum from the 1st day of August, 1813.

6. That the two acquittances and releases given in 1817, by the plaintiffs, Madame Adam and Madame Pargoud, to Jean François Girod, be set aside, and be allowed no other force or effect than as acknowledgments of the receipt by Madame Pargoud for 5,242 francs 75c., and by Madame Adam for the sum of 10,242 francs 75c., making respectively the sum of $975.15, and $1,905.15, in the currency of the United States, as stated in said receipt; and that the said amounts should be deducted from their portions respectively in the distribution.

7. That a reference be made to a master in chancery to take an account of what is due from the estate of Nicolas Girod to the plaintiffs on account of the property belonging to the estate of Claude François Girod, and alienated by said Nicolas Girod, for rents and profits, and for interest; and of what may be due by the complainants to the estate of Nicolas Girod, for payments made by the said Nicolas on account of the debts of the said Claude François Girod, and of the legacies paid by him, and of permanent improvements; and, in taking said account, said master shall

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charge the said estate with the value of the crop alleged to have been on hand when the property in Lafourche was adjudicated to Charles St. Felix, with interest thereon; with the amounts which, by the aforesaid account of 1817, the said executors acknowledged to have received, or for which they consented to become responsible, from the time the same were received; with the price at which the two tracts of land on Bayou Lafourche and the two slaves were sold, and which are mentioned in the pleadings as having heretofore been sold, with interest thereon from the time when, according to the bill of sale, said price was payable; with the sum of thirty-five thousand dollars, this being the admitted value of the price of the ground donated by Nicolas Girod to the Female Orphan Asylum, with interest thereon from the time said donation was [*565] made; with the *rents and profits of the plantation and slaves, the house at the corner of Chartres and St. Louis streets, and the property in Faubourg St Mary, now called the Second Municipality, from the adjudication of 1814, and at the rate which might reasonably, and with a proper administration, have been obtained from the same, it being understood that from the years 1829 and 1830, when the property in Faubourg St. Mary, or Second Municipality, still undisposed of, was leased to John F. Miller, the rents and profits thereon are to be charged at the rate at which the rent was stipulated in the lease to said Miller.

8. And the said master shall credit the estate of Nicolas Girod, on said account, with the amount with which said executors credited themselves in their account of the 23d of May, 1817, with interest thereon, except the personal claim of $40,418.09, in lieu of which this court has directed the allowance of $6,576.30, being one of the items of the general account which was claimed by Nicolas Girod against Claude François Girod after the death of the said Claude, and the estate of Nicolas Girod shall be credited with any payments that have been made on account of legacies left by the said Claude, with interest thereon. And the estate of the said Nicolas Girod shall be credited with one half of the rents and profits of the plantation and slaves of Bayou Lafourche, up to the time when Jean François sold his interest in the same to Nicolas Girod. And the said master shall also credit the estate of the said Nicolas Girod with the actual cost in money expended by the said Nicolas in permanent improvements, still in existence, of or upon any part of the estate of Claude François Girod, including improvements of the property gained by alluvion, accessory to the property derived from the estate of Claude François Girod, which was abandoned to Nicolas Girod by the heirs of Bertrand Gravier, by an act of compromise, executed on the 29th of March, 1823, and the expenses and cost paid by him in recovering the alluvion before mentioned, and including also improvements on the lot at the corner of St. Louis and Chartres streets, and with improvements on the lands on Bayou Lafourche deducting from these last the value of the labor of the slaves on the said plantation aiding and making such improvements, and of the materials procured from the same. And the actual cost in money of all improvements made by said Nicolas shall be allowed, with interest at five per cent. upon the same from the time it shall be ascertained or found by the master that the sums were expended. And allowance is, also, to be made to the estate of said Nicolas for all taxes paid on the property of Claude François Girod. And the said master is hereby authorized, for the discovery of the matters aforesaid, to receive from the parties, upon oath, books, and papers, and writings in their custody and power relating thereto and also to examine witnesses orally or upon written interrogatories, in regard to the cost *of all improve- [*566 ments, due notice of his proceedings in this matter being given to the parties or their attorney.

9. And the said master shall compute what amount or the balance so to be found against the estate of Nicolas Girod shall be paid to each of the plaintiffs, according to their declared proportionate interest in the estate of Claude François Girod, and said balance shall be paid to them, with interest from the date up to which the master's report may present a calculation of interest; and said payment shall be made by the dative testamentary executors of Nicolas Girod, out of the funds of said estate, in preference to any legacies under the will of said Nicolas Girod. And for the better discovery of matters aforesaid, the parties are to produce before the said master, upon oath, all books, papers, and writings in their custody or power relating thereto, as the said master shall direct. And the said master shall, when necessary, examine said parties upon written interrogatories.

10. That any other person or persons, not now parties to the proceedings, claiming title to the funds or estate in controversy, or to any part thereof, should be allowed to present their claims respectively before the said Circuit Court, to make due proofs thereof, and to become parties to the proceedings, for the due establishment and adjudication thereof. And that the costs of this suit which have hitherto accrued in the said court should be paid by the said dative testamentary executors out of the funds of said estate.

11. It is thereupon now here adjudged and decreed by this court, that so much of the decree of the said Circuit Court as conforms to the decree and opinion of this court be, and the same is hereby affirmed; and that this cause be, and the same is hereby remanded to the said Circuit Court, with directions to allow any person or persons not now parties and claiming title to any portion of the estate in controversy to become parties to the suit, to present their claims and make due proof thereof, and for such further proceedings to be had therein, in conformity to the decree and opinion of this court, as to law and justice shall appertain.

Cited—5 How., 276; 6 How., 204; 7 How., 829, 830; 8 How., 152, 413; 18 How., 201; 19 How., 287; 2 Wall., 85, 93; 7 Wall., 346; 18 Wall., 506; 6 Otto, 238; 9 Otto, 202; 1 Wood. & M., 64, 206; 2 Wood. & M., 199; 3 Wood. & M., 489, 490, 498-500; 2 Cliff., 153; 3 Cliff., 621; 1 Woods, 567; 3 Woods, 648; 9 Bank. Reg., 182; 5 Sawy., 379, 380; 3 McAr., 322.

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567*] *THE UNITED STATES, *Plaintiffs*,

v

WILLIAM S. ROGERS.

Indian tribes—laws for punishment of offenses—trial of offenses—plea of adoption.

The United States have adopted the principle originally established by European nations, namely, that the aboriginal tribes of Indians in North America are not regarded as the owners of the territories which they respectively occupied. Their country was divided and parceled out as if it had been vacant and unoccupied land.

If the propriety of exercising this power were now an open question, it would be one for the law making and political department of the government, and not the judicial.

The Indian tribes residing within the territorial limits of the United States are subject to their authority, and where the country occupied by them is not within the limits of any one of the States, Congress may, by law, punish any offense committed there, no matter whether the offender be a white man or an Indian.

The 25th section of the Act of 30th June, 1834, extends the laws of the United States over the Indian country, with a proviso that they shall not include punishment for "crimes committed by one Indian against the person or property of another Indian."

This exception does not embrace the case of a white man who, at mature age, is adopted into an Indian tribe. He is not an "Indian," within the meaning of the law.

The Treaty with the Cherokees concluded at New Echota, in 1835, allows the Indian Council to make laws for their own people or such persons as have connected themselves with them. But it also provides that such laws shall not be inconsistent with acts of Congress. The Act of 1834, therefore, controls and explains the treaty.

It results from these principles, that a plea, set up by a white man, alleging that he had been adopted by an Indian tribe, and was not subject to the jurisdiction of the Circuit Court of the United States, is not valid.

THIS case came up on a certificate of division from the Circuit Court of the United States for the District of Arkansas.

At the April Term, 1845, of the said Circuit Court, the grand jury indicted William S. Rogers for the murder of Jacob Nicholson. Both Rogers and Nicholson were alleged, in the indictment, to be "white men and not Indians." The offense was charged to have been committed within the jurisdiction of the court, that is to say, in that part of the Indian country west of the State of Arkansas that is bounded north by the north line of lands assigned to the Osage tribe of Indians, produced east to the State of Missouri, west by the Mexican possessions, south by Red River, and east by the west line of the now State of Arkansas and the State of Missouri (the same being territory annexed to the said District of Arkansas, for the purposes in the act of Congress in that behalf made and provided).

The defendant filed the following plea:

"And the defendant in his own proper person, comes into court, and, having heard the said indictment read, says that the court ought not to take further cognizance of the said prosecution, because, he says, heretofore, to wit, on the ——— day of November, 1836, he then being a free white man and a citizen of the United States, and having been born in the said United States, voluntarily and of his free will removed to the portion of the country west of the State of Arkansas, assigned and belonging to the Cherokee *tribe of Indians, and [*568 did incorporate himself with said tribe, and from that time forward became and continued to be one of them, and made the same his home, without any intention of returning to the said United States; and that afterwards, to wit, on the ——— day of November, 1836, he intermarried with a Cherokee Indian woman, according to the forms of marriage, and that he continued to live with the said Cherokee woman, as his wife, until September, 1843, when she died, and by her had several children, now living in the Cherokee nation, which is his and their home.

"And the defendant further says, that, from the time he removed, as aforesaid, he incorporated himself with the said tribe of Indians as one of them, and was and is so treated, recognized, and adopted by said tribe and the proper authorities thereof, and exercised and exercises all the rights and privileges of a Cherokee Indian in said tribe, and was and is domiciled in the country aforesaid; that, before and at the time of the commission of the supposed crime, if any such was committed, to wit, in the Indian country aforesaid, he, the defendant, by the acts aforesaid, became, and was, and still is, a citizen of the Cherokee nation, and became, and was, and still is, a Cherokee Indian, within the true intent and meaning of the act of Congress in that behalf provided. And the said defendant further says that the said Jacob Nicholson, long before the commission of said crime, if any such was committed, although a native born free white male citizen of the United States, had settled in the tract of country assigned to said Cherokee tribe of Indians west of the State of Arkansas, without any intention of returning to said United States; that he intermarried with an Indian Cherokee woman, according to the Cherokee form of marriage; that he was treated, recognized, and adopted by the said tribe as one of them, and entitled to exercise, and did exercise, all the rights and privileges of a Cherokee Indian, and was permanently domiciled in said Indian country as his home, up to the time of his supposed murder.

"And the said defendant further says that, by the acts aforesaid, he, the said Jacob Nicholson, was a Cherokee Indian at the time of the commission of the said supposed crime, within the true intent and meaning of the act of Congress in that behalf made and provided. Wherefore the defendant says that this court has no jurisdiction to cause the defendant to make a further or other answer to said bill of indictment, for said supposed crime alleged in the bill of indictment. And the defendant prays judgment, whether he shall be held bound to further answer said indictment."

To this plea the District Attorney of the United States filed the following demurrer:

"And the said United States, by Samuel H. Hempstead, District *Attorney, come [*569 and say, that the said first plea of the defendant to the jurisdiction of this honorable court is insufficient in law, and that, by reason of

NOTE.—*As to Indians and Indian tribes, their status; to what laws amenable; their right and title in lands occupied by them*, see note to Worcester v. Georgia, 6 Pet., 515.

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anything therein contained, this court ought not to refuse to entertain further jurisdiction of the crime in said bill of indictment alleged.

"And the following causes of demurrer are assigned to said plea:

"1st. That a native born citizen of the United States cannot expatriate himself, so as to owe no allegiance to the United States, without some law authorizing him to do so.

"2d. That no white man can rightfully become a citizen of the Cherokee tribe of Indians, either by marriage, residence, adoption, or any other means, unless the proper authority of the United States shall authorize such incorporation.

"3d. That the proviso of the act of Congress relating to crimes committed by one Indian upon the property or person of another Indian, was never intended to embrace white persons, whether married and residing in the Indian nation or not."

And, upon the argument of the said demurrer, the following questions arose, and were propounded for the decision of the court; but the judges being divided in opinion upon the same, upon motion, ordered that they be entered of record, and certified to the next term of the Supreme Court of the United States for its opinion and decision thereupon:

1st. Was it competent for the accused, being a citizen of the United States, either under the fourth clause of the eighth section of the first article of the Constitution of the United States, or under any act of Congress passed in virtue of the Constitution of the United States, upon the subject of naturalization; or in virtue of any admission, obligation, or duty incumbent upon the government of the United States, and implied by the said clause, section, and article of the Constitution; or any of the said acts of Congress in reference to citizens of the United States, or to foreign governments, their subjects or citizens, upon the authority of the will and act of the accused, and without any form, mode, or condition prescribed by the government of the United States, to devest himself of his allegiance to that government, and of his character of citizen of the United States?

2d. Could the accused, as a citizen of the United States, or resident within the same, possess the right or the power resulting from the nature and character of the civil and political institutions of the United States, or as appertaining to, and inherent in, him, as a free moral and political agent, or derived to him from the law of nature or from the law of nations, founded either upon natural right or upon convention, voluntarily and entirely put off his allegiance to, and his character of citizen of [*570 the United States, *and transfer that allegiance and citizenship to any other government, State, or community?

3d. Could the tribe of Indians residing without the limits of any one of the States, but within the territory of the United States, as set forth in the pleadings in this prosecution, and designated as the Cherokee tribe, and also as the Cherokee nation (and by whom the accused alleges that he has been adopted), be held and recognized, in reference to the government, and under the laws of the United States, as a separate and distinct government or nation, possessing political rights and powers such as authorize them to receive and adopt, as members of their State, the subjects or citizens of other States or governments, with the assent of such subjects or citizens, and particularly the citizens of the United States, and thereby to sever their allegiance and citizenship from the States or governments to which they previously appertained, and to naturalize such subjects or citizens, and make them exclusively or effectually members, subjects, or citizens of the said Indian tribe, with regard to civil and political rights and obligations?

4th. Could the accused, by any act or assent of his own, combined with the acts, authority, or assent of the above mentioned tribe, residing within the territory aforesaid, so change and put off his character, rights, and obligations as a citizen of the United States, as to become in his social, civil, and political relations and condition a Cherokee Indian?

5th. Does the twenty-fifth section of the Act of Congress of the 30th of June, 1834, entitled "An Act to regulate trade and intercourse with the Indian tribes, and to preserve the peace of the frontiers," and the proviso to that section, limit the operation of the said act, and give effect to the said proviso, as to instances of crimes committed by natives of the Indian tribes of full blood, against native Indians of full blood only; or do the said section and proviso have reference also to Indians (natives), or others adopted by, and permanently resident within, the Indian tribes; or have they relation to the progeny of Indians by whites or by negroes, or of whites or negroes by Indians, born or permanently resident within the Indian tribes and limits, or to whites or free negroes born and permanently resident in the tribes, or to negroes owned as slaves, and resident within the Indian tribes, whether procured by purchase, or there born the property of Indians?

6th. Does the plea interposed by the accused in this prosecution, the facts whereof are admitted by the demurrer, constitute a valid objection to the jurisdiction of this court?

The twenty-fifth section of the Act of 1834, referred to in the fifth point certified, enacts as follows: "That so much of the laws of the United States as provides for the punishment of crimes committed within any place within the sole and exclusive jurisdiction *of [*571 the United States, shall be in force in the Indian country; provided, that the same shall not extend to crimes committed by one Indian against the person or property of another Indian."

The defendant moved the court for an order to discharge him from imprisonment, on the ground that the court were divided in opinion on his plea to the jurisdiction; but the court overruled the motion, and remanded him to the custody of the marshal.

The case came up to this court upon the points certified, and was argued by *Mr. Mason*, Attorney-General, on behalf of the United States.

Mr. Chief Justice TANEY delivered the opinion of the court:

This case has been sent here by the Circuit Court of the United States for the District of Arkansas, under a certificate of division of opinion between the justices of that court.

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It appears by the record that William S. Rogers, a white man, was indicted in the above mentioned court for murder, charged to have been committed upon a certain Jacob Nicholson, also a white man, in the country now occupied and allotted by the laws of the United States to the Cherokee Indians.

The accused put in a special plea to the indictment, in which he avers that, having been a citizen of the United States, he, long before the offense charged is supposed to have been committed, voluntarily removed to the Cherokee country, and made it his home, without any intention of returning to the United States, that he incorporated himself with the said tribe of Indians as one of them, and was so treated, recognized, and adopted by the said tribe, and the proper authorities thereof, and exercised all the rights and privileges of a Cherokee Indian in the said tribe, and was domiciled in their country; that by these acts he became a citizen of the Cherokee nation, and was, and still is, a Cherokee Indian, within the true intent and meaning of the act of Congress in that behalf made and provided; that the said Jacob Nicholson had in like manner become a Cherokee Indian, and was such at the time of the commission of the said supposed crime, within the true intent and meaning of the act of Congress in that behalf made and provided; and that, therefore, the court had no jurisdiction to cause the defendant to make a further or other answer to the said indictment.

This is the substance of the plea, and to this plea the attorney for the United States demurred, setting down the causes of demurrer which appear in the foregoing statement of the case.

Several questions have been propounded by the Circuit Court, which do not arise on the plea of the accused, and some of them, we think, cannot be material in the decision of the case, and need not, therefore, be answered by this court.

The country in which the crime is charged to have been committed is a part of the territory of the United States, and not within the 572*] *limits of any particular State. It is true that it is occupied by the tribe of Cherokee Indians. But it has been assigned to them by the United States as a place of domicil for the tribe, and they hold and occupy it with the assent of the United States, and under their authority. The native tribes who were found on this continent at the time of its discovery have never been acknowledged or treated as independent nations by the European governments, nor regarded as the owners of the territories they respectively occupied. On the contrary, the whole continent was divided and parceled out, and granted by the governments of Europe as if it had been vacant and unoccupied land, and the Indians continually held to be, and treated as, subject to their dominion and control.

It would be useless at this day to inquire whether the principle thus adopted is just or not; or to speak of the manner in which the power claimed was in many instances exercised. It is due to the United States, however, to say, that while they have maintained the doctrines upon this subject which had been previously established by other nations, and insisted upon the same powers and dominion within their territory, yet, from the very moment the general government came into existence to this time, it has exercised its power over this unfortunate race in the spirit of humanity and justice, and has endeavored by every means in its power to enlighten their minds and increase their comforts, and to save them if possible from the consequences of their own vices. But had it been otherwise, and were the right and the propriety of exercising this power now open to question, yet it is a question for the law making and political department of the government, and not for the judicial. It is our duty to expound and execute the law as we find it, and we think it too firmly and clearly established to admit of dispute, that the Indian tribes residing within the territorial limits of the United States are subject to their authority, and where the country occupied by them is not within the limits of one of the States, Congress may by law punish any offense committed there, no matter whether the offender be a white man or an Indian. Consequently, the fact that Rogers had become a member of the tribe of Cherokees is no objection to the jurisdiction of the court, and no defense to the indictment, provided the case is embraced by the provisions of the Act of Congress of the 30th of June, 1834, entitled "An Act to regulate trade and intercourse with the Indian tribes, and to preserve the peace of the frontiers."

By the twenty-fifth section of that act, the prisoner, if found guilty, is undoubtedly liable to punishment, unless he comes within the exception contained in the proviso, which is, that the provisions of that section "shall not extend to crimes committed by one Indian against the person or property of another Indian." And we think it very clear that a white man, who at mature age is adopted in an Indian tribe, does not thereby become an Indian, and was not *intended to be embraced in [*573 the exception above mentioned. He may by such adoption become entitled to certain privileges in the tribe, and make himself amenable to their laws and usages. Yet he is not an Indian; and the exception is confined to those who by the usages and customs of the Indians are regarded as belonging to their race. It does not speak of members of a tribe, but of the race generally—of the family of Indians; and it intended to leave them both, as regarded their own tribe, and other tribes also, to be governed by Indian usages and customs. And it would perhaps be found difficult to preserve peace among them, if white men of every description might at pleasure settle among them, and, by procuring an adoption by one of the tribes, throw off all responsibility to the laws of the United States, and claim to be treated by the government and its officers as if they were Indians born. It can hardly be supposed that Congress intended to grant such exemptions, especially to men of that class who are most likely to become Indians by adoption, and who will generally be found the most mischievous and dangerous inhabitants of the Indian country.

It may have been supposed that the Treaty of New Echota, made with the Cherokees in 1835, ought to have some influence upon the construction of this act of Congress, and ex-

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tend the exception to all the adopted members of the tribe. But there is nothing in the treaty in conflict with the construction we have given to the law. The fifth article of the treaty stipulates, it is true, that the United States will secure to the Cherokee nation the right, by their national councils, to make and carry into effect such laws as they may deem necessary for the government and protection of the persons and property within their own country, belonging to their people, or such persons as have connected themselves with them. But a proviso immediately follows, that such laws shall not be inconsistent with the Constitution of the United States, and such acts of Congress as had been, or might be passed, regulating trade and intercourse with the Indians. Now, the act of Congress under which the prisoner is indicted had been passed but a few months before, and this proviso in the treaty shows that the stipulation above mentioned was not intended or understood to alter in any manner its provisions, or affect its construction. Whatever obligations the prisoner may have taken upon himself by becoming a Cherokee by adoption, his responsibility to the laws of the United States remained unchanged and undiminished. He was still a white man, of the white race, and therefore not within the exception in the act of Congress.

We are therefore of opinion that the matters stated in the plea of the accused do not constitute a valid objection to the jurisdiction of the court, and that, if he is found guilty upon the indictment, he is liable to the punishment provided by the act of Congress before referred to, and is not within the exception in relation **574*]** to Indians. *And we shall direct this opinion to be certified to the Circuit Court, as the answer to the several questions stated in the certificate of division. We abstain from giving a specific answer to each question, because, as we have already said, some of them do not appear to arise out of the case, and, upon questions of that description, we deem it most advisable not to express an opinion.

S. C., Hemp., 450.
Cited—11 Wall., 619; 17 Wall., 242; 1 Dill., 265, 276; Hemp., 500.

JOHN A. BARRY, *Plaintiff in Error,*
v.
MARY MERCEIN AND ELIZA ANN BARRY, *Defendants.*

Practice.

After a case has been called, and placed at the foot of the docket, the court cannot take it up, on motion, and assign a day for its argument, when other cases, of great public importance, have already been assigned for what may be the remainder of the term.

THE circumstances which led to the interlocutory opinion of the court in this case are sufficiently set forth in the memorial of Mr. Barry, and the opinion of the court.

The memorial was as follows:

"To their Honors, the Justices of the Supreme Court of the United States of America.

"The memorial of John A. Barry respectfully represents that he is a British subject, domiciled and resident abroad within the dominions of her Britannic Majesty; that, for some considerable time past, he has had upon the docket of this honorable court a highly important and most interesting case, on a writ of error to the Circuit Court for the Southern District of New York: that, consequently, he came over to these United States in November, 1844, to attend to the said case at the last term of this honorable court; but the number of the case being 128, he was greatly disappointed in being obliged to return to his home without its having been reached; that he has now again come over to this country for the purpose of meeting the said case; but, owing to an unusual length of passage, did not arrive at Boston until after this honorable court had commenced its present session; that it was his intention, and full expectation, to have been before this honorable court whenever the said case (No. 72) on the present calendar should be called; but, owing to an attack of bodily indisposition, he was detained in New York until he became apprehensive that he might not be enabled to be present at the call of the said case in its regular order; that he thereupon wrote a letter to W. T. Carroll, Esq., the clerk of this honorable court, intimating his said apprehension, in order that, should it be realized, the cause thereof might be communicated to *your hon- [*575
ors, in the hope that, under the circumstances, your honors would be pleased to permit the case to be passed over without prejudice until your memorialist's arrival in Washington; that he received an answer from the said W. T. Carroll, Esq., acknowledging his receipt of the said letter, but informing your memorialist that, unfortunately, the case had been reached only the day before, when, agreeably to the forty third rule of court, the said case was placed at the foot of the calendar: that, in the event of its so remaining, your memorialist will, if he shall live, be necessitated to come again—a third time—to this country, at the next setting of this honorable court, as no probability exists that the case can be reached, in its new position, during the present, term.

"Your memorialist, therefore, respectfully prays, that, in consideration of the foregoing premises, and further, that the case is one in relation to the writ of *habeas corpus*, in favor of liberty, in proceedings on which courts are accustomed to relax that stringency of technical requirements so strenuously adhered to and insisted on in ordinary formal suits at law, the said forty-third rule of court may not be enforced on the present occasion; but that your memorialist may be heard in the matter at such earlier day as may comport with the convenience of your honors, or be appointed for the purpose by this honorable court.

"JOHN A. BARRY.

"Washington, D. C., February 6th, 1846"

Mr. Chief Justice TANEY delivered the opinion of the court:

In the case of *John A. Barry* v. *Mary Mercein and Eliza Ann Barry*, a motion was made on Friday last by the plaintiff in error to assign some day during the present term for the argument. A petition was filed at the last term by one of the defendants in error, praying that the writ of error might be dismissed for want of jurisdiction. The case in the regular

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order of business was called on the 15th day of January last, and neither party appearing, it was, according to the rules of the court, placed at the foot of the calendar; and it is now evident, from the number of cases standing before it, that it cannot be reached during the present term, unless by a special order of the court giving it priority.

There are two questions in the case, both of them grave and serious ones: 1st. Whether this court have jurisdiction upon a writ of error in a case like this; and, 2d. If it should be determined that it has jurisdiction, then, whether the Circuit Court committed an error in refusing to award the *habeas corpus*.

As this controversy, while it continues undecided, must be a painful one to the parties on both sides, the court feel every disposition to bring it to a speedy hearing, if it could be done without injustice to others; and if the motion to assign a day was liable to no other objection than that it would be a departure from the order of business prescribed by the rules, 576*] there would be no difficulty *in making this case an exception, and assigning a day for the hearing.

But at the present period of the term, the assignment of a particular day for the trial of this case involves other and higher considerations than that of a mere departure from established rules. In four or five weeks, at farthest, the court will be compelled to close its session, in order to enable its members to perform their duties at the circuits; and several important cases, some of which cannot be continued without producing much public inconvenience in three or more of the States, have already been specially assigned for argument, and the order in which they are to be taken up announced from the bench; and in obedience to this notice counsel have been for some time past, and still are, attending to argue them. It is very doubtful whether enough remains of the term to enable the court to dispose of these cases, and it is probable that one or more of them may of necessity be continued. Under such circumstances, we cannot, without injustice to others and inconvenience to the public in several of the States, make a new and unexpected arrangement in the order of business, by which another case, not entitled to priority, is interposed out of its proper order.

The case in question must, therefore, stand over until the next term.

S. C., 5 How., 103.

EDWARD BRADFORD, *Plaintiff in Error*,
v.
ROBERT W. WILLIAMS, *Defendant*, AND
JOHN JUDGE, *Plaintiff in Error*,
v.
ROBERT W. WILLIAMS, *Defendant*.

Florida statute—suit on bond by assignee—obligor and obligee same person—execution need not be proved unless denied under oath—practice on appeal—duty of clerk.

By a statute of Florida, where suit is brought upon a bond, the plaintiff need not prove its execution unless the defendant denies it under oath. It also provides that such an instrument may be assigned; that the assignee becomes vested with all the rights of the assignor, and may bring suit in his own name.

Under this statute, where a joint and several bond was signed by three obligors and made payable to three obligees, one of whom was also one of the obligors, and the obligees assigned the bond, the fact that one of the obligors was also an obligee was no valid defense in a suit brought by the assignee against the two other obligors.

The inability of one of the obligees to sue himself did no impair the vitality of the bond, but amounted only to an objection to a recovery in a court of law. The assignment, and ability of the assignee to sue in his own name, removed this difficulty.

The statute of Florida places bonds, as far as respects negotiability and the right of the assignee to sue in his own name, upon the same footing as bills of exchange and promissory notes. The case, therefore, falls within the principle of a partner drawing a bill upon his house, or making a note in the name of the firm, payable to his own order, both of which are valid in the hands of a *bona fide* holder.

THESE were kindred cases, argued and decided together. Bradford and Judge were obligors upon the same bonds, although sued separately, and the same questions were common to both cases.

*They came up by writ of error from [*577 the Court of Appeals for the Territory of Florida.

The case was this:

The defendant in error brought an action of debt in the Superior Court in the Middle District of Florida against the plaintiff in error, and declared upon four bonds, amounting in the aggregate to the sum of $4,854.28, made by the defendant below, William P. Craig, and Ed. Bradford by which they bound themselves jointly and severally to pay that sum to William B. Nuttall, Hector W. Braden, and William P. Craig, or to their order, setting out the assignment of said bonds, in due and proper form, by the obligees to the plaintiff in the suit.

The defendant, by his attorney, craved oyer of the bonds, and, after setting out the same, pleaded "that William P. Craig, one of the obligors mentioned, was, and is, the same identical person named William P. Craig as one of the obligees in the said bonds, who, together with the others, had indorsed the bonds to the plaintiff, and that the same was therefore null and void at law, and not the deed of the defendant," concluding with a verification.

To which the plaintiff demurred, and the defendant joined in the demurrer.

The court gave judgment for the plaintiff on the demurrer, which judgment was affirmed by the Court of Appeals, upon which this writ of error was brought.

The record not having been filed in time, the cases had been docketed and dismissed under the forty-third rule of court, on motion of the defendant in error. Afterwards, a motion was made by *Mr. Westcott* to re-instate them, which was argued by *Mr. Westcott* and opposed by *Mr. Thompson;* upon which motion

Mr. Justice M'LEAN delivered the opinion of the court:

A writ of error having been allowed in this case, and the record not having been filed by the plaintiff within the forty-third rule, a motion was made by the counsel of the defendant,

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on presenting a statement of the judgment below, regularly certified, to dock it and dismiss the cause, which the court ordered to be done. And now a motion is made to set aside that order, on the ground that the clerk, who certified the judgment, acted without authority.

The certificate objected to is in the proper form, is signed by R. T. Birchett, clerk of the Court of Appeals of Florida, and is authenticated by the seal of that court.

Florida was admitted into the Union as a State on the 3d of March last, but provision was made under the seventeenth article in the Constitution for the continuance of the courts and officers of the territory until superseded under the laws of the State. We think the clerk, having possession of the records of the Court of Appeals, has a legal right, under its **578*]** sanction, to certify its judgments, *and therefore that the order of dismissal cannot be set aside on the above ground. But in consideration of a charge of government in the territory, and the consequent embarrassments and doubts in regard to this writ of error; and also in consideration that the plaintiff in error, in seven days after the above dismissal, made this motion, and asked leave to file the record, the court will set aside the former order, and permit the record now to be filed; on the condition that, at the option of the defendant in error, the plaintiff shall submit the case, on printed arguments, at the present term.

In conformity with the above order, the case was submitted, upon the following printed arguments, by *Mr. Westcott* and *Mr. C. J. Ingersoll* for the plaintiff in error, and *Mr. Thompson* for the defendant.

Mr. Westcott and *Mr. Ingersoll*, for the plaintiff in error:

These cases are both depending on the same principles. The statement of defendant in error, in his brief, of the pleadings, is correct. The notice of the court is, however, asked to the particular form of the counts on the bonds sued on. They are described as the joint and several bonds of Judge, Bradford, and Craig, and as given to Nuttall, Braden, and Craig. They are averred to have been indorsed by all the obligees (Nuttall, Braden, and Craig) to Williams. The plaintiff must recover upon the case made in his declaration, or not at all, in this action.

The fact that Craig, named as obligee in the bonds, is also one of the obligors, is distinctly averred in defendant's plea. The plaintiff's demurrer admits this fact. The first question, then, arises as to the correctness of the position assumed by the defendant, that the bonds are nullities, and cannot be sued upon at law by the obligees or their assignees.

It is a principle of the common law, that no one can be both obligor and obligee in the same bond. He cannot sue himself, and the instrument is a nullity. (1 Plowden, 367, 368; Co. Litt., 264, 265; Bac. Abr., 156, 157; Powell on Contracts, 438; *Eastman* v. *Wright*, 6 Pick., 321; 6 Taunt., 407; 1 Tucker's Com., 277; 2 American Common Law, 412, 414; 1 Chitty's Pleadings, 45; 2 Saunders's Rep., 47, note T; Roscoe on Bills, 43, 44; 2 Coventry & Hughes's Dig., 238, art. 9, sec. 7, art. 7, sec. 12; *Turton* v. *Benson*, 10 Mod., 450; *Mainwaring* v. *Newman*, &c., 2 Bos. & Pull., 120; *Jus* v. *Armstrong*, 3 Dev., 286; *Taylor's* case, *Ibid.*, 289; *Bonner's* case, *Ibid.*, 290; *Shamhour's* case, 2 Dev., 6; *Davis* v. *Somerville*, 4 Dev., 382; 13 Serg. & Lowb., 328.) The court are particularly referred to the North Carolina cases above cited.

Independent of all authority, the common sense of this principle is so obvious that it cannot be disputed. Delivery, which, with sealing, is an essential part of a bond, cannot be made by a man to *himself, nor can a [*579 man sue himself. This objection, therefore, is insuperable, unless it can be evaded.

The counsel for defendant in error, in his submitted brief, does not seem disposed to contest this position, but it is attempted to be evaded by contending that the thirty-third and thirty-fourth sections of the territorial statute of 1828 (see Duval's Comp., p. 69, correctly quoted in 2d page of defendant's brief), alters the common law on this subject.

The common law was adopted in Florida at the first session of the Territorial Legislature after the cession. (See Laws of Florida of 1822, p. 53.) It has continued in force in Florida ever since. In 1828, a revision of the laws was attempted by the Legislature, and in the enumeration of the acts to be continued in force, the Act of 1822, above referred to, was, as is notorious, by mere inadvertence, omitted. Until it was re-enacted in 1829, it was contended by some that during that interim the civil law of Spain, and not the common law of England, was to be regarded as existing in that territory; but such position never received the sanction of any judicial decision. It is submitted that the common law, once adopted as a system in 1822, continued till positively and affirmatively abrogated. A different rule would occasion great confusion and embarrassment as to contracts made in the year 1828, made according to the rules and forms of the common law, and in the belief that it controlled them. Yet defendant in error seeks to establish such doctrine.

The territorial statute cited "vests" the indorsee with the same rights, powers, and capacities as might have been "possessed by the assignor or indorser; and the assignee or indorsee may bring suit in his own name." (See sec. 34 of statute cited, p. 2, defendant's brief, and Duval's Comp., p. 96.)

This territorial statute does not give to the assignee or indorsee of a bond any more "rights, powers, or capacities" than "might have been possessed by the assignor or indorser. The restrictive words, "the same," used in the law, show such intention by the Legislature. Defendant in error cannot sue as indorsee, unless the words "the same" are construed to mean more. It would be as reasonable to argue that the words "might have been possessed," used in the same clause, meant that the indorsee of an invalid bond should have the "same rights, powers, and capacities" as his indorsee "might" have had if the bond had been valid.

The concluding clause, providing that "the assignee or indorsee may bring suit in his own name," was not intended to "vest" him with such "right, power, or capacity," as an additional right to that possessed by his assignor or indorser; in other words, to sue on the bond in

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his own name, even if his assignor or indorser could not sue on it. The statute was intended to make valid bonds negotiable, and allow the assignee or indorsee to sue in his own name, **580***] *which was not allowed at common law; all the indorser's right to sue in his own name is founded on the statute. It was not intended to make a bond, invalid before indorsement, become valid by indorsement.

It was never contemplated that it would be used to overturn a fundamental principle of the common law, that the same person could not be both obligor and obligee in the same bond, and both plaintiff and defendant in the same suit.

In this case the counts all allege Nuttall, Braden, and Craig to be obligees; they allege Nuttall, Braden, and Craig to be indorsers, and they allege Judge, Bradford, and Craig to be the obligors. We are saved all inquiry as to what might have been properly decided, if plaintiff had not made these express allegations, and if he had counted differently, dropping Craig either as obligor or as obligee and indorser, with appropriate averments. This case must be decided on the pleadings; and they state that Williams, the plaintiff, claims as indorsee of Nuttall, Braden, and Craig, of a bond given to them by Judge, Bradford, and Craig. Craig is expressly alleged to be one of his three joint indorsers. He has, therefore, in this suit, under the statute, cited precisely "the same," or "all" (as defendant cites the statute in p. 3 of his brief) "the rights, powers, and capacities," as his indorsers, Nuttall, Braden, and Craig had, and no more. He cannot gainsay his own pleadings. If these bonds had not been indorsed, could Nuttall, Braden, and Craig have sued Judge, Bradford, and Craig?

The cases cited show that they could not at common law, and the statute gives Williams the same and no additional rights to those they had.

The argument of defendant in error (page 3 of brief filed), which concedes that "Craig sealed, but could not deliver, the bond, because he was one of the obligees; the execution of the bond was therefore incomplete, until Craig, joining the other obligees in the assignment to Williams, by that single act compelled the execution," &c., it is submitted, gives up the law of this case upon these pleadings. The counts are not consistent with such case as that made by such arguments. To sustain it, the bonds must be regarded as being made and delivered directly to Williams by Judge, Bradford, and Craig, and Craig not regarded as indorser.

The pleadings are the reverse of this supposed case. So, too, all the arguments and authorities cited by defendant, with respect to "express" and "implied" delivery of a deed and "inchoate" instruments, and delivery to part, and not all, of the obligees, are inapplicable to this case upon the pleadings, and they are conclusively answered by a similar reference. The cases and rules of law contended for by defendant in error, if they were conceded, do not apply to his case, made upon his own pleadings.

The assimilation of this case to those found-
581*] ed upon the rules of *commercial law, by which bills of exchange and notes, payable to the order of the maker, are held valid, and, when indorsed by the maker, suits sustained upon them, we think will not be sanctioned by this court. The essential difference between sealed instruments and simple contracts, and the pleadings upon them, and the distinctions of the mercantile law, are so obvious that it is not necessary to refer to them. Nor has the law governing simple contracts by partnerships any analogy to the law relating to sealed obligations.

The case of *Smith* v. *Lusher* (5 Cowen's Rep.), cited by defendant in error, was a case turning on both a partnership and a promissory note, in which, according to the law merchant, and for securing the free circulation of those negotiable instruments which have become a convenient substitute for the common currency of the country, and, in many respects equivalent to money itself, the court could not do less than sustain the right for recovery. But no bond was in suit in that case, and the whole argument, both at the bar and on the bench, whenever the case of a bond is alluded to, shows what would have been the decision if the action had been upon a bond. The instance of an obligation payable by a man to himself is constantly mentioned as an absolute nullity.

The case cited by defendant from 7 Gill & Johns., 265, is deemed to be in our favor. The principle for which we contend—that the bonds declared on were void at common law—is, we conceive, conceded in that case; and the only question was, what constituted an assignment of the instrument then sued on. The court held the bequest to be such assignment, especially as it was delivered to plaintiff by the executor, who was the party owing and sued. The objection we make in this case at bar, that these bonds were void in their inception, could not be made in that. The instrument there was confessedly valid, and the objection made was, that it was extinguished by coming to the hands of the executor. Whether these bonds can be made valid by any indorsement, and whether the court would so hold in a case in which the the pleadings were consistent with a case so made, as before observed, it is not necessary now to inquire.

The rule admitted by defendant in error (see page 3 of his brief), that "there is a technical objection to the jurisdiction of a court of law in cases of suit on a bond in which the same party is obligor and obligee, and such suits are properly cognizable in a court of equity, because it is in such courts only that adequate relief can be given," is, however, all-sufficient for plaintiff in error in this case. We admit, though these bonds are void at common law, the obligors can be compelled to do justice by a court of equity. The defendant in error states, on same page in his brief, that these bonds are by one "company of persons to another company or association, and one of the persons is a member of both." This is but a partial statement of the case. If it had been stated, also, that these *bonds [***582** were given for lands, for which lands bonds to make titles were given by the obligees, and that the vendors are unable to make good titles, the justice of the rule conceded by defendant

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in error, and the reason and object of a defense against these bonds at law would be manifest, for, in such case, a court of equity is the only tribunal proper to decide between the parties.

It can scarcely be necessary to observe, that the rule of the federal courts, to follow the decisions of the highest State court in the construction of the local statutes regulating practice in suits, has never been held to apply to the territorial courts, which are made subject to the appellate and revisory power of this court by act of Congress, which courts are created by federal legislation, and, indeed, the legislation of the territory wholly derived from federal authority; nor does the rule apply to the decision of a State court, when the question is, as in this case, not as to a mere matter of practice, but as to a fundamental rule of common law, and whether it has been abrogated by the statute. Whether three or four, out of five, judges of the Florida court concurred in the decision now under examination, we do not deem important. If all had concurred, and if erroneous, it should be reversed; but, in answer to the statement in the brief on the other side on this subject, we would remark, that the only judge who filed a dissenting opinion speaks of the decision as being made by "a majority of the court."

Mr. Thompson, for defendant in error:

This was an action of debt, instituted in the Superior Court of the Middle District of Florida by Williams against the present plaintiff in error, as one of the obligors of four joint and several bonds, made by John Judge, Edward Bradford, and William P. Craig, payable to Hector W. Braden, William B. Nuttall, and William P. Craig, or order, and by the said obligees asigned to Robert W. Williams, the defendant in error in this court.

The declaration contains five counts—one upon each bond, and the fifth upon an account stated.

The defendant pleaded two pleas; the first applicable to the first four counts, and the second, a plea of *nil debet* to the fifth count. The plea to the special counts craves oyer of the writings obligatory, and alleges that William P. Craig, one of the obligors, "was and is the same identical person named William P. Craig," as one of the obligees in said bonds, and the same are therefore null and void in law, and not the deeds of the said Judge. To this plea there was a general demurrer and joinder, and the Superior Court sustained the demurrer, and gave judgment for the plaintiff (Williams) according to the agreement of counsel filed in the record.

The cause was removed to the Court of Ap- **583***] peals of the Florida *Territory, which court affirmed the judgment of the Superior Court.

The question which presents itself for consideration in this case is this: Does the fact alleged in the plea, and admitted by the demurrer, of the identity of William P. Craig, one of the obligors, as one of the obligees, render the bonds null and void in law as to all the obligors, so as to defeat the right of action of Robert W. Williams, the assignee?

We maintain the negative of this proposition, and contend that the present case is clearly distinguishable from the cases cited by the plaintiff in error in argument in the court below, and which will doubtless be pressed upon the consideration of the court here. It was said that such an instrument was void, because Craig could not deliver the instrument to himself, and delivery was essential to the validity of a bond, and because no action could be maintained upon it; the same person cannot be plaintiff and defendant.

This case, however, is not to be determined by the rules of the common law, but by the act of the Legislative Council of Florida, which has made some important alterations in the law as it formerly stood.

By the thirty-third section of the Act of 1828, it is provided, "That it shall not be necessary for any person who sues upon any bond, note, covenant, deed, bill of exchange, or other writing whereby money is promised or secured to be paid, to prove the execution of such bond, note, covenant, deed, bill of exchange, or other writing, unless the same shall be denied by the defendant under oath."

The thirty-fourth section provides, "That the assignment or indorsement of any of the forementioned instruments of writing shall vest the assignee or indorsee thereof with the same rights, powers, and capacities as might have been possessed by the assignor or indorser. And the assignee or indorsee may bring suit in his own name," &c. (See Duval's Comp., p. 96.)

The character of the transaction, as inferable from the instruments, seems to have been an indebtedness of several persons composing one joint company, of which Craig was one, to another company of several persons, of which he was also a member, and the bond was executed as the evidence of that indebtedness. We admit that delivery is essential to the complete execution of every deed, but we contend that where there are several co-obligees, a formal delivery to all is not necessary (*Moss* v. *Riddle*, 5 Cranch, 351), and we presume where there are several co-obligors a formal delivery by all to the obligees is equally unnecessary. In this case we see no valid objection to the delivery of these bonds by Judge, Bradford, and Craig, the obligors, or by some one of them, to Braden or Nuttall, representing the obligees.

"Delivery of a deed may be express, or implied by circumstance—by saying something and doing nothing—or by doing *some- [*584 thing and saying nothing." (Shep. Touch., 57; 4 Halst. (N. J.) Rep., 153; 1 Johns. Cas., 253; 1 Harris & Gill's Rep., 324; 1 Harris & Johns. Rep., 328.)

But suppose the bonds were inchoate, or incomplete in the hands of the obligors for want of delivery, because Craig could not deliver to himself. The statute which we have referred to will, upon the assignment of the instrument, avoid the mere technical objection by providing a person to whom Craig could and did deliver the instruments. Judge and Bradford sealed and delivered the obligations to the obligees—Craig sealed, but could not deliver, because he was one of the obligees; the execution of the bond was therefore incomplete until Craig, joining the other obligees in the assignment to Williams, by that single act completed the execution; Williams, the assignee, being

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invested by the statute with "all the rights, powers, and capacities" of his assignors, and the bond becoming by the mere operation of the statute payable to Williams, the assignee.

The instruments were not technically void, because inchoate; they were merely in the progress of creation, and had life and vigor when complete and perfect. In *Kent* v. *Somerville*, in the Court of Appeals of Maryland, it was held that a bequest by the obligee of a single bill was an inchoate transfer of the bill in writing, which, when assented to by the executor, is made perfect, and vests at law in the legatee the *bona fide* title or interest in the bill. (7 Gill & Johns., 265, 271.)

The bequest in this case was not held void because inchoate and incomplete; it was only inoperative till it received the assent of the executor, which completed the act of transfer.

Next, we contend that the bonds were not void because Craig could not sue himself. This is not precisely the case of a bond by one person to himself; it is of one company of persons to another company or association, in which one of the persons is a member of both.

We admit there is a technical objection to the jurisdiction of a court of law in such a case; that such suits are properly cognizable in a court of equity, because it is in the latter courts only that adequate relief can be given. It is quite common in the mercantile world for one person to be a member of two firms, and for one of such firms to become indebted to the other, yet we have never known such a contract to be held and deemed void, because a court of common law would not take jurisdiction. And why should this transaction be deemed void, because the parties chose to use a sealed instrument as the evidence of their contract?

As the law formerly stood in Florida, before the Act of 1828 before cited, there was a technical objection to the jurisdiction of a court of law upon the bonds; but the Act of 1828, making bonds and "all other instruments whereby **585*]** money is promised or secured *to be paid" assignable, and giving the assignee a right to sue in his own name, avoids the objection, and, instead of forcing him to use the names of the original obligees, which would drive him for his remedy to a court of equity, throws open to him the courts of law. The suit is in the name of Williams, the assignee; the plaintiff and defendant on the record are not the same person.

In Florida, since the Act of 1828, the analogy between bonds and notes, in regard to their negotiability, is complete. Prior to the Stat. 3 and 4 Anne, in England, promissory notes were regarded as mere choses in action; the transfer or assignment did not vest the transferee with a right to sue in his own name; the statute gave them this negotiability by putting them on the same footing with inland bills of exchange.

It is, and has been for many years, a common practice to draw both bills of exchange and notes payable to the order of the drawer and maker, and then, by indorsing and putting them into circulation, give them vitality and full effect. Now, it must be admitted that the action on a note, at law, prior to the statute of Anne, must have been in the name of the payee, for the use of the assignee or indorsee; and if the note were payable to the maker's own order, such action would have been liable to the common law objection, that the plaintiff could not sue himself; but since the statute of Anne, giving the assignee or indorsee a right to sue in his own name, courts of law have sustained actions in the names of indorsees, or notes payable to the maker's own order, and by him indorsed to the plaintiff. This is expressly recognized in the Court of Errors in New York, in *Smith* v. *Lusher*. In this case, a note was made by a partnership composed of several persons, payable to one of the firm, and it was held, that, though no action could be maintained by the payee, because he was both payee and one of the makers, yet the plaintiff, to whom it had been transferred by indorsement, might sue at law upon the note as indorsee, and recover. It was, say the court, like a note payable to the maker's own order, and by him indorsed and put into circulation. (See 5 Cowen's Rep., 689.)

The case of *Kent* v. *Somerville*, cited before from 7 Gill & Johns., 265, also bears strongly upon this case, if not directly in point. In that case, S., the holder and obligee of a bond, bequeathed the same specifically to A., and made T., the obligor, his executor; upon the demise of S., the executor, who was also obligor, assented to the legacy and delivered it to the legatee. It was objected that the bond was a chose in action of the testator, and a suit upon it could only have been brought by the executor, and that he could not sue himself. But the court held that the bequest was an inchoate assignment, rendered perfect by the assent of the executor, and that, although, as the law in Maryland formerly stood, he could not sue upon it at law, either in the name *of the obligee, because he was dead, [***586** or in the name of the executor, because he was the obligor and could not sue himself, yet, by the Act of 1829, c. 51, giving to the assignee of a bond a right to sue in his own name, he was enabled to maintain the action.

The application to the case at bar will be seen in this: when the bond by the demise of S., passed to the executor, it was in the same position as the bonds of the present case while in the hands of the obligees; a suit at law could not be maintained upon it; but when the executor, who was also the debtor, perfected the assignment by his assent, then the objection was removed; so in the case at bar, where the objection to the jurisdiction of a court of law, because of the identity of Craig as obligor and obligee, was removed by the assignment to Williams.

It was urged in the court below, that the language of the thirty-fourth section of the Act of 1828 was restrictive in its character, and gave to the assignee no other "rights, powers, and capacities" than those possessed by the assignee; but there are no negative or restrictive words in the section; no words of limitation. It expressly gives the same rights, but does not prevent the assignee from acquiring any other rights which necessarily result from, or spring out of, the act of assignment: and one of the "rights, powers and capacities" possessed by the assignee beyond those previously had by the assignor, and resulting from

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or springing out of the assignment, by the mere operation of law, is the removal of the technical objection to the jurisdiction of a court of law.

It was also urged in the court below, that the mention of notes, in the thirty-fourth section of the Act of 1828, was superfluous, as they were before negotiable by the statute of Anne. We do not see any force in the argument as applied to this case, but if there should be, it is easily answered. When the Act of 1828 went into operation, the statute of Anne was not of force in Florida; the act adopting the common law and the statutes of Great Britain was not passed until November, 1829. (Duval's Comp., 357.)

It is believed that all the cases cited by the plaintiff in error in the court below were suits brought by the obligees against the obligors, where there was no assignment, or where the assignment did not by law give the assignee a a right to sue in his own name.

The view of the case here presented was fully sustained by four out of five judges composing the Court of Appeals of Florida, and upon it we confidently rest our right to a judgment of affirmance in this court.

Mr. Justice NELSON delivered the opinion of the court:

Whether the obligees of the bonds in question could have maintained an action at law against the defendant is a question we need not determine, though it is not easy to perceive the force of the objection urged against it, namely, **587***] that Craig, one of the co-obligors, *is also an obligee. The bond is joint and several, and the suit against Judge, one of the obligors; and if it had been brought in the name of the obligees, Craig would not have been a party plaintiff and defendant, which creates the technical difficulty in maintaining the action at law. It would have been otherwise if the obligation had been joint and not several, for then the suit must have been brought jointly against all the obligors.

It has been held that if two are bound jointly and severally, and one of them makes the obligee his executor, the obligee may, notwithstanding, maintain an action against the other obligor. (*Cock* v. *Cross*, 2 Levinz, 73; 5 Bac. Abr., 816, tit. Oblig., D. 4.)

But conceding, for the sake of the argument, the objection to be well taken, that a suit at law would not lie in the name of the obligees, we have no difficulty in maintaining it, even in the aspect in which the case is presented, and has been argued, before us.

By an act of the Legislature of Florida it is provided, "That it shall not be necessary for any person who sues upon any bond, note, &c., to prove the execution of such bond, note, &c., unless the same shall be denied by the defendant under oath." And also, "That the assignment or indorsement of any of the forementioned instruments of writing shall vest the assignee or indorsee thereof with the same rights, powers and capacities as might have been possessed by the assignor or indorser. And the assignee or indorsee may bring a suit in his own name." (Duval's Comp., p. 96, Secs. 33, 34.)

The bonds have been duly assigned in this case, and the suit is in the name of Williams, the assignee, and it being thus authorized by the laws of Florida, all difficulty as to the remedy at law, arising out of the circumstance of the same party being plaintiff and defendant, is removed.

The act just recited provides that the assignee shall be vested "with the same rights, powers, and capacities as might have been possessed by the obligees," and inasmuch as the bonds were uncollectable, at law, in the hands of the obligees, it has been argued that, upon the words of the statute providing for the assignment and suit in the name of the assignee, they must be equally invalid and inoperative after the assignment and in his hands.

This argument, doubtless, would be well founded and conclusive against the plaintiff, if the objection to the bonds was such as went to vitiate and destroy the legal force and effect of their obligation, such as usury, illegality, or the like, which would constitute a valid defense to a suit, in any form in which it might be brought. So, in respect to any other defense in discharge of the obligation, such as payment, release, and the like. For the assignee takes the bonds subject to every defense of the description mentioned; and can acquire no greater rights by virtue thereof than what belonged at the time to the obligees. This, we think, is what the *statute intended, and is all [*588 its language fairly imports; and is, indeed, only declaratory of what would have been the legal effect, without the particular phraseology of the section.

But the only objection here made to the bonds in the hands of the obligees is, the want of legal validity in a court of law, arising out of the difficulty as to the parties, one of them being common to both sides of the obligation; not that they are altogether void and uncollectable, for it is conceded they might have been enforced in a court of equity. They are ineffectual at law, from defect of remedy.

Now, the assignment, and ability to sue in the name of the assignees, removed at once this difficulty, and left him free to pursue his remedy at law; and, as all parties concerned are to be taken as having assented to the assignment and delivery to the assignee, including Craig himself, and the suit in his name being sanctioned by the law, we are unable to perceive any well grounded objection to the judgment.

It has been suggested, that there could have been no delivery of the bonds to the obligees, and hence none by them to the plaintiff, so as to bind the defendant. But the obvious answer is, that all the parties, except Craig, were competent to make a delivery, and as he joined in the assignment, it is not for him to set up the objection for the purpose of invalidating his own act. The inchoate or imperfect delivery as to him in the first instance, arising out of his double relation to the instruments, became complete by his joining in the assignment and delivery to the plaintiff.

The common case of one partner drawing a bill upon his firm, payable to his own order, or of partners making a promissory note payable to the order of one of the firm, which becomes valid in the hands of a *bona fide* holder, and collectable at law, affords abundant au-

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thority for the principle of the decision in this case. (*Smith* v. *Lusher*, 5 Cow., 688; *Smyth* v. *Strader et al.*, decided this term, *ante*, p. 404.)

The statute of Florida has put bonds on the footing of bills of exchange and promissory notes, so far as respects negotiability and right to sue in the name of the assignee.

The above principle is therefore strictly applicable to the case in hand.

We are of opinion the judgment of the court below should be affirmed.

589*] *JOHN HUNT, *Plaintiff in Error*,

v.

J. & M. PALAO, *Defendants*.

After admission of Florida as a State, writ of error cannot be issued to bring up record of Territorial Court of Appeals.

Upon the admission of Florida as a State, the records of the former Territorial Court of Appeals were directed by a law of the State to be deposited for safe keeping with the clerk of the Supreme Court of the State.

No writ of error can be issued to bring up a record thus situated, the Territorial Court being defunct, and the Supreme Court of the State not holding the records as part of its own records, nor exercising judicial power over them.

Nor could a law of the State have declared the records of a court of the United States to be a part of the records of its own State court, nor have authorized any proceedings upon them.

If the record were to be brought up under the fourteenth section of the Act of 1789, it would be of no avail, because there is no court to which the mandate of this court could be transmitted.

THIS was a motion made to bring up the record in the above case, which had been decided by the Territorial Court of Appeals of Florida previously to the admmission of Florida as a State.

The motion was as follows:

"*Mr. Westcott*, in behalf of John Hunt, submitted to the court a certified copy of the record of the opinion of said Court of Appeals; and of said judgment in said case, and suggested to the court that said Court of Appeals was defunct by the admission of the Territory of Florida as a State, on the 4th of March last, and that all the records and papers of said Court of Appeals, and the record aforesaid in said case, had been placed, by the act of the General Assembly of the said State, in the custody and keeping of the clerk of the Supreme Court of said State, and also that said case was a case of federal jurisdiction; and he moved this court to allow a writ of error to remove said record and judgment into this court, with directions to the clerk of this court to direct the same to the judges of said Supreme Court of said State, and to the clerk aforesaid having the custody of said record as aforesaid, in order that said record and judgment may be certified to this court, and a return to said writ of error made by said clerk of said Supreme Court of said State."

Mr. Chief Justice TANEY delivered the opinion of the court:

A motion has been made for process from this court to bring here for revision the record and proceedings of the late Territorial Court of Appeals of Florida, in the case of *Hunt* v. *The Lessee of M. & S. Palao*, in which judgment was rendered in favor of the latter, at February Term, 1844.

Since Florida ceased to be a Territory and became a State, a law has been passed by the State, directing the records and papers of the above mentioned Territorial Court to be placed in the custody of the clerk of the Supreme Court of the State; and under this law, the record in the case in question is now in his possession for safe keeping.

*As Congress has made no special [*590 provision for a case of this kind, the appellate power of this court, if exercised at all, must be exercised in the manner prescribed by the general laws of Congress upon that subject. Under the Act of 1832, writs of error to the Territorial Court of Appeals were to be prosecuted according to the provisions and regulations of the twenty-fifth section of the Judiciary Act of 1789. And assuming the case in question to be one subject to revision in this court, according to these acts of Congress, yet the appellate power must be exercised in the manner prescribed by these laws; and under the Act of 1789, the writ of error must be directed to the court which holds the proceedings as a part of its own records, and exercises judicial power over them. But the court which rendered the judgment in the case before us is no longer in existence; the proceedings are not in the possession of any court authorized to exercise judicial power over them, but are in the possession of an officer of another court, merely for the purpose of safe keeping. For the law of Florida does not place these records in the custody of the State court, but in that of the clerk; nor does it subject him to the control of the court in any manner in regard to them. And, indeed, if it had placed them in the custody of the court, it would not have removed the difficulty; for the law of the State could not have made them records of that court, nor authorized any proceedings upon them. The Territorial Court of Appeals was a court of the United States, and the control over its records, therefore, belongs to the general government, and not to the State authorities; and it rests with Congress to declare to what tribunal these records and proceedings shall be transferred; and how these judgments shall be carried into execution, or reviewed upon appeal or writ of error.

It has been suggested that a writ of error may issue, under the fourteenth section of the Act of 1789, to the person having the actual custody of the record, upon the ground that such a writ is necessary to the exercise of the appellate powers of this court. But if the language of that section would justify such a construction, and the record and proceedings were brought here by a writ of error, either to the Supreme Court of the State or to the clerk, and the judgment of the territorial court found to be erroneous and reversed, still there is no tribunal to which we are authorized to send a mandate to proceed further in the case, or to carry into execution the judgment which this court may pronounce. Certainly we could not send it to the Supreme Court of the State, for it is not their judgment or record, nor have

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they any power to execute the judgment given by the territorial court. Neither, for the same reasons, could we send such a mandate to the District Court of the United States, unless authorized to do so by a law of Congress. And it would be useless and vain for this court to issue a writ of error, and bring up the 591*] record, and proceed to judgment *upon it, when, as the law now stands, no means or process is authorized by which our judgment could be executed. We think, therefore, that no judgment or decree rendered by the late territorial court can be reviewed here by writ of error or appeal, unless some further provision on that subject shall be made by Congress.

Consequently, the motion in this case must be refused.

Cited—9 How., 245, 246; 10 How., 79; 13 Wall., 448; 4 Dill., 257.

THE STATE OF RHODE ISLAND,

Complainant,

v.

THE STATE OF MASSACHUSETTS,

Defendant.

Boundary line between Massachusetts and Rhode Island settled in 1711 by commissioners and adopted by the colonies—allegations of mistake of fact by commissioners—prescription in chancery.

The grant of Massachusetts, confirmed in 1629, included the territory "lying within the space of three English miles on the south part of Charles River, or of any or every part thereof."

In 1662 the grant of Connecticut called to be bounded on the north by the line of the Massachusetts plantations.

In 1663 the grant of Rhode Island called to be bounded on the north by the southerly line of Massachusetts.

Whether the measurement of the three miles shall be from the body of the river, or from the head waters of the streams which fall into it, is not clear. The charter may be construed either way without doing violence to its language.

The early exposition of it is not to be disregarded, although it may not be conclusive.

In 1642 Woodward and Saffrey fixed a station three miles south of the southernmost part of one of the tributaries of Charles River.

An express order of the crown was not necessary to run this line, as it was not then a case of disputed boundary.

In 1702 commissioners were appointed by Massachusetts and Rhode Island to run the boundary line, who admitted the correctness of the former line.

In 1710 Rhode Island appointed an agent to conclude the matter on such terms as he might judge most proper, who agreed that the stake set up by Woodward and Saffrey should be considered as the commencement of the line.

In 1711 Rhode Island sanctioned this agreement.

In 1718 Rhode Island again appointed commissioners with power to settle the line, who agreed that the line should begin at the same place. This was accepted by Massachusetts and Rhode Island, the line run accordingly by commissioners, and the running approved by Rhode Island.

The allegation that the commissioners of Rhode Island were mistaken as to a fact, and believed that the stake was within three miles of the main river and not one of its tributaries, is difficult to establish, and cannot be assumed against transactions which strongly imply, if they do not prove, the knowledge.

If the first commission was mistaken, it almost surpasses belief that the second should again be misled.

To sustain the allegation of a mistake, it must be made to appear, not only that the station was not within the charter, but that the commissioners believed it to be within three miles of the river, and that they had no knowledge of a fact as to the location of it which should have led them to make inquiry on the subject.

Even if the calls of the charter had been deviated from, which is not clear, still Rhode Island would be bound, because her commissioners were authorized to compromise the dispute.

It is doubtful whether a court of chancery could relieve against a mistake committed by so high an agency, in a recent occurrence. It is certain that it could not, except on the clearest proof of mistake.

This mistake is not clearly established, either in the construction of the charter, or as to the location of the Woodward and Saffrey station.

Even if the mistake were proved, it would be difficult to disturb a possession of two centuries by Massachusetts under an assertion of right, with the claim admitted by Rhode Island and other colonies in the most solemn form.

*For the security of rights, whether of [*592 States or individuals, long possession, under a claim of title, is protected. And there is no controversy in which this great principle may be invoked with greater justice and propriety than in a case of disputed boundary.

THIS was a case of original jurisdiction in the Supreme Court, which now came up for final argument, having been partly discussed at a former term, and reported in 12 Peters.

A full statement of the case, with an analysis of the historical documents filed by the respective parties, would require a volume. The facts are summarily recited in the opinion of the court, which the reader is requested to peruse before reading the arguments of counsel.

The case was argued by *Mr. Randolph* and *Mr. Whipple* on the part of Rhode Island, and by *Mr. Choate* and *Mr. Webster* on the part of Massachusetts.

The points of the arguments will be sufficiently understood by transcribing the briefs of the respective counsel. *Mr. Randolph* opened the case for the complainant. *Mr. Choate* and *Mr. Webster* followed, on the part of the defendant, and *Mr. Whipple* concluded the argument on behalf of Rhode Island.

The brief on the part of the complainant was as follows:

1st. That the words in the charter of Massachusetts of 1628, "three miles north of the Merrimack River, and the most northerly part thereof, and three miles south of Charles River, and the most southerly part thereof," according to their usual, ordinary, and long established import, authorized lines three miles north and south of the Merrimack and Charles proper, and did not comprehend the tributary streams of either.

2d. That this was the construction given to the above words by the first settlers, and the colonial government of Massachusetts; that they not only thus limited their claim, but erected a bound-house three miles north of the Merrimack proper, near its mouth, in 1636, at a period when rival and opposing claims, as well as adversary settlements all along the line, forewarned her that she had reached the utmost limit of her chartered right.

3d. That, notwithstanding these stimulating inducements, Massachusetts neglected to exercise any jurisdiction over a very large body of inhabitants, who had possessed the territory immediately north of her from 1621 until 1641, when, upon "the reiterated and earnest solicit

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ation of the inhabitants," she received under her protection these inhabitants, who, according to her subsequent and very ambitious pretensions, had been all along her own people, upon her own soil, and famishing for want of sustenance and protection from their own government.

4th. That in 1638, 1639, and up to 1642, [*593]Massachusetts surveyed *both her northern and southern lines. Taking the same principle as her guide on both her borders, she found the source of the tributary streams of the Charles on the south, and the Merrimack on the north, running her south line at or near the Woodward and Saffrey station, and her north from some part of Lake Winnepiseogee, thereby embracing all the State of New Hampshire, and nearly all the State of Maine, and she extended a jurisdiction, savoring strongly of conservatism, if not of severity, over both.

5th. That Massachusetts continued to exercise her jurisdiction over these extended limits from 1641 till 1676, except being ordered away from Maine by the king's commissioners, somewhere about 1660, which order she disobeyed, when John Mason, the proprietor of New Hampshire, presented his petition to the king. The merits of the claim were closely scrutinized by the king and council, aided by the chief justices of the King's Bench and Common Pleas. Massachusetts was unsuccessful in her new pretensions, and obliged to retire to the old bound-house, upon the Merrimack proper.

6th. That the decree of the king and council of 1677 was not a judicial decision merely, which other judicial bodies are at liberty to respect or not, according to its merits, but the decision of a grantor in relation to a grant, revocable in its very nature—a grant of jurisdiction, and not of territory; that consequently the will of the king, thus expressed, was tantamount to a revocation of the old grant, and the issuing of a new one.

7th. That the agreement of 1710 and 1718 was entered into by the Rhode Island commissioners, upon the representation of the Massachusetts commissioners that the Woodward and Saffrey station was three miles from Charles River proper, and not three miles from any of its tributary streams, as is stated in the answer of Massachusetts. That no such pretension was then made, or ever made by Massachusetts after said decision of 1677. On the contrary, the whole entire agreement of 1710–1718 was entered into by Rhode Island, under the full belief that said station was three miles, and no more, from Charles River proper.

8th. That the only matter in dispute between said commissioners, from the first to the last, was not as to the station or starting place, but in regard to the course of the line; that no compromise was ever proposed by either party as to the starting point; that both parties agreed upon the Woodward and Saffrey station, because it was represented and believed to be three miles from Charles River proper, according to charter; and that this mistake was not discovered until 1750.

9th. That in 1750 Rhode Island appointed commissioners to meet those of Massachusetts, in order to complete the execution of the agreement of 1710–1718; that being unable to find the Woodward and Saffrey station (still believed to be three miles from *Charles River [*594] proper), they were obliged to measure three miles from the river, and run an east and west line from its termination; that they erected monuments upon that line (four miles north of the pretended Woodward and Saffrey station), and the State of Rhode Island has claimed to that line, indicated by said bounds, still remaining, from that day to the present.

10th. That it was never pretended by Massachusetts that the Woodward and Saffrey station was the fruit of compromise, or that it was three miles from the tributaries of Charles River, until as late as 1790, when the commissioners of Massachusetts endeavored to defend their claims upon that basis; that, on the contrary, Massachusetts, from 1710–1718 up to 1790, through her commissioners, uniformly claimed to the Woodward and Saffrey station, as being according to charter; and the agreement of Rhode Island of 1710–1718 as her title, and her only title, according to charter.

11th. That the assertion of the answer, that Massachusetts had claimed still further south (to the angle tree), and that Rhode Island claimed to Charles River proper, and that, upon these rival and opposing claims, a medium station was adopted, is contrary to the entire body of the evidence in the case, contrary to the fact, and mainly, if not entirely, the offspring of the active imaginings of learned and anxious counsel.

12th. That the answer is no evidence, coming from a corporation, in any case; much more as to matter not responsive to the bill.

13th. That Massachusetts never granted to the town of Providence the five thousand acres of land stipulated and covenanted to be granted by said agreement of 1710–1718; and that, in a court of equity, although covenants are independent, yet one will not be enforced without a full performance of the other. (Best on Presumption.)

14th. Upon these facts the plaintiffs will contend that the agreement of 1710 was void—

1. Because made under an evident and apparent mistake.

2. That it cannot operate to transfer four miles of the acknowledged territory of Rhode Island, because Rhode Island, as a colony, had no power to transfer her jurisdiction to Massachusetts.

3. That no confirmation can be presumed, because a confirmation of a void agreement is void itself.

4. Because a confirmation must have been of record in England, and also in Massachusetts, if not in Rhode Island; and that no case has gone the length of presuming the loss of a record, without some foundations being first laid to support such presumption.

5. Because Massachusetts has always claimed under the agreement of 1710–1718, and never alleged or pretended that there was any other title.

*6. Because the subject of the bounds [*595] of Massachusetts, involving the dispute in the present case, has been at various periods before the commissioners of the king, 1664; before the king and council, 1677, 1737; and at various other times between Connecticut and Rhode Island; and no such confirmation has ever been suggested, but the direct reverse,

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Cases as to Mistake of Facts.

"A man is presumed to know the law. But no man can be presumed to be acquainted with all matters of fact, and therefore an ignorance of facts does not import culpable negligence." (Story's Equity Jurisprudence, 156.)

"The general rule is, that an act alone, or a contract made under a mistake or ignorance of a material fact, is voidable and relievable in equity." (*Ibid.*, 155.)

If instruments be delivered up by mistake, and owing to ignorance of a transaction which would have made it unconscientious to hold the instrument and proceed at law, equity will relieve. (1 Madd. Ch. Practice.) The case cited is *The East India Company* v. *Donald* (9 Ves., Jun., from 275). A charter-party was delivered up to the defendant after a voyage, the provisions of which he had violated, the plaintiff being ignorant of the violation. It was agreed that there was no fraud nor misrepresentation, but the court said there was a plain mistake.

Tompkins v. *Bernet* (1 Salk., 22). One of three persons paid money on an usurious bond, and afterwards recovered it back as paid by mistake, he not knowing the fact of the usury.

Bingham v. *Bingham* (1 Ves.; Sen., 126, in 1748). "An agreement was made for the sale of an estate to the plaintiff by defendant, who had brought an ejectment in support of a title thereto under a will.

"The bill was to have the purchase money refunded, as it appeared to have been the plaintiff's estate.

"It was insisted that it was plaintiff's own fault, to whom the title was produced, and who had time to consider it.

"Decreed for the plaintiff, with costs, and interest for the money from the time of bringing the bill; for no fraud appeared, and the defendant apprehended he had a right. Yet there was a plain mistake, such as the court was warranted to relieve against, not to suffer the defendant to run away with the money, in consideration of the sale of an estate to which he had no right."

Rhode Island gave away her own territory, instead of the territory which Massachusetts was entitled to.

Gee. v. *Spencer* (1 Vernon, 32). A release set aside by reason of the misapprehension of the party. (*Luxford's* case cited.)

2 Ves., Sen., 400. A general release relieved against, as to particulars not in the knowledge of the party.

5196*] **Evans* v. *Llewellyn* (2 Bro. Ch. Cas., 150). A conveyance set aside, as improvidently entered into; though no fraud or imposition.

N. B —The report of this case is more full in Cox. (See *Leonard* v. *Leonard*, 2 Ball & Beatty, 184.)

An omission in an agreement by mistake stands on the same ground as an omission by fraud. (Chitty's Dig., tit. Mistake.)

(*Ramsbottom* v. *Gordon* 1 Ves. & B., 168; 3 Atk., 388; 4 Bro. Ch. Cas., 514; 6 Ves., 334, *note.*)

Cocking v. *Pratt* (1 Ves., Sen., 400). J. Self, dying intestate, left a widow and daughter, then an infant, who, four months after coming of age, entered into an agreement with her mother concerning the distribution of the personal estate; which agreement was afterwards ratified by the daughter's husband. After the daughter's death, the husband brought a bill, as her administrator, to set aside the agreement, and to have a distributive share according to her right.

Master of the Rolls. "The daughter clearly did not intend to take less than her full share, her two thirds of the value, though what that was did not clearly appear; but she thought what was stipulated for her was her full share.

"The court will look with a jealous eye up on a transaction between parent and child. Whether there has been *suppressio veri* does not clearly appear.

"But there is another foundation to interpose, that it appeared afterwards that the personal estate amounted to more, and the party suffering will be permitted to come here to avail himself of that want of knowledge, not, indeed, in the case of a trifle, but some bounds must be set to it. The daughter would be entitled to five or six hundred pounds more, which is very material in such a sum as this, and a ground for the court to set it right. The daughter did not act on the ground of a composition, but took it as her full share; and if it appears not so, the court cannot suffer the agreement to stand. As to the ratification by the husband, he was as much in the dark."

Griffith v. *Trapwell* (June, 1732) was cited in the above case, "where one died intestate, leaving two sisters, the plaintiff's wife and the defendant's wife. The latter first got administration, and prevailed on the other to accept of an agreement for her share. There was a further agreement, that the plaintiff's wife should have a further share, reciting that she should have an equal share, and that there should be a decree for that. The plaintiff afterwards discovered the estate to be a great deal more, and brought a bill of review, and both the decree and agreement were set aside."

Pooley et al. v. *Ray* (1 Peere Wms., 354). The executor of a mortgagee, coming before the master, and not admitting any of his mortgage to have been paid, proved his deed, and got a report for *the whole amount of his [*597 debt, £700, which report was afterwards confirmed and made absolute. Afterwards it appeared, under the mortgagee's own hand, that £353 had been paid by the mortgagor. The defendant had paid this money away to creditors.

Master of the Rolls. "Let the master see whether there has been a double payment, and as to so much as has been overpaid it must be allowed to the plaintiffs." This, on appeal, was affirmed by Lord Cowper.

Honor v. *Honor* (1 Peere Wms., 123). Articles and a settlement mentioned to be made in pursuance thereof, were both made before marriage but the settlement varied from the uses of the articles. Decreed to set the settlement aside

Chancellor. "It is a plain mistake in varying the settlement from the articles, and this appearing upon the face of the papers, the plain reason of the thing, length of time, is immaterial." (Same case, 2 Vern., 658; 1 Madd Ch., 61.)

But though a court of law will not grant a

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new trial merely to enable a party to get fresh witnesses, nor would a court of equity interfere on such grounds; yet where the admissions come from the party himself, upon a bill of discovery, filed after the trial, it is very different, and the court will in such case relieve. (1 Maddock's Ch., 77; *Harkey* v. *Vernon*, 2 Cox, 12.)

Under peculiar circumstances, however, excusing or justifying the delay, courts of equity will not refuse their aid in furtherance of the rights of the party; since in such cases there is no pretense to insist on laches or negligence, as a ground of dismissal of the suit. (1 Story's Eq. Jurisp., 503, 504; *Lobdell* v. *Creagh*, 1 Bligh. N. S., 255; 1 Fonbl. Eq., B. 1, ch. 4, p. 27, and *notes;* Jeremy on Eq. Jurisp., B. 3, pt. 2, ch. 5, pp. 549, 550.)

If the legatee allege that he knew not of his right, time is no bar. Nor when fraud is proved. (Fonbl., as above.)

Garland v. *Salem Bank* (9 Mass. R., 408). An indorser paid a note, ignorant that no demand had been made upon the maker or notice to himself, though he was advised not to pay it. Held to be a payment by mistake, and he recovered back again. (4 Mass. R., 378; 3 Mass. R., 74; 5 Burr., 2672; 1 Durn. & East, 712; 1 Bos. & Pull., 326; Doug. R., 638.)

The case of *The Union Bank* v. *The Bank of the United States* (3 Mass. R., 74) is a strong case. The marginal note is: "If A. confiding, though improperly, in the mistaken affirmation of B, pay his money, A shall recover it back."

The case was, the branch bank had received two bad checks, which they supposed they had received from the Union Bank. They sent them to the Union Bank by their messenger, stating that they came from the Union Bank; whereupon the Union Bank paid them. Between the time of paying them by the Union Bank and the discovery of the mistake, Raw-**598***] son, who drew them, failed and *absconded; so that the branch bank lost the amount. *Judge* Parsons and the Supreme Court decided that the loss must fall on the branch bank, who committed the first error.

The case in Douglass and Bos. & Pull. are both cases of payment by mistake, and as strong as the two cases in Mass. Reports.

Cases of settlements and Marriage Articles being reformed on Account of Mistake.

Randall v. *Randall* (2 Peere Wms., 464, in 1728). In that case, the husband had confessed, under hand and seal, that both the articles and settlement limited the estate to his heirs in fee, when it was the intention of the mother of his wife to limit it to the heirs of the wife in fee. The articles and settlement were reformed. Lord Chancellor King decreed the estates to be settled upon the heirs of the wife in fee.

West v. *Erissey* (2 Peere Wms. 349, in 1726), where the settlement made, before the marriage, varied materially from the articles, but stated to be made "in pursuance of the articles and performance," the settlement will be presumed to depart from the articles by mistake. (See note of Cox to the above case; see 3 Bro. Parl. Cases, 347, in 1727.)

Honor v. *Honor* (1 Peere Wms. 123, in 1710), before Lord Chancellor Cowper, establishes the same principle. The articles limited the estates to heirs of the body of the wife. The settlement (made before marriage, and in pursuance of the articles) was to the heirs of the body of the husband, of the wife begotten.

Lord Chancellor. "It is a plain mistake in making the settlement vary from the articles."

After reciting the articles, he further says: "And the articles being so, the settlement, which is said to be in pursuance of the articles, shows there was no alteration of the intention, nor any new agreement, between the making of the articles and the settlement. And this appearing upon the face of the articles and settlement, and in the plain reason of the thing, length of time is immaterial."

In the case of *Motteaux* v. *The London Ins. Co.* (1 Atk., 545), in 1739, Halhead, as agent of the plaintiff, paid the defendants fifteen pounds premium, being at the rate of three per cent., which was the current premium then, upon the ship, at and from Fort St. George, and a label of such agreement was, on the 7th of Agust, 1733, entered in a book, and subscribed by Halhead and two of the directors. The policy was made out from Fort St. George. Lord Hardwicke rectified the mistake, saying that the policy ought to have conformed to the label.

In *Baker* v. *Paine* (1 Ves., Sen., 458), in 1750, Lord Hardwicke rectified an agreement by previous minutes of the parties.

In *Barstow* v. *Kilvington* (5 Ves., Jun., 592), Lord Eldon rectified *a settlement by a [***599** previous letter of the party. (See, also, a similar case cited in a note to that case.)

Cases of Compromise.

If a person, after due deliberation, enter into an agreement for the purpose of compromising a claim made *bona fide*, to which he believes himself to be liable, and with the nature and extent of which he is fully acquainted, the compromise of such a claim is a sufficient consideration for the agreement, and a court of equity, without inquiring whether he in truth was liable to the claim, will compel a specific performance. (*Atwood* v. ———, 1 Russell, 353; 5 Russell, 149, affirmed on appeal.)

If a party, ignorant of plain and settled principle of law, is induced to yield a portion of his indisputable right, equity will relieve; but where title is doubtful, and with due deliberation he enters into compromise, no relief is given, nor is consideration inquired into. (1 Sim. & Stu., 564.)

No remedy in equity for the recovery of money paid on compromise of an action, where the party had full knowledge of the facts, and the means of proving them at the trial. (*Goodman* v. *Sayers*, 2 Jac. & Walk., 249.)

A compromise of rights, doubtful in point of law, but founded upon a misrepresentation or suppression of facts in the knowledge of one of the parties only, cannot be supported. (*Leonard* v. *Leonard*, 2 Ball & Beatty, 171.)

To constitute a fair compromise of right doubtful in point of law, the facts creating this doubt should be fairly stated. (*Ibid.*, 181.)

It is essential to the validity of a compromise that both parties be in equal ignorance. (*Ibid.*, 182.)

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Defense of compromise is not proper for answer, but for plea only. (1 Ball & Beatty, 328.)

Authorities as to Presumptions of Title.

"A grant of land will never be presumed from lapse of time, unless it be so great as to create the belief that it was actually made, or unless the facts and circumstances show that the party to whom it is presumed to have been made was legally or equitably entitled to it." (Note to Mathews on Presumptions, 296, ed. of 1830; 6 Cowen, 706; 3 Johns., 269, 109; 1 Wash. C. C. R., 70.)

No possession of one claiming under a defective title can raise a presumption of a good title. (Mathews, 198, *note;* 5 Harris & Johns., 230; 1 Harris & Johns., 18; *Beal* v. *Lynn*, 6 Harris & Johns., 336.)

"Presumptions of law are suppositions or opinions previously formed on questions of frequent occurrence, being found, from experience, to be generally accordant with truth, and remain of force until repelled by contrary evidence.

600*] *"Presumptions of fact are conclusions drawn from particular circumstances. Many of the presumptions of law were formerly considered too powerful to admit of contradiction, but this doctrine is now confined principally to the doctrine of estoppels." (Mathews, 2; Phillips on Evidence, 6th ed., 146.)

"The grounds upon which legal presumptions rest are various. In some cases on the laws of nature and the general principles of justice, on the nature and general incidents of property. In others, on those innate principles of self-interest and prudence, which generally govern the conduct of men," &c. (Mathews, 2)

Other legal presumptions originate in the policy of the law. Of this description, however, as they relate to property, examples are rare.

"Presumptions of fact are such as are usually found by experience to be consequent upon, or coincident with, the facts presumed. They must correspond with, and be adequate to account for, the circumstances actually proved." (Mathews, 4.)

"Legal presumptions generally apply to facts of a transitory character, the proper evidence of which is not usually preserved with care; but not records or public documents, &c., unless proved to have been lost or destroyed." (Mathews, 4, in *note; Brunswick* v *McKean*, 4 Greenleaf, 511.)

"Presumptions from evidence of the existence of particular facts are, in many cases, if not all, mixed questions of law and fact. If the evidence be irrelevant to the fact insisted upon, or such as cannot fairly warrant a jury in presuming it, the court would err in instructing them that they are at liberty to presume it." (*Ibid.*, p. 5, *note; Bank of United States* v. *Corcoran*, 2 Peters's S. C. R., 133.)

"Following up this principle, courts will, in favor of long possession, presume as well the existence of the needful instruments of conveyance, as the observance of all such acts and solemnities as are requisite to make actual assurances valid."

Fines and recoveries are an exception, which cannot be presumed without evidence directly pointing to them.

Act of Parliament, and grants from the crown, though assurances of record, are constantly presumed, within even the time of legal memory. (Cowp., 102, 215; Jac. & Walk., 63, 159; 11 East, 488; see Am. authorities in *note*, p. 6, Matthews.)

"Ignorance has sometimes, in courts of equity, been held to afford an answer to averred releases of demands. The desertion of a right, it has been judicially observed, always supposes a previous knowledge of it. It is absurd to say that a man has relinquished a right of which he is not aware." (Matthews, 17, 18; Sel. Ch. Cas., 11; 2 Peere Wms., 736; per Sir Wm. Grant, 2 Mer., 362.)

In England there is but little difference between the doctrine of *prescription, [*601 and the doctrine of presuming lost grants, in regard to the objects embraced by the two principles.

The doctrine of prescription never extended to lands in fee, or corporeal hereditaments, nor did it extend to such incorporeal rights as could exist only by matter of record; such as many species of royal franchise, deodands, traitors, or felons' goods, &c.

On the other hand, the doctrine of presuming grants never extended to corporeal hereditaments; but, unlike the doctrine of prescription, it embraced all incorporeal hereditaments, whether evidenced by matters of record, or purely by grant. Patents from the crown, and acts of Parliament even, were presumed to exist.

The great difference between the two doctrines consisted mainly in the length of time necessary for their successful operation.

Under the doctrine of prescription as it exists in England to this day, immemorial usage must be established. Therefore, if it appears that the title to be presumed had no existence at any time subsequent to the 1st Rich. I. (1189), there is an end to the power and agency of prescription.

On the other hand, while the doctrine of presuming grants embraced a rather wider range of objects or titles, its children were deemed legitimate, though comparatively of modern birth.

This latter doctrine, however, during the whole of its minority, experienced considerable opposition from many wise, as well as learned lawyers. (2 Ev. Poth., 139.)

The Parliament of England, by the 2d and 3d Wm. IV. (1822), were obliged to remedy some of the evils growing out of judicial fictions. The real property commissioners express themselves as follows:

"Amid these difficulties, it has been usual of late, for the purpose of supporting a right which has been long enjoyed, but which can be shown to have originated within time of legal memory, to resort to the clumsy fiction of a lost grant, which is pleaded to have been made by some person seized in fee of the servient, to another seized in fee of the dominant tenement. But, besides the objection of its being well known to the counsel, judge, and jury, that the plea is unfounded in fact, the object is often frustated by proof of the fact of the two tenements having been such that the

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fictitious grant could not have been made in the manner alleged in the act."

"In addition to all this," says Best, "it was well observed, that the requiring juries to make artificial presumptions of this kind amounted, in many cases, to a heavy tax on their consciences, which it was highly expedient should be removed. In a word, it became apparent that the evil could only be remedied by legislation, and the statutes of Wm. IV. were passed for that purpose."

602*] *"Whether deeds of conveyance can be presumed, in cases where the law has made provision for their registration, has been doubted.

"The point was argued, but not decided, in *Doe* v. *Hirst* (11 Price, 475). The better opinion seems to be, that though the court will not in such cases presume the existence of the deed as a mere inference of law, yet the fact is open for the jury to find, as in other cases." (Note to 1 Greenl. Ev., 52.)

In the United States, while the doctrine of presuming a grant has been applied to corporeal as well as to incorporeal hereditaments, and the sphere of its operation very much enlarged, yet, at the same time, the principle of its operation has been circumscribed within very narrow, and in all probability very safe, grounds. It is placed beyond the reach of the innovation of mere book lawyers and book judges, and rests, as a mere matter of fact, upon the common sense of a jury.

The judges in England were obliged to flee to this matter of fact view, as a refuge from the rapidly increasing evils growing out of artificial presumptions. In this country, upon this subject, there are no artificial presumptions. It is simply a case of circumstancial evidence.

In 6 Cowen, 725, it is said: "A grant of land will never be presumed, unless the lapse of time is so great as to create a belief that it was actually made; or unless the facts and circumstances show that the party to whom it is presumed to have been made was legally or equitably entitled to it." (Matthews on Presumption, 296, *note*, ed. 1836; 6 Cowen, 706; 3 Johns., 109, 269; 1 Wash. C. C. Rep., 70.)

Same principle in 2 Wendell, 13–15.

In *Ricard* v. *Williams* (7 Wheat., 59), this court decided, that "Presumptions of a grant, arising from a lapse of time, are applied to corporeal as well as to incorporeal hereditaments. They may be encountered and rebutted by contrary presumptions, and can never arise where all the circumstances are entirely consistent with the non-existence of a grant. *A fortiori*, they cannot arise when the claim is of such a nature as is at variance with the supposition of a grant."

"Legal presumptions generally apply to facts of a transitory character, the proper evidence of which is not usually preserved with care; but not to records or public documents in the custody of officers charged with their preservation, unless proved to have been lost or destroyed." (Cowen & Hill's Notes to Phillips, part 1, p. 364; *Brunswick* v. *McKean*, 4 Greenl., 508.)

See Cowen & Hill's notes, generally, on subject of presumptions.

"No possession of one claiming under a de-

603*] fective title can *raise a presumption of a good title." (Matthews, 198, *note*; 5 Harris & Johns., 230; 1 *Ibid.*, 10; 6 *Ibid.*, 336.)

"Presumptions from evidence, of the existence of particular facts, are, in many cases, if not all, mixed questions of law and fact. If the evidence be irrelevant to the fact insisted upon, or such as cannot fairly warrant a jury in presuming it, the court would err in instructing them that they are at liberty to presume it." (*Bank of United States* v. *Corcoran*, 2 Peters, 133.)

"Ignorance has sometimes, in courts of equity, been held to afford an answer to averred releases of demands.

"The desertion of a right, it has been judicially observed, always supposes a previous knowledge of it.

"It is absurd to say, that a man has relinquished a right of which he is not aware." (Matthews on Pres., 17, 18; Sel. Ch. Cases, 11; 2 Peere Wms., 730; per Sir Wm. Grant, 2 Mer., 362.)

Cases upon Presumptive Evidence.

Beedle v. *Beard et al.*, in 4th Ja. I. (1627), 12 Coke, 5.

In 31st Ed. I. (1303), the king being seized of the manor of Kimbolton, to which the advowson of the church was appendant, granted said manor, with the appurtenances, to Humphrey de Bohun, Earl of Hereford, in tail general. Humphrey de Bohun, the issue in tail, by his deed, in the 40th Ed. III. (1367), granted the said advowson, then full of an incumbent, to the prior of Stonely and his successors; and at the next avoidance they held it *in proprio usus;* and upon this appropriation made *concurrentibus iis quere in jure requirunter*. After the death of the incumbent, the said prior and his successors held the said church appropriate, until the dissolution of the monastery. In 27th Hen. VIII. (1530), the said manor descended to Edw., Duke of Buckingham, as issue to said estate tail. The reversion descended to Henry VIII. The Duke, in 13th Hen. VIII., was attaint of high treason. In 14th Hen. VIII. the king granted said manor, &c., with all advowsons appendant, to Richard Wingfield, and the heirs male of his body. In 16th Hen. VIII. it was enacted by Parliament, that the Duke shall forfeit all manors, &c., advowsons, &c., which he had in 4th Hen. VIII.

The king, 37th Hen. VIII., "granted and sold for money the said rectory, &c., of Kimbolton, as inappropriate in fee, which by mesne conveyance came to the plaintiff, for £12,000. In the 37th Eliz., Beard, the defendant, did obtain a presentation of the queen by lapse, pretending that the said church was not lawfully appropriated to the said prior of Stonely.

"1st. For this, that Humphrey, who did grant it to the said prior, had nothing in it, for that it did not pass to his ancestor by these words, *Manorium cum pertinentibus*."

*In the case, the advowson was [**604** bought and paid for in 1303; was in the possession of the first taker, Earl of Hereford, until 1367, sixty-four years. It was then granted to a corporation, the prior of Stonely, in whose possession it remained until the dissolution of the monasteries, in the reign of Henry VIII., 1530, one hundred and sixty-three years more. It descended to the Duke of Buckingham, upon

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his attainder was forfeited to the crown, and Henry VIII. granted the manor and advowson to the plaintiff for a pecuniary consideration. The action was tried in 4th Ja. I., 1627, three hundred and twenty-four years after the possession commenced under the first grant.

Mayor of Kingston upon *Hull* v. *Horner* (Cowper, 102), in 1774.

The declaration stated the right of the plaintiff, as mayor, to certain water-bailiff dues, for certain goods imported into Kingston.

In support of the title, the plaintiff produced—

1. An entry upon the corporation books, entitled "A particular note of all such duties, &c., as by the water-bailiffs are to be received for the use of the mayor and burgesses of Kingston upon Hull, according to the order prescribed and set down in the year 1441, and continued and put in use from that time to the present day, 1st April, 1575." In this list were included the duties in question.

2. An order of the corporation, in the 13th Eliz., requiring the water-bailiff to keep these duties separate, &c.

Then followed a particular account of the receipt of these duties from 1545 to 1646, from 1648 to 1678, of persons who had rented the office of water-bailiff; also an account of dues for three years in 1726; and the testimony of persons who had paid the dues from 1734; together with an estimate of repairs by the corporation to the amount of £15,000.

The defense was, that the earliest book of the corportion was the 19th Ed. III. (1346), and the date of their charter the 27th Ed. I. (1299), a century subsequent to the time of legal memory, Rich. I., 1199.

That the title, if any, to the duties in question could be supported only by prescription or charter. That the first did not exist, they being a corporation within legal memory. That the charter authorized the erection of the port, but granted no duties.

To this it was answered, that a usage of three hundred years was a sufficient ground to presume a grant of the duties, in consideration of the repairs, which it was in proof the corporation had constantly done from 1441 to the bringing the action.

Lord Mansfield said, there were two grounds to show that the evidence was sufficient to go to the jury:

1. That there existed a port, with duties belonging to the king, previous to the charter of 5th Rich. II. Consequently, a grant by Rich. II. of the port would carry the duties along with it.

605*] *2. If this charter erected a new port, the king could not create duties. But that there might be some charter from the king creating and giving these duties, upon a ground which would support them in point of law, namely, upon the consideration of repairs, and the general advantage to be derived to the public from its being properly kept up.

The question that arises upon it is, "Whether, upon the evidence, it was properly left to the jury to presume such grant between 1382 (date of charter) and 1441" (time of first collecting the duties). (p. 106.)

Lord Mansfield (p. 108). "A jury is concluded, by the statute of limitations, as a bar. So, in the case of prescription, if it be time out of mind, a jury is bound to conclude the right from that prescription, if there could be a legal commencement of the right." Any written evidence, showing a time when the claim did not exist, is an answer to prescription. (p. 109.)

"But length of time, used merely by way of evidence, may be left to a jury to be credited or not, and to draw their inference one way or the other, according to circumstances." (p. 109.)

"In questions of this kind, length of time goes a great way; but there is no positive rule which says, that a hundred and fifty years possession, or any other length of time within memory, is a sufficient ground to presume a charter." (p. 110.)

The case of *Johnson & Humphrey* v. *Ireland* (11 East, 279) presented the question, whether "the enfranchisement of copyhold may, upon proper evidence, be presumed even against the house."

The evidence offered and rejected by Heath was an entry, in the parliamentary survey, of sixpence rent against these premises for a hundred and sixty years, in the column of freehold, instead of six shillings and sixpence, in the column of copyhold.

The court admitted the evidence, observing that there were persons, between 1636 and 1649, competent to make the enfranchisement, "the king having continued his functions the greater part of the time." (283.)

Fenwick v. *Reed* (5. Barn. & Ald., 228), in 1821. In this case, Reed, the defendant, took possession of the estates of the plaintiff, in 1750, under an agreement to remain in possession until the debts were satisfied out of the rents and profits. In 1801 a suit in chancery was instituted by the plaintiff. Much evidence was offered on both sides. Bayley, *Justice*, told the jury "that the real question was, whether they believed that a conveyance had actually taken place."

The court approved of this direction, and said: "In cases where the original possession cannot be accounted for, and would be unlawful unless there had been a grant, the case may be different. Here the original possession is accounted for, and is consistent with the fact of there having been no conveyance. As the defendant's *ancestors had originally a [*606 lawful possession, it was incumbent on them to give stronger evidence of a conveyance."

Abbott, *Chief Justice*, also says: "In my opinion, presumptions of grants and conveyances have already gone to too great lengths, and I am not disposed to extend them farther."

Bayley said: "The question for the jury was a mere question of fact, whether there had been such a conveyance. The deeds of 1747 and 1752 were both produced, and if there had been a conveyance, it would probably have been produced also. No draft of it, or abstract referring to it, was produced. A conveyance of this sort was not likely to have been lost, if it ever existed."

The case of *Howson* v. *Waterton* (3 Barn. & Ald., 150, 1819) was a conveyance of copyhold lands (in 1743, by surrender in open court) to charitable uses; was declared void, for not complying with the provisions of 9 Geo. II., ch. 36, which requires all conveyances to be executed in the presence of two witnesses, to be en-

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rolled in chancery, and for the party to survive one year.

The court was asked to presume an enrollment.

Abbott, *Chief Justice*, said: "No instance can be found where the court have said that an enrollment has been presumed."

Bayley said: "As to presuming an enrollment, if it had appeared that the rolls of chancery had been searched, and a chasm had been found about that period, it might have been different." (p. 142.)

Best, on Presumptions, p. 149, says: "It has been said (*Beanland* v. *Hirst*, Price, 475; Phill. and Am. Ev., 476), that the registration of the memorial of a deed in a register county cannot be presumed, and that direct proof must be adduced."

But it is difficult to contend "that there can be any matter of fact which a jury may not presume from possession and circumstances, when that possession and circumstances are sufficiently strong to convince them of its existence. The true conclusion seems to be, that in the case of a memorial of a deed requiring registry, the court will not direct them to make any artificial presumption."

Best cites 1 Greenleaf's Law Ev., art. 46, p. 52. "The same presumption," says Greenleaf (p. 52), "has been advised in regard to the reconveyance of mortgages, conveyance from old to new trustees, mesne assignments of leases, and any other species of documentary evidence and acts *in pais* which are necessary for the support of a title, in all other respects evidently just."

"It is sufficient that the party who asks for the aid of this presumption has proved a title to the beneficial ownership, and a long possession not inconsistent therewith; and has made it not unreasonable to believe that the deed of conveyance, or other act essential to the title, was duly executed. Where these merits are wanting, the jury are not advised to make the presumption." He cites, among numerous other 607*] authorities, *Doe* v. *Cooke* (5 Bing., *174); 19 Serg. & Lowb., 44; *Doe* v. *Reed* (5 Barn. & Ald., 232; *Livett* v. *Wilson* (3 Bing., 115); 11 Serg. & Lowb., 57; 2 Wend., 14–87.

The case of *Livett* v. *Wilson* (3 Bing., 115). "Defendant pleaded a right of way, by deed subsequently lost. Plaintiff traversed the grant. There was contradictory evidence. The judge directed the jury, that, if upon this issue they thought defendant had exercised the right of way uninterruptedly for more than twenty years, by virtue of a deed, they would find for the defendant. If they thought there had been no way granted by deed, they would find for the plaintiff."

The rule to show cause why the verdict for the plaintiff should not be set aside was discharged.

Best, *Ch. J.*, said, that upon an uninterrupted usage of twenty years, the jury would be authorized to presume a deed. But even in such a case a judge would not be justified in saying they must, but might, find a deed.

Burrough, *J.*, said: "If there had been such a deed, it is not probable the way would have been constantly in dispute."

The case of *Doe* v. *Cooke* (6 Bing., 174; 19 Serg. & Lowb., 44) was a case of more than twenty years' possession; but the Court of Common Pleas would not presume the surrender of a term. After stating the particular circumstances of that case, Tindall, *Ch. J.*, says: "No case can be put in which any presumption has been made, except where a title has been shown by the party who calls for the presumption, good in substance, but wanting some collateral matter to make it complete in point of form. In such case, where the possession is shown to have been consistent with the fact to be presumed, and in such cases only, has it ever been allowed."

Sir Samuel Romilly said, in *Whally* v. *Whally* (1 Merivale's R., 441, 1814): "Length of time cannot affect this case. The statute does not apply, and it is not easy to see for what purpose it is here insisted upon. Time is no bar to relief in equity, unless it be in the excepted cases of mortgage, &c. In all other cases it only operates by way of evidence."

The bill was filed to set aside a conveyance from an uncle to a nephew after forty years, upon a charge of fraud and gross inadequacy of price. The court sustained the deed, upon the ground that it was not merely for a pecuniary consideration, but, as it stated, was also for "love and affection"; and consequently the court, Lord Eldon, said nothing about time.

The opposite counsel admitted that time was not a bar, by a strict analogy to the rule of law, but that it afforded evidence sufficient to raise a presumption. (p. 444.)

McDonald v. *McDonald* (1 Bligh's R., House of Lords, 1819) was the case of a client against his agent and attorney, upon a *trans- [*608 action of twenty-five years' standing. It was a case of confidence.

The Lord Chancellor Redesdale says: "The case, therefore, by its circumstances, is taken out of the principles of the presumption and prescription, which ought to protect professional men. On these grounds, and a fair view of the case, as a juryman, it is my opinion that the bond was not intimated."

Wood v. *Veal* (5 Barn. & Ald., 454) was the case of land under lease from 1719 to 1818; and as far as memory could extend had been used by the public, and lighted, paved, and watched, under an act of Parliament, in which it was enumerated as one of the streets of Westminster.

It was submitted to the jury by the court whether there had been a dedication to the public, telling them that there might be a highway without a thoroughfare, and telling them that nothing done by the lessee, without the consent of the owner of the fee, would give the right of way to the public. Bailey, *J.*, said: "Where the consent is by a person having a limited right, it can only continue for a limited period."

Same principle. (*Barkee* v. *Richardson*, 4 Barn. & Ald., 579.)

Wright v. *Smythies* (10 East, 409), is a decision, that no presumption of a grant enrolled can be presumed, because if it existed it might be shown.

In *Vooght* v. *Winch* (2 Barn. & Ald., 663), it was said: "If it is admitted that this was a public, navigable river, and that all his majesty's subjects had a right to use it, an obstruction for twenty years would not have the effect of

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preventing his majesty's subjects from using it." (p. 667.)

In Matthews on Presumptions, p. 17, it is said: "That no length of time will raise a presumption in favor of encroachments on the public; at least, no period has as yet been mentioned as binding the community."

Carter v. *Murcott* (4 Burr., 2163), and 7 East, 199, are cited.

In *Stoughton et al.* v. *Baker* (4 Mass. R.) Parson, *J.*, says: "Every owner of a water-mill or dam holds it on the condition or limitation that a sufficient passageway is left for the fish. This limitation, being for the benefit of the public, is not extinguished by any inattention or neglect, for no laches can be imputed to the government, and against it no time runs."

In *Livett* v. *Wilson* (3 Bing. R., 115), the court instructed the jury, that if they thought there was no deed of the right of way, they must find accordingly, notwithstanding the possession.

Matthews (p. 17) says: "The apparent assent of the adverse party is, in all cases of this sort, the true and essential source of inference; but it is evident that, without a total disregard to fact, this cannot be maintained where the claim has formed a constant source of contest."

609*] *See Matthews, 19, also, as to a body of creditors, under an assignment to trustees for their benefit, being also an answer to lapse of time, such persons not being expected, in their collective capacity, to use the same diligence as individuals. (3 Ves., 740; 12 Ves., 136, 158.)

Piatt v. *Vattier et al.* (9 Peters, 416, 405, in 1835) was a case of clear adverse possession for thirty years, without a claim even, or the shadow of an excuse. The court say (p. 416): "And we are of opinion that the lapse of time is, upon the principles of a court of equity, a clear bar to the present suit, independently of the statute. There has been a clear adverse possession of thirty years, without the acknowledgment of any equity or trust estate in Bartel; and no circumstances are stated in the bill, or shown in evidence, which overcome the decisive influence of such an adverse possession." (Per Story, *J.*)

Miller v. *M'Intire* (6 Peters, 61, 62, in 1832), was the common case of a bill in a court of equity, where the statute of limitation was applied by analogy, and not where time was used as evidence.

Points of the Respondents.

The complainant's case proceeds upon two propositions; first, that the charter of Massachusetts of March, 1628, intended to trace as her southern boundary a line three miles south of what is now the main stream of what is now called Charles River; second, that therefore the complainant has the right to have the same line of boundary decreed at this time, without regard to anything which has taken place since the date of the charter.

Both these propositions the respondents controvert. And, first, they contend that the charter intended to trace, as their southern boundary, a line three miles south of all the waters of the Charles, as a geographical whole; three miles south of its basin or valley, and of the sources and contributory streams which feed and preserve it.

To enable the court to determine between these two constructions, they will contend that it is competent to advert to a great body of extrinsic circumstances and evidence, the character, situation, age, and objects of the parties, their knowledge or ignorance of the localities, the existence or non-exisence of distinctive names of contributory streams, and, above all, to the contemporary exposition of the instrument afforded by the acts of parties in the age of the charter and subsequently.

And upon this point they maintain the position, that as the language of the charter, "three miles south of Charles River, and any and every part thereof," is vague, general, and flexible, such extrinsic evidence as is above indicated may be resorted to in order to ascertain the sense in which the parties used it; that even if the language *prima fronte* bears a particular legal sense, it may be *shown to have [*610 been used in a different one; that this might be done, even if the grant was recent, and between individuals; and that it may be done *a fortiori multo* when the instrument is ancient and is the charter of a State.

In support of this proposition of the law of evidence will be cited Greenleaf's Ev., secs. 280, 286–288, 290, 295; 3 Cowen's Phillips, 1382, 1389; 6 Pick., 63; 16 Johns. R., 14; 16 Wend., 663; 6 Mass. R., 435; 13 Pick., 261; 2 N. H. R., 369; 1 M. & K., 571; 6 Sim., 54; 3 Cowen's Phillips, 1403–1405; 1 Mason, 10, 13; 1 Mood. & Malk., 300; 19 Johns. R., 313; 1 Bing., 445; 3 Camp., 16; 1 Com. & Lawson, 223–225; 3 Barn. & Adolph., 728.

These cases show that the terms in this charter are so far vague and flexible, that even if they legally import the complainant's construction, it may be proved that a different one was intended. (7 Sim., 310; 3 Atk., 576; see, too, 16 Peters, 534; 2 Inst., 282; 2 Brod. & Bing., 403.)

Proceeding, then, to discuss the question of the original meaning of the charter, under a view of all the surrounding circumstances, the respondents will maintain—

1. That the burden of proof is upon the complainants; and that, being out of possession, never having been in possession, and presenting the question after a lapse of more than two centuries, they should be holden to make their construction clear to judicial certainty. (13 Pick., 77; 2 Brod. & Bing., 403.)

2. That the charter is to be construed most liberally in favor of the grantee, because it was a grant from a monopolist to the people of Massachusetts of that and of all generations. (1 Bancroft's History, 292, 293, 351–354; 11 Peters, 544; 7 Pick., 487.)

3. That there is no circumstance or consideration in aid of the complainant's interpretation, beyond the words themselves; that they have never had possession under their interpretation; that there is no proof that the streams and fountains south of what is now the main stream of what is now Charles River have not always been reputed parts of Charles River; and that there is proof that anciently they were so reputed. (See depositions of Metcalf, Cowell, Ware, and Mann, in papers put into the case by Massachusetts, pp. 30–32; 1 Douglass's Summ., 415, 463.)

4. That there is no judicial evidence that the

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words themselves, in the age of the date of this charter, used by such parties, in such an instrument, even *prima fronte*, bore the sense contended for by the complainants; that they do not obviously import that sense; and that, in the absence of other evidence, the court would not, against a possession of two centuries, even *prima facie*, so construe them.

And, *e contra*, in aid of the respondent's interpretation, they will contend—

611*] *1. That presumption favors it, arising from long possession.

2. That if the words may bear two senses, that which is most beneficial to the grantee, the settler, and colonist, will be taken, rather than that most beneficial to the monopolist grantor.

3. That the words themselves more obviously and naturally import the sense claimed by the remonstrance.

4. That their construction imputes the more probable, reasonable, and usual conduct to these parties, since, under the complainant's construction, the boundary would be a fluctuating and uncertain one, varying with reputation; and would divide a river between the States, giving the main stream to one and the sources and confluent waters to the other, thus promoting strife. Whereas the obvious design of this charter was to give the whole river to Massachusetts. (1 How., 186.)

5. That the whole question is settled by the contemporaneous exposition, that Massachusetts, from the planting of the colony, took an open and notorious possession under, according to, and in enforcement of her present doctrine of interpretation, going more than three miles south of what is now the main stream of what is now Charles River; and that during all the period properly denominated contemporary, and down to the year 1750, neither the crown, nor Plymouth, Rhode Island, nor Connecticut, objected to that interpretation, but, on the contrary, expressly and repeatedly assented to it; Plymouth in 1638 and 1664, Rhode Island in 1711 and 1718, and Connecticut in 1713. And this conduct of Massachusetts, in assertion of her principle of interpretation, and this contemporary assent of all others adversely interested, constitute a body of circumstantial evidence in favor of the Massachusetts interpretation, which would be decisive of the cause on that point alone.

To show, 1. That Massachusetts took and maintained a possession from the earliest period under her present doctrine of construction, will be cited, Bill, 29, 30, 34, 35; Evidence of R. I., 47, 56, 63, 104; Borden's Evidence, 8; 1 Winthrop's Journal, 284; 1 Hutch., 108; 1 Trumb., 185, 186, 401, 402; Connecticut Memorial, 4, 8; Answer, 5; Ev. of R. I., 58, 90, 101, 104, 105, 111, 119, 121; 1 Hutch., 208; Mass. Rep. of 1791, p. 3; Mass. Ev., 22.)

2. To show assent of Plymouth, Connecticut, and Rhode Island. 1. Plymouth—1 Wint., 284; 1 Hutch., 208; 1 Doug., 401; Mass. Rep., 1791, p. 3. 2. Of Connecticut—Ev. of R. I., 89, 121, and Conn. Memorial, 4. 3. Rhode Island—Mass. Ev., 22; R. I. Ev., 56, 61.

3. To show that Massachusetts would not have asserted such a possession, on such a doctrine of intepretation, unless she had believed it sound, and that she knew the true meaning of her charter, see 1 Met., 388; 1 Bancroft, 439, 440, 474, 476; 1 Hutch., 229, *249–251; [*612 1 Belknap, 106, 107, 113, 115, 116; Minot, 38, 43; Brad. Hist. of Mass., 94, 95; R. I. Ev., 46; 2 Doug., 92.

4. That Connecticut assented with full knowledge of localities. (Conn. Mem., 3, 4, 5, 7; R. I. Ev., 104, 121.)

If the court should be of opinion that the complainant's interpretation is established to judicial certainty, still the respondents contend that, by reason of matter *ex post facto*, the bill cannot be maintained.

1. The complainant's charter bounds Rhode Island, not on the charter line of Massachusetts, but on her actual occupation at the time, which extended south to the present line. (14 Peters, 247.)

2. By the Declaration of Independence the then existing boundary lines of the States became the true lines, without regard to their historical origin, and those lines are unalterable by any jurisdiction. (12 Peters, 681.)

3. That it is not competent for the complainants to bring the matter of this boundary into contestation in a court of equity, by reason of their prolonged and gross laches. (1 Story's Eq., 73, sec. 64, *a;* 1 Howard, 168, 193; 2 Story's Eq., secs. 1520, 1522; 2 Story's R., 215; *Bell* v. *Sanborn*, 8 Clark & Fin., 650; 1 Story's R., 215; 18 Pick., 393; 9 Peters, 417; 5 Johns. Ch. R., 550.) They are barred by time. (7 Paige, 197; 6 Peters, 61; 2 Jac. & Walk., 191; 2 Molloy, 157; 12 Eng. Ch. R.; 2 Sch. & Lef., 636.)

4. That the respondents have a perfect and indefeasible title to soil and jurisdiction up to the existing line, by prescription, a title resting on a possession of more than a century, the highest and most sacred of the titles of nations. (14 Peters, 260, 261.)

5. That the existing line has been conclusively established by accord, compromise, award, and treaty; by the deliberate agreements of agents, arbitrators, or ministers plenipotentiary of the complainants, whose acts were subsequently expressly and by implication ratified by the complainants themselves, as a government.

And hereunder the respondents will contend—

1. That, in 1711, and again in 1718, commissioners were appointed by Rhode Island and Massachusetts, with full powers to determine and settle, by compromise or ascertainment, the line of boundary; and that they did agree and establish the now existing line as the boundary. (R. I. Ev., 53, and *id. seq.*)

2. That, in making this determination of the line, the commissioners of Rhode Island had full knowledge of all material facts; and that they were uninfluenced by any representations of the commissioners of Massachusetts; and that, if this be so, the case is concluded. (14 Peters, 260.) And in support of this position, the respondents will rely on the want of proof of the complainants to show such mistake or misrepresentation, on the legal presumption *against it, on the probabilities, and on [*613 the direct and circumstantial evidence in the case.

1. That the presumptions are against it appears, because to have been ignorant of material facts would manifest a gross neglect of

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official duty; and this is never presumed. (Greenleaf, sec. 40, p. 47; 2 Cow. Phill., 296; 12 Wheat., 69; 3 East, 199; 19 Johns. R., 347; 11 Wheat., 74.)

2. Mistake of law alone is no ground of relief. (12 Peters, 82.)

That they must have known the localities. (Mass. Ev., 22; R. I. Ev., 52, and *id. seq.* 55, 57.)

3. That in the absence of fraud and misrepresentation of the commissioners of Massachusetts, mistake of facts by the commissioners of Rhode Island would be no ground of relief against the agreements; and that there is no proof of such fraud or misrepresentation. (14 Peters, 280; 1 Story's Eq., sec. 146–151; 2 Wheat., 178; 11 Wheat., 59; 11 Merlin, 70; 6 Toullier, 62; 4 Johns. R., 566; 9 Heineccius, 101; 9 Dowl. & Ryl., 731; 1 Story's Eq., sec. 1456; 14 Peters, 276; 6 Pick., 154.)

4. That the votes of the Rhode Island Assembly in 1711, 1718, 1719, and 1749 (in Rhode Island Evidence), and her long acquiescence, prove or work a ratification of the acts of her commissioners. That mere silence and inaction alone, so long continued, would prove or work it; but these are unequivocal acts. (Story on Agency, secs. 253, 255, 256.)

5. That, to avoid the operation of those votes and acts, it is not legally competent to aver that the Assembly and government of Rhode Island were ignorant of the localities or other facts; and that, if it were competent to make that averment, it is disproved by all the presumptions, and direct and circumstantial evidence. (2 Cow. Phill., 288; 12 Wheat., 70, 76; Ang. & Ames on Corp., 175; 11 Peters, 603; *Fletcher* v. *Peck*, 6 Cranch, 129; see, too, the cases *supra* to the point that official duty is presumed to be done.)

6. That if the existing line is to be deserted, and a new one run according to the true sense of the charter, as an open question, it must be removed far south of its present place. (Ans., 6 and 7.)

In illustration of the points stated above on the part of the complainant, *Mr. Randolph* occupied three days in referring to and reading ancient grants and documents and other papers.

Mr. Choate confined himself to that branch of the argument resulting from the two following points, viz.:

1. The true interpretation of the charter.

2. The acts of 1713, 1718, &c.

The skeleton of *Mr. Webster's* argument was this:

The case of Rhode Island rests on two propositions:

614*] *1. That the disputed territory belongs to her, according to the true construction of the original charters.

2. That she has done nothing to abandon, surrender, or yield up her original right to the territory, or to close inquiry into those original rights.

Against these, we maintain four propositions.

1. That the territory belongs to Massachusetts, according to the just interpretation of her original charter, and that no subsequent acts of the British crown or courts of law, nor any acts of her own, have impaired or lessened her right in this respect.

2. That the line up to which she now possesses has been seated and established by fair and explicit agreements between the two parties, executed without misrepresentation or mistake, and with equal means of knowledge on both sides; and that she has held possession accordingly, from the dates of those agreements.

3. That if all this were otherwise, Massachusetts is entitled, by prescription and equitable limitation, to hold to the limits of her present possession.

4. That Rhode Island, by her own neglect or laches, is precluded from asserting her claim to the disputed territory, if she ever had such claim, or from opening the question for discussion now.

Mr. Whipple, in reply and conclusion:

The case naturally divides itself into three separate and independent questions.

1. Did the disputed territory belong to Rhode Island by virtue of the charter of 1691, commonly called the Province charter?

2. If the court should decide that question in the affirmative, the next question will be, Has Rhode Island transferred a portion of that territory by the contracts of 1710–1718?

3. If the rights of Rhode Island were not affected by those contracts, then the third and only remaining question will be, Are they impaired, or in way affected, by time?

I. Did the Province charter of 1691 confer this territory upon Rhode Island? The counsel for Massachusetts very correctly commence their arguments with the propositions, that inasmuch as Rhode Island has admitted this territory to be the territory of Massachusetts by the contracts of 1710–1718, and has suffered Massachusetts to remain in possession from 1710 down to the present time, that it is incumbent upon Rhode Island, in order to counteract these adverse influences, to establish a title under the charter so clear, that no two minds can possibly differ concerning it.

By this test we are willing to stand or to fall. The title of Rhode Island under the charter is so clear that no two minds can differ about it. Hardly an attempt has as yet been made to impeach it. The very statement of the question settles it.

*The charter of 1628 describes the [*615 territory of Massachusetts as lying between a line "three miles north of the Merrimack River and of any and every part thereof," on the north, and a line "three miles south of Charles River, and of any and every part thereof, on the south." The lines thus limited on the north and south were to be east and west lines, parallel to each other. The southern line of Massachusetts, by the subsequent charter of Rhode Island, in 1663, is constituted the northern line of Rhode Island.

We contend that these words, yielding to them their obvious and natural import, admit of no doubt. Three miles south of Charles River, and of any and every part thereof, is no more than three miles south of Charles River, and of any and every part of Charles River. These latter words were intended to embrace all the southern curves of the river. Rhode Island contends that the northern line of Massachusetts was intended to be three miles from the Merrimack proper, or the main stream, and the southern line three miles from the most

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southerly part of the main stream of Charles River; that this construction is imperiously called for by the natural and obvious import of the words, and by the contemporaneous construction of all the parties, grantors and grantees, the crown and all the adjacent colonies, including Massachusetts, from 1622 down to 1710.

1. What is the obvious meaning conveyed by the words "three miles south of Charles River?" Do they comprehend a tributary stream, the head of which may be ten or fifty miles south of the Charles? Do the words "three miles west of the Mississippi River," mean three miles west of the sources of its tributary, the Missouri? Would a grant of territory (either between nations or individuals), ten miles north of the Ohio River, or any part thereof, include all the territory two hundred miles northward, because the Wabash, its principal tributary, extended that distance north? Why have different names been assigned to tributary streams, in ancient and modern times, and by all nations, savage and civilized, if the main stream included the tributary? Have geographers or historians ever described Frankfort and Treves as cities upon the Rhine, because upon streams emptying into the Rhine? Or have they invariably been named as upon the Maine and the Moselle?

Webster defines a river to be "a large stream of water flowing in a channel toward the ocean, a lake, or another river. A large stream, copious flow."

Johnson says it is "a land current of water bigger than a brook."

In 1642, Massachusetts surveyed a small stream running from the south into the Charles, as and for the Charles River of the charter. At that early period, the main stream had acquired the name of Charles River, far to the westward of its junction with the brook. But the surveyors of Massachusetts called the brook 616*] *Charles River, and mapped it as Charles River—as the main stream—omitting to lay down the river itself. As early as 1670, this brook had acquired the name of Jack's Pasture Brook, notwithstanding the attempt of Massachusetts to impress upon it the name of Charles River. Before 1700 it acquired the name of Mill Brook, mills having been built upon it. All the public and private grants of towns, corporations, and individuals referred to the main stream as the Charles, and to this brook as Jack's Pasture Brook, or Mill Brook.

The people of Massachusetts made the same distinction between a river and a brook, one of its tributaries, that all the other members of the human family had made from the creation of the world down to that period. We say, therefore, that the words of the charter admit of but one construction, and never have recieved a different construction.

This was the construction put upon those words by the grantees of the territory and jurisdiction, and by the grantors of the territory, the Plymouth Company, and the grantors of the jurisdiction, the king and council. All the parties, Massachusetts and the grantors of Massachusetts, so understood these words, and limited their possessions accordingly.

The extended construction now contended for would have carried the northern line of Massachusetts to Lake Winnipiseogee, and an east and west line from that lake would have embraced all the State of New Hampshire, and nearly all of Maine.

But as early as December 30th, 1621, the Council of Plymouth granted to Sir Robert Gorges a territory ten miles by thirty, in the northern part of Massachusetts Bay, embracing Salem, Cape Ann, &c.

In 1628 the same Council of Plymouth granted to Massachusetts a line running east and west, three miles from the Merrimack River.

In 1629 the king and council granted jurisdiction over the territory ceded to Massachusetts by the Plymouth Council.

In November, 1629, the same Council of Plymouth granted what is now called New Hampshire, beginning at the Merrimack River.

In April, 1635, another grant was made to Mason, from said Council of New Hampshire, with a slight difference of boundaries. In consequence of these subsequent grants as far south as the Merrimack, Massachusetts, in 1636, erected her bound-house three miles north of the Merrimack proper, near its junction with the ocean. When pressed with this fact by Mason, in the trial before king and council, in 1676, Massachusetts gave to this house the name of a possession-house. But it must be observed that Massachusetts never claimed that her territorial rights extended more than three miles north of the Merrimack proper. In the trial before the king and council, in 1676, [*617 she formally renounced any such claim. Her grant of jurisdiction by the king, in 1629, is over the territory (described by the same words, *verbatim*) that was granted to her by the Council of Plymouth.

The ambitious pretensions of Massachusetts to an extension of her jurisdiction over New Hampshire and Maine, the territorial rights to which were in Mason and Gorges, arose out of the fact that after 1636 the inhabitants of New Hampshire, being destitute of the powers of government, petitioned the General Court of Massachusetts to be taken under their government and protection. Massachusetts refused to grant these petitions for a number of years. She had erected her bound-house three miles north of the Merrimack proper. She had refused to take the inhabitants of the towns adjoining immediately north under her protection, because she was aware that her jurisdiction did not reach them. In her answer to the charge of Mason before the king and council, in 1676, she admits "that her whole management in those eastern parts was not without the reiterated and earnest solicitation of most of the people there inhabiting."

When her ambition had become fully awakened by those reiterated and earnest solicitations, she employed Woodward and Saffrey to run her north and south lines, and after discovering that a river comprehends all its tributary streams, they run their line on the north so as to comprehend New Hampshire and Maine, and on the south so as to comprehend the territory in dispute.

This extraordinary claim resulted in a series of suits, which extended over a period of nearly a century, in every one of which the pretensions of Massachussetts were overruled.

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In 1676 a formal and protracted trial was had between Mason and the colony of Massachusetts, before the two chief justices of England, sitting for the king and council. The complaint of Mason and the answer of Massachusetts contain the elements of the whole controversy. Massachusetts formerly renounced any claim to the territory more than three miles north of the Merrimack proper.

In a subsequent trial in relation to the rights of New Hampshire, in 1737, she filed the written claim to begin at a point three miles north of the Merrimack, where it empties itself into the ocean, and to follow the course of the river to the crotch, where the union of the two tributary streams form the Merrimack proper, thus disclaiming, as she did in 1676, the whole tributary stream principle—the whole principle upon which she bases her right to the territory now claimed by Rhode Island.

We find, then, that Massachusetts herself, in 1636, and all the grantors of Massachusetts, the Plymouth Council as to the territory, and the king and council as to jurisdiction, had given to these words, "three miles from Charles 618*] River," the construction which *Rhode Island now gives to them; the construction which has been given to them among all nations and in all ages.

A very faint attempt has been made to disturb the smoothness of this current of authority by a resort to contemporaneous grants of territory and jurisdiction. The result of that attempt was, that in every case where the boundary has been "a river" simply, the tributaries and sources of the river have been excluded. New York, in one instrument, came east as far as Connecticut River. She did not claim east of the river proper, to the heads of the easternmost tributary stream, but to the river itself. When the heads and sources of rivers were intended, "to the uttermost heads and sources thereof" were the expressions invariably employed.

After the most minute and widely extended seach into all the grants, public and private, from 1620 down to the present period, not an instance has been found in which a boundary by a river has ever been extended beyond the river itself.

We therefore say, that the construction given to these words by the parties themselves, grantors and grantees, accords with their obvious and ordinary meaning.

But if additional matter could strengthen these views of this question, it will be found in the fact that in 1676 this construction was given to these words by the king and council; in 1684, the charter of Massachusetts of 1628 was vacated and declared void, and in 1691, another charter, called the Province charter, was granted. The limits of Massachusetts, both as to territory and jurisdiction, were expressed by precisely the same words as those contained in the charter of 1628. Upon these words the grantor has impressed a certain meaning, no matter for this purpose whether the ordinary or an extraordinary meaning. The grant of 1628, unlike a grant of property, was revocable in its very nature. A grantee of jurisdiction, or other political power, holds by no other tenure than the discretion or caprice of the granting power. Massachusetts existed as a colony during the will and pleasure of the king and council. She might be deprived of a part of the whole of her jurisdiction at any moment, and with or without any sufficient cause. It belonged to the king and council to decide arbitrarily, if they chose, how much or how little should be granted or taken away. It belonged to them to explain the meaning of the terms by them employed. Their action in this respect is legislative, rather than judicial, and the effect of their action is conclusive upon all mankind. Massachusetts excepted the Province charter of 1691 from the king and council, after the same king and council had decided, in 1676, that three miles from Charles River meant from the main stream, or Charles River proper.

It is unimportant, therefore, what this court may deam to be the usual and ordinary meaning of these terms. The granting party here has explained the sense in which these terms are used in this *grant. The party to whom the [*619 grant was made knew that such was the meaning of the grantor, and by that explained and understood meaning—explained by one party, and understood by the other—must this court be governed.

On the part of Rhode Island, therefore, we say, that we do show, beyond the capacity of the human mind to doubt, that, under the Province charter of 1691, the south line of Massachusetts and the north line of Rhode Island was a due east and west line, beginning at a point three miles south of Charles River proper.

II. In the discussion of the second point, has Rhode Island parted with her right by the contracts of 1710–1718, we must consider it settled, that in 1710 she had the right, under the charter.

In order to judge fairly of the effect of these contracts, we must consider their nature and character, the main objects of the parties, their powers in relation to the subject matter, and their terms employed to express their intentions.

In the first place, the parties agree, that both instruments constitute but one contract.

The commissioners of Massachusetts, in their report of 1791 (p. 59 of Bill), speak of the agreement of 1710–1718 as a subsisting agreement. The answer of Massachusetts throughout, but particularly in pp. 20–28, treats both instruments as forming but one contract, the agreement of 1718 being in addition, and not a substitute, to the agreement of 1710. Nor is it contended in the argument that the agreement of 1718 was to take the place of that of 1710.

In the next place, the sole object of the parties was to ascertain the true charter line. From 1705 to 1710, four acts were passed by Rhode Island, appointing commissioners to settle the line according to the charter. Massachusetts and Rhode Island were colonies of the mother country, and both were fully aware that Rhode Island possessed no power to transfer any portion of her territory to Massachusetts. There was an incurable incapacity in Rhode Island to sell, and in Massachusetts to purchase, any portion of Rhode Island territory. Neither possessing the power to sell or to purchase territory, the law will presume that neither had any such object in view. It is not pretended that any consideration was paid to Rhode Island. It must, therefore, be taken as

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the sole object of the meeting of the commissioners in 1710, to find the dividing line, according to the charter of 1691. The contracts themselves express this as their object, in the most explicit manner. They agree, "that the stake set up by Woodward and Saffrey in 1642, being three miles from Charles River, according to charter, be allowed, on both sides, as the commencement of the line," &c. This line was admitted by the Rhode Island commissioners to be three miles from Charles River, upon the authority of a map of Woodward and Saffrey, made in 1642, as the contract 620*] *states, "now shown forth to us, and remaining upon record in the Massachusetts government." These commissioners were Governor Dudley and Governor Jenckes. They did not go upon the land, but met at the house of Dudley, in Roxbury, in midwinter, fifteen miles from the localities referred to in the map. If they had been upon the premises, there must have been a surveyor appointed, and the report would have mentioned his name. This map states that the station was three miles from Charles River, according to charter, whereas it is three miles from the head of Jack's Pasture Brook, that brook being called on the map Charles River. By the map of these sworn surveyors, it appears that the station adopted by the commissioners was three miles from Charles River, according to the charter. In point of fact, it was seven miles and upwards. This map was produced by Dudley from the Massachusetts records. What it represents he represented. Jenckes confided in the integrity of this map, and admitted that the starting point was three miles from Charles River, according to the charter. In point of fact, it was over seven. In point of fact, the Rhode Island commissioner admitted that over four miles of Rhode Island territory belonged to Massachusetts. And this admission was made upon a false representation, through the medium of false papers. This map was the work of 1642, based upon the principle asserted by Massachusetts, and exploded by king and council in 1676, and explicitly renounced by Massachusetts in 1676, and subsequently in 1737.

We have attempted to show, that it was no part of the intention of the parties to transfer acknowledged territory from one to the other, neither possessing the requisite power, but that the only object was to ascertain the line called for by the charter. Rhode Island admitted this line to be the true charter line, upon a false representation. Is she bound by it legally or equitably?

It being three miles, according to charter. Was not that fact, it being three miles, the basis of the contract? Because it is three miles, if it is three miles, as this map states, we agree to run the line such a course to Connecticut River. Suppose it turns out that one or both parties were mistaken, that they began at a station seven miles from the river instead of three, is not the admission void, on the ground of mistake? If the parties had intended to commence at the Woodward and Saffrey station, without regard to its distance from the river, without regard to its conformity to the charter, why were those words inserted in the contract? If they had intended to bind their respective States absolutely, whether the station was three miles or ten miles, why did they insert those words in the contract? Jenckes did not know whether the map was correct or not. He trusted solely to its truthfulness. But in case of error, he did not mean to be bound. He says, "it being three miles, according to charter. This is my reason for agreeing *to [*621 it." But if the admission is taken to be absolute, and not conditional, then these words are entirely without a meaning. They were inserted as the basis of the contract, or they are surplusage. (*Allen* v. *Hammond*, 11 Peters's Rep., 71; 1 Story's Equity, 143, *b*.) Massachusetts herself has claimed the disputed territory from 1710 to the present day, not as Rhode Island territory, ceded to her by the contract, but as Massachusetts territory, under the Massachusetts charter, admitted to be such by the contracts. (Page 4 of defendant's plea of 1840; Answer, pages 6–10.)

It is a general principle, that where a contract is entered into for the purpose of executing the provisions of a prior instrument, by which the rights of the parties are settled, and the subordinate contract declares that it is made in pursuance of the prior instrument, that any departure from that instrument is presumed to be by mistake. A marriage settlement, declared to be in pursuance to the marriage articles, is void so far as it departs from the articles. (Atherly on Marriage Settlements.)

In case of a post-nuptial settlement, it is void, though it does not say that it was in pursuance of the articles, because, after the marriage is consummated, the parties have no power to depart from the articles.

This case combines three elements of mistake, either of which is sufficient to invalidate the contract.

1. The contract declares that it was in pursuance of the charter.

2. The parties had no power to depart from the charter.

3. It was made upon a misrepresentation of a material fact.

This is one answer to the effect of the contracts.

Massachusetts attempts to support them, upon the ground that the right under the charter was doubtful; that Massachusetts claimed under the tributary stream principle still farther south; that Rhode Island claimed to Charles River proper, and that, with a knowledge of all the localities, with a knowledge that the map of Woodward and Saffrey was drawn from a tributary stream, the Rhode Island commissioners agreed to the Woodward and Saffrey station.

To this we give various answers.

1. That the right under the charter was not doubtful, but clear and conclusive. The charter gives the line three miles from a fixed and permanent object.

2. There is not a tittle of proof that the Rhode Island commissioners either knew the localities, or that they knew that the Woodward and Saffrey station was three miles from a tributary stream. On the contrary, all the proof is the other way.

The map itself represents the station to be three miles from Charles River. The contract states it to be three miles from the river, ac-

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cording to charter. The map calls the brook
622*] Charles River, *and omits a delineation of Charles River entirely. Instead of laying down the river, and the brook emptying into it, it represents the brook as the only Charles River, and the station as three miles from that only river. The contract itself states that the persons thereafter to be appointed to run the line "were to attend within six months thereafter to show the ancient line of Woodward and Saffrey, and to raise and renew the monuments." This proves that the parties to this agreement were not shown the localities. The line was not run until 1718, and then the commissioners report that they went to the station and run the line, and it does not appear that any of them went near the river, or made any admeasurement of its distance from the station. It was their duty to report all their proceedings, and the law presumes that they performed their duty.

There is another fatal objection to the ground assumed in argument. The court is asked to presume that the commissioners from Rhode Island knew all the localities, knew also that the Woodward and Saffrey station was seven miles from Charles River and three miles from a tributary stream. If the Rhode Island commissioner knew those facts, it was a fraud in him to conceal them from the Legislature of Rhode Island, and to sign a contract which represented the direct reverse—that the station was but three miles from Charles River according to the charter, when it was seven miles and contrary to the charter. The court is asked to presume that the commissioners stated what they knew to be false. Can this be presumed? If it were true, would it not amount to a designed fraud upon the Legislature of Rhode Island?

It is agreed by the answer, that the ratification of these contracts by the Legislature of Rhode Island is essential to their validity. Did the Legislature of Rhode Island ratify a contract establishing a line three miles from a tributary stream contrary to the charter, or three miles from Charles River according to the charter? If a knowledge of the secret facts, the localities, and the true meaning of the map was essential to bind the commissioners, was it not equally essential to bind the Legislature? The obvious meaning of the contract is three miles from Charles River proper. Did the Legislature ratify the contract according to its obvious and legal meaning, or according to a meaning impressed upon it by a knowledge of facts which it is not pretended they possessed.

But the whole groundwork of this presumption, which the court is asked to make—that in 1710 Massachusetts claimed from the tributary streams and not from Charles River—wholly fails; for after the decision of 1676, Massachusetts never did claim from a tributary stream.

In 1642 she claimed the right to decide which was the main stream and which the tributary, in point of fact, and she mapped out the brook as the main stream, and called it Charles River.
623*] *In 1710 she showed that map as and for a map of Charles River according to charter and not as a map of a tributary stream.

In 1750 she took depositions to prove the fact that the brook was Charles River proper.

In 1791 the Massachusetts commissioners say. "The branch now called Charles River could not have been known as Charles River in 1710." The Rhode Island commissioners say: "That the Massachusetts commissioners pointed out the brook as and for Charles River." From 1642 down to 1791, the claim of Massachusetts rested upon the fact that the brook was the main stream, and the main stream its tributary, and they impliedly admit that if the fact was the other way the case was against them. Until this trial, Massachusetts has never contended for the right to begin the three miles from a tributary stream, but for the fact that the brook was the main stream.

The fact, that as early as 1640 the public authorities of Massachusetts bestowed the name of Charles River upon the main stream, far to the westward of its junction with the brook, and as early as 1670 the name of Jack's Pasture Brook upon the tributary, and that all the boundaries of the towns and private conveyances treated and called the one the main stream, the Charles River proper, and the other the brook, is proved so clearly and decisively that it is not even brought into dispute. The further fact is also proved, that it is obvious to the senses that the one is the main stream, the other but a tributary.

This conclusive proof rendered it necessary for the counsel to shift the ground of defense, and to contend for the first time during the history of this controversy, that Massachusetts had always claimed from a tributary stream as such; that, in 1710, Rhode Island knew all the localities, and intended to allow the validity of that claim, although the language of the contract is precisely the reverse.

In 1749 the Rhode Island commissioners discovered the mistake. Being unable to find the Woodward and Saffrey station, they were obliged to go to the river and measure off the three miles. They then discovered that the line of 1718 was seven miles, instead of three, from the river. They run the line to which we now claim, erected permanent monuments upon it, gave notice of their claim to Massachusetts, and have claimed to that line from that day to this.

We therefore contend: 1. That the right to this territory under the charter is established as clear and certain. 2. That the contracts of 1710 and 1718 were not intended to convey Rhode Island territory to Massachusetts, neither party possessing the power to convey or to purchase. 3. That these contracts were merely admissions that the station was three miles, when in fact it was seven, from the river. 4. That these admissions were made upon an *obviously false statement of the facts, [*624 and are not binding in law or in equity.

These are some of the leading views of the Rhode Island mind upon these vital points of the case, and we have been largely encouraged that they are unanswerable, by the fact that notwithstanding the extraordinary power of intellect arrayed against us, they remain wholly and entirely unanswered.

Taking it for granted that what has not been answered by counsel will not be overruled by the court, we now proceed to inquire whether the jurisdictional right of Rhode Island, secured to her by a record of the highest and

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most enduring nature, has been lost through the agency of time.

To our minds it seems a clear proposition, that if time is to exert any influence over the rights of the parties in this case, that influence must be based upon principles never as yet promulgated in the code of any municipal or national law which has come to our knowledge. The artificial system prevailing in the courts of common law and equity, in England and in this country, has been more largely inflated, and made deeper and broader encroachments upon the domain of practical justice and common sense than any previous system within the range of our learning. Yet that system, extended as it has been by ambitious book lawyers and book judges, contains no form of action capable of bringing time into hostility with any one of the rights or claims of Rhode Island, in the present case.

In the first place, the main reason why time is so prolific of presumptions against the party out of possession is founded upon the ceaseless and untiring activity of avarice. The love of money is the basis of all prescription, presumptions of grant, and statutes of limitations. It is against human experience that any man should allow another to receive the rents and income, and other benefits of his property, for a series of years, claiming it as his own, and remain silent under such encroachment. The law presumes it more probable that there has existed a lost grant, than that such an anomaly should take place. It is because the man in possession enjoys great advantages, and the man out of possession sustains great losses, that the law so readily concludes the title to be according to the enjoyment. This reason, in many cases, if not in all, would apply but awkwardly to jurisdiction—a duty, and oftentimes an onerous, sometimes a dangerous, duty, which, instead of courting, we gladly escape from—and not, like property, an enjoyment, a benefit—indeed, the greatest of worldly blessings in the opinion of the mass of mankind. To forego the performance of a duty does not impregnate time quite so quick with a presumption of the absence of all rights, as to forego the enjoyment, it may be, of many thousands of dollars of income, claimed by another, enjoyed by another, with a denial of our right by another.

625*] *Then, again, time quiets long possessions of property upon a principle of policy. Property passes from parent to child, it is transmitted by will, transferred by deeds and other instruments, and in the course of forty or fifty years it acknowledges, it may be, as many distinct owners, many, if not the most, of whom took it for granted that the peaceable and undisturbed possessor was the legitimate and undoubted owner. The law encourages this belief, for otherwise no improvements would be made. Heirs, devisees, and purchasers would be unwilling to hazard large expenditures, if a flaw in a deed, or even the entire loss of the paper title, could not be cured by the salutatory and benign influences of a long and undisputed possession. But jurisdiction is a chaster and less prolific character. She has no heirs, or devisees, and but here and there a purchaser. Third persons will not be discouraged from making improvements by large expenditures of money, because in the first place there are no third persons connected with jurisdiction, and in the next place, jurisdiction amplifies and enlarges itself without expenditures of any kind, and the policy of the law is to restrain rather than encourage these expensive propensities. It must therefore be admitted that the application of the benign influences of time to such a subject as jurisdiction would be rather gawky, old-maidish, and ungraceful.

But suppose we bring this subject of jurisdiction within the range of all the principles applicable to property; has time any ordinance, any form of action, that can in the slightest degree affect the rights of Rhode Island? We say with the most entire confidence that it has not.

There are but three modes known to the courts of law or equity in which time exercises her influences upon permanent property—1. By statutes of limitations; 2. By prescription; and 3. By presumptions of grants.

It is not pretended that statutes of limitations can apply to the case of two States. It would be equally absurd to invoke the common law doctrine of prescription, as administered at law or in equity, for to this day, in England and in this country, prescription is overthrown if the person out of possession can show that the possession commenced at any time subsequent to the 1st of Richard I. (Best on Presumptions, 47 Law Library, 75; *Taylor* v. *Cooke*, 8 Price, 650; 2 Bl. Com., 31; *Fisher* v. *Greaves*, 3 Eagle & Younge, Tithe, C., 1100.)

"The presumption of prescriptive rights, derived from enjoyment, is instantly put an end to, where the right is shown to have originated within the period of legal memory," that is 1 Rich. I. (1189).

Massachusetts was not settled until 1620, and the charter under which she claims was granted in 1628.

In the two first modes in which time operates upon title, she *acts alone, unaided by [*626 any other proof, direct or circumstantial. If the period required by the statute of limitations has transpired, or if the possession has been as far back as memory extends, the law presumes that it was coeval with Richard I., and in both cases time alone constitutes a legal title.

But with the exception of the case of a mortgage, and one or two other analogous cases, time alone, unaided by circumstances, is never sufficient for the third form of its action, by way of presuming a grant.

In *Mayor of Kingston* v. *Horner* (Cowper, 102), Lord Mansfield says: "A jury is concluded by the statute of limitations. So in the case of prescription, if it be time out of mind, a jury is bound. Any evidence showing a time when the claim did not exist is an answer to prescription." (p. 109.)

"But length of time, as evidence, may be left to a jury to be credited or not, according to circumstances."

"There is no positive rule which says that one hundred and fifty years, or any other length of time within memory, is a sufficient ground to presume a charter."

The more modern authorities are all collected in Best, and the well settled doctrine in England and in this country now is, that the presumption of a grant is a case of circumstan-

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tial evidence, of which time constitutes but a single link.

A jury must believe that a grant was actually made. (6 Cowen, 706; 3 Johns. R., 109, 269; 1 Wash. C. C. Rep., 70; 2 Wend., 13–15; 3 Conn. R., 431; 11 East, 279; 5 Barn. & Ald., 228; 3 *Ibid.*, 150.)

This court, in *Ricard* v. *Williams* (7 Wheat., 59), say: "Presumptions of grant can never arise where all the circumstances are consistent with the non-existence of a grant. *A fortiori*, they cannot arise when the claim is of such a nature as is at variance with the existence of a grant."

The facts of this case conclusively show that no presumption of a grant (other than the charters and the contracts of the parties, upon the construction of which the case depends) can for a moment be indulged in; because—

1. From 1628 down to 1775 there was no power competent to make a grant except the mother country. Massachusetts and Rhode Island were colonies, and it is not denied that up to 1775 they were incompetent to convey territory or jurisdiction.

2. No other grant from the crown can be presumed (than the charters of 1628, 1691), enlarging the limits of Massachusetts, because all such grants are enrolled, and by the well settled law of England an enrollment cannot be presumed without proof of a spoliation or hiatus in the record. In 3 Barn. & Ald., 150, Abbott, *Ch. J.*, says: No instance can be **627*** found where the court have *said that an enrollment has been presumed." (See, also, Best on Presumptions, 149.)

But such enlarged grant must not only have been recorded in England, but in Massachusetts and in Rhode Island, and no such grant would have been made without the most formal notice to both the parties to be affected. No confirmation of the contracts of 1710 and 1718 can be presumed, for the same reasons. Such confirmation must have been upon notice, and would have appeared upon the records of the mother country and both the colonies interested.

III. Any additional grant from the mother country, or from Rhode Island, after 1775, is not only inconsistent with the circumstances of the case, but at war with its whole history from 1710 to the present time. Because any grant prior to 1775, or any confirmation of the contracts of 1710 and 1718, would have been enrolled in the mother country, and upon the records of both Massachusetts and Rhode Island, and any grant by Rhode Island since 1775, or confirmation of the contracts of 1710 and 1718, must have been recorded in Massachusetts and Rhode Island. Some human hands must have touched these grants or confirmations, and some human eyes must have seen them, and when lost from all three of their beds of repose, a hiatus, or lost stick, must have appeared upon the record books.

How is the fact? The mistake in the admissions of the Rhode Island commissioners (we omit to call it an imposition) was not discovered until 1748. From that time down to 1825, scarcely a year has elapsed during which commissioners from both the States have not been appointed, or continued under former appointments, for the purpose of settling this long pending dispute. Frequent meetings have been had. All their conversations, arguments, and claims have been in writing, and reports of those conversations made to the respective Legislatures of the two States. From the first to the last, no pretense has been made of any hiatus in the records in England, or in either of the two States. Not a syllable has been lisped of any other title than the charters of 1628 and 1691. From first to last, the claim of Massachusetts has been, and now is, that the territory was hers by charter, that the contracts of 1710 and 1718 conceded the territory as the chartered right of Massachusetts.

It is admitted, it is made the sole foundation of the opposite argument, that, as long ago as 1642, Massachusetts surveyed this territory, and took possession up to the Woodward and Saffrey line, by virtue of the charter; that she has occupied and claimed it from that time down to the present by virtue of the charter. All this is irreconcilable with any other title. Besides, during the period from 1748 down to 1825, neither party, in their various and frequent discussions, pretended that any other question existed between them than what was the proper construction of the charter. Both *admitted that the whole title rested [***628** upon that instrument. Massachusetts contended that Jack's Pasture Brook was the main stream in 1710 and 1718, though it had since become a tributary, and Rhode Island contended that it always had been a tributary. As late as 1791, the Massachusetts commissioners, in their report, recommended to their Legislature that that question should be referred to the arbitrators. In 1750 Rhode Island run the line three miles from Charles River, erected permanent boundaries upon it, gave to Massachusetts a map of that line, with notice that she claimed to it. Here, then, Massachusetts was put upon her defense as early as 1750. Her line, four miles south of ours, was claimed by her as the true charter line. Ours was claimed by us as the true charter line. From that day to this our monuments have stood upon that line, and from that day to this our commissioners have claimed to it. It has been a continual claim. In 1750 Massachusetts took the depositions of witnesses, in order to preserve the evidence of her construction of the charter. All her evidence in favor of that construction is in the case. She knew, then, that at some day or other she must either concede our right by negotiation, or surrender it under legal compulsion. All the moral reasons, therefore, in favor of long possession have no application here. She has lost none of her evidence. The depositions of all her witnesses taken in 1750 are now in the case. None of the legal reasons apply. She took possession under her charter, and therefore can set up no other title. The whole has been a subject of constant dispute from 1750 to 1825, and therefore no presumption of a grant from Rhode Island can arise.

Indeed, it is in vain to attempt to reason upon such a question. It contradicts all our legal and moral instinct to suppose that any principle ever did or ever can exist, which would sanction or even countenance the idea that such a possession, disputed from the moment it was taken to the time of filing the bill, can have any influence upon the title of either party.

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The law is yet to be made which gives countenance to such gross and glaring injustice.

Mr. Justice McLEAN delivered the opinion of the court:

We approach this case under a due sense of the dignity of the parties, and of the importance of the principles which it involves.

The jurisdiction of the court having been settled at a former term, we have now only to ascertain and determine the boundary in dispute. This, disconnected with the consequences which follow, is a simple question, differing little, if any, in principle from a disputed line between individuals. It involves neither a cession of territory, nor the exercise of a political jurisdiction. In settling the rights of the respective parties, we do nothing more than ascertain the true boundary, and the territory up to that line on either side necessarily falls within the proper jurisdiction.

629*] *James I., on the 3d of November, 1620, granted to the Council established at Plymouth the territory on the Atlantic lying between forty and forty-eight degrees of north latitude, extending westward to the sea. And on the 19th of March, 1628, the Council of Plymouth granted to Henry Roswell and others the territory of Massachusetts, which was confirmed by Charles I., the 4th of March, 1629. This grant was limited to the territory "lying within the space of three English miles on the south part of Charles River, or of any or every part thereof; and also all and singular the lands and hereditaments whatsoever, lying and being within the space of three English miles to the southward of the southernmost part of Massachusetts Bay; and also all those lands and hereditaments whatsoever, which lie and be within the space of three English miles to the northward of the Merrimack River, or to the northward of any and every part thereof," extending westward the same breadth to the sea.

On the 13th of January, 1629, the Council of Plymouth granted to the colony of Plymouth, which on the same day was sanctioned by Charles I., "all that part of New England, in America aforesaid, and tract or tracts of land that lie within or between a certain rivulet or runlet there commonly called Coahasset towards the north, and the river commonly called Narraganset River towards the south," &c.

The Council of Plymouth surrendered its charter to the king the 7th of June, 1635. On the 23d of April, 1662, Charles II. granted the territory of the colony of Connecticut, "bounded on the east by Narraganset River, commonly called Narranganset Bay, where the said river falleth into the sea; and on the north by the line of the Massachusetts plantation," &c.

The charter of Rhode Island was granted the 8th of July, 1663, by Charles II., limited on the north by the southerly line of Massachusetts.

It thus appears that the disputed line is the common boundary between Massachusetts and Rhode Island; the latter lying south of the line, and the former north of it. The true location of this line settles this controversy.

More than two hundred years have elapsed since the emanation of the Massachusetts charter, calling for this boundary; and more than one hundred and eighty years, since the date of the Rhode Island charter. In looking at transactions so remote, we must, as far as practicable, view things as they were seen and understood at the time they transpired. There is no other test of truth and justice, which applies to the variable condition of all human concerns.

The words of the Massachusetts charter, "lying within the space of three English miles on the south part of Charles River, or of any or every part thereof," do not convey so clear and definite an idea as to be susceptible of but one construction. Whether *the measurement of the three miles shall be from the body of the river, or from the head waters of the streams which fall into it, are questions which different minds may not answer in the same way. That the tributary streams of a river, in one sense, constitute a part of it, is clear; but whether they come within the meaning of the charter is the matter in controversy. The early exposition of this instrument by those who claimed under it is not to be disregarded, though it may not be conclusive. [*630

This line is said to have been often a matter of controversy between the Plymouth colony and Massachusetts, as early as 1638, and that in that year Nathaniel Woodward took an observation upon part of Charles River, 41 deg. 50 min. north latitude. In 1642, the southern bounds of Massachusetts were ascertained by the said Woodward and Solomon Saffrey, who fixed a station three miles south of the southernmost part of Charles River. And in 1664, a line was run by commissioners from each colony, and their return was accepted by the General Court of Massachusetts, and ordered to be recorded; and it may fairly be presumed that the return was also accepted by Plymouth. This was a construction of the charter by Massachusetts, and assented to by Plymouth, that the three miles were to be measured not from the main channel of Charles River, but from the head waters of one of its tributaries. Grants of land were made by Massachusetts and Connecticut on their common boundary, and also towns were established, without a strict regard to the line, which produced much contention. To adjust these disputes, in 1702, commissioners were appointed by the two provinces to ascertain the boundary line. They set up their quadrant and took their observation, at, or not far from, the distance of three miles south of the southermost part of Charles River, after which they took a second observation at Bissell's house, called for in the line of Woodward and Saffrey; and it was found that Massachusetts had made grants and established towns south of the line. This line was finally established by commissioners appointed by Massachusetts and Connecticut, in which they admit the correctness of the beginning at Woodward and Saffrey's station, "three English miles on the south of Charles River, and every part thereof, agreeably to the charter."

Serious difficulties occurred between the border inhabitants of Massachusetts and Rhode Island, on account of conflicting grants, and the establishment of towns. And after much correspondence and legislative action on the subject by the respective parties, it was finally

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agreed to appoint commissioners to settle the line. In October, 1710, the General Assembly of Rhode Island "enacted, that whereas Major Joseph Jenks being commissionated to treat with Governor Dudley concerning the settling the bounds between the province of Massachusetts and this government; that in case Governor Dudley and himself should not agree so **631*]** as to issue the *matter, then Major Jenks is hereby empowered and authorized to offer and conclude on such other terms as he may judge most proper for the interest of the colony," &c.

The commissioners of both colonies met at Roxbury, January 19th, 1710–1711, and after stating the authority under which they acted, and having "examined the several charters and letters patent relating to the line betwixt the said respective governments, and being desirous to remove and take away all occasions of dispute and controversy," &c., "they agree that the stake set up by Nathaniel Woodward and Solomon Saffrey, skillful, approved artists, in the year of our Lord one thousand six hundred and forty-two, and since that often renewed, in the latitude of forty-one degrees and fifty-five minutes, being three English miles distant southward from the southernmost part of the river called Charles River, agreeable to the letters patent for the Massachusetts province, be accounted and allowed on both sides the commencement of the line between the Massachusetts and the colony of Rhode Island." Other matters were adjusted according to the line of Woodward and Saffrey, which need not be referred to. This agreement was signed by Dudley and Jenks, and by three commissioners from Massachusetts and two from Rhode Island. In March, 1711, the Rhode Island Legislature sanctioned this agreement, by authorizing the line to be run in pursuance thereof, and the agreement was accepted and approved of by Massachusetts.

In 1716, and also in 1717, commissioners were appointed by Rhode Island to run the line under the agreement at Roxbury, jointly with commissioners from Massachusetts; or if the latter refuse or neglect to act, then to run the line without them. On the 17th of June, 1718, the Rhode Island Legislature, after stating that the commissioners had been retarded in settling the line by the agreement made at Roxbury, &c., "This assembly, taking the premises under consideration, do hereby enact, constitute, and appoint Major Joseph Jenks, and others, a committee to treat and agree with such gentlemen as are or may be appointed and commissionated, with full power, by the General Assembly of the Province of Massachusetts Bay aforesaid, for the final settling and stating the aforesaid line between the said colonies, hereby giving and granting unto the aforesaid Major Joseph Jenks and others, or the major part of them, our full power and authority to agree and settle the aforesaid line between the said colonies, in the best manner they can, as near agreeable to our royal charter as in honor they can compromise the same," &c.

The commissioners of both colonies met at Rehoboth, the 22d of October, 1718, and under their hands and seals again agreed "that the stake set up by Nathaniel Woodward and Solomon Saffrey, in the year 1642, upon Wrentham Plain, be the station or commencement to begin the line," &c. This agreement being returned *on the 29th of October, 1718, was [*632 accepted by the General Assembly of Rhode Island, and ordered to be recorded; and it was also accepted by Massachusetts. And a joint commission, being appointed by both governments to run the line as established, met on the 5th of June, 1719, and say: "We, the subscribers, being of the committee appointed and empowered by the governments of the province, &c., for settling the east and west between the said governments, by virtue of the agreement of the major part of the said committee at the meeting at Rehoboth, on the 22d of October last past, at which time the said line was fully settled and agreed, and by them directed to be by us run. Having met at the stake of Nathaniel Woodward and Solomon Saffrey, on Wrentham Plain, the 12th of May, Anno Domini 1719, in the morning, and computed the course of the said agreed line," &c., which line was run by them two miles west of Allom Pond, and they erected monuments at different points. This return was approved by the Rhode Island Assembly.

In October, 1748, the Legislature of Rhode Island appointed other commissioners to continue the line to the Connecticut River, recognizing the stake set up by Woodward and Saffrey as the place of beginning. The commissioners thus appointed having met, in 1749, twice, at Wrentham, and Massachusetts having failed to appoint commissioners to act with them, the Rhode Island commissioners proceeded to complete the running of the line. In their report they say: "That we, not being able to find any stake or other monument which we could imagine set up by Woodward and Saffrey, but considering that the place thereof was described in the agreement mentioned in our commission by certain invariable marks, we did proceed as followeth, namely: we found a place where Charles River formed a large current southerly, which place is known to many by the name of Poppotalish Pond which we took to be the southernmost part of said river; from the southernmost part of which we measured three English miles south; which three English miles did terminate upon a plain in a township called Wrentham," &c.

These are the leading facts relied on by the respondent to establish the station of Woodward and Saffrey as the place from which the boundary line was agreed to be run, and in fact was run. And we are now to consider how these facts and the arguments deduced from them are met by the complainant.

In the first place, it is insisted that the line run by Massachusetts in 1642 was without authority.

There does not appear to have been any order from the crown to run this line, nor is it supposed to have been usual or necessary for the crown to give such an order, where no controversy respecting the line was brought before it. The general boundary, as named in the charter, was run and established by the colony or *colonies interested; and [*633 where there was no dispute no further action was required. The controversy in regard to

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their common boundary, between Plymouth and Massachusetts, which seems to have existed as early as 1638, was finally adjusted by running the line in 1664. This line was commenced at the place called the angle tree, which is said to be about two miles south of the Woodward and Saffrey station.

When the Woodward and Saffrey station was first established, neither Connecticut nor Rhode Island had a political existence. And the Plymouth colony, which in 1691 was incorporated into Massachusetts, having then a distinct political existence and a common boundary with Massachusetts, assented to the line farther south than the above station. At the time this line was run, neither Connecticut nor Rhode Island can scarcely be said to have had a political organization, as the charter of the former was dated only two years before, and that of the latter one year. Massachusetts, then, in establishing the above station of Woodward and Saffrey, and in running the line, does not seem to have acted precipitately, without authority, or in disregard of the rights of other colonies.

The misconstruction of the charter, in going more than three miles south of Charles River, is earnestly insisted on by complainant's counsel. If the words of the charter were clear and unequivocal in this respect, there would be great force in this argument. It would be decisive of this controversy, unless controlled by other facts and circumstances in the case. But who can maintain that a line to be run "three miles south of Charles River, or of any and every part thereof," is clearly limited to three miles south of the main channel of the river. Can the body of the river with more accuracy of language be called a part of it, than its tributary streams? We call that a part which is less than the whole, when we speak of anything made up of parts. We do not call a limb a tree, but it is a part of a tree; and if a measurement is to be made from any and every part of the tree, would its branches be disregarded? When we speak of a river, we speak of it as a whole, whether we refer to it above or below a certain point; as bearing north or south, it is the river, in common language, and not a part of the river. The flowing of the water in the channel of the river gives it its name and character, and these are not changed by its length. We speak of the Upper and Lower Mississippi, but neither the one nor the other is called a part of the Mississippi. Had the Massachusetts charter been designed to limit the line to three miles south of the river, would not the language have been, "three miles south of the most southerly bend in the river?"

It would therefore seem that the charter may be construed favorable to the respondent. That the construction of the complainant is not a forced one is admitted; and the conclusion **634***] naturally *follows, that men of equal intelligence may differ in opinion as to the true meaning of the instrument. That Massachusetts more than two hundred years ago construed the charter as her counsel now construe it is clear, and the facts proved authorize the conclusion that this construction was not, for many years, opposed by Connecticut or Rhode Island, and at no time by Plymouth. But the attention of the court is drawn to the northern boundary of Massachusetts, which the charter describes as "three English miles to the northward of the Merrimack River, or to the northward of any and every part thereof"; which received the construction for which the complainant contends by the king and council.

The northern boundary line, as claimed by Massachusetts, included Maine and New Hampshire; and it appears that Mason and Gorges, who claimed under grants, some of which were prior in date to that of Massachusetts, petitioned the king against the encroachments of Massachusetts on territory covered by their grants. The answer of Massachusetts was made, and in 1677 the question was brought before the Privy Council. The title to the land claimed by the petitioners was disclaimed by Massachusetts; and the king and council held, as to the government, "that if the province of Maine lies more northerly than three English miles from the River Merrimack, the Massachusetts patent gave no right to govern there."

In 1684, the charter of Massachusetts was vacated on a *scire facias*, by the judgment of the King's Bench, and a new charter was granted in 1691, including Maine and Plymouth, but the southern boundary, as regards the present controversy, was not changed.

The northern boundary was again brought before the king and council in 1740, when the decision was, "that the northern boundary of the province of Massachusetts be a similar curve line, pursuing the course of Merrimack River at three miles distance thereof on the north side, beginning at the Atlantic Ocean, and ending at a point due north of Pawtucket Falls; and a straight line drawn from thence due west," &c. In this decision, the call of the charter was disregarded, on a ground that the tribunal deemed equitable. From this it clearly appears, that the decision was not governed by legal principles, but was an exercise of the king's prerogative; and by the same power was the former case determined, although the opinion of the judges was taken, so that neither decision constitutes a rule in other cases for the action of a court of law. In the first case, there was a conflict of jurisdiction, which the crown had power to settle, upon principles of expediency, and although the decision purports to be founded on a construction of the charter, yet other considerations may have influenced it. The decision, however, if not regarded as authority in other cases, is entitled to respectful consideration.

*To avoid the effect of the agree- [***635**
ments in 1711 and 1718, by the commissioners of both governments, in regard to the line in dispute, the complainant alleges that its commissioners, relying upon the representations of the Massachusetts commissioners, and the words of the charter, did believe that the station of Woodward and Saffrey was within three miles of Charles River; and that the true situation of that station was not known to the authorities and people of Rhode Island until about the year 1750.

The fact of a want of this knowledge, after the lapse of more than a century and a quarter, is difficult to establish. It certainly cannot be assumed against transactions which strongly imply, if they do not prove, the knowledge. If

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the Rhode Island commissioners were misled in the first agreement, as to the locality of this station, it almost surpasses belief, that, seven years afterwards, the subject of the line having been discussed in Rhode Island, and such dissatisfaction being shown by the people as to lead to a new commission, the second commission should again be misled.

It may be a matter of doubt, whether a mistake of recent occurrence, committed by so high an agency in so responsible a duty, could be corrected by a court of chancery. Except on the clearest proof of the mistake, it is certain there could be no relief. No treaty has been held void, on the ground of misapprehension of the facts, by either or both of the parties.

It appears, from the report of John Cushing, that he and others, being a committee to unite with a committee of Rhode Island, did meet at Wrentham in November, 1709, agreeably to appointment, and being shown the line run by Major-General John Leverett, in 1671, the Rhode Island committee was requested to unite with the Massachusetts committee in renewing that line. But they declined doing so, alleging that they knew the line, but could not recognize it as the true one.

It appears, from several depositions in the case, that the station of Woodward and Saffrey was well known in the neighborhood, by tradition and otherwise, by the oldest settlers at Wrentham, in the year 1750; and, from Callicott's deposition in 1672, "that, thirty years before, he was present when Woodward and Saffrey established their station, measuring three miles south from a pond out of which the principal part of the river came."

From the year 1750, repeated steps were taken by Rhode Island, in various resolutions, and by appointing commissioners, at different times, to ascertain and run the line in connection with commissioners to be appointed by Massachusetts. Commissioners from both colonies met more than once, but they could make no arrangement changing the line, as established under the agreements in 1711 and 1718. Rhode Island alleged a mistake in her commissioners in the place of beginning, as the ground of these efforts. That the colonies had a right to mark out their boundaries was not denied; **636*]** *but it was insisted, that they had no power, without the consent of the crown, to change the limits called for in their charters. These controversies were kept up, as Massachusetts alleges, by the border inhabitants, and others, for party effect. However this may be, they seem not to have subsided with the change of government. At one time, an arrangement was made by Rhode Island to take the subject before the king in council, but the appeal was not effected. In 1746, Rhode Island obtained a decision against Massachusetts, before the king in council, in regard to the boundary on the Narraganset Bay. This boundary was claimed by Massachusetts, after the old colony of Plymouth was annexed to it. Up to this time, no dissatisfaction seems to have been expressed by Rhode Island to the Woodward and Saffrey line; and it is deemed unnecessary to state its acts in detail subsequently, showing its objections, as they led to no practical result. They can be of no importance, except in so far as they may conduce to rebut the presumption of acquiescence from the lapse of time. From time to time, up to 1825, Rhode Island adopted resolutions, appointed commissioners to meet those which should be appointed by Massachusetts for the adjustment of this disputed line, but Massachusetts adhered to the agreements.

This is a general outline of this protracted and important controversy. The facts are not stated, where it did not seem to be necessary to state them; but their effect on the case has not been disregarded. It now only remains, by a general view, to come to that conclusion which is authorized and required by the well established principles of law.

The complainant's counsel rely mainly upon two grounds:

1. The misconstruction of the charter.

2. The mistake as to the true location of the Woodward and Saffrey station.

If the first be ruled against the complainant, the second must fall as a consequence. And as regards the first ground, little need be added to what has already been said. The charter is of doubtful construction, and may, without doing violence to its language, be construed in favor of or against the position of the complainant. In this view, the construction of the charter by Massachusetts, assented to by the old colony of Plymouth, many years before Connecticut or Rhode Island had a political organization, is an important fact in the case. Plymouth was interested in restricting the line to the calls of the charter, for the line constituted the common boundary between the two colonies. And as controversies had arisen respecting this boundary, and commissioners been appointed to settle it, the presumption is that the rights of both colonies were understood and respected in the establishment of the line. And the line thus established was two miles south of Woodward and Saffrey's station. When this station was afterwards agreed to as *the place from [*637 which the boundary was to be run, Massachusetts seems to have considered the change as prejudical to her rights.

If the commissioners of Plymouth had construed the charter to extend only three miles south of the most southerly bend of Charles River, they could not have assented to the boundary as run. In the absence of proof, the presumption is not to be drawn that they supposed the line established was only three miles south of the river. Connecticut, after the lapse of many years, assented to the line run from the Woodward and Saffrey station as its boundary, and so did the complainant, in the most solemn agreements, as stated. These proceedings conduce strongly to establish a fixed construction of the charter, favorable to the respondent, unless it be clearly made to appear that they were founded on mistake or fraud.

Fraud is not charged, and we have only to inquire into the alleged mistake.

From the nature of this supposed mistake, it is scarcely susceptible of proof. The words of the charter used by Massachusetts in describing Woodward and Saffrey's station, as three miles south of the southernmost part of Charles River, and the statements in certain reports to the Legislature of Rhode Island, and the late

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survey of Simeon Borden, constitute the facts relied on by the complainant as proving the mistake.

Whatever inaccuracy may be detected in the latitude or longitude of the station of Woodward and Saffrey, as given by them, or in the volume of water of the streams called for, the place being identified will control other calls. Streams are often made to change their direction by the improvements of the country, and their volume of water is increased or diminished by the same cause.

If the representations made by the commissioners of Massachusetts as to the location of Woodward and Saffrey's station, by any plausible construction, came within the charter, there was no mistake of fact on which relief can be given. To sustain the allegation of mistake, it must be made to appear not only that the station was not within the charter, but that the commissioners of Rhode Island, in 1711 and 1718, who signed the agreements, believed it to be within three miles of the river, and that they had no knowledge of a fact, as to the true location of it, which should have led them to make inquiry on the subject.

From the notoriety of Woodward and Saffrey's station in 1711, and from the fact that commissioners of Rhode Island met Massachusetts commissioners respecting this line, at Wrentham, in November, 1709, and professed to be well acquainted with Leverett's line, as appears from the report of Cushing, it is difficult to believe that they, at least, were not acquainted with Wrentham Plain, and with the station there established.

638*] *This dispute is between two sovereign and independent States. It originated in the infancy of their history, when the question in contest was of little importance. And fortunately, steps were early taken to settle it, in a mode honorable and just, and one most likely to lead to a satisfactory result. There is no objection to the joint commission in this case, as to their authority, capacity, or the fairness of their proceeding. An innocent mistake is all that is alleged against their decision. And as has been shown, this mistake is not clearly established, either in the construction of the charter, or as to the location of the Woodward and Saffrey station. But if the mistake were admitted as broadly and fully as charged in the bill, could the court give the relief asked by the complainant?

In 1754, William Murray, then Attorney-General, afterwards Lord Mansfield, was consulted by Connecticut, whether the agreement with Massachusetts respecting their common boundary, in 1713, would be set aside by a commission appointed by the crown. To which Mr. Murray replied, "I am of opinion, that in settling the above mentioned boundary, the crown will not disturb the settlement by the two provinces so long ago as 1713. I apprehend his majesty will confirm their agreement, which of itself is not binding on the crown, but neither province should be suffered to litigate such an amicable compromise of doubtful boundaries. If the matter was open, the same construction already made in the case of Merrimack River must be put upon the same words in the same charter applied to Charles River. As to Jack's Brook, it is impossible to say whether 't is part of Charles River, without a view, at least without an exact plan, and knowing how it has been reputed."

From the settlement referred to up to the time this opinion was given by Mr. Murray, forty-one years only had elapsed. And if that time was sufficient to protect that agreement, with how much greater force does the principle apply to the agreements under consideration, which are protected by the lapse of more than a century and a quarter. More than two centuries have passed since Massachusetts claimed and took possession of the territory up to the line established by Woodward and Saffrey. This possession has ever since been steadily maintained, under an assertion of right. It would be difficult to disturb a claim thus sanctioned by time, however unfounded it might have been in its origin.

The possession of the respondent was taken not only under a claim of right, but that right in the most solemn form has been admitted by the complainant and by the other colonies interested in opposing it. Forty years elapsed before a mistake was alleged, and since such allegation was made nearly a century has transpired. If in the agreements there was a departure from the strict construction of the charter, the commissioners of Rhode Island acted within their powers, for they were authorized "to agree and settle *the line [**639** between the said colonies in the best manner they can, as near agreeable to the royal charter as in honor they can compromise the same." Under this authority, can the complainant insist on setting aside the agreements, because the words of the charter were not strictly observed? It is not clear that the calls of the charter were deviated from by establishing the station of Woodward and Saffrey. But if in this respect there was a deviation, Rhode Island was not the less bound, for its commissioners were authorized to compromise the dispute. Surely this, connected with the lapse of time, must remove all doubt as to the right of the respondent under the agreements of 1711 and 1718. No human transactions are unaffected by time. Its influence is seen on all things subject to change. And this is peculiarly the case in regard to matters which rest in memory, and which consequently fade with the lapse of time, and fall with the lives of individuals. For the security of rights, whether of States or individuals, long possession under a claim of title is protected. And there is no controversy in which this great principle may be involved with greater justice and propriety than in a case of disputed boundary.

The State of Rhode Island, in pursuing this matter, has acted in good faith, and under a conviction of right. Possessing those elements, in an eminent degree, which constitute moral and intellectual power, it has perseveringly and ably submitted its case for a final decision.

The bill must be dismissed.

Mr. Chief Justice TANEY:

This case came before the court in 1838, upon a motion to dismiss the bill for want of jurisdiction; and that question was then very elaborately argued at the bar, and carefully considered by the court. Upon that argument, and upon full consideration, I came to the con-

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clusion that the court had not jurisdiction over the subject matter in controversy, and my opinion to that effect, with a very brief statement of the principles upon which it was founded, is reported in 12 Peters, 752; wherein I have intimated, that at the final hearing of the case I should examine more fully the grounds upon which jurisdiction was asserted in the opinion from which I dissented.

As the case was legally in court under this decision, it became my duty from time to time to take part in the interlocutory proceedings which were necessary to prepare and conduct the case to final hearing. But, after many unavoidable delays, it has reached that point; and we are now to determine whether Rhode Island is in this court entitled to the relief she asks for. Entertaining upon this subject the opinion heretofore expressed, and which has been confirmed by subsequent reflection, I think she is not; and that this court have no constitutional power to decide the question in **640*]** dispute *between the States, and consequently that the bill ought to be dismissed.

I concur, therefore, in the decree just pronounced, and as I do not dissent from the decree, it is unnecessary to state more fully than I have heretofore done my objection to the doctrines upon which jurisdiction was maintained.

Deciding the case, so far as I am concerned, upon this point, I of course express no opinion upon the merits of the controversy; and have not even deemed it necessary to be present at the elaborate arguments upon the evidence which have been made at the present term. For if Rhode Island had proved herself to be justly and clearly entitled to exercise sovereignty and dominion over the territory in question, and the people who inhabit it, yet my judgment must still have been, that the bill should be dismissed, upon the ground that this court, under the Constitution of the United States, have not the power to try such a question between States, or redress such a wrong, even if the wrong is proved to have been done.

S. C., 7 Pet., 651; 11 Pet., 226; 12 Pet., 657; 13 Pet., 23; 14 Pet., 210; 15 Pet., 233.

WILLIAM HARDEMAN AND D. HARDEMAN, *Plaintiffs in error*,

v.

EDWARD ANDERSON, *Defendant.*

Practice—Supersedeas.

After a case has been docketed and dismissed under the forty-third rule of court, and the plaintiff in error sues out another writ of error, this court will, when the case appears to require it, order a *supersedeas* to stay all proceedings pending the second writ of error.

The *supersedeas* is issued under the fourteenth section of the Act of the 24th of September, 1783.

THIS was a writ of error from the Circuit Court of the United States for the Southern District of Mississippi.

At the preceding term of this court, namely, on the 28th of February, 1845, *Mr. Howard*, on behalf of the defendant in error, moved for leave to file a certificate that a writ of error had been sued out, and for an order to docket and dismiss the case under the forty-third rule of court.

This order was accordingly passed, and at the close of the term, no record having been filed by the plaintiffs in error, the case was dismissed.

At the present term, *Mr. Crittenden*, counsel for the plaintiffs in error, filed the following affidavit, namely:

"UNITED STATES OF AMERICA, Southern Distrit of Missisippi.

"This day William Hardeman personally appeared before me, commissioner, &c., for taking affidavits in civil cases, &c., and made oath, that sometime during the last summer, and many months, *previous to the ses- [*641 sion of the present term of the Supreme Court of the United States, he applied to the clerk of the Circuit Court of the United States for the Southern District of Mississippi, to know what he should do in relation to the record in the case of Edward Anderson against the said Hardeman and others, on a writ of error from said Circuit Court, and the said clerk then told this affiant that he would prepare and send up to the Supreme Court of the United States the transcript of the record in said cause, and that all affiant would have to do would be to procure sureties for costs of suit in the Supreme Court. Trusting to this, and fully believing that said transcript would be duly sent up by the clerk to the Supreme Court, this affiant applied to Daniel W. Dickenson, a member of Congress, and amply solvent, to become his surety for the costs of the Supreme Court, which he promised to do. The said Dickenson was taken sick, and, as he informed affiant, had written to Joseph H. Peyton and Mr. Rayner, members of Congress, to become the sureties for costs. Affiant has been informed this day for the first time, by his counsel in the Circuit Court, that the transcript of said record had not been forwarded by the clerk as aforesaid. Affiant sends the same accompanying this affidavit, and prays that said record be filed and the case docketed, and if said suit be dismissed, that the same be set aside, the record filed, and the case docketed.

"WILL. HARDEMAN."

"Sworn to and subscribed before me on the 26th day of February, A. D. 1845.

"THOMAS SHACKELFORD.

"United States Commissioner of Affidavits, &c., for the Southern District of Mississippi."

Mr. Crittenden thereupon submitted the following motion, viz.:

"HARDEMAN ET AL. }
v. }
ANDERSON. }

"This case was depending before this court at its last term, upon writ of error operating as a *supersedeas*, and was then dismissed because the record was not filed. The cause of the failure to file is accounted for and explained in the affidavit now submitted to the court. The affidavit was received here within a few days after the close of the last term, and too late, of course, to make the intended motion to set aside the dismission. Since then, the plaintiffs

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have sued out another writ of error, and executed another bond, &c., but this not operating, *per se*, as a *supersedeas*, the plaintiffs are exposed to execution on the judgment below; they therefore move the court for a *supersedeas*," &c.

This motion was sustained by *Mr. Crittenden*, who contended that the plaintiffs in error had used all reasonable exertion to have the record brought up in time, and referred to the case of *Stockton et al.* v. *Bishop* (2 Howard, 74.)

642*] *Mr. Howard* opposed the motion. It did not appear that all reasonable exertion had been used by the party. The judgment appealed from was given in May, 1840, and the case was not docketed and dismissed until February, 1845. In the mean time, the plaintiff in error appears to have relied upon the clerk of the court below to send the record up. The effort to obtain security for costs was very faint. If such reasons are allowed to be sufficient to re-instate a case after dismissal under the rule, the rule itself may as well be abolished. Certainly, a court which passes a rule has power to relax it, whenever a proper occasion shall offer. But this motion does not apply to a case which has been dismissed. It is not to re-instate that case, but it is to call forth the power of the court in another case, upon another writ of error. The act of Congress divides appeals into two classes, giving to them very different rights. Where the party is diligent, and prosecutes his writ of error without delay, the law gives a *supersedeas*. But if he is dilatory, the law is reluctant to deprive him of the benefit of an appeal, but subjects him to the risk of an execution. Thus the rights of creditor and debtor are both protected. But in order to prevent a vexatious and lingering suit, and to supply an omission in the act, a rule of court compels the appellant to prosecute his suit under the penalty of dismissal by an application from the appellee. The appellant has his choice, either to prosecute his appeal with or without the benefit of a *supersedeas*, and the act of Congress has made a clear distinction between these two modes. But the present motion is to take a case out of one of these classes, and put it in the other.

The case of *Stockton* v. *Bishop* does not apply, because every step required by the act of Congress was taken in that case; and this court not only can, but ought to, protect cases which are in regular progress towards it, according to all forms of law.

Mr. Justice McLEAN delivered the opinion of the court, directing the following order to be passed:

WM. AND D. HARDEMAN AND WM. P. PERKINS, PLAINTIFFS IN ERROR, *v.* EDWARD ANDERSON.

On consideration of the motion made in this cause on a prior day of the present term of this court, to wit, on Friday, the 9th instant, by *Mr. Crittenden*, of counsel for the plaintiffs in error, for a writ of *supersedeas* to stay execution on the judgment below in this cause, and of the arguments of counsel thereupon had, as well against as in support of the motion, it is the opinion of this court that a *supersedeas* should be allowed, under the general powers conferred upon this court by the fourteenth section of the Act of the 24th of September, 1789, leaving the question, whether a writ of error will lie to the judgment in this case, an open one. Whereupon *it is [*643 now here considered and ordered by this court, that a writ of *supersedeas* be, and the same is hereby awarded, commanding the judges of the Circuit Court of the United States for the Southern District of Mississippi to stay any execution or proceedings on the judgment of the said Circuit Court in this case pending this writ of error, and also command the marshal of the United States for the said district that from every and all proceedings on execution or in any wise molesting the said plaintiffs in error on account of the said judgment, he entirely surcease, the same being superseded.

26th January, 1846.

Supersedeas.

UNITED STATES OF AMERICA, *sct.:*

The President of the United States of America to the Honorable the Judges of the Circuit Court of the United States for
[SEAL.] the Southern District of Mississippi, and to the Marshal of the United States for the said district, greeting:

Whereas, lately, in the said Circuit Court before you, the said judges, or some of you, in a cause lately pending in said court between Edward Anderson, plaintiff, and William Hardeman and D. Hardeman, defendants, a judgment was rendered by the said Circuit Court, at the May Term, 1839, of said court, in favor of the said plaintiff, and against the said defendants, for the sum of $8,293.45, with interest thereon at the rate of eight per centum per annum, together with costs and charges of suit, on which judgment an execution of *fieri facias* issued, and was levied by the marshal of said district on certain property of said defendants, which property was left in the hands of the defendants upon their executing a forthcoming bond, with one W. P. Perkins as security, and which forthcoming bond was returned by the said marshal to the said Circuit Court at the next November Term thereof, A. D. 1839, "Forfeited," having thereby, according to the laws of Mississippi, the force and effect of a judgment against the said defendants and the said security for the aforesaid debt, interest, and costs, and upon which last mentioned judgment an execution of *fieri facias* was issued against the goods and chattels, lands and tenements, of the said William Hardeman, D. Hardeman, and W. P. Perkins, for the amount of the said judgment, interest, and costs, as aforesaid, as also for the sum of $133.81 additional costs subsequently accruing; upon which execution the aforesaid marshal returned that he had received thereon "$9,125 in Union money, or post notes of the Union Bank," which said return of the marshal last aforesaid the said Circuit Court, at a subsequent term, to wit, on the 20th of May, A. D. 1840, set aside, and awarded an *alias fieri facias* on the judgment last aforesaid. Whereupon, the said Wm.

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644*] Hardeman, *D. Hardeman, and W. P. Perkins sued out a writ of error in due form of law and in proper time, and filed their bond in error, with sufficient security approved by one of the judges of the said Circuit Court, so as to operate, *per se*, as a *supersedeas*, and which said writ of error was abated and quashed by the order of this court on the 28th day of February, A. D. 1845, by virtue of the forty-third rule of court, in consequence of the failure of the aforesaid plaintiffs in error to file a transcript of the record of the case with the clerk of this court; and to have their case docketed, in compliance with the rules of court. Whereupon, the aforesaid plaintiffs in error sued out another writ of error in due form of law, filed their bond in error in a sum double the amount of the aforesaid judgment, with sufficient security approved by one of the judges of the aforesaid Circuit Court, and a citation having been regularly taken out, served upon the defendant in error, and duly returned, as by the inspection of the transcript of the record of the said Circuit Court, which was brought into the Supreme Court of the United States by virtue of said writ of error, agreeably to the act of Congress in such case made and provided, fully and at large appears. And whereas, in the present term of December, in the year of our Lord eighteen hundred and forty-five, it is made to appear, on affidavit to the said Supreme Court of the United States, that the failure of the aforesaid plaintiffs in error to file the transcript of the record and docketed the writ of error first aforesaid mentioned, and which operated, *per se*, as a *supersedeas*, was not owing to any neglect or fault on their part, but wholly attributable to the neglect of the clerk of the said Circuit Court to make out in due time, and as requested by the said plaintiffs in error, a transcript of the record, as alleged in said affidavit, and that in consequence thereof they are exposed to an execution on the aforesaid judgment. It is thereupon now here ordered by this court, that a writ of *supersedeas* be, and the same is hereby awarded, to be directed to the aforesaid marshal, commanding and enjoining him and his deputies to stay any and all proceedings upon any execution which may have been issued on the aforesaid judgment of the said Circuit Court in said case, and which has or may come to his hands, and that he return any such execution with the writ of *supersedeas* to the said Circuit Court, and that the judges of the said Circuit Court cause any such writ of execution to be stayed, and to stay any execution or further proceedings of every kind and character on the judgment of the said Circuit Court in this case, pending the aforesaid writ of error in this court.

You, therefore, the Marshal of the United States for the Southern District of Mississippi, are hereby commanded, that from every and all proceedings on any execution on the aforesaid judgment, or in any wise molesting the said defendants on the account aforesaid, you entirely surcease, as being superseded, and that you do 645*] *forthwith return any such execution in your hands, together with this *supersedeas*, to the said Circuit Court, as you will answer the contrary at your peril. And you, the judges of the said Circuit Court, are hereby commanded to stay any execution which may have issued as aforesaid, and to stay any execution or further proceedings on the aforesaid judgment of the said Circuit Court in this case, pending the writ of error last aforesaid in this court.

Witness the Honorable ROGER B. TANEY, Chief Justice of said Supreme Court, this 27th day of January, in the year of our Lord one thousand eight hundred and forty-six.

WM. THOS. CARROLL, Clerk of the Supreme Court of the United States.

Cited—11 How., 296; 16 How., 148; 5 Wall., 190; 10 Wall., 292; 12 Wall., 100.

ROBERT HOLLIDAY ET AL.,

v.

JOSEPH N. BATSON ET AL.

In order to entitle a party to have a case docketed and dismissed, under the forty-third rule of court, the certificate of the clerk of the court below must set forth an accurate titling of the case.

MR. BARTON having filed and read in open court a certificate in writing, in the following words and figures, to wit:

"*Clerk's Office, Circuit Court, United States, 5th Circuit, and Eastern District of Louisiana.*

"ROBERT HOLLIDAY ET AL. *v.* JOSEPH N. BATSON ET AL.

"In the above entitled cause, I certify that a final judgment was rendered in the Circuit Court of the United States for the 9th (now 5th) Circuit and Eastern District of Louisiana, on the twentieth day of January, eighteen hundred and forty-one, and that a writ of error was taken by the defendants, returnable to the January Term, 1842, of the Supreme Court of the United States.

"Witness my hand, and the seal of said court, at New Orleans, this 4th February, 1845,

[SEAL.] "DUNCAN N. HENNEN, Clerk."

and moved the court to docket and dismiss the said writ of error, under the forty-third rule of court. It is thereupon now here considered and ordered by the court, that the said motion be, and the same is hereby overruled, the titling of the case in the said certificate being too vague and uncertain.

Per *Mr. Chief Justice* TANEY.

The above motion was made and overruled at the preceding *term. At the present [*646 term, a certificate was filed, with a proper titling, and, on motion of *Mr. Eustis*, the case was docketed and dismissed.

Cited—12 How., 22; 11 Wall., 87.

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JAMES G. WILSON, *Plaintiff*,

v.

LEWIS ROUSSEAU ET AL. *Defendants.*

Patents—Act of 1836 authorizes extension of letters patent to administrator of deceased patentee who had, in his lifetime, disposed of his entire interest—assignees entitled to continue to use article—not to sell—covenants for improvements—Commissioner of Patents, powers of—surrender for defects—re-issue.

The eighteenth section of the Patent Act of 1836 authorized the extension of a patent, on the application of the executor or administrator of a deceased patentee.

Such an extension does not inure to the benefit of assignees under the original patent, but to the benefit of the administrator (when granted to an administrator), in his capacity as such. But those assignees who were in the use of the patented machine at the time of the renewal have still a right to use it.

The extension could be applied for and obtained by the administrator, although the original patentee had, in his lifetime, disposed of all his interest in the then existing patent. Such sale did not carry anything beyond the term of the original patent.

A covenant by the patentee, made prior to the law authorizing extensions, that the covenantee should have the benefit of any improvement in the machinery, or alteration or renewal of the patent, did not include the extension by an administrator, under the Act of 1836. It must be construed to include only renewals obtained upon the surrender of a patent on account of a defective specification. Parties to contracts look to established and general laws, and not to special acts of Congress.

A plaintiff, therefore, who claims under an assignment from the administrator, can maintain a suit against a person who claims under the covenant.

An assignee of an exclusive right to use two machines within a particular district can maintain an action for an infringement of the patent within that district, even against the patentee.

In the case of Woodworth's planing machine, the patent granted to the administrator was founded upon a sufficient specification and proper drawings, and is valid.

The decision of the Board of Commissioners, to whom the question of renewal is referred, by the Act of 1836, is not conclusive upon the question of their jurisdiction to act in a given case.

The commissioner of patents can lawfully receive a surrender of letters patent for a defective specification, and issue new letters patent upon an amended specification, after the expiration of the term for which the original patent was granted and pending the existence of an extended term of seven years. Such surrender and renewal may be made at any time during such extended term.

THIS case, and the three subsequent ones, namely, *Wilson* v. *Turner, Simpson et al.* v. *Wilson*, and *Woodworth & Bunn* v. *Wilson*, were argued together, being known as the patent cases.[1] Many of the points of law involved were common to them all, and those which were fully argued in the first case which came up were but incidentally touched in the discussion of the subsequent cases. They all *related to the rights which were de- [*647 rived under a patent for a plaining machine, taken out by Woodworth, and renewed and extended by his administrators. The validity of the original patent was questioned only in one case, namely, that which came from Kentucky, which was the last argued. There were four cases in all, namely, one from New York, one from Maryland, one from Louisiana, and one from Kentucky. In the course of the argument, counsel referred indiscriminately to the four records, as some documents were in one which were not to be found in another.

The cases will be taken up and reported *seriatim*, and the documents which are cited in the first will not be repeated in the others.

The first in order was the case from New York, the titling of which is given at the head of this report.

It came up from the Circuit Court of the United States for the Northern District of New York, on a certificate of division in opinion.

On the 26th of November, 1828, William Woodworth presented the following petition:

"To the Honorable Henry Clay, Secretary of State of the United States.

"The petition of William Woodworth, of the city of Hudson, in the County of Columbia and State of New York, respectfully represents:

"That your petitioner has invented a new and improved method of planing, tonguing, grooving, and cutting into mouldings, or either, plank, boards, or any other material, and for reducing the same to an equal width and thickness; and also for facing and dressing brick, and cutting mouldings on, or facing, metallic, mineral, or other substances, not known or used before the application by him, the advantages of which he is desirous of securing to himself and his legal representatives. He therefore prays that letters patent of the United

1.—The reporter intended to publish the arguments of counsel in these patent cases *in extenso*, and with that view applied for and obtained from many of the counsel their arguments prepared by themselves; but circumstances beyond his control prevent him from executing this purpose. He returns his thanks to those gentlemen who so kindly furnished him with their arguments, and regrets that his original design has been frustrated.

NOTE.—*Patents, when assignee may sue for infringement when patentee must sue; when they must join in suing.*

An assignee of an invention, under an assignment made before patent issued, may maintain an action in his own name for an infringement. Gayler v. Wilder, 10 How., 477.

An exclusive right of action exists in favor of a sole assignee of a patent only in two cases, namely: where he acquires by assignment the whole interest in the patent, or, by a grant or conveyance, the whole interest within some particular district or territory. Suydam v. Day, 2 Blatchf., 20; Tyler v. Tuel, 6 Cranch, 324; Blanchard v. Eldridge, 1 Wall., Jun., C. C., 337; Hill v. Whitcomb, 5 Pat. Off. Gaz., 430.

The assignees of an exclusive right in a patent are the proper persons to maintain an action for a violation of such right. Washburn v. Gould, 3 Story C. C., 122; 1 West. Law J., 465; 7 Law Rep., 276.

Assignees of a patent, though their title accrues by several deeds, may all join as owners of the title in an action to recover damages for an infringement of the patent. Stein v. Goddard, 1 McAll., 82.

Under the patent laws of the United States an assignee of a patent must be regarded as acquiring his title to it with a right of action in his own name only by force of the statute. Suydam v. Day, 2 Blatchf., 20.

The patentee is entitled to recover for a violation of his patent, no matter what private agreement subsists between him and any other one, as to his interest in his invention, unless he has made a legal assignment and transfer of his interest in the invention. Park v. Little, 3 Wash. C. C., 196.

An assignor who retains an interest in a patent may be joined as a party plaintiff with an assignee of the exclusive interest in a certain territory in which such assignor has no interest, in a bill for an injunction to restrain the violation of the patent

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States may be issued, granting unto your petitioner, his heirs, administrators, or assigns, the full and exclusive right of making, constructing, using, and vending to others to be used, his aforesaid new and improved method, agreeably to the acts of Congress in such case made and provided; your petitioner having paid thirty dollars into the Treasury of the United States, and complied with the other provisions of the said acts.

"WILLIAM WOODWORTH.

"November 26th, 1828."

On the 4th of December, 1828, Woodworth executed to James Strong the following assignment:

"Whereas I, William Woodworth, of the city of Hudson, in the State of New York, heretofore, to wit, on the 13th day of Septem-
648* ber, *1828, assigned and transferred, for a legal and valuable consideration, the one equal half of all my right, title, claim, and interest in and to the invention or improvement mentioned and intended in the foregoing petition, oath, and specification, to James Strong, of the city of Hudson.

"And whereas, also, the subjoined assignment is intended only to convey and assign the same interest transferred and assigned in the assignment of the 13th of September above mentioned, without any prejudice to my one equal half part of said invention or improvement, which is expressly reserved to myself and my legal representatives.

"Now, know all men, that I, the said William Woodworth, for and in consideration of the sum of ten dollars, and other valuable considerations me moving, have, and do hereby, for myself and legal representatives, give, assign, transfer, and assure to the said James Strong and his legal representatives the one full and equal half of all my right, title, interest, and claim in and to my new and improved method of planing, tonguing, grooving, and cutting into mouldings, either plank, boards, or any other material, and for reducing the same to an equal width and thickness, and also for facing and dressing brick, and cutting mouldings on, or facing, metallic, mineral, or other substances, mentioned and intended to be secured by the foregoing petition, oath, and specification, together with all the privileges and immunities, as fully and absolutely as I do or shall enjoy or possess the same; to have and to hold and enjoy the same, to the said James Strong, and his legal representatives, do or may.

"In witness whereof, I have hereunto set my hand and seal, the 4th day of December, 1828. WILLIAM WOODWORTH. [SEAL.]

"Witnesses:

"HENRY EVERTS,

"DAVID GLEASON."

On the 6th of December, 1828, Woodworth took the following oath:

"State of New York, Rensselaer County, ss.:

"On this 6th day of December, A. D. 1828, before the subscriber, a justice of the peace in and for the County of Rensselaer aforesaid, personally appeared the aforesaid William Woodworth, and made solemn oath, according to law, that he verily believes himself to be the true and original inventor of the new and improved method, above described and specified, for planing, tonguing, grooving, and cutting into mouldings, or either, plank, boards, or any other material, and for reducing the same to an equal width and thickness; and also for facing and dressing brick, *and cuttting [*649 mouldings on, or facing, metallic, mineral, or other substances; and that he is a citizen of the United States.

"JOHN THOMAS, Justice of the Peace."

The above documents appear to be recorded in the third volume of Transfers of Patent Rights, pages 155, 156, in the patent office of the United States.

On the 27th of December, 1828, a patent was issued as follows:

"*Letters Patent to W. Woodworth.*

"The United States of America to all to whom these letters patent shall come:

"Whereas William Woodworth, a citizen of the United States, hath alleged that he has invented a new and useful improvement in the method of planing, tonguing, grooving, and cutting into mouldings, or either, plank, boards, or any other material, and for reducing the same to an equal width and thickness; and also for facing and dressing brick, and cutting mouldings on, or facing, metallic, mineral, or other substances, which improvements, he states, have not been known or used before his application; hath made oath that he does verily believe that he is the true inventer or discoverer of the said improvement; hath paid into the Treasury of the United States the sum of thirty dollars, delivered a receipt for the same, and presented a petition to the Secretary of State, signifying a desire of obtaining an exclusive property in the said improvements, and praying that a patent may be granted for that purpose. These are, therefore, to grant, according

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in that territory. Woodworth v. Wilson, 4 How., 712; Brooks v. Bicknell, 3 McLean, 250; 1 West Law J., 150; Whittemore v. Cutter, 1 Gall., 429.

A patentee may reserve to himself the right to prosecute for piracies within the particular district where the right of use is conveyed. But if he afterwards assign all his right to such district, the owner of the patent may sue. It would be unreasonable under the circumstances to call upon the patentee to prosecute. Bicknell v. Tood, 5 McLean, 236.

A patentee may maintain a suit at law upon a patent, in his own name, although he is under a contract to assign it to others, if it has not been executed. Wheeler v. McCormick, 2 Pat. Off. Gaz., 692.

But equity regards that as already done which the patentee has agreed to do, and requires the proposed assignees to be made parties to a bill in chancery brought against infringers. Wheeler v. McCormick, 2 Pat. Off. Gaz., 692.

If the other parties to such contract release to the patentee all their interest in the patent, the latter may sue in his own name for subsequent but not prior infringements. And if patentee sells and assigns the patents he cannot recover damages for subsequent infringements. *Ibid.*

The assignee of an exclusive right to use but not to make the thing patented, within specified territory, may maintain an action against an infringer in his own name. Chambers v. Smith, 5 Fish. Pat. Cas., 12.

One who is only a licensee cannot sue in equity in his own name, but must join with him the owner of the legal title as plaintiff. Nelson v. McMann, 16 Pat. Off. Gaz., 761.

No person who is not the patentee or such an assignee or grantee as the statute points out, can bring a suit for profits or infringement. Gordon v. Anthony, 16 Pat. Off. Gaz., 1125.

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to law, to the said William Woodworth, his heirs, administrators, or assigns, for the term of fourteen years from the 27th of December, 1828, the full and exclusive right and liberty of making, constructing, using, and vending to others to be used, the said improvement, a description whereof is given in the words of the said William Woodworth himself, in the schedule hereto annexed, and is made a part of these presents.

"In testimony whereof, I have caused these letters to be made patent, and the seal of the United States to be hereunto affixed. Given under my hand, at the [L. S.] city of Washington, this 27th day of December, in the year of our Lord 1828, and of the independence of the United States of America the fifty-third.

(Signed) "J. Q. ADAMS.

"By the President.

(Signed) "H. CLAY, Secretary of State."

Certificate of Wm. Wirt, Attorney-General of the United States.

"City of Washington, to wit:

"I do hereby certify that the foregoing let-**650***] ters patent were delivered *to me on the 27th day of December, in the year of our Lord 1828, to be examined; that I have examined the same, and find them conformable to law; and I do hereby return the same to the Secretary of State, within fifteen days from the date aforesaid, to wit, on this 27th day of December, in the year aforesaid.

"WM. WIRT,

"Attorney-General of the United States."

Schedule.

"The schedule referred to in these letters patent, and making part of the same, containing a description, in the words of the said William Woodworth himself, of his improvement in the method of planing, tonguing, grooving, and cutting into mouldings, or either, plank, boards, or any other material, and for reducing the same to an equal width and thickness; and also for facing and dressing brick, and cutting mouldings on, or facing, metallic, mineral, or other substances.

"The plank, boards, or other material, being reduced to a width by circular saws or friction-wheels, as the case may be, is then placed on a carriage, resting on a platform, with a rotary cutting-wheel in the centre, either horizontal or vertical. The heads or circular plates, fixed to an axis, may have one of the heads movable, to accommodate any length of knife required. The knife fitted to the head with screws or bolts, or the knives or cutters for moulding fitted by screws or bolts to logs, connecting the heads of the cylinder, and forming with the edges of the knives or cutters a cylinder. The knives may be placed in a line with the axis of the cylinder, or diagonally. The plank, or other material resting on the carriage, may be set so as to reduce it to any thickness required; and the carriage, moving by a rack and pinion, or rollers, or any lateral motion, to the edge of the knives or cutters on the periphery of the cylinder or wheel, reduces it to any given thickness. After passing the planing and reducing-wheel, it then approaches, if required, two revolving cutter-wheels, one for cutting the groove, and the other for cutting the rabbets that form the tongue; one wheel is placed directly over the other, and the lateral motion moving the plank, or other material, between the grooving and rabbeting wheels, so that one edge has a groove cut the whole length, and the other edge a rabbet cut on each side, leaving a tongue to match the groove. The grooving-wheel is a circular plate fixed on an axis, with a number of cutters attached to it to project beyond the periphery of the plate, so that when put in motion it will perform a deep cut or groove, parallel with the face of the plank or other material. The rabbeting-wheel, also of similar form, having a number of cutters on each side of the plate, projecting like those on the grooving-wheel, cuts the rabbet on the side of the edge of the plank, and leaves the tongue or match for the *groove. By placing the [***651** planing-wheel axis and cutter-knives vertical, the same wheel will plane two planks or other material in the same time of one, by moving the plank or other material opposite ways, and parallel with each other against the periphery of the planing or moulding-wheel. The groove and tongue may be cut in the plank or other material at the same time, by adding a grooving and rabbeting-wheel.

"Said William Woodworth does not claim the invention of circular saws or cutter-wheels, knowing they have long been in use; but he claims as his invention the improvement and application of cutter or planing-wheels to planing boards, plank, timber, or other material; also his improved method of cutters for grooving and tonguing, and cutting mouldings on wood, stone, iron, metal, or other material, and also for facing and dressing brick; as all the wheels may be used single and separately for moulding, or any other purpose before indicated. He also claims, as his improved method, the application of circular saws for reducing floor-plank, and other materials, to a width.

"Dated Troy, December 4th, 1828.

"WILLIAM WOODWORTH.

"HENRY EVERTS, } Witnesses."
"D. S. GLEASON, }

On the 25th of April, 1829, one Uri Emmons obtained a patent for a new and useful improvement in the mode of planing floor-plank, and grooving, and tonguing, and straightening the edges of the same, planing boards, straightening and planing square timber, &c., by machinery, at one operation, called the cylindrical planing machine. The said letters patent, and specification attached thereto, being in the following words and figures:

Uri Emmons's Patent.

"United States of America to all to whom these letters patent shall come:

"Whereas, Uri Emmons, a citizen of the United States, hath alleged that he has invented a new and useful improvement in the mode of planing floor-plank and grooving and tonguing the edges of the same, planing boards, straightening and planing square timber, &c., by machinery, at one operation, called 'the cylindrical planing machine,' which improvement he states has not been known or used before his application, hath made oath that he does verily believe that he is

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the true inventor or discoverer of the said improvement, hath paid into the Treasury of the United States the sum of thirty dollars, delivered a receipt for the same, and presented a petition to the Secretary of State, signifying a desire of obtaining an exclusive property in the said improvement, and praying that a patent may be granted for that purpose These are therefore to grant, according to law, to the **652***] said Uri Emmons, his *heirs, administrators or assigns, for the term of fourteen years from the twenty-fifth day of April, one thousand eight hundred and twenty-nine, the full and exclusive right and liberty of making, constructing, using, and vending to others to be used, the said improvement, a description whereof is given, in the words of the said Uri Emmons himself, in schedule hereto annexed, and is made a part of these presents.

"In testimony whereof, I have caused these letters to be made patent, and the seal of the United States to be hereunto affixed.

"Given under my hand, at the city of Washington, this twenty-fifth day or April, in the year of our Lord one thousand eight hundred and twenty-nine, and of the independence of the United States of America the fifty-third.

[SEAL.] (Signed) "ANDREW JACKSON.

"By the President.

(Signed) "M. VAN BUREN."

"City of Washington, to wit:

"I do hereby certify that the foregoing letters patent were delivered to me on the twenty-fifth day of April, in the year of our Lord one thousand eight hundred and twenty-nine, to be examined; that I have examined the same, and find them conformable to law; and I do hereby return the same to the Secretary of State, within fifteen days.from the date aforesaid, to wit, on the twenty-fifth day of April, in the year aforesaid.

(Signed) "J. MACPHERSON BERRIEN,

"Attorney-General of the United States."

Schedule.

"The schedule referred to in these letters patent, and making part of the same, containing a description, in the words of the said Uri Emmons himself, of his improvement in the mode of planing floor-plank, and grooving, and tonguing, and straightening the edges of the same, planing boards, straightening and planing square timber, &c., by machinery, at one operation, called the cylindrical planing machine.

"The machinery for the improvement consists—

"1st. Of a frame of wood or metal.

"2d. Of the gear and fixtures combined and connected together for the above named operation, the principle of which consists in running the plank, boards, or timber over, under, or at the sides of a cylinder of wood or metal, on which knives are placed, straight or spiral, with their edges exactly corresponding with each other, having from two to twelve knives or edges; also burrs or saws, similar to those used for cutting teeth in brass wheels, to groove and tongue the edge of the boards or plank as they pass through between rollers, or on a carriage, by the surface of the cylinder. **653***] *The shape, form, and construction of the above principle may be varied in shape and position, dimensions, &c., still the same in substance—the same principle producing the same effect. I have, by experimental operation, found that the following mode in form is the best:

"1st. A frame composed of two pieces of timber, from twelve to eighteen feet long, about six by ten inches broad, placed about fifteen inches apart, framed together with four girths, one at each end, and at equal distances from the center, and flush with the under side. This frame is supported by posts of a proper length, framed into the under side of the above pieces of timber, and braced so as to be of sufficient strength to maintain the operative posts. There is placed a roller in the center, of metal or hard wood, across the frame, the surface of the roller being even with the surface of the frame; directly above, and parallel with this roller, is hung the cylinder, with two or four spiral edges or knives, six to ten inches diameter, and hung on a cast steel arbor, resting in movable boxes attached to the sides of the frame, so as to set the cylinder up and down from the roller, to give the thickness of the timber to be planed. On each side of the cylinder is placed a pair of feeding-rollers, of hard wood or metal, the under one of each pair being level with the center one. The upper ones are hung in boxes, which are pressed down with springs or weights, so that when the timber comes between them, they will hug and carry it through. These rollers are connected and turned by wheels, at a velocity of about twelve feet surface of the roller per minute. The cylinder with two edges to make about two thousand five hundred revolutions per minute, cutting five thousand strokes every twelve feet; this can be varied according to the number of edges, power, and velocity of the different parts. The power is attached to the cylinder by a bolt running on a pulley, on the outward end of the cylinder shaft. Each way from the feeding-rollers is placed rollers about two feet apart for the timber to rest on while running through. On one side of the frame is fastened a straight edge, to serve as a guide, lined with metal; on the other side, rollers are placed in a piece of timber, which is pressed up to the plank or board to keep it close to the guide or straight edge by a spring. The grooving and tonguing is done by burrs or circular cutters similar to a saw; these burrs are hung on perpendicular spindles, the arbors of which rest in boxes attached to the inward side of the frame, a burr on one side to cut the groove, and on the other is placed two burrs, just as far apart as the thickness of the above one, for cutting the groove. At or near one end of the frame is hung a shaft, with a drum or roller, from which belts pass over to pulleys on each spindle of the burrs or circular cutters, which must have about the same velocity of the cylinder. These burrs are placed on one side of the cylinder, opposite to each *other, so as to cut the tongue to [*654 match the groove; on the other side of the cylinder is an arbor parallel with the cylinder, on which is placed circular cutters for planing the edges of the board or plank as they pass through. The cutter on the side next to the guide is stationary on the arbor; the opposite one is movable in the arbor, but fastened with screws to set it for different widths. A belt

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runs from a pulley on the end of the arbor, outside the frame, to the said drum, as also the same from the cylinder, each having about the same motion. The feeding-rollers are put in motion by a belt from the slow part of the driving power. I have also put in operation a carriage for feeding, but rollers save the time of running the carriage back.

"Now, what I, the said Uri Emmons, consider and claim as my improvement, and for which I solicit a patent, is as follows, namely:

"1st. The principle of planing boards and plank with a rotary motion, with knives or edges on a cylinder, placed upon the same, straight or spiral, as before described, which I put in operation at Syracuse, in the County of Onondaga, in the State of New York, in the early part of the year 1824.

"2d. The burrs for grooving and tonguing, in contradistinction from the mode used by William Woodworth, he using the duckbill cutters.

"3d. The feeding, by running the timber through on a carriage, or between feeding-rollers, guided by a straight edge, as before described.

"In testimony that the aforegoing is a true specification of my said improvement, as before described, I have herunto set my hand and seal, the eighth day of April, in the year of our Lord one thousand eight hundred and twenty-nine. (Signed) URI EMMONS.

"Witnesses: THOS. THOMAS.
"SILAS HATHAWAY."

On the 16th of May, 1829, the said Emmons sold his entire interest in the last mentioned patent to Daniel H. Toogood, Daniel Halstead, and William Tyack, by the following instrument:

Deed from Emmons to Toogood, Halstead, and Tyack.

"Whereas Uri Emmons, of the State of New York, machinist, has received letters patent of the United States of America, dated April 25th, one thousand eight hundred and twenty-nine, [for] the full and exclusive right and liberty of making, constructing, using, and vending to others to be used, a new and useful improvement in the mode of planing floor-plank, and grooving and tonguing, and straightening the edges of the same, planing boards, straightening and planing square timber, &c., by machinery, at one operation, called the cylindrical planing machine.

655*] *"Now, know all men by these presents, that I, Uri Emmons, of the city of New York, in consideration of five dollars, to to me in hand paid by Daniel H. Toogood, Daniel Halstead, and William Tyack, all of said city of New York, who fully viewed and considered the said improvement, and the said patent and specifications therein contained, have granted, sold, and conveyed, and by these presents do grant, sell, and convey, to the said Daniel H. Toogood, Daniel Halstead, and William Tyack, their heirs, executors, administrators and assigns, the full and exclusive right and liberty derived from the said patent, of making, using, and vending to others to be made, used, and sold, the said improvement, within and throughout the United States of America. To have and to hold and enjoy all the privileges and benefits which may in any way arise from the said improvement by virtue of said letters patent. And I do hereby empower the said Daniel H. Toogood, Daniel Halstead, and William Tyack, their heirs, executors, administrators and assigns, to commence and prosecute to final judgment and execution, at their own cost, any suit or suits against any person or persons who shall make, use, or vend the said improvement, contrary to the intent of the said letters patent and law in such case made and provided, and to receive, for their own benefit, the avails thereof, in such manner as I might do.

"In witness thereof, I have hereunto set my hand and seal, this sixteenth day of May, in the year of our Lord one thousand eight hundred and twenty-nine.

"URI EMMONS. [SEAL.]

"Witnesses: THOMAS AP THOMAS.
"ALEX. DEDDER."

"City and County of New York, *ss.:*

"Be it remembered, that on the sixteenth day of May, in the year of our Lord one thousand eight hundred and twenty-nine, before me, personally appeared Uri Emmons, known to me to be the person described in, and who executed, the within deed, and acknowledged that he executed the same for the purposes therein mentioned; and there being no material alterations, erasures, or interlineations, I allow the same to be recorded.

"THOMAS THOMAS, Commissioner, &c."

On the 28th of November, 1829, the following mutual deed of assignment was executed between Woodworth and Strong, on the one part, and Toogood, Halstead, Tyack, and Emmons, on the other part, by which Woodworth and Strong convey to Toogood, Halstead, and Tyack all their interest in the patent of December 27th, 1828, in the following places, namely: In the city and County of Albany, in the State of New York; in the State of Maryland, except the western part which lies west of the Blue Ridge; in Tennessee, Alabama, South Carolina, Georgia, the Floridas, *Louisi- [*656 ana, Missouri, and the territory west of the Mississippi; and Toogood, Halstead, Tyack, and Emmons, conveyed to Strong and Woodworth all their interest in Emmons's patent of 25th April, 1829, for the rest and residue of the United States; by which mutual deed of assignment the parties agreed, that any improvement in the machinery, or alteration, or renewal of either patent, such improvement, alteration, or renewal should accrue to the benefit of the respective parties in interest, and might be applied and used within their respective districts.

Mutual Deed between Woodworth, Strong, Toogood, Halstead, Tyack, and Emmons.

"Know all men by these presents, that William Woodworth, now of the city of New York, the patentee of an improved method of planing, tonguing, grooving, &c., &c., plank, boards, &c., by letters patent from the United States, dated December 29th, 1828, and James Strong, of the city of Hudson, in the State of New York, the assignee of one equal half of the rights and interests secured by the aforesaid letters patent, of the one part, and Uri Emmons, of the city of New York, the patentee of an improvement in the mode of planing floor-

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plank, and grooving, tonguing, and straightening the edges of the same, &c., by letters patent from the United States, dated April 25th, 1829, and Daniel H. Toogood, Daniel Halstead, and William Tyack, of the city of New York, the assignees, by deed dated the 16th day of May, 1829, of all the rights and interest secured by the last aforesaid patent to said Emmons, of the other part, in consideration of the following covenants and agreements, do hereby covenant and agree as follows:

"First. The said Woodworth and Strong, and their assigns, have, and hereby do assign to the said Toogood, Halstead, and Tyack, and their assigns, all their right and interest in the aforesaid patent to William Woodworth, to be sold and used, and the plank or other materials prepared thereby to be vended and used, in the following places, namely: In the city and County of Albany, in the State of New York; in the State of Maryland, except the western part thereof which lies west of the Blue Ridge; in Tennessee, Mississippi, Alabama, South Carolina, Georgia, the Floridas, Louisiana, and the territory west of the River Mississippi, and not in any other State or place within the limits of the United States or the territories thereof. To have and to hold the rights and privileges hereby granted to them and their assigns for and during the term of fourteen years from the date of the patent; and they are also authorized to prosecute, at their own costs and charges, any violation of the said patent, in the same manner as the patentee, Woodworth, might lawfully do.

"Secondly. The said Emmons, Toogood, Hal-
657* stead, and Tyack, *in consideration aforesaid, have, and hereby do covenant and agree to assign, and do assign, for themselves and assigns, to the said Woodworth and Strong and their assigns, all their right and interest in the aforesaid patent granted to the said Uri Emmons, to be sold and used, and the plank or other material prepared thereby to be vended and used, in all and singular the rest and residue of the United States, and the territories thereof, that is to say, in all places other than in those especially assigned to the said Toogood, Halstead, and Tyack, as aforesaid. To have and to hold the said rights and privileges hereby granted to them and their assigns for and during the term of fourteen years from the date of the said letters patent to the said Uri Emmons; and they are also authorized to prosecute, at their own costs and charges, any violation of the said patent, in the same manner as the patentee, Uri Emmons, might lawfully do.

"Thirdly. And the two parties further agree, that any improvement in the machinery, or alteration, or renewal of either patent, such alteration, improvement, or renewal shall accrue to the benefit of the respective parties in interest, and may be applied and used within their respective districts as hereinbefore designated.

"Witness our hands and seals, at the city of New York, the 28th of November, 1829.

"WILLIAM WOODWORTH.	[SEAL.]
"JAMES STRONG.	[SEAL.]
"WILLIAM TYACK.	[SEAL.]
"D. H. TOOGOOD.	[SEAL.]
"DANIEL HALSTEAD.	[SEAL.]
"URI EMMONS.	[SEAL.]

"Sealed and delivered, in presence of
"THOMAS AP THOMAS,
"Witness to the signing of Toogood, Tyack, Halstead, and Emmons."

Under this mutual assignment, the respective parties and their assignees would possess the following rights, namely: if they claimed under Woodworth's patent, to use the same for fourteen years from the 29th of December, 1828, that is to say, until the 29th of December, 1842; and if they claimed under Emmons's patent, to use the same for fourteen years from the 25th of April, 1829, that is to say, until the 25th of April, 1843.

On one or the other of these days, therefore, if things had remained in the same condition, all rights either in the patentees or their assignees would have ceased, as far as respected an exclusive use of the thing patented.

In 1836, Congress passed an act from which the following is an extract, and the construction of which was the chief controversy (Act approved 4th July, 1836, ch. 357, 5 Litt. & Brown's ed., 117, *sec. 18): "And be it [*658 further enacted, that whenever any patentee of an invention or discovery shall desire an extension of his patent beyond the term of its limitation, he may make application therefor, in writing, to the Commissioner of the Patent Office, setting forth the grounds thereof; and the commissioner shall, on the applicant's paying the sum of forty dollars to the credit of the treasury, as in the case of an original application for a patent, cause to be published in one or more of the principal newspapers in the city of Washington, and in such other paper or papers as he may deem proper, published in the section of country most interested adversely to the extension of the patent, a notice of such application, and of the time and place when and where the same will be considered, that any person may appear and show cause why the extension should not be granted. And the Secretary of State, the Commissioner of the Patent Office, and the Solicitor of the Treasury shall constitute a board to hear and decide upon the evidence produced before them, both for and against the extension, and shall sit for that purpose at the time and place designated in the published notice thereof. The patentee shall furnish to the said board a statement in writing, under oath, of the ascertained value of the invention, and of his receipts and expenditures, sufficiently in detail to exhibit a true and faithful account of loss and profit in any manner accruing to him from and by reason of said invention. And if, upon a hearing of the matter, it shall appear to the full and entire satisfaction of said board, having due regard to the public interest therein, that it is just and proper that the term of the patent should be extended, by reason of the patentee, without neglect or fault upon his part, having failed to obtain, from the use and sale of his invention, a reasonable remuneration for the time, ingenuity, and expense bestowed upon the same, and the introduction thereof into use, it shall be the duty of the commissioner to renew and extend the patent, by making a certificate thereon of such extension, for the term of seven years from and after the expiration of the term; which certificate, with a certificate of said board of their

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judgment and opinion as aforesaid, shall be entered on record in the patent office; and thereupon the said patent shall have the same effect in law as though it had been originally granted for the term of twenty-one years. And the benefit of such renewal shall extend to assignees and grantees of the right to use the thing patented, to the extent of their respective interest therein. Provided, however, that no extension of a patent shall be granted after the expiration of the term for which it was originally issued."

On the 3d of February, 1839, William Woodworth, the patentee, died; and on the 14th of February, 1839, William W. Woodworth took out letters of administration upon his estate, in the County of New York.

In 1842, William W. Woodworth, the ad-**659***] ministrator, applied for *an extension of the patent under the above recited Act of 1836, and on the 16th of November, 1842, the board issued the following certificate:

"In the matter of the application of William W. Woodworth, administrator on the estate of William Woodworth, deceased, in writing to the commissioner of patents for the extension of the patent for a new and useful improvement in the method of planing, tonguing, and grooving, and cutting into mouldings, or either, plank, boards, or any other material, and for reducing the same to an equal width and thickness; and also for facing and dressing brick, and cutting mouldings on, or facing, metallic, mineral, or other substances, granted to the said William Woodworth, deceased, on the 27th day of December, 1828, for fourteen years from said 27th day of December.

"The applicant having paid into the treasury the sum of forty dollars, and having furnished to the undersigned a statement in writing, under oath, of the ascertained value of the invention, and of the receipt and expenditures thereon, sufficiently in detail to exhibit a true and faithful account of loss and profits in any manner accruing to said patentee from or by reason of said invention; and notice of application having been given by the commissioner of patents, according to law, said board met at the time and place appointed, namely, at the patent office, on the 1st September, 1842, and their meetings having been continued by regular adjournments, until this 16th day of November, 1842, they, on that day, heard the evidence produced before them, both for and against the extension of said patent, and do now certify, that, upon hearing of the matter, it appears to their full and entire satisfaction, having due regard to the public interest therein, that it is just and proper that the term of said patent should be extended, by reason of the patentee, without neglect on his part, having failed to obtain from the use and sale of his invention a reasonable remuneration for the time, ingenuity, and expense bestowed upon the same, and the introduction thereof into use.

"Washington city, Patent Office, November 16th, 1842.

"DANIEL WEBSTER,
"Secretary of State.
"CHAS. B. PENROSE,
"Solicitor of the Treasury.
"HENRY L. ELLSWORTH,
"Commissioner of Patents."

And on the same day the commissioner of patents issued the following certificate:

"Whereas, upon the petition of William W. Woodworth, administrator of the estate of William Woodworth, deceased, for an extension *of the within patent, granted to [***660** William Woodworth, deceased, on the 27th day of December, 1828. The Board of Commissioners, under the 18th section of the Act of Congress approved the 4th day of July, 1836, entitled 'An Act to promote the progress of useful arts, to repeal all acts and parts of acts heretofore made for that purpose,' did, on the 16th day of November, 1842, certify that the said patent ought to be extended.

"Now, therefore, I, Henry L. Ellsworth, commissioner of patents, by virtue of the power vested in me by said eighteenth section, do renew and extend said patent, and certify that the same is hereby extended for the term of seven years from and after the expiration of the first term, namely, the 27th day of December, 1842, which certificate of said Board of Commissioners, together with this certificate of the commissioner of patents, having been duly entered of record in the patent office the said patent now has the same effect in law as though the term had been originally granted for the term of twenty-one years.

"In testimoney whereof, I have caused the seal of the patent office to be here-
[SEAL.] unto affixed, this 16th day of November, 1842.

"HENRY L. ELLSWORTH,
"Commissioner of Patents."

On the 2d of January, 1843, William W. Woodworth, the administrator, filed the following disclaimer:

"To all men to whom these presents shall come, I, William W. Woodworth, of Hyde Park, in the County of Duchess and State of New York, Esq., as I am administrator of the goods and estate which were of William Woodworth, deceased, hereinafter named, send greeting:

"Whereas letters patent, bearing date on the twenty-seventh day of December, in the year of our Lord eighteen hundred and twenty-eight, were granted by the United States to William Woodworth, now deceased, for an improvement in the method of planing, tonguing, grooving, and cutting into mouldings, or either, boards, plank, or any other material, and for reducing the same to an equal width and thickness; and also for facing and dressing brick, and cutting mouldings on, or facing, metallic, mineral, or other substances. And whereas, before the term of fourteen years, for which the said letters patent were granted, had fully expired, such proceedings were had that, pursuant to the act of Congress in such case made and provided, the said letters patent were renewed or extended for the term of seven years from and after the expiration of the said term of fourteen years, and to the certificate granting the said extension and renewal unto me in my said capacity, bearing date on the sixteenth day of November now last past, and which is duly recorded according to act of Congress in that behalf, reference is *hereby made, [***661** as showing my title and interest in and to the said letters patent.

"And whereas the said William Wood-

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worth, through inadver'ence, accident, or mistake in his application for letters patent, made his specification of claim too broad, in this, namely, that he, the said William Woodw rth, claimed as his improved method the application of circular saws for reducing floor-plank and other material to width, of which he was not the original and first inventor. And whereas some material and substantial part of the said patented thing was justly and truly the invention and improvement of the said William Woodworth.

"Now therefore know ye, that I, the said William Woodworth, in my capacity aforesaid, and as the person to whom the said certificate was granted as aforesaid, have disclaimed, and do by these presents, for myself, and for all claiming under me, disclaim, all and any exclusive right, title, property, or interest of, in, or to the application of circular saws for reducing floor-plank or other materials to a width, by reason of the aforesaid letters patent, and the aforesaid renewal or extension thereof.

"In testimony whereof, I have hereto, in my capacity aforesaid, set my hand and seal, on this second day of January, in the year eighteen hundred and forty-three.

"WILLIAM W. WOODWORTH,
"Administrator of W. Woodworth, deceased. [SEAL.]
"Executed in presence of
"CHAS. W. EMEN.
"B. R. CURTIS."

In March, 1843, Woodworth, the administrator, made an assignment of his patent rights in some of the States to James G. Wilson, the plaintiff. At what time the assignment was made for New York, the record in that case did not state, but it was one of the admitted facts that he was the grantee. The assignment first referred to was recorded in the patent-office in liber 4, pp. 291, 292, on the 20th of March, 1843.

On the 9th of August, 1843, the administrator assigned his right to Wilson, in and for the State of Maryland.

On the 26th of February, 1845, Congress passed the following act:

"An Act to extend a patent heretofore granted to William Woodworth.

"Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the patent granted to William Woodworth on the twenty-seventh day of December, in the year one thousand eight hundred and twenty-eight, for his improvement on the method of planing, tonguing, grooving, and cutting into mouldings, or either, 662*] plank, boards, or *any other material, and for reducing the same to an equal width and thickness; and also for facing and dressing brick, and cutting mouldings on and facing several other substances, a description of which is given in a schedule annexed to the letters patent granted as aforesaid, be, and the same is hereby extended for the term of seven years from and after the 27th day of December in the year one thousand eight hundred and forty-nine; and the commissioner of patents is hereby directed to make a certificate of such extension in the name of the administrator of the said William Woodworth, and to append an authenticated copy thereof to the original letters patent, whenever the same shall be requested by the said administrator or his assigns.

"Approved February 26, 1845.

"A true copy from the roll of this office.
"R. K. CRALLE, Chief Clerk.

"Department of State, March 3, 1845."

And on the 3d of March, 1845, the following certificate was issued:

"In conformity, therefore, with the directions in the said act contained, I, Henry L. Ellsworth, Commissioner of Patents, do hereby certify, that the patent therein described is, by the said act, extended to William W. Woodworth, administrator of said William Woodworth, for the term of seven years from and after the twenty-seventh day of December, in the year one thousand eight hundred and forty-nine; and this certificate of such extension is made on the original letters patent, on the application of William W. Woodworth, the administrator of the said William Woodworth.

"In testimony whereof, I have caused the seal of the patent office to be here-
[L. S.] unto affixed, this 3d day of March, 1845.

"HENRY L. ELLSWORTH,
"Commissioner of Patents."

On the 8th of July, 1845, a new patent was issued, with an amended specification, as follows:

"The United States of America to all to whom these letters patent shall come:

"Whereas, William W. Woodworth, administrator of William Woodworth, deceased, of Hyde Park, N. Y., has alleged that said William Woodworth invented a new and useful improvement in machines for planing, tonguing, and grooving, and dressing boards, &c., for which letters patent were granted, dated the 27th day of December, 1828, which letters patent have been extended (as will appear by the certificates appended thereto, copies of which are hereunto attached) for fourteen years from the expiration of said letters patent; and which letters patent are hereby cancelled on *ac-[*663 count of a defective specification, which he states has not been known or used before said William Woodworth's application; has made oath that he is, and that said William Woodworth was, a citizen of the United States; that he does verily believe that said William Woodworth was the original and first inventor or discoverer of the said improvement, and that the same hath not, to the best of his knowledge and belief, been previously known or used, has paid into the Treasury of the United States the sum of fifteen dollars, and presented a petition to the commissioner of patents, signifying a desire of obtaining an exclusive property in the said improvement, and praying that a patent may be granted for that purpose.

"These are therefore to grant, according to law, to the said William W. Woodworth, in trust for the heirs-at-law of said W. Woodworth, their heirs, administrators or assigns, for the term of twenty-eight years from the twenty-seventh day of December, one thousand eight hundred and twenty-eight, the full and exclusive right and liberty of making, constructing, using, and vending to others to be used, the said improvement, a description whereof is given in the

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words of the said William W. Woodworth, in the schedule hereunto annexed, and is made part of these presents.

"In testimony whereof, I have caused these letters to be made patent, and the [L. S.] seal of the patent office has been hereunto affixed.

"Given under my hand, at the city of Washington, this eighth day of July, in the year of our Lord one thousand eight hundred and forty-five, and of the independence of the United States of America the seventieth.

"JAMES BUCHANAN,
"Secretary of State."

"Countersigned, and sealed with the seal of the patent office.

"HENRY H. SYLVESTER,
"Acting Com'r of Patents."

"The schedule referred to in these letters patent, and making part of the same:

"To all whom it may concern: Be it known, that the following is a full, clear, and exact description of the method of planing, tonguing, and grooving plank or boards, invented by William Woodworth, deceased, and for which letters patent of the United States were granted to him on the 27th day of December, in the year one thousand eight hundred and twenty-eight; the said letters patent having been surrendered for the purpose of describing the same invention, and pointing out in what it consists, in more clear, full, and exact terms than was done in the original specification.

664*] *"*Amended Specification.*

"The plank or boards which are to be planed, tongued, or grooved are first to be reduced to a width by means of circular saws, by reducing-wheels, or by any other means. When circular saws are used for this purpose, two such saws should be placed upon the same shaft, on which they are to be capable of adjustment, so that they may be made to stand at any required distance apart; under these the board or plank is to be forced forward, and brought to the width required: this apparatus and process do not require to be further explained, they being well understood by mechanicians.

"When what has been above denominated reducing-wheels are used, these are to consist of revolving cutter-wheels, which resemble in their construction and action the planing and reducing-wheel to be presently described; these are to be made adjustable like the circular saws, but the latter are preferred for this purpose. The plank may be reduced to a width on a separate machine.

"When the plank or boards have been thus prepared (on a separate machine), they may be placed on or against a suitable carriage, resting on a frame or platform, so as to be acted upon by a rotary cutting or planing and reducing-wheel; which wheel may be made to revolve either horizontally or vertically, as may be preferred. The carriage which sustains the plank or board to be operated upon may be moved forwards by means of a rack and pinion, by an endless chain or band, by geared friction-rollers, or by any of the devices well known to machinists for advancing a carriage or materials to be acted upon in machines for various purposes. The plank or board is to be moved on towards the cutting edges of the cutters or knives, on the planing-cylinder, so that its knives or cutters, as they revolve, may meet and cut the plank or board in a direction contrary to that in which it is made to advance; the edges of the cutters are, in this method, prevented from coming first into contact with its surface, and are made to cut upwards from the reduced part of the plank towards said surface, by which means their edges are protected from injury by gritty matter, and the board or plank is more evenly and better planed than when moved in the reversed direction.

"After the board or plank passes the planing-cylinder, and as soon, or fast, as the planing-cylinder has done its work on any part of the board or plank, the edges are brought into contact with two revolving cutter-wheels, one of which wheels is adapted to the cutting of the groove, and the other to the cutting of the two rebates that form the tongue. When the axis of the planing and reducing-wheel stands vertically, the grooving and tonguing-wheels are placed one above the other, with the plank edgewise between *them; when the axis [*665 of the planing-wheel stands horizontally, these wheels are on the same horizontal plane with each other, standing on perpendicular spindles.

"The grooving-wheel consists of a circular plate fixed on an axis, and having one, two, three, four, or more cutters, which are to be screwed, bolted, or otherwise attached to it, the edges of which cutters project beyond the periphery of the plate to such distance as is required for the depth of the groove; their thickness may be such as is necessary for its width: they are, of course, so situated as to cut the groove in the middle of the edge of the board, or as nearly so as may be required. The tonguing-wheel is similar in form to the grooving-wheel, but it has cutters on each of its sides, or otherwise, so formed and arranged as to cut the two rebates which are necessary to the formation of the tongue.

"The grooving and tonguing cutters, at the same time and by the same operation, reduce the board or plank to an exact width throughout. When the axis of the planing-wheel is placed vertically, the knives or cutters may be made to plane two planks at the same time; the planks being in this case moved in contrary directions, and so as to meet the edges of the revolving knives or cutters. When the machine is thus constructed, a second pair of grooving and tonguing-wheels may be made to operate in the same way with those above described. A machine to operate upon a single plank or board, and having the axis of the planing-wheel placed horizontally, will, however, be more simple and less expensive than that intended to operate on two planks simultaneously.

"In the accompanying drawing, fig. 1 is a perspective representation of the principal operating parts of the machine when arranged and combined for planing, tonguing, and grooving; and when so arranged as to be capable of planing two planks at the same time, the axis of the planing-wheel being placed vertically. A A is a stout, substantial frame of the machine, which may be of wood or of iron, and may be varied in length, size, and strength, according to the work to be done. B B are

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the heads of the planing-cylinder, and C C, the knives or cutters, which extend from one to the other of said heads, to the peripheries of which they may be attached by means of screws. The knives C C, with the faces forming a planing angle, may be placed in a line with the axis, J, of the cylinder, or they may stand obliquely thereto, as may be preferred; but in the latter case the edge should form the segment or portion of a helix; *b* represents a pulley near to the upper end of the axis J; and I, a pulley or drum, which may be made to revolve by horse, steam, or other motive power, and from which a belt may extend around the pulley *b*, to drive the planing-cylinder and other parts of the machinery; G is the carriage, which is represented as being driven forward **666*]** by means of a rack *and pinion, H; against this carriage, the plank K, which is to be planed, tongued, and grooved, is placed, and is made to advance with it. It will be manifest, however, that the plank may be moved forward by other means, as, for example, by an endless chain or band, passing around drums or chain-wheels, or by means of geared friction-wheels borne up against it. To cause the carriage and plank to move forward readily, there may be friction-rollers, *f f f*, placed horizontally, and extending under them; the rollers, *f f f*, which stand vertically, are to be made to press against the plank and keep it close to the carriage, and thus prevent the action of the cutters from drawing the plank up from its bed in cutting from the planed surface upwards; they may be borne against it by means of weights or springs, in a manner well known to machinists. In a single horizontal machine, the horizontal friction-rollers may be geared, and the pressure-rollers placed above them to feed the board with or without the carriages, a bed-plate being used directly under the planing-cylinder.

"Fig. 2 is a separate view of the planing-cylinder, with its knives or cutters; and fig. 3, an end view of one of the heads. E E are the revolving cutters, or tonguing and grooving wheels, and D D whirls upon their shafts, which may be driven by bands, or otherwise, so as to cause said wheels to revolve in the proper direction.

"Fig. 4 is a side view of one of these wheels; fig. 5 is an edge view of the tonguing-wheel; and fig. 6, an edge view of the grooving-wheel; the latter being each shown with two cutters in place. The number of cutters on these wheels may be varied, but they are represented as furnished with four. The cutters may be fixed on the sides of circular plates, with their edges projecting beyond the periphery of said plate.

"The edges of the plank, as its planed part passes the planing-cylinder, are brought in contact with the above described tonguing and grooving wheels, which are so placed upon their shafts as that the tongue and groove shall be left at the proper distance from the face of the plank, the latter being sustained against the planing cylinder by means of the carriage or bed-plate, or otherwise, so that it cannot deviate, but must be reduced to a proper thickness, and correctly tongued and grooved.

"In fig. 1, above referred to, only one carriage and one pair of cutter-wheels are shown, it not being deemed necessary to represent those on the opposite side, they being similar in all respects.

"Fig. 7 represents the same machine, with the axis of the planing-cylinder placed horizontally, and intended to operate on one plank only at the same time. A A is the frame; B B the heads of the planing-cylinder; C C the knives or cutters attached to said heads. To meet the different thicknesses of the planks *or boards, the bearings of the shaft [***667** or cylinder may be made movable, by screws or other means, to adjust it to the work; or the carriage or bed plate may be made so as to raise the board or plank up to the planing-cylinder. E and E' are the revolving cutters, or tonguing and grooving-wheels, which are placed upon vertical shafts, having upon them pulleys, D D, around which pass belts or bands from the main drum, I, to which a revolving motion may be given by any adequate motive power.

"From the drum, I, a belt, L, passes also around the pulley, *b*, on the shaft of the planing-cylinder, and gives to it the requisite motion. There may in this machine be a horizontal carriage moved forward by a rack and pinion, in a manner analogous to that represented in fig. 1; but in the present instance the plank is supposed to be advanced by means of one or two pairs of friction or feed-rollers, shown at *f f'*; the uppermost, *f f'*, of the pairs of rollers may be held down by springs, or weighted levers, which it has not been thought necessary to show in this drawing, as such are in common use. The lowermost of these rollers may be fluted or made rough on their surfaces, so as to cause friction on the under side of the plank. M M' are pulleys on the axles of these lower rollers which are embraced by bands, N N', which also pass around a pulley, O, on a shaft which crosses the frame, A A, and has a pulley, T, on it, which is embraced by the belt, P, on a pulley, Q, on the shaft of the main drum, I; these bands and pulleys serve to give motion to the feed-rollers, as will be readily understood by inspecting the drawing. R R are guide strips, used in place of the rollers used for the same purpose, and also for bearing or friction-rollers, when the machine is vertical, to direct one edge of the plank, and against its opposite edge; any pressure may be used equal to the weight of the board or plank, when worked in a vertical position. One of the cutter-wheels should be made adjustable, to adapt it to stuff of different widths.

"The planing-cylinder, and likewise the cutter or tonguing and grooving wheels, may be constructed in the manner represented in figures 2, 3, 4, 5, and 6, and hereinbefore fully described. One of the heads of the planing-wheel may be made movable, to accommodate its width to the width of the boards or plank to be planed.

"The respective parts of this machine may be varied in size, as may also the velocity of the motion of the planing-cylinders and cutter-wheels; but the following has been found to answer well in practice: The planing-cylinder, having four knives or cutters, may be twelve inches in diameter, and may make two thousand, and upwards, revolutions in a minute In a machine like that shown in fig. 7, the main drum, I, may be two feet in diameter,

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and may be driven with the speed of five hundred, and upwards, revolutions in a minute. The pulleys on the planing-cylinder, and on **668***] the *cutter-wheels, may be six inches in diameter. The plank should be moved forward at the rate of about one foot for every hundred revolutions of the cutter-wheel; and, of course, the diameter of the feed-rollers and of the pulleys by which they are turned must be so graduated as to produce this result. The size and speed of the above parts of this machine may be in some degree varied; but the above have been found to work well.

"Having thus fully described the parts and combination of parts, and operation of the machine for planing, tonguing, and grooving boards or plank, and shown various modes in which the same may be constructed and made to operate without changing the principle or mode of operation of the machine, what is claimed therein as the invention of William Woodworth, deceased, is the employment of rotating planes, substantially such as herein described, in combination with rollers, or any analogous device, to prevent the boards from being drawn up by the planes when cutting upwards, or from the reduced or planed to the unplaned surface, as described.

"And also the combination of the rotating planes with the cutter-wheels, for tonguing and grooving, for the purpose of planing, tonguing, and grooving boards, &c., at one operation, as described. And also the combination of the tonguing and grooving cutter-wheels for tonguing and grooving boards, and at one operation, as described.

"And, finally, the combination of either the tonguing or the grooving cutter-wheel for tonguing or grooving boards, &c., with the pressure-rollers, as described, the effect of the pressure-rollers in these operations being such as to keep the boards, &c., steady, and prevent the cutters from drawing the boards towards the center of the cutter-wheels, whilst it is moved through by machinery. In the planing operation, the tendency of the plane is to lift the boards directly up against the rollers; but in the tonguing and grooving, the tendency is to overcome the friction occasioned by the pressure of the rollers.

"WILLIAM W. WOODWORTH,
"Administrator of
William Woodworth, deceased.

"Witnesses:
"JAMES MILHOLLAND,
"CHS. M. KELLER."

The above papers show the title of the administrator, who was the grantor of Wilson, the plaintiff in the suit. The record in the New York case was exceedingly brief, and contained neither the declaration nor pleas, but only the state of the pleadings and the existence of demurrers. But from the eighth fact in the statement of facts, in which it is said that "the defendants trace no title to themselves to a right to use said machines from **669***] the assignment *made by William Woodworth and James Strong to Halstead, Toogood, and Tyack," the inference must be that their defense was in showing an outstanding title.

The following is the entire case presented by the New York record:

"United States of America, Northern District of New York:

"At a Circuit Court of the United States, begun and held at Albany, for the Northern District of New York, on Tuesday, the twenty-first day of October, in the year of our Lord one thousand eight hundred and forty-five, and in the seventieth year of American independence.

"Present, the Honorable Samuel Nelson and Alfred Conkling, Esquires.

"JAMES G. WILSON,
v.
"LEWIS ROUSSEAU AND CHARLES EASTON.

"*State of the Pleadings.*

"This is an action on the case to recover damages for the alleged infringement of letters patent issued to William Woodworth, on the 27th day of December, 1828, for the term of fourteen years, for an improvement in machinery for planing, tonguing, and grooving boards and plank at one operation; which letters patent were, on the 16th day of November, 1842, extended for seven years more, such extension being granted to William W. Woodward, as administrator of said William Woodworth.

"To the first count of the plaintiff's declaration, the defendants interposed three several special pleas in bar, to each of which pleas the plaintiff demurred, and the defendants joined in demurrer. To the second count of the plaintiff's declaration, the defendants demurred, and the plaintiff joined in demurrer.

"The case coming on to be argued at this term, the following questions occurred for decision, to wit:

"1. Whether the eighteenth section of the Patent Act of 1836 authorized the extension of a patent on the application of the executor or administrator of a deceased patentee.

"2. Whether, by force and operation of the eighteenth section of the Act of July 4th, 1836, entitled "An Act to promote the progress of the useful arts," &c., the extension granted to William W. Woodworth, as administrator, on the 16th day of November, 1842, inured to the benefit of assignees, under the original patent granted to William Woodworth, on the 27th day of December, 1828, or whether said extension inured to the benefit of the administrator only, in his said capacity.

"3. Whether the extension specified in the foregoing second point inured to the benefit of the administrator to whom the same *was [**670** granted, and to him in that capacity exclusively; or whether, as to the territory specified in the contract of assignment made by William Woodworth and James Strong to Toogood, Halstead, and Tyack, on the 28th day of November, 1829 (and set forth in the second plea of the defendants to the first count of the declaration), and by legal operation of the covenants contained in said contract, the said extention inured to the benefit of the said Toogood, Halstead, and Tyack, or their assigns.

"4. Whether the plaintiff, claiming title under the extension from the administrator, can maintain an action for an infringement of the patent right within the territory specified in the contract of assignment to Toogood, Halstead, and Tyack, against any person not

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claiming under said assignment; or whether the said assignment be of itself a perfect bar to the plaintiff's suit.

"5. Whether the extention specified in the second point could be applied for and obtained by William W. Woodworth, as administrator of William Woodworth, deceased, if the said William Woodworth, the original patentee, had, in his lifetime, disposed of all his interest in the then existing patent, having, at the time of his death, no right or title to, or interest in, the said original patent; or whether such sale carried with it nothing beyond the term of said original patent; and, if it did not, whether any contingent rights remained in the patentee or his representatives.

"6. Whether the plaintiff, if he be an assignee of an exclusive right to use two of the patented machines within the town of Watervliet, has such an exclusive right as will enable him to maintain an action for an infringement of the patent within said town; or whether, to maintain such action, the plaintiff must be possessed, as to that territory, of all the rights of the original patentee.

"7. Whether the letters patent of renewal issued to William W. Woodworth, as administrator aforesaid, on the 8th day of July, 1845, upon the amended specification and explanatory drawings then filed, be good and valid in law; or whether the same be void, for uncertainty, ambiguity, or multiplicity of claim, or any other cause.

"8. Whether the court can determine, as matter of law, upon an inspection of the said two patents and their respective specifications, that the said new patent of the 8th of July, 1845, is not for the same invention for which the said patent of 1828 was granted.

"9. Whether the decision of the Board of Commissioners, who are to determine upon the application for the extension of a patent, under the eighteenth section of the Act of 1836, is conclusive upon the question of their jurisdiction to act in the given case.

"10. Whether the commissioner of patents can lawfully receive a surrender of letters patent for a defective specification, and issue new letters patent upon an amended specification, after the expiration of the term for which the original patent was granted, and **671*]** *pending the existence of an extended term of seven years; or whether such surrender and renewal may be made at any time during such extended term.

"On which questions the opinions of the judges were opposed.

"Whereupon, on a motion of the plaintiff, by William H. Seward, his counsel, that the points on which the disagreement hath happened may, during the term, be stated under the direction of the judges, and certified under the seal of the court to the Supreme Court, to be finally decided.

"It is ordered that the foregoing state of the pleadings, and the following statement of facts, which is made under the direction of the judges, be certified, according to the request of the plaintiff by his counsel, and the law in that case made and provided, to wit:

"1. That William Woodworth, as the inventor of a machine, or improvement in machinery, for planing, tonguing, and grooving boards and plank at one operation, on the 27th day of December, in the year 1828, applied to the proper department of the government for a patent for said invention, and upon the same day, on filing his specifications and explanatory drawings, and complying with the other legal prerequisites, letters patent signed by the President, and under the seal of the United States, were duly issued to the said William Woodworth, granting to him the exclusive right throughout the United States, to construct and use, and vend to others to be used, the machine or improvement patented, for and during the term of fourteen years from the said 27th day of December, 1828.

"2. That subsequently, to wit, on the 28th day of November, 1829, the said William Woodworth and James Strong, who had become jointly interested with said Woodworth, in the rights secured by the said letters patent by contract of assignment of that date, transferred to Daniel H. Toogood, Daniel Halstead, and William Tyack all their right and interest in and to the said patent for certain parts and portions of the United States in said contract specifically set forth,. including the city and County of Albany, in the State of New York, which is the domicile of the defendants.

"3. That the *habendum* in said contract of assignment is in the words following, to wit:

"'To have and to hold the rights and privileges hereby granted for and during the term of fourteen years from the date of the patent.'

"And that the third clause in said contract of assignment in the following words, to wit:

"'And the two parties further agree, that any improvement in the machinery, or alteration or renewal of either patent, such improvement, alteration or renewal, shall inure to the benefit of respective parties interested, and may be applied and used within their respective districts, as hereinbefore designated.'

*"4. That previous to the expiration [*672 of the fourteen years' limitation of said patent, William Woodworth, the patentee, died, to wit, on the 9th of February, 1839; that William W. Woodworth was thereupon duly appointed, and now is, administrator of the estate of the said William Woodworth, and that said Woodworth, in his lifetime, had sold all his interest in the said original patent.

"5. That William W. Woodworth, as administrator aforesaid, on the 16th day of November, 1842, under the 18th section of the Act of Congress of July 4th, 1836, applied to the board of commissioners created by the said section for an extension of said patent, and that, upon complying with the requisites in said section prescribed, an extension of said patent was granted by said board to William W. Woodworth, as administrator of the estate of William Woodworth, on said 16th day of November, 1842, and letters patent of extension were on said day duly issued to him, granting to him, in his aforesaid capacity, the exclusive right to make and use, and vend to other to be used, the said invention or improvement, for the term of seven years from and after the term of limitation of said original patent.

"6. That on the 8th day of July, 1845, the said William W. Woodworth, in his capacity as administrator aforesaid, and in accordance

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with the provisions of the thirteenth section of the said Act of July 4th, 1836, made a surrender to the commissioner of patents of the letters patent to him granted on the 16th day of November, 1842, for an insufficiency of the specification upon which said original patent was issued, and upon filing a corrected and amended specification, with explanatory drawings, a copy of which is annexed hereto and made a part of this statement, the said commissioner, on said 8th day of July, 1845, issued to the said William W. Woodworth new letters patent of said invention for the unexpired term of the first extension thereof, and of the extension granted by special act of Congress on the 26th day of February, 1845.

"7. That the defendants in this action have erected and put in operation, in the town of Watervliet, which is within the County of Albany and State of New York, one or more machines for planing, tonguing, and grooving boards and plank, substantially the same in principle and mode of operation as that the subject of the patent granted to William Woodworth.

"8. That the defendants trace no title to themselves to a right to use said machines from the assignment made by William Woodworth and James Strong to Halstead, Toogood, and Tyack.

"9. That the plaintiff in this action is the grantee of William W. Woodworth, as administrator, of the exclusive right to construct and use, and vend to others to be used, two of said patented machines within said town of Watervliet, in said County of Albany, and State of New York."

673*] *The case was argued by *Mr. Seward*, *Mr. Latrobe*, and *Mr. Webster* (the two latter dividing the points), on behalf of the plaintiff, and *Mr. Stevens* for the defendants. The reporter has been kindly furnished with the arguments of these gentlemen, but his limits will not permit their publication *in extenso*, and he is unwilling to take the responsibility of condensing them.

Mr. Justice NELSON delivered the opinion of the court:

The questions in this case come before us on a certificate of division of opinion from the Circuit Court of the United States for the Northern District of New York, involving the construction of various provisions of the Act of Congress to promote the progress of useful arts, commonly called the Patent Act. We shall examine the questions in the order in which they appear on the record. The first is as follows:

1. Whether the eighteenth section of the Act of 1836 authorized the extension of a patent on the application of the executor or administrator of a deceased patentee.

The eighteenth section provides, in substance, that whenever any patentee of an invention or discovery shall desire an extension of his patent beyond the term of its limitation, he may make application therefor, in writing, to the commissioner of the patent office, setting forth the grounds thereof. That the Secretary of State, the Commissioner of the Patent office, and the Solicitor of the Treasury shall constitute a board to hear and decide upon the application; the patentee shall furnish to the board a statement in writing, under oath, of the value and usefulness of the invention, and of his receipts and expenditures, sufficiently in detail to exhibit a true and faithful account of loss and profit in any manner accruing to him from and by reason of the invention; and if, upon a hearing of the matter, it shall appear to the satisfaction of the board, having a due regard to the public interest, that it is just and proper the term of the patent should be extended by reason of the patentee, without neglect or fault on his part, having failed to obtain, from the use and sale of his invention, a reasonable remuneration for the time, ingenuity, and expense bestowed upon the same, and the introduction thereof into use, it shall be the duty of the commissioner to renew and extend the patent, by making a certificate thereon of such extension for the term of seven years from and after the expiration of the first term, &c.

This is the substance of the section, so far as is material to the consideration of the question; and it will be seen, that, according to the words of the provision, the application is to be made by, and the new term to be granted to, the patentee himself, and hence the objection on account of its having been granted to the administrator.

The main argument relied on to support the objection is, that the patentee had no interest or right of property in the extended term at *the time of his death. That all he [*674 had was a mere possibility, too remote and contingent to be regarded as property, or any right of property, in the sense of the law, and therefore not assets or rights in the hands of the administrator which, would authorize an application within the meaning of the statute.

At common law, the better opinion, probably, is, that the right of property of the inventor to his invention or discovery passed from him as soon as it went into public use with his consent; it was then regarded as having been dedicated to the public, as common property, and subject to the common use and enjoyment of all.

The act of Congress for the encouragement of inventors, and to promote the progress of the useful arts, and for the purpose of remedying the imperfect protection, or rather want of protection, of this species of property, has secured to him, for a limited term, the full and exclusive enjoyment of his discovery.

The law has thus impressed upon it all the qualities and characteristics of property, for the specified period; and has enabled him to hold and deal with it the same as in case of any other description of property belonging to him, and on his death it passes, with the rest of his personal estate, to his legal representatives, and becomes part of the assets.

Congress have not only secured to the inventor this absolute and indefeasible interest and property in the subject of the invention for the fourteen years, but have also agreed, that upon certain conditions occurring and to be shown, before the expiration of this period, to the satisfaction of a board of commissioners, an indifferent tribunal designated for the purpose, this right of property in the invention shall be continued for the further term of seven years.

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Subject to this condition, the right of property in the second term is as perfect, to the extent of the intent, as the right of property in the first.

The circumstances upon which the condition rests, and the occurrence of which gives effect and operation to the further grant of the government, are by no means uncommon, or difficult to be shown. They have often happened to inventors in the course of their dealings with this species of property. The act of Congress contemplates their occurrence again, and has therefore provided further security and protection, by enlarging the interest and right of property in the subject of their invention.

The provision is founded upon the policy of the government to encourage genius, and promote the progress of the useful arts, by holding out an additional inducement to the enjoyment of the right secured under the first term; and as an act of justice to the inventors for the time, ingenuity, and expense bestowed in bringing out the discovery, frequently of incalculable value to the business interests of the country. And it is apparent, therefore, unless the executor or administrator is permitted to **675*]** take the place of the *patentee in case of his death, and make application for the grant of the second term, which continues the exclusive enjoyment of the right of property in the invention, the object of the statute will be defeated, and a valuable right of property, intended to be secured, lost to his estate.

The statute is not founded upon the idea of conferring a mere personal reward and gratuity upon the individual, as a mark of distinction for a great public service, which would terminate with his death; but of awarding to him an enlarged interest and right of property in the invention itself, with a view to secure to him, with greater certainty, a fair and reasonable remuneration. And to the extent of this further right of property, thus secured, whatever that may be, it is of the same description and character as that held and enjoyed under the patent for the first term. In its nature, therefore, it continues, and is to be dealt with, after the decease of the patentee, the same as an interest under the first, and passes, with other rights of property belonging to him, to the personal representatives, as part of the effects of the estate.

It would seem, therefore, from the nature of this interest in an extended term itself, as well as from a consideration of the object and purpose of the statute, plainly expressed upon its face, in providing for the prolonged enjoyment and protection of this species of property, that the Board of Commissioners were well warranted in making the renewed grant to the administrator, upon his complying with the conditions.

An argument has been urged against this conclusion, grounded upon the tenth and thirteenth sections of the patent law. The former provides in express terms for the issuing of a patent to the executor or administrator, in case of the death of the inventor before it is taken out; and the latter, for a surrender of a patent defective by reason of an insufficient description, and the re-issuing of a new one. These are supposed to be analogous cases, and manifest the sense of Congress, that, without the express provisions of law, the patent in the one case, and the surrender in the other, could not be issued to, or be made by, the legal representative. The argument is no doubt a proper one, and entitled to consideration; but is not necessarily conclusive.

As it respects the provision for a surrender by the executor or administrator, which is most analogous to the question in hand, we think there could be no great doubt that the right would exist in the absence of any such express authority, regard being had to the nature of the property, and the rights and duties of the legal representative, within the spirit and object of the patent law. It would be the surrender of a patent, the legal interest and property in which had become vested in him as part of the assets, which he was bound to take care of, and protect against waste; a step necessary to perfect the title and give value to the property *would seem to be not only directly [*676 within the line of his duty, but in furtherance of the chief object of the law, namely, to secure remuneration to the meritorious inventor.

It has also been argued, that the executor or administrator could not comply with the terms and conditions of the eighteenth section, upon which the right of property in the extended term is made to depend. In other words, that he would be unable to furnish to the Board of Commissioners a statement under oath of the usefulness of the invention, and of the receipts and expenditures of the patentee, exhibiting a true and faithful account of the loss and profit in any manner accruing from, and by reason of, the invention. This argument assumes as a matter of fact that which may well be denied. Suppose the dealings of the patentee in the subject of his discovery have been carried on through the instrumentality of agents or clerks, or, if not, that the patentee himself, as business men usually do, has kept an accurate account of his receipts and expenditures, all difficulty at once disappears. The account books of a deceased party, in many of the States of the Union, identified and the handwriting proved, are received as legal evidence of the demand in the courts of justice, and afford full authority, upon legal principles, for the admission of the books before the board, in support of the application. We perceive no great difficulty in a substantial compliance with the terms of the section, on the part of the executor or administrator.

The second question is, Whether, by force and operation of the eighteenth section already referred to, the extension granted to W. W. Woodworth, as administrator, on the 16th day of November, 1842, inured to the benefit of assignees under the original patent granted to William Woodworth, on the 27th day of December, 1828, or whether said extension inured to the benefit of the administrator only, in his said capacity.

The most of this section has already been recited in the consideration of the first question, and it will be unnecessary to repeat it. It provides for the application of the patentee to the commission for an extension of the patent for seven years; constitutes a board to hear and decide upon the application; and if his receipts and expenditures, showing the loss and profits accruing to him from and on account of his in-

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vention, shall establish, to the satisfaction of the board, that the patent should be extended by reason of the patentee, without any fault on his part, having failed to obtain from the use and sale of his invention a reasonable remuneration for his time, ingenuity, and expense bestowed upon the same, and the introduction of it into use, it shall be the duty of the commissioners to extend the same by making a certificate thereon of such extension for the term of seven years from and after the first term; "and thereupon the said patent shall have the same effect in law as though it had been originally granted] 677* ed for the term of twenty-one *years." And then comes the clause in question: "And the benefit of such renewal shall extend to assignees and grantees of the right to use the thing patented, to the extent of their respective interests therein."

The answer to the second question certified depends upon the true construction of the above clause respecting the rights of assignees and grantees.

Various and conflicting interpretations have been given to it by the learned counsel, on the argument, leading to different and opposite results, which it will be necessary to examine.

On one side, it has been strongly argued, that the legal operation and effect of the clause save and protect all the rights and interests of assignees and grantees in the patent existing at the time of the extension; and thus secure and continue the exclusive use and enjoyment of these rights and interests for the seven years, to the same extent, and in as ample a manner, as held and enjoyed under the first term. That if A holds an assignment of a moiety of the patent, he will hold the same for the new term of seven years; if of the whole patent, then the whole interest for that period. And that as soon as the new grant is made to the patentee, the interest therein passes, by operation of this clause, to the assignees of the old term, in proportion to their respective shares.

On the other side, it has been argued, with equal earnestness, that, according to the true construction and legal effect of the clause, protection is given, and intended to be given, only to the rights and interests of assignees and grantees acquired and held by assignments and grants from the patentee in and under the second or new term; and that it does not refer to, or embrace, or in any way affect the rights and interest of assignees or grantees holding under the old.

In connection with this view, it is said that the rights thus protected in the new term may be acquired by means of the legal operation of the clause, either from a direct assignment or grant after the extension of the patent, or by an appropriate provision for that purpose, looking to an extension, contained in the assignment or grant under the old.

It is not to be denied, but that, upon any view that has been taken or that may be taken of the clause, its true meaning and legal effect cannot be asserted with entire confidence; and, after all, must depend upon such construction as the court can best give to doubtful phraseology and obscure legislation, having a due regard to the great object and intent of Congress, as collected from the context and general provisions and policy of the patent law.

The rule is familiar and well settled, that, in case of obscure and doubtful words or phraseology, the intention of the law makers is to be resorted to, if discoverable from the context, in order to fix and control their meaning so as to reconcile it, if possible, with the general policy of the law.

*Now, the serious difficulty in the [*678 way, and which renders the first interpretation inadmissible, except upon the most explicit and positive words, is, that it subverts at once the whole object and purpose of the enactment, as is plainly written in every line of the previous part of the section. It gives to the assignees and grantees of the patent, as far as assigned under the old term, the exclusive right and enjoyment of the invention—the monopoly—in the extended term for the seven years; when, by the same provision, it clearly appears that it was intended to be secured to the patentee as an additional remuneration for his time, ingenuity, and expense in bringing out the discovery, and in introducing it into public use. It gives this remuneration to parties that have no peculiar claims upon the government or the public, and takes it from those who confessedly have.

The whole structure of the eighteenth section turns upon the idea of affording this additional protection and compensation to the patentee, and to the patentee alone, and hence the reason for instituting the inquiry before the grant of the extension, to ascertain whether or not he has failed to realize a reasonable remuneration from the sale and use of the discovery—the production of an account of profit and loss to enable the board to determine the question; and as it comes to the one or the other conclusion, to grant the extended term or not.

It is obvious, therefore, that Congress had not at all in view protection to assignees. That their condition on account of dealing in the subject of the invention, whether successful or otherwise, was not in the mind of that body, nor can any good reason be given why it should have been.

They had purchased portions of the interest in the invention, and dealt with the patent rights as a matter of business and speculation; and stood in no different relation to the government or the public than other citizens engaged in the common affairs of life.

Nothing short of the most fixed and positive terms of a statute could justify an interpretation so repugnant to the whole scope and policy of it, and to wise and judicious legislation.

We think this construction not necessarily required by the language of the clause, and is altogether inadmissible.

Then as to the second interpretation, namely, that the clause refers to, and includes, assignees and grantees of interests acquired in the new term, either by an assignment or grant from the patentee after the extension, or by virtue of a proper clause for that purpose, in the assignmen under the old term.

The difficulty attending this construction lies in the uselessness of the clause upon the hypothesis—the failure to discover any subject matter upon which to give reasonable operation and effect to it; and hence, to adopt the construction is to make the clause *virtually [*679 a dead letter, the grounds for which conclusion we will proceed to state.

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The eleventh section of the Patent Act provides, that every patent shall be assignable, in law, either as to the whole interest, or any undivided part thereof, by an instrument in writing; which assignment, and also every grant and conveyance of the exclusive right under any patent, &c., shall be recorded in the patent office. And the fourteenth section authorizes suits to be brought in the name of the assignee or grantee, for an infringement of his rights, in a court of law.

One object of these provisions found in the general patent system is to separate the interest of the assignee and grantee from that which may be held by the patentee, and to make each fractional interest held under the patent distinct and separate; in other words, to change a mere equitable into a legal title and interest, so that it may be dealt with in a court of law.

Now, in view of these provisions, it is difficult to perceive the materiality of the clause in question, as it respects the rights of assignees and grantees held by an assignment or grant in and under the new term, any more than in respect to like rights and interests in and under the old.

The eleventh and fourteenth sections embrace every assignment or grant of a part or the whole of the interest in the invention, and enable these parties to deal with it, in all respects, the same as the patentee. They stand upon the same footing, under the new term, as in the case of former assignments under the old. Nothing can be clearer. It is impossible to satisfy the clause by referring it to these assignments and grants; or to see how Congress could, for a moment, have imagined that there would be any necessity for the clause, in this aspect of it. It would have been as clear a work of supererogation as can be stated.

The only color for the argument in favor of the necessity of this clause, in the aspect in which we are viewing it, is as respects the contingent interest in the new term, derived from a provision in an assignment under the old one, looking to the extension. As the right necessarily rested on contract, at least till the contingency occurred, there may be some doubt whether, even after its occurrence, the eleventh and fourteenth sections had the effect to change it into a vested legal interest, so that it could be dealt with at law: and that a new assignment or grant from the patentee would be required, which could be enforced only in a court of equity. To this extent there may be some color for the argument—some supposed matter to give operation and effect to the clause.

But what is the amount of it? Not that the clause creates or secures this contingent interest in the new term, for that depends upon the contract between the parties, and the contract alone, and which, even if the general provisions **680*]** of the law respecting *the rights of assignees and grantees could not have the effect to change into a legal right, might be enforced in a court of equity.

The only effect, therefore, of the provision in respect to assignees and grantees of this description would be, to change the nature of the contingent interest after the event happened, from a right resting in contract to a vested legal interest; or, to speak with more precision, to remove a doubt about the nature of the interest in the new term, after the happening of a certain contingency, which event in itself was quite remote. This seems to be the whole amount of the effect that even ingenious and able counsel have succeeded in finding, to satisfy the clause. It presupposes that Congress looked to this scintilla of interest in the new term, which might or might not occur, and cast about to provide for it, for fear of doubts as to its true nature and legal character, and the effect of the general system upon it.

We cannot but think a court should hesitate before giving a construction to the clause so deeply harsh and unjust in its consequences, both as it respects the public and individual rights and interests, upon so narrow a foundation.

But there are other difficulties in the way of this construction.

The eleventh section, regulating the rights of assignees and grantees, provides, "that every patent shall be assignable at law," &c., "which assignment, and also every grant and conveyance of the exclusive right under any patent to make and use, and to grant to others to make and use, the thing patented within and throughout any specified part or portion of the United States, "&c., "shall be recorded."

Now, it will be apparent, we think, from a very slight examination of the clause in question, that it does not embrace assignees or grantees, in the sense of the eleventh section, at all; nor in the sense in which they are referred to when speaking of these interests generally under the patent law, without interpolating words or giving a very forced construction to those composing it.

The clause is as follows: "And the benefit of such renewal shall extend to assignees and grantees of the right to use the thing patented, to the extent of their respective interests therein."

It will be seen that the word "exclusive," used to qualify the right of a grantee in the eleventh section, and, indeed, always when referred to in the patent law (sec. 14), and also the words "to make," "and to grant to others to make and use," are dropped, so that there is not only no exclusive right in the grantee, in terms, granted or secured by the clause, but no right at all—no right whatever—to make or to grant to others to make and use the thing patented; in other words, no exclusive right to make or vend. And it is, we think, quite obvious, from the connection and phraseology, that assignees and grantees are placed, and were intended to be placed, in this respect, upon the same footing. We should scarcely be *justified in giving to this term a more **[*681** enlarged meaning as to the right to make and sell, as it respects the one class, than is given to the others, as they are always used as correlative in the patent laws, to the extent of the interests held by them. The clause, therefore, in terms, seems to limit studiously the benefit, or reservation, or whatever it may be called, under or from the new grant to the naked right to use the thing patented; not an exclusive right even for that, which might denote monopoly, nor any right at all, much less exclusive, to make and vend. That seems to have been guardedly omitted. We do not forget the remaining part of the sentence, "to

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the extent of their respective interests therein," which is relled on to help out the difficulty. But we see nothing in the phrase, giving full effect to it, necessarily inconsistent with the plain meaning of the previous words. The exact idea intended to be expressed may be open to observation, but we think it far from justifying the court in holding that the grant or reservation of a right to use a thing patented, well known and in general use at the time, means an exclusive right to make and use it; and not only this, but an exclusive right to grant to others the right to make and use it, meaning an exclusive right to vend it.

The court is asked to build up a complete monopoly in the hands of assignees and grantees in the thing patented, by judicial construction, founded upon the grant of a simple right to use it to the extent of the interest possessed; for the argument comes to this complexion. A simple right to use is given, and we are asked to read it an exclusive right, and not only to read it an exclusive right to use, but an exclusive right to make and vend the patented article.

Recurring to the patent law, it will be seen that Congress, in granting monopolies of this description, have deemed it necessary to use very different language. The grant in the patent must be in express terms, for "the full and exclusive right and liberty of making, using and vending," in order to confer exclusive privileges. The same language is also used in the act when speaking of portions of the monopoly in the hands of assignees and grantees. (Secs. 11, 14.)

We cannot but think, therefore, if Congress had intended to confer a monopoly in the patented article upon the assignees and grantees by the clause in question, the usual formula in all such grants would have been observed, and that we should be defeating their understanding and intent, as well as doing violence to the language, to sanction or uphold rights and privileges of such magnitude by the mere force of judicial construction.

We conclude, therefore, that the clause has no reference to the rights or interests of assignees and grantees under the new and extended term, upon the ground—

1. Because, in that view, giving to the words **682***] the widest construction, *there is nothing to satisfy the clause, or upon which any substantial effect and operation can be given to it; it becomes virtually a dead letter, and work of legislative superfluity; and

2. Because the clause in question, upon a true and reasonable interpretation, does not operate to vest the assignees and grantees named therein with any exclusive privileges whatever, in the extended term, and therefore cannot be construed as relating to or embracing such interests in the sense of the law.

The extention of the patent under the eighteenth section is a new grant of the exclusive right or monopoly in the subject of the invention for the seven years. All the rights of assignees or grantees, whether in a share of the patent or to a specified portion of the territory held under it, terminate at the end of the fourteen years, and become re-invested in the patentee by the new grant.

From that date he is again possessed of "the full and exclusive right and liberty of making, using, and vending to others the invention," whatever it may be. Not only portions of the monopoly held by assignees and grantees as subjects of trade and commerce, but the patented articles or machines throughout the country, purchased for practical use in the business affairs of life, are embraced within the operation of the extension. This latter class of assignees and grantees are reached by the new grant of the exclusive right to use the thing patented. Purchasers of the machines, and who were in the use of them at the time, are disabled from further use immediately, as that right became vested exclusively in the patentee. Making and vending the invention are prohibited by the corresponding terms of his grant.

Now, if we read the clause in question with reference to this state of things, we think that much of the difficulty attending it will disappear. By the previous part of the section, the patentee would become re-invested with the exclusive right to make, use, and vend the thing patented; and the clause in question follows, and was so intended as a qualification. To what extent, is the question. The language is, "And the benefit of such renewal shall extend to assignees and grantees of the right to use the thing patented, to the extent of their respective interests therein"; naturally, we think, pointing to those who were in the use of the patented article at the time of the renewal, and intended to restore or save to them that right which, without the clause, would have been vested again exclusively in the patentee. The previous part of the section operating in terms to vest him with the exclusive right to use, as well as to make and vend, there is nothing very remarkable in the words, the Legislature intending thereby to qualify the right in respect to a certain class only, leaving the right as to all others in the patentee, in speaking of the benefit of the renewal extending to this class. The renewal vested him with the whole right to use, and therefore there is no great impropriety of language, if intended to protect *this class, by giving them in [***683** terms the benefit of the renewal. Against this view it may be said that "the thing patented" means the invention or discovery, as held in *McClurg* v. *Kingsland* (1 How., 202), and that the right to use the "thing patented" is what, in terms, is provided for in the clause. That is admitted, but the words, as used in the connection here found, with the right simply to use the thing patented, not the exclusive right, which would be a monopoly, necessarily refer to the patented machine and not to the invention; and, indeed, it is in that sense that the expression is to be understood generally throughout the patent law, when taken in connection with the right to use, in contradistinction to the right to make and sell.

The "thing patented" is the invention; so the machine is the thing patented, and to use the machine is to use the invention, because it is the thing invented, and in respect to which the exclusive right is secured, as is also held in *McClurg* v. *Kingsland*. The patented machine is frequently used as equivalent for the "thing patented," as well as for the invention or discovery, and no doubt, when found in connec-

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tion with the exclusive right to make and vend, always means the right of property in the invention, the monopoly. But when in connection with the simple right to use, the exclusive right to make and vend being in another, the right to use the thing patented necessarily results in a right to use the machine, and nothing more. Then, as to the phrase "to the extent of their respective interests therein," that obviously enough refers to their interests in the thing patented, and in connection with the right simply to use, means their interests in the patented machines, be that interest in one or more at the time of the extension.

This view of the clause, which brings it down in practical effect and operation to the persons in the use of the patented machine or machines at the time of the new grant, is strengthened by the clause immediately following, which is, "that no extension of the patent shall be granted after the expiration of the term for which it was originally issued." What is the object of this provision? Obviously, to guard against the injustice which might otherwise occur to a person who had gone to the expense of procuring the patented article, or changed his business upon the faith of using or dealing with it, after the monopoly had expired, which would be arrested by the operation of the new grant. To avoid this consequence, it is provided that the extension must take place before the expiration of the patent, if at all. Now, it would be somewhat remarkable if Congress should have been thus careful of a class of persons who had merely gone to the expense of providing themselves with the patented article for use or as a matter of trade, after the monopoly had ceased, and would be disappointed and exposed to loss if it was again renewed, and at the same time had overlooked the class who in addition to this expense and **684*]** change of business *had bought the right from the patentee, and were in the use and enjoyment of the machine, or whatever it might be, at the time of the renewal. These provisions are in juxtaposition, and we think are but parts of the same policy, looking to the protection of individual citizens from any special wrong and injustice on account of the operation of the new grant.

The consequences of any different construction than the one proposed to be given are always to be regarded by courts, when dealing with a statute of doubtful meaning. For between two different interpretations, resting upon judicial expositions of ambiguous and involved phraseology, that which will result in what may be regarded as coming nearest to the intention of the Legislature should be preferred.

We must remember, too, that we are not dealing with the decision of the particular case before us, though that is involved in the inquiry; but with a general system of great practical interest to the country; and it is the effect of our decision upon the operation of the system that gives to it its chief importance.

The eigtheenth section authorizes the renewal of patents in all cases where the Board of Commissioners is satisfied of the usefulness of the invention, and of the inadequacy of remuneration to the patentee. Inventions of merit only are the subject of the new grant; such as have had the public confidence, and which it may be presumed have entered largely, in one way and another, into the business affairs of life.

By the report of the commissioner of patents it appears that five hundred and two patents were issued in the year 1844—for the last fourteen years, the average issue yearly exceeded this number—and embrace articles to be found in common use in every department of labor or art, on the farm, in the workshop, and factory. These articles have been purchased from the patentee, and have gone into common use. But, if the construction against which we have been contending should prevail, the moment the patent of either article is renewed, the common use is arrested, by the exclusive grant to the patentee. It is true the owner may repurchase the right to use, and doubtless would be compelled from necessity; but he is left to the discretion or caprice of the patentee. A construction leading to such consequences, and fraught with such unmixed evil, we must be satisfied was never contemplated by Congress, and should not be adopted unless compelled by the most express and positive language of the statute.

The third question certified is, whether the extension of the patent granted to W. W. Woodworth, as administrator, on the 16th of November, 1842, inured to the benefit of the administrator exclusively, or whether, as to certain territory specified in the contract of assignment made by W. Woodworth and James Strong to Toogood, Halstead, and Tyack, on the 28th of November, 1829, and *by [**685** legal operation of the convenants contained in said contract, the said extension inured to the benefit of said Toogood, Halstead, and Tyack, or their assigns.

William Woodworth was the original patentee, and took out letters patent on the 27th of December, 1828; and soon after conveyed a moiety of the same to James Strong. One Uri Emmons also obtained a patent for a similar machine on the 25th of April, 1829, and soon after conveyed all his interest in the same to Toogood, Halstead, and Tyack. With a view to avoid litigation, both parties mutually assigned to each other their interests in the respective patents to different and separate portions of the United States; and in the assignment from Woodworth and Strong to Toogood, Halstead, and Tyack, the following covenant was entered into by the parties: "And the two parties further agree, that any improvement in the machinery, or alteration, or renewal of either patent, such improvement, alteration, or renewal shall inure to the benefit of the respective parties interested, and may be applied and used within their respective districts, as herein before designated."

At the time this covenant was entered into, there was no provision in the patent laws authorizing an extension or renewal of the same beyond the original term of fourteen years. The first act providing for it was passed in July, 1832. Before this time, the only mode of prolonging the term beyond the original grant was by means of private acts of Congress upon individual applications.

A construction had been given by the Circuit Court of the United States, in New York,

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as early as 1824, by which the patentee, on surrendering his patent on account of a defective specification, would be entitled to take out a new patent correcting the defect, which construction was afterwards upheld by this court in *Grant* v. *Raymond* (6 Peters, 218), and the principle since ingrafted into the patent law by the Act of 1832.

The court is of the opinion that the covenant in question should be construed as having been entered into by the parties, with a reference to the known and existing rights and privileges secured to patentees under the general system of the government established for that purpose; that the parties would naturally look to the established system of law on the subject in arranging their several rights and obligations, in dealing with property of this description, rather than to any possible change that might be effected by private acts of Congress upon individual application. Contracts are usually made with reference to the established law of the land, and should be so understood and construed, unless otherwise clearly indicated by the terms of the agreement. If the parties in this case contemplated any alteration or modification of their rights, more advantageous, by the further legislation of Congress, we think some more specific provision having reference to it should have been **686***] *inserted in their covenant. The term "renewal" may be satisfied by a reference to the law as it then stood. The patentee might surrender his patent, and take out a new one, within the fourteen years; and the term was used, probably, to guard against any question that might be raised as to the right under the assignment in the new patent, if a surrender and new issue should become necessary. The specification accompanying the patent was a complicated one, and has been the subject of much controversy, and the necessity of a surrender for correction and amendment might very well have been anticipated.

We think this view satisfies the use of the term, and that no right is acquired in the new grant by virtue of the assignment or covenant.

The fourth and fifth questions certified are answered by the opinion of the court upon the first and second questions.

The sixth question certified is as follows: Whether the plaintiff, if he be an assignee of an exclusive right to use two of the patented machines within the town of Watervliet, has such an exclusive right as will enable him to maintain an action for an infringement of the patent within the said town; or whether, to maintain such action, the plaintiff must be possessed, as to that territory, of all the rights of the original patentee.

The plaintiff is the grantee of the exclusive right to construct and use, and to vend to others to be used, two of the patented machines within the town of Watervliet, in the County of Albany.

The fourteenth section of the patent law authorizes any person, who is a grantee of the exclusive right in a patent within and throughout a specified portion of the United States, to maintain an action in his own name for an infringement of the right.

The plaintiff comes within the very terms of the section. Although limited to the use of two machines within the town, the right to use them is exclusive. No other party, not even the patentee, can use a right under the patent within the territory without infringing the grant.

The seventh question certified is as follows: Whether the letters patent of renewal issued to W. W. Woodworth, as administrator, on the 8th of July, 1845, upon the amended specification and explanatory drawings then filed, be good and valid in law, or whether the same be void for uncertainty, ambiguity, or multiplicity of claim, or any other cause.

The court is satisfied, upon an examination of the specification and drawings referred to in the question certified, that it is sufficiently full and explicit, and is not subject to any of the objections taken to it.

The remaining questions will be sufficiently answered by the certificate sent to the court below.

*ORDER. [*687

This cause came on to be heard on the transcript of the record from the Circuit Court of the United States for the Northern District of New York, and on the points and questions on which the judges of the said Circuit Court were opposed in opinion, and which were certified to this court for its opinion, agreeably to the act of Congress in such case made and provided, and was argued by counsel; on consideration whereof, it is the opinion of this court—

1. That the eighteenth section of the Patent Act of 1836 did authorize the extension of a patent on the application of the executor or administrator of a deceased patentee.

2. That, by force and operation of the eighteenth section of the Act of July 4th, 1836, entitled "An act to promote the progress of the useful arts," &c., the extension granted to William W. Woodworth, as administrator, on the 16th day of November, 1842, did not inure to the benefit of assignees under the original patent granted to William Woodworth on the 27th day of December, 1828, but that the said extension inured to the benefit of the administrator only, in his said capacity.

3. That the extension specified in the foregoing second point did inure to the benefit of the administrator, to whom the same was granted, and to him in that capacity exclusively; and that, as to the territory specified in the contract of assignment made by William Woodworth and James Strong to Toogood, Halstead, and Tyack, on the 28th day of November, 1829 (and set forth in the second plea of the defendants to the first count of the declaration), and by legal operation of the covenants contained in said contract, the said extension did not inure to the benefit of the said Toogood, Halstead, and Tyack, or their assigns.

4. That the plaintiff, claiming title under the extension from the administrator, can maintain an action for an infringement of the patent right within the territory specified in the contract of assignment to Toogood, Halstead, and Tyack, against any person not claiming under said assignment. And that the said assignment is not, of itself, a perfect bar to the plaintiff's suit.

5. That the extension specified in the second point could be applied for and obtained by

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William W. Woodworth, as administrator of William Woodworth, deceased, although the said William Woodworth, the original patentee, had in his lifetime disposed of all his interest in the then existing patent, having at the time of his death no right or title to or interest in the said original patent; and that such sale did not carry anything beyond the term of said original patent; and that no contingent rights remained in the patentee or his representatives.

6. That the plaintiff, if he be an assignee of [*688] an exclusive right *to use two of the patented machines within the town of Watervliet, has such an exclusive right as will enable him to maintain an action for an infringement of the patent within said town.

7. That the letters patent of renewal issued to William W. Woodworth, as administrator as aforesaid, on the 8th day of July, 1845, upon the amended specification and explanatory drawings then filed, are good and valid in law; and are not void for uncertainty, ambiguity, or multiciplity of claim, or any other cause.

8. That the question involved in the eighth point propounded does not present any question of law which this court can answer.

9. That the decision of the Board of Commissioners, who are to determine upon the application for the extension of a patent under the eighteenth section of the Act of 1836, is not conclusive upon the question of their jurisdiction to act in a given case.

10. That the commissioner of patents can lawfully receive a surrender of letters patent for a defective specification, and issue new letters patent upon an amended specification, after the expiration of the term for which the original patent was granted, and pending the existence of an extended term of seven years; and that such surrender and renewal may be made at any time during such extended term.

It is thereupon now here ordered and adjudged by this court, that it be so certified to the said Circuit Court.

Mr. Justice McLEAN:

As I dissent from the opinion of the court, in their answer to the second question certified, I will state, in few words, the reasons of my dissent.

The question is, whether the extension of the patent, under the Act of 1836, to William W. Woodworth, the administrator, inured to the benefit of the assignees of the first patent.

I had occasion to consider this question in the case of *Brooks and Morris* v. *Bicknell and Jenkins*, on my circuit, and on a deliberate examination of the eighteenth section of the above act, I came to the conclusion, that unless the assignment gave to the assignee the right in the extended or renewed patent, his interest expired with the limitation of the original patent.

The lamented *Justice* Story, without any interchange of opinion between us, about the same time, gave the same construction to the section. The late *Mr. Justice* Thompson, and several of the district judges of the United States, have construed the act in the same way.

The eleventh section of the act makes the patent assignable in law, either as to the whole interest or any undivided part thereof, by any instrument of writing, which is required to be recorded in the patent office within three months from the date.

By the eighteenth section, the patentee may make application *for the extension of [*689] his patent to the commissioner, who is required ot publish a notice of such application "in one or more of the principal newspapers in the city of Washington, and in such other paper or papers as he may deem proper, published in the section of country most interested adversely to the extension of the patent." "And the Secretary of State, the Commissioner of the Patent Office, and the Solicitor of the Treasury shall constitute a board to hear and decide upon the evidence produced before them both for and against the extension, and shall sit for that purpose at the time and place designated in the published notice thereof. The patentee shall furnish to said board a statement in writing, under oath, of the ascertained value of the invention, and of his receipts and expenditures, sufficiently in detail to exhibit a true and faithful account of loss and profit in any manner accruing to him from and by reason of said invention. And if, upon a hearing of the matter, it shall appear to the full and entire satisfaction of the said board, having due regard to the public interest therein, that it is just and proper that the term of the patent should be extended by reason of the patentee, without neglect or fault on his part, having failed to obtain, from the use and sale of his invention, a reasonable remuneration for the time, ingenuity, and expense bestowed upon the same, and the introduction thereof into use, it shall be the duty of the commissioner to renew and extend the patent," &c.; "and thereupon the said patent shall have the same effect in law as though it had been originally granted for the term of twenty-one years. And the benefit of such renewal shall extend to assignees and grantees of the right to use the thing patented, to the extent of their respective interest therein."

This section embraces patents previously issued, and the construction now to be given to it operates on all cases of extensions under it, whether the assignments were made before or after the passage of the act.

The object of this section is so clearly expressed as not to admit of doubt. It was for the exclusive benefit of the patentee; for the extension can only be granted when it shall be made to appear that the patentee, "without neglect or fault on his part, having failed to obtain, from the use and sale of his invention, a reasonable remuneration for his time, ingenuity, and expense," &c. This, then, being the clear intent of Congress, expressed in this section, it must have a controlling influence in the construction of other parts of the section. A statute is construed by the same rule as a written contract. The intent of law makers, and of the persons contracting, where that intent clearly appears, must be carried into effect. Where the statute or the contract is so repugnant in its language as not to show the intent, then no effect can be given to it. If the words used be susceptible of such a construction as *not only to show the intent, [*690] but to enable the court to give effect to it, it is the duty of the court so to construe it.

Bacon, on the construction of statutes, says: "The most natural and genuine way of con-

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struing a statute is to construe one part by another part of the same statute; for this best expresseth the meaning of the makers." And, "If any part of a statute be obscure, it is proper to consider the other parts; for the words and meaning of one part of a statute frequently lead to the sense of another." "A statute ought, upon the whole, to be so construed, that, if it can be prevented, no clause, sentence or word shall be superfluous, void, or insignificant."

That the patentee may have his patent extended, though the assignee held the entire interest in it, is undoubted. He has only to show that he has not been re-imbursed, &c., within the meaning of the section, to establish his claim for an extension. And, in such a case, if the benefit of the extension go to the assignee, he having the entire interest in the patent, how is the patentee benefited? And yet the law was enacted exclusively for his benefit. Does not such a construction defeat the object of the law? And if it does, can it be maintained? Where the assignment of the patent has been for less than the whole, the same objection lies, though the object of the law is subverted only to the extent of the assignment.

The interest of the assignee, it is supposed, is protected by the provision, that "the benefit of such renewal shall extend to assignees and grantees of the right to use the thing patented, to the extent of their respective interests therein." There can be no doubt that the words "to the extent of their respective interests therein" refer to their right to use the thing patented; and this, it is contended, is the benefit which results to the assignee from the renewal. That this would seem to be the import of these words, disconnected from other parts of the section, is admitted; but such a construction is wholly inadmissible, when the object of the section is considered.

The patent is extended for the benefit of the patentee. This is so obvious that no one will deny it. And the above construction gives the benefit to the assignee. Here is a direct repugnancy, and there is no escape from it; for the same repugnancy exists, though in a less degree, where a part of the patent only has been assigned. Under such circumstances, we must inquire whether this repugnancy may not be avoided by giving another and a different application to the provision, of which the words may be susceptible.

The benefit of the renewal is given to the assignees; but to what extent? To the extent of their interest in the renewal. But it is said that this cannot be the true construction, as it renders the provision inoperative. If, by the **691*]** assignment, there was an express *contract that the assignee should enjoy the same interest in the renewal or extension of a patent, this would secure such interest, without the provision.

To this it may be answered, that such an assignment of a thing not *in esse* would, at most, only be a contract to convey the legal right. But, under the eighteenth section, the assignment after the extension becomes a legal transfer. In addition to this, the right under the extension being legal, all purchasers would be affected with notice, where the assignment had been recorded in the patent office. This view gives effect to the section, and harmonizes its provisions. The other construction makes the parts of the section repugnant, and nullifies the whole of it. Now, which is the more reasonable view? But, in addition to this, what conceivable motive could Congress have had to give a boon to the assignee? How is he injured by the extension?

Without the extension, the assignee would only have a right, in common with all others, to use the invention. This could be of no more value to him than the worth of his machinery; for competition equally open to all, cannot be estimated of any value. Under the assignment, the assignee claims a monopoly. Now, did Congress intend to give him this boon? Why should he be an object of public munificence? He laid out his money in the purchase of the patent right, because he believed it would be profitable. And, in most cases, the assignee speculates upon the poverty of the inventor. Inventors are proverbially poor and dependent. The history of this patent illustrates strongly this fact. Half of the right was originally assigned to pay the expense and trouble of taking out the patent. Another part of the patent was assigned to compromise a pretended claim to a similar invention.

The hardship complained of by the assignee is more imaginary than real. If the patentee takes all the benefit of the extension, the assignee loses, it is said, the value of his machinery. This does not necessarily follow. For if the machinery has been judiciously selected, and put in operation at a proper place, it will sell for its value generally, if not always. If the invention be of great value, as is undoubtedly the case in this instance, the machinery will be wanted by anyone who may wish to continue the business, under the extended patent. So that the loss in the sale of the machinery would not be greater than would have been suffered by a sale if the patent had not been extended.

This construction, then, inflicts little or no injury on the assignee, whilst the other construction, as has been shown, defeats the object of the statute. But this inconvenience or loss to the assignee is duly considered and weighed, under the statute, as the board, in granting the extension, must have a due regard to the public interest. Notice is to be given, as far as practicable, to all persons interested against the extension of the patent, who may *appear before the board and oppose it. [***692** And it was stated in the argument, that the assignees of this patent did oppose the extension of it. Little did they suppose at the time that they were resisting a boon secured to them by the above section. Whatever loss, real or imaginary, the assignee may suffer from the extension of the patent, is a loss or inconvenience which results from the general advancement of the public good, and for which society does not, and indeed cannot, make compensation. The price of property is affected by general legislation. An embargo is laid, and ships, during its continuance, are valueless. The increase or diminution of the tariff affects beneficially or injuriously the value of machinery used in manufactures. The reduction of the price of the public lands affects the price

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of lands generally in the new States. An act authorizing a company or individual to construct a railroad renders useless turnpike roads in its neighborhood, and the public houses established thereon; but for these injuries no compensation is made. Indeed, it is difficult to find any great public enterprise which does not, in a greater or less degree, affect injuriously private rights. But these must yield to the general welfare of society.

All enlightened governments reward the inventor. He is justly considered a public benefactor. Many of the most splendid productions of genius, in literature and in the arts, have been conceived and elaborated in a garret or hovel. Such results not only enrich a nation, but render it illustrious. And should not their authors be cherished and rewarded?

If the assignee under the eighteenth section take anything, in my judgment he takes the whole extent of his interest—the whole or nothing. And it appears to me the construction given by the court is, if possible, less warranted by the section, than to hold that the assignee takes under the extension the entire interest assigned.

The words "and the benefit of such renewal shall extend to assignees and grantees of the right to use the thing patented, to the extent of their respective interest therein," cannot, it seems to me, by any known rule of construction, be held to give to the assignee or grantee the right to use the machine he may have had in operation at the time the extension took effect. The words, "to use the thing patented," are descriptive of the right assigned or granted, and refer to such right, not to the mere use of the machine. "The extent of their respective interests therein" undoubtedly covers the whole interest, and cannot refer merely to the number of machines the individual may have in operation.

Mr. Justice WAYNE expressed his dissent from that part of the opinion of the court which, in answer to the second question, gave a right to an assignee to continue the use of **693***] the patented *machine, and said he would probably file his reasons with the clerk.

Mr. Justice WOODBURY:

There is one of the leading questions certified to us in this cause, in the decision of which I have the misfortune to differ from a majority of the court.

As that decision bears on several of the other questions, and also disposes entirely of some of the four causes connected with this matter, which have been so long and so ably under argument before us, I consider it due to the importance of this subject to the parties and the public, as well as just to myself, to state the reasons for my dissent.

The difference in our views arises in the construction of the eighteenth section of the patent law of July 4th, 1836, and relates to the benfits which may be enjoyed under it by assignees and grantees.

Before the passage of that law, a patent could not, under any circumstances, be extended in its operation for the benefit of anybody beyond its original term, except by a special act of Congress. But this section allowed a patentee to apply to a board of officers and obtain from them a renewal of his patent for seven years longer, provided he offered to them satisfactory proofs that his expenses and labor in relation to the patent had not been indemnified. It provided further, that the renewal be indorsed on the back of the original patent; "and thereupon the said patent shall have the same effect in law as though it had been originally granted for the term of twenty-one years." It then added, "And the benefit of such renewal shall extend to assignees and grantees of the right to use the thing patented, to the extent of their respective interests therein." This last clause creates the chief embarrassment. In this case, the patentee having died, and we having just decided that a renewal was legally granted to his administrator, the controverted question about which we differ is, whether that renewal inures exclusively to the use of the patentee through his administrator, or goes either in full or in part to his assignees and grantees under the old patent. In the present case it is conceded, that by the contract of assignment or grant, nothing is expressly conveyed but the old patent, and in words, only for the original term of "fourteen years."

The question is not, then, whether, when assigning an interest in the old term, before or after the passage of the Act of 1836, it might not be competent and easy to use language broad and explicit enough to transfer an interest in any subsequent extension by means of the contract of assignment, and this be confirmed by the words of the eighteenth section; but whether those words alone transfer it, or were intended to transfer it, when the contract of assignment, * as in this case, [***694** was made before the Act of 1836 passed, and referred, *eo nomine*, only to the old patent, and expressly limited the time for which the patent was assigned to the old term.

In such case, it seems to me that both the language and spirit of this section restrain its operation to the patentee or his legal representatives, and convey no rights in the extension to assignees or grantees, whether prior or subsequent, except where the patentee had clearly contracted that they should have an interest beyond the original term.

But the majority of the court hold here, that this clause, independent of any expression in the assignment, transfers an interest in the extension to all assignees and grantees, so that they may continue to use any machines already in operation during the new term, without any new contract, or any new compensation for such further use.

The argument on the part of the assignees, in all the cases before us, on this subject, has been, that by force of this section all assignees before authorized to make, vend, or use these machines, for fourteen years, could continue to make and vend, as well as use them, for seven more, without any new contract or new consideration; and that "grantees of the right to use" should have a like prolongation of all their interests. And such seems to have been the opinion of the Circuit Court in Maryland, in *Wilson* v. *Turner* (October Term, 1844), *Chief Justice* Taney presiding, though other points besides arose there, and were disposed of in that opinion.

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But now, for the first time, it is believed, since the passage of the patent law, this court, by force of the last clause in the eighteenth section, not only give to assignees and grantees a greater or longer interest in the thing patented than was given in the contract of assignment to them, but undertake to introduce a novel discrimination, not seeming to me to be made in the clause itself, and give to assignees of the patent right itself an extension of only a part of their former interest, but to "grantees of the right to use" the patent, an extension of all their former interests.

We propose to examine the objections to this decision of the court, first, on the principle of giving to old assignees and grantees an extension of their interests to the new patent at all, unless the contract of assignment to them was manifestly meant to embrace any new term; and, after that, to examine the propriety of the discrimination in allowing a right in the renewed patent to grantees of the use, to the extent of all their old interests, and withholding a like privilege from assignees of the patent itself.

First, it has been repeatedly decided, that "a thing which is in the letter of a statute is not within the statute, unless it be within the intention of the makers." (Dwarris on Statutes, 692; Bac. Abr., Statute, T; 2 Inst., 107, 386.) **695*]** *Here the great design of the whole section was to extend assistance to an unfortunate and needy class of men of genius, who had failed to realize any profits from their valuable inventions during the first term of their patents. The intention of the makers of this law is usually conceded to have been relief to such patentees, and not to assignees or grantees.

It was the former, and not the latter, who were sufferers, and whom Congress had before, by special acts of extension, occasionally tried to indemnify for their losses; and to whom now, in a more summary way, on application and proof by them alone, an extension was authorized to be given by a board of officers, in order that they and not others might reap the profits of such extension.

But, by allowing the benefit of it to go to the former assignees of only the old patent, the intention of the makers appears to be defeated, and those profited who have not proved any loss or suffering, but, on the contrary, may, have already derived great advantages from the assignment.

It might thus happen, likewise, where, in a case like this, the patentee has assigned all his old patent before the extension, and the use of it under the extension would constitute all or its chief value, that neither he nor his representatives—he whose genius had produced the whole invention, at the sacrifice of time and toil, and whose sufferings, losses, and disappointments the law is expressly made to indemnify—would receive the smallest pittance from it; but those reap all its advantages who may already have grown rich by the assignment to them of the old patent, and who nobody can pretend were the particular or principal objects of relief. Under such a construction, how absurd would it be for such a patentee ever to apply for an extension, when he must do it at new cost and expense, and then have the whole fruits of it stripped from him by persons who had neither paid for the extension, nor had it conveyed to them. It is an equal violation of the leading intention of this section, and of most of these principles and of much of this reasoning, to allow, as the opinion of the court does, such persons to take, unpaid for and unbought, a part of the benefits of the renewal, as to take the whole of them.

Second, by the construction of the court, contracts and vested rights seem to be radically encroached upon. Under it, an assignee of an old patent, limited in the contract conveying it to fourteen years, will, for some purposes, get it for twenty-one years, directly in conflict with the express stipulation of the parties. Congress will, in this way, be made unworthily to tamper with the private obligations of individuals, and will impair them by taking from the rights of one, and enlarging or adding to the rights of the other; and this without any new consideration or new engagement passing between them, but, on the contrary, against the wishes, assent, and interests of one. That view, also, involves us in the unreasonable inference, *that Congress intended **[*696** to violate a solemn compact, to disturb the vested rights and written agreements of parties, when the language used is susceptible of a different construction, and one that is consistent with what is just, and with the spirit of the whole section.

By that view, an assignee or grantee will obtain "a right to use the thing patented" for a term of seven years longer than he contracted or paid for, while the patentee, without any such agreement in his contract assigning or granting the right to use, and without any new consideration, will be deprived of all his new and vested rights in the extension, so far as regards that use, and will have his former contract impaired virtually in its whole vitality, by making him part with the use for a term of twenty-one years, when the contract says but fourteen, and making him do it, also, without any application by others for the extension, any proof by others of not being indemnified, any payment by others of the costs and expenses for procuring the additional seven years, and when the avowed and cardinal object of the renewal was to indemnify him alone for losses which he and not others had sustained. Well may he say, as to these new and extended interests attempted to be conferred on assignees and grantees beyond the contract of assignment, *in hæc fœdera non veni*.

Third, the construction I contend for seems to me the only one consistent with the language used in the latter portion of the eighteenth section. By this, no part of those troublesome four lines is senseless, or expunged, or ungrammatical, or contradictory to the object of the previous portion of the section. While the construction opposed to this must, in my view, require interpolations or extirpations of words, and a violation of the object of the rest of the section, in order to give to the clause the meaning the advocates of that construction impute to it. Look at the phraseology of the clause: "The benefit of such renewal shall extend to assignees and grantees of the right to use the thing patented, to the ex-

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tent of their respective interests therein," but surely to no more than that extent. It would violate both the words and design to have them enjoy more than the extent of their interests therein, quite as much as not to let them enjoy all of the extent of them. In the construction of statutes it is a well settled axiom, that, "to bring a case within the statute, it should be not only within the mischief contemplated by the Legislature, but also within the plain, intelligible import of the words of the act of Parliament." (*Brandling* v. *Barrington*, 6 Barn. & Cress., 475.) In this case the assignees and grantees were not within either the mischief intended to be remedied, that is, a want of indemnity for losses by the patentee; or within the "plain, intelligible import of the words," as their contract of assignment or grant did not extend to the renewed term at all, for any purpose whatever, but was expressly limited to the fourteen years of the original patent.

There must be some measure of their respect-
697* ive interests, when *the act passed. What was it? Clearly, the contracts under which they had been acquired. Nothing had been done, either in other acts or previous portions of this, to increase those interests beyond the contracts, but merely to enable assignees and grantees of exclusive rights to protect them by suits in their own names. The present clause, also, does not profess to increase those interests, but simply to let assignees and grantees enjoy them under the renewal, if by their extent by the contract which limits and defines them they run into the extended term. Various hypotheses and metaphysical refinements have been resorted to for the purpose of putting a meaning on the words of this clause differing from this, which is so plain and so consistent with the spirit of the section; and virtually making it provide, that assignees and grantees shall have more benefits under the renewal in the thing patented than the "extent of their respective interests therein."

But before testing more critically the extent of those interests by the only standard applicable to them, it will be necessary to consider separately the true meaning of two of the words employed in this clause, namely, "renewal," and "therein."

Much research has been exhibited, in attempting to draw distinctions in this case between the words "renewal" and "extension," but I am not satisfied that any exist, when these words are employed as in this act of Congress, or in contracts relating to this subject. It is true, that some "renewals" are not "extensions," in the sense of prolonging the term of the patent—that is, when an old patent is surrendered and a new one taken out, or a renewal made for the rest of the term—while all "extensions" prolong the term. But still "renewals" are as often used for a prolongation of the term, or for a new term, as "extensions" are, and in this very section, "to renew and extend" is used as if synonymous, and this is sound analogy to the use of the word "renewal" on several other subjects. Thus, to renew a lease is to extend it another term. To renew an office is to extend it another term. To renew griefs, *renovare dolores*, is to extend them. Again, the second "therein," at the close of the clause, has been considered by some as meaning "in the renewal," and by others, "in the right to use," and by others still, "in the thing patented." But, grammatically, it refers to the "thing patented," and hence "the interests therein" are "the interests in the thing patented."

Phillips treats it as a matter of course to mean "in the patent," and uses that as synonymous to "therein," and though, in regard to my construction of the whole clause, the result is much the same, whether "therein" is considered to mean in "the thing patented," or "the patent," or "the renewal," yet I incline to the first view of it as that most strictly grammatical and the most natural, as well as coming nearest to the views of this court in
**M'Clurg* v. *Kingsland* (1 How., 210). [*698
Further objections to its meaning "in the right to use" will be stated hereafter, under another head. Passing, then, to a more careful scrutiny of the whole clause, it would seem that there could be but one rational test of "the extent" of the interests of assignees and grantees in the thing patented, and that such test must be the previous contract of assignment or grant, under which alone they hold any interests.

If that contract grants to them one fourth or one half of the old patent, or the use of it in one State or county, and for a term of five years, or ten, or fourteen, from the issue of the patent, then such, and such alone, is the extent of their interests, and they will not run into the new term. But if the contract goes further, and grants one half or all of the old patent to assignees, and for a term not only of fourteen years, but twenty-one years, or any number to which the patentee may afterwards become entitled by any extension or new grant, then such is the extent of their interests, and they will in such case run into the new term. This view gives meaning and spirit to every word, and excludes or alters none. This, too, conforms to the design of the section in taking away no part of the benefit intended to be conferred by it on the patentee, unless he has chosen to dispose of it clearly and deliberately, and receive therefor, either in advance or after actually granted, such additional consideration as he deemed adequate and contracted to be sufficient.

If after the word "extent" in this clause, there had been added, what is the legal inference, both in time and quantity, this meaning might have been still more clear to some. But without those words, the extent of interest seems to me to depend as much on the length of time the patent is granted to the assignee, as on the dimensions of territory over which he may use it, or the proportion of the whole patent he is authorized to use. It is like a leasehold interest in land, or a grant of it. The extent of interest by such a grant of land is more or less, as the term is shorter or longer, quite as much as if the land conveyed is more or less in quantity.

The word "extent," in common parlance, varies somewhat in meaning, according to the subject to which it is applied, and as that changes, it may as well refer to time as to space, or proportion; and more especially so, when applied to interests, as in patents, for a particular term of years.

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There is another analogy in support of this view, that has not been urged in the ingenious arguments offered, but has struck me with some force. A patent was the description once applied to commissions for office; and the records of this court at first speak of the commissions of the judges as patents.

Now, what is the extent of interest the in-
699*] cumbent has in any *office under his commission or patent? Clearly, in part, the length of time it is to run, whether four years, during good behavior, or for life, and in part only its yearly profits; often quite as much depending on that length of time as the amount of the salary or fees annually attached to the office.

What is the chief objection in reply to all this? Nothing, except that the assignee could get protected to the extent of his interest, in this view, by the contract alone, without the aid of the provision at the close of the eighteenth section, and hence that the provision is in this view unnecessary or nugatory, and must have been inserted for some other purpose. But were it in reality unnecessary, that would not require us to consider it as intending something different from its words, or different from the previous contracts of the parties. Legislatures often add clauses to acts, which do not prove to be in reality necessary, but are inserted from abundant caution and to remove future doubts or litigation. So, in this very act, in the eleventh section, it is declared that a patent may be assigned. Yet this is probably unnecessary, as an interest like that of a patentee can of course be assigned, on common law principles, without the aid of a statute.

When we look, however, to another circumstance—that, though a contract of assignment would, without any clause in the statute, pass the interest to the assignee, yet it would not enable him to sue in his own name—we can discover another reason for this provision still more effective. A clause had been inserted in a previous part of the act to enable the assignee to sue in his own name on the old patent, if violated; and, probably in doubt whether such provision would be extended to assignees under the renewal, when having any interest therein, it was provided further, that "the benefit of the renewal" should reach them to the extent of their interests therein—a part of which benefit would be to sue in their own name for any infringement on their rights to it, as fully as they could do for a violation of their rights in the original patent, and as if that had been for twenty-one years. The provision thus would be far from nugatory, by clearly conferring on them every power and privilege to sue under the extension which they possessed under the original patent.

By means of this provision, also, in another view, the condition of the parties might be changed, from a reliance on a contract alone that they should have a certain interest in the new patent, to a vested interest in it; or, in another view still, from an executory to an executed right.

There is, in the construction given by some of the majority of the court to the clause immediately preceding this, another ample reason for inserting such a provision.

The previous clause, stating, that "there-upon the said patent shall have the same effect in law as though it had been originally granted for *the term of twenty-one years," [*700 would, it is argued, if the section had there ended, have conferred on any assignee or grantee of the old patent, or any part of it, the extended term, so as to enable them to use the patent as if it originally had been granted for twenty-one years instead of fourteen.

Suppose, then, for a moment, that this construction was considered by Congress proper, or only possible, it is manifest that the additional clause which follows had a second and most pregnant object—no less than to prevent that consequence, so hostile to the design of inserting the whole section—to grant an extended term for the benefit and indemnity of the patentee, and not of the assignee. In this view, the last clause might well be added, as a limitation on what would otherwise be the inference from that just preceding it; and might well declare, instead of this inference, that assignees of the old patent should not hold it, in all cases, as if originally granted for twenty-one years, though patentees might; but that assignees should hold only in conformity to "the extent of their respective interests" in the thing patented. In other words, if by contract they had acquired clearly an interest for twenty one years, they should hold for that time; but if by contract they had acquired an interest for only five or fourteen years, they should hold it only to that extent. This is rational, consistent with the great object of the section, and gives new and increased force and necessity to the clause. The assignees would then, after the renewal, hold the patent for all the time they had stipulated, and for all they had paid, but for no more.

It will be perceived, that very few assignees or grantees, prior to the passage of the Act of 1836, would in this view be likely to come under this provision, and be benefited by it; because, not knowing that any future law would pass allowing an extension, very few would be likely to anticipate one, and provide in their contract and pay for a contingent interest in its benefits.

This would make the provision, in practice, apply chiefly to future assignees, who, knowing that such a provision existed, might be willing to give something for a right to any extension which might ever take place under it and therefore might expressly stipulate in the assignment for that right. Indeed, the arguments on the part of the patentee in this case have mostly proceeded on the ground that this provision was intended to apply solely and exclusively to future assignees. Considering that any other construction is in some degree retrospective, and that this would give force to the provision, as well as preserve the spirit of the section, I should be inclined to adopt it, if mine did not produce a like effect, and was not alike free from objection, as limited by me; because I do not make the provision retrospective except in cases where the parties had expressly contracted that the prior assignee should receive the benefit of any extension, and in that case it has the preference in its operation *over the other view, as it carries into [*701 effect that express compact, and does not cramp the force of it to the future alone, where the

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language and the consideration are equally applicable to past engagements of this character.

This conclusion is also strengthened by being in harmony with all the leading rules of construction applicable to statues, while that adopted by the court seems, to my mind, to violate some of the most important of them.

Beside those already referred to, it is well settled, that "if a particular thing be given or limited in the preceding parts of a statute, this shall not be taken away or altered by any subsequent general words of the same statute." (Dwarris, 658; *Standen* v. *The University of Oxford*, 1 Jones, 26; 8 Coke, 118, *b.*) Here a particular benefit is, by the former part of the eighteenth section, conferred on a patentee, for reasons applicable to him alone; and yet, in this case, by the opposite construction, a few general words towards the close are construed so as in some respects to destroy entirely all those benefits to the patentee; and that, too, when the language is susceptible of a different construction, more natural and perfectly consistent with the previous particular grant to the patentee.

Some collateral considerations have been urged in support of the conclusions of the court on this branch of the construction, which deserve notice. On a close scrutiny, they appear to me to amount to less in any respect than is supposed, and in some particulars strengthen the grounds of dissent. Thus, it has been said that the English Act of the 5th and 6th of William IV., passed September 18th, 1835, was before Congress in 1836, and was intended to be copied or adopted; and as, under that, assignees have been allowed to participate in the extended time, it has been argued that such was the intention here. But it is doubtful whether that act was before the committee when they reported the bill in 1836, as the intervening time had been short, and the eighteenth section, on examining the journals and files, appears not to have been in the bill at all as originally introduced, or as originally reported; but was afterwards inserted as an amendment in the Senate. The consideration of this section, therefore, does not seem to have been so full as of the rest of the bill; and it is very far, in language, from being a copy of the English act. Assignees are not named at all in that act; and though, in extensions under it, assignees have in two or three cases been allowed to participate, it has only been where an enlarged equity justified it—as where the patentee consented, or was to receive a due share in the benefits, or had clearly conferred a right in the extension by the assignment; and where, also, the assignees are expressly named in the new grant or patent as entitled to a share of it. (See Webster's Patent Cases, 477.)

There, also, an assignee, under like circum- **702*** stances, would doubtless *benefit by the renewal, under its ordinary operations; and the practice in England, thus limited, will fortify rather than weaken the construction I adopt of the true design of the last clause in our own law.

There is much, also, in another collateral consideration here, which does not apply in Great Britain, and which restricts conferring the benefit of an extension, or an extension itself, on an assignee by or under any statute, if it goes beyond what a patentee had himself contracted to do.

Here the Constitution limits the powers of Congress to give patents to inventors alone.

"The Congress shall have power to promote the progress of science and the useful arts, by securing, for limited times, to authors and inventors, the exclusive right to their respective writings and discoveries." (Article I., sec. 8.)

No authority is conferred to bestow exclusive rights on others than "authors and inventors" themselves.

Hence a patent could not probably be granted to an assignee, nor an extension bestowed on one, independent of the assent or agreement of the patentee, or of its inuring to his benefit, without raising grave doubts as to its being a violation of the Constitution. But so far as inventors have expressly agreed that assignees shall be interested in their patents, or in the extensions of them, the latter may well be protected; and so, as far as administrators represent the inventor or patentee, when deceased, the grant to them is substantially a grant to the inventor, as the benefit then inures to his estate and heirs. But to grant an exclusive right to an assignee would confer no benefit on the patentee, or his estate; and it would violate the spirit as well as letter of the Constitution, unless the inventor had himself agreed to it, and had substituted the assignee for himself by plain contract, whether for the original term or any extension of it.

Cases have been cited in this country, likewise, where Congress, in ten or twelve instances, have renewed patents to the inventors; but they have never done it to assignees. And though in two out of the whole, which were renewed after the term had expired and the assignees and the public were in the free use of the patent, some limitations have been imposed on requiring further payments from the assignees for the longer use of the old patent; yet in these only, and under such peculiar circumstances, has it been done, and in these no term was granted by Congress directly to the assignee rather than the patentee; and this limitation or condition in favor of the assignee, in the grant to the patentee, is of very questionable validity, unless it was assented to by the patentee. In this case it is most significant of the views of Congress to relieve the patentee rather than assignees, that by a special law, passed February 26th, 1845, they have conferred on the representative of the *original patentee still another term of [***703** seven years, without mentioning the assignees in any way, and without any pretense that the benefits of this extension were designed for them.

The argument, that the assignee is sometimes a partner, and makes liberal advances, furnishes a good reason, in a pecuniary view, why an assignment should be made to him of such an interest in the old patent as will indemnify him, but furnishes none for giving him, even if he regards money above public spirit or benevolence, more than an indemnity; or for giving him a benefit in any renewal, which it has never been agreed he should have, and for which he never has paid.

So, the reasoning that the assignee stands in the shoes or in the place of the patentee, and

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represents him, and therefore should have an interest in the extension, applies very well, so far as he is assignee, or so far as the contract extends. But he no more stands in the shoes of the patentee beyond the extent of his contract than an entire stranger does. Such are the cases of *Herbert* v. *Adams* (4 Mason, 15), and that cited in 1 Hawk. P. C., 477, *note*.

In one, the assignee of the old patent represented the patentee as to that, and that only; and in the other, where by law a further copyright was authorized in all cases, and the patentee assigned his whole interest, the second term passed also; because the law had previously given it absolutely, without contingency or evidence of losses, but in connection with, or appurtenant to, the first copyright.

Again, it has been urged that the assignee should have the benefit of the extension; otherwise he may have made large expenditures, in preparing for a free use of the patent after the original term expires, and will lose them in a great degree, or be obliged to pay largely for the continued use of the patent. But this same reasoning applies equally well to the whole world as to the assignee; because any individual, not an assignee, may have incurred like expenditures in anticipation of the expiration and free use of the old patent. In fact, the argument is rather a legislative than judicial one, and operates against the policy of the whole section, rather than the construction put on the last clause.

But the hardship to any person, in such case, is more apparent than real. The price to be paid for the new patent is not so much as the gain by it, and hence those who have proposed to use it and do use it after the extension, and pay anew for a new or further term, gain rather than lose, or they would have employed the old machinery in operation before this invention.

Nor is it any relief to the community at large, as seems by some to have been argued, to hold that the renewal, or a large part of it, vests in the assignee and grantee rather than in the patentee.

For the great mass of the people must still pur- **704***] chase the patent, or the *right to use it, of some one, and must pay as much for it to the assignee as to the patentee.

Finally, the construction of the court, by conferring any privilege whatever on assignees and grantees beyond the extent of their interests in the thing patented, when those interests, as in this case, were expressly limited in the contract to the term of the old patent, goes, in my view, beyond the language of the act, beyond the contract of assignment, beyond the consideration paid for only the old term, and beyond any intention in the Legislature for relief or indemnity to others than unfortunate patentees.

I feel not a little fortified in these views on the case, by several decisions and opinions that have heretofore been made, in substantial conformity to them. Indeed, independent of opinions in some of the actions now before us (from which an appeal has been taken, or the cause has come up on a certificate of division), every reported case on this subject has been settled substantially in accordance with these views. (See *Woodworth* v. *Sherman*, and *Woodworth* v. *Cheever et al.*, Cir. Ct. for Mass., May Term, 1844, decided by *Justice* Story; *Van Hook* v. *Wood*, Cir. Ct. for New York, October Term, 1844, by *Justice* Betts; *Wilson* v. *Curtis & Grabon*, Cir. Ct. for Louisiana, by *Justice* McCaleb; *Brooks & Morris* v. *Bicknell et al.*, Cir. Ct. for Ohio, July Term, 1844, by *Justice* McLean, Western Law Journal, October, 1845; Butler's opinion, as Attorney-General, in *Blanchard's* case, opinions of Attorneys-General, pp. 1134 and 1209.)

All that remains for me is to advert a moment to that branch of the construction adopted by the majority of the court, which, after giving to both assignees and grantees a benefit in the new patent or term beyond "the extent of their interests" under the contract of assignment, undertakes to go still further, and make a discrimination between assignees and grantees, as to the enjoyment, under the renewal, of their different original interests. It gives to the latter, the grantees, by the mere force of this last clause in the eighteenth section, the enjoyment of all their old interests during the whole of the new term; but it gives to the former, the assignees, the enjoyment of only about a third portion of their old interests during that term. In other words, it gives to "grantees of the right to use the thing patented" a continuance of all their interests; but to assignees, whose interests extended to the right to make and to vend, as well as use, the thing patented, a continuance of only a part of theirs. In such a discrimination, uncountenanced and unwarranted, as it seems to me, by either the words or the spirit of the act of Congress, I am sorry to find another strong ground of dissent to the opinion of the court. The act does not say, as is their construction, that "the benefit" of only "the right to use the thing patented" shall extend to anyone, whether an assignee or grantee; but that the benefit of the renewal *shall extend to [***705** both, "to the extent of their respective interests," though differing clearly in extent as they do, and as will soon be more fully shown.

"Judges are bound to take the act of Parliament as the Legislature have made it." (1 D. & E., 52, and Dwarris on Statutes, 711.)

But the words in this act, "the right to use the thing patented," must be transposed, and other words altered in their ordinary meaning, to make these a description of the interests conferred.

They are now a description of one kind of purchasers, that is, "grantees of the right to use the thing patented," to whom the renewal should extend, if they had stipulated for any interests therein by their contracts. The clause refers to two classes, who may in such case be benefited by the renewal. "Assignees" are one class, and "grantees of the right to use the thing patented" are the other class. This accords with the language itself, and also with the punctuation of this clause, as examined by me in manuscript on file in the Senate, and as printed by the State department, having no comma or other pointing in it except after the word "patented." It accords, too, with what is well understood to be the fact, that assignees and grantees usually constitute two distinct classes of purchasers, the former being those who buy a part or all of the patent right itself,

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and can protect their interests by suits in their own name; and the latter being those who buy only "the right to use the thing patented," and generally, except where the use is exclusive (fourteenth section), cannot institute suits in their own name for encroachments upon it. In the face of this, to hold that assignees and grantees mean the same thing here, and that the words "of the right to use the thing patented" apply equally to both, is a departure from the above established usage in employing those terms, and gives a different meaning to them from what is previously twice given in this very act. Thus in the eleventh section an "assignment" is mentioned as one thing, and "a grant and conveyance of the exclusive right," &c., as another, and in the fourteenth section, "assigns" are spoken of as if one class, and "grantees of the exclusive right," &c., as if another. And why does the conclusion to this clause say, "to the extent of their respective interests therein," if such assignees and grantees as to patents were not in this very clause considered by Congress as having different interests, and that these were to be protected according to their respective extents? It would have said, and must be made to say, if sustaining the construction of the court, "to the extent of that right," or "to the extent of that interest," and there stop. Manifestly, then, there is not conferred on these two classes, by this clause, either in its spirit or *in totidem verbis*, merely "the right to use the thing patented," but, on the contrary, "the benefit of the renewal," "to the extent of their respective **706*]** interests in the *thing patented." The interests of the grantees may be limited to the use, and those of the assignees may not be, but include the right to make and vend as well as use; yet large or long as may be the interests of either, the benefit of the renewal is to cover them, if the extent of them, under the original assignment or grant, reached to the new term. One is not to have the whole of his interests protected and the other a part only, when their equities are the same. But the assignee is to have to the extent of his, which is to make, vend, and use; and the grantee only "of the right to use" is to have to the extent of his.

This, to my apprehension, is unquestionably the substance of what Congress has said on this topic; and yet it is only by supposing new language not in the act, or by transposing some of the old, so as to not be in harmony with the original structure of the sentence, or by giving a meaning to words different from what has been established, and, in my view, only by doing this, that any foundation can be laid in support of this part of the construction approved by the court. But "it is safer," said Mr. J. Ashurst, "to adopt what the Legislature have actually said, than to suppose what they meant to say." (1 D. & E., 52; 6 Adolph. & Ellis, 7.)

It may be well, also, not to forget, that it is always more judicial, and less like legislation, to adhere to what Congress have actually said, and that it is more imperative to do this when by adhering to it you carry out, as in this case, the manifest intention of the previous part of the section. Nor can the inconsistency produced by the construction of the court be without influence in creating doubts as to its correctness; as by it "the benefit of the renewal" will be extended to assignees and grantees not in a ratio with "their respective interests"—the words of the law—nor in conformity to their respective contracts, nor according to the respective considerations they have paid, nor in proportion to the respective losses they have sustained, but, under the same general permission as to the extent of the "respective interests" of both, one class will be allowed to the full extent of his previous interests, and the other to only a part of that extent.

By what authority, let me respectfully ask, is this general permission thus divided, and in one class or case limited and in the other not? By what legal authority are assignees cut off from a valuable portion of their interests in a patent, while grantees to use the thing patented are allowed to exercise the whole of theirs, and both under one and the same general permission, covering all "their respective interests"? To make this discrimination, and allow to one class the full extent of their interests and to the other not the full extent of theirs, when the law says it shall be "to the extent of their respective interests," and when their respective contracts and equities show that this should include both the duration and quantity of their interests, looks like a distinction in a great degree arbitrary, *and not a little in con- [*707 flict with the plain words and design of the act of Congress.

But, beside this further departure from what seems to me the obvious meaning of the eighteenth section, caused by this branch of the construction of the court, it will fail, I fear, as any compromise of the difficulties arising under this section, if any compromise be expected from it. It is not likely to avert ruin from most of those indigent inventors, who have in their distresses resorted for aid to the delusive provisions of that section. Their very necessities and embarrassments, which are the justification for granting the renewal to them, have usually forced them to sell and assign all the original patent, as was the case with Woodworth in this instance; and if in such circumstances the law is to strip them of all benefits under the renewal, and, without any contract to that effect, confer those benefits on the assignees and grantees of the old patent, the law is perfectly suicidal as to the only design to be effected by its bounty. But if, seeing this, the construction is modified, as here, by the court, so as to deprive the patentee in such cases of only the benefits of the use of his old patent or old machines during the new term, this qualification in the operation of the law will, it is apprehended, usually prove a mere mockery, working, in most cases, as fully as the court's construction without the qualification would, the entire defeat of the laudable object of the renewal towards patentees. In one or two of the cases now before us, the patentee, under this construction, will still be subjected to defeat and burdensome costs. In relation to its effect on the present patent as a whole, all the consequences cannot now be ascertained. But it is admitted, that the inventor had assigned the whole of the old patent, so that no right whatever to use will remain in his representatives to dispose of; or if a right remains where machines are not now in actual use, probably enough are now in use to supply for

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some time the public wants in most parts of the United States.

The right to continue to use them will probably last during the whole seven years the renewal runs, as the machine will usually, with proper repairs, do service beyond that time. It will not, then, be very difficult to calculate what value, during the seven years, will be derived from the right to make and vend machines, when the use of others already in existence is scattered over every section of the country, and they may be employed all the time of the extended patent, without the assignees or grantees ever having paid or being obliged to pay a dollar for that extended use.

Looking, then, to the beneficent design of the eighteenth section, to enforce the Constitution, by advancing science and the arts, and protecting useful inventions, through the security for a longer term to men of genius of a property in their own labors, in cases where they had not been already remunerated for their time and expenses, I cannot but fear that the **708***] construction given by the majority *of the court will prove most unfortunate. It will tend to plunge into still deeper embarrassment and destitution, by losses in litigation and by deprivation of a further extended sale of their inventions, those whose worth and poverty induced Congress to attempt to aid them.

Nor would a different construction tie up, as some suppose, the future use of numerous patents. Of the fourteen thousand five hundred and twenty-six heretofore issued, since the Constitution was adopted, I am enabled, by the kindness of the commissioner of patents, to state, that only ten have been renewed under the eighteenth section during nearly ten years it has been in operation.

And if the individuals who use the improved machines, the fruit of the toil and expense and science of others, were obliged in but one case in a year, over the whole country, to pay something for that further use, is it a great grievance? They are not obliged to employ the patent at all, and will not unless it is better by the amount they pay than what was in use before. And is it a great hardship, or inequitable, where they are benefited by another's talents, money, and labor, to compensate him in some degree therefor?

While other countries, and Congress, and our State courts are adopting a more liberal course yearly towards such public benefactors as inventors, I should regret to see this high tribunal pursue a kind of construction open to the imputation of an opposite character, or be supposed by anyone to evince a feeling towards patentees which belongs to other ages rather than this (and which I am satisfied is not cherished), as if patentees were odious monopolists of the property and labors of others, when in truth they are only asking to be protected in the enjoyment and sale of their own—as truly their own as the wheat grown by the farmer, or the wagon built by the mechanic.

Nor should we allow any prejudices against the utility of patents generally and much less against the utility of the invention now under consideration, to make our constructions more rigid in this case. The settled doctrine of the courts now, under the lights of longer experience, though once otherwise, is in doubtful cases to incline to constructions most favorable to patentees. (*Grant et al.* v. *Raymond*, 6 Peters, 218; 1 Sumner, 485; *Wyeth* v. *Stone*, 1 Story's Rep., 287; *Blanchard* v. *Sprague*, 2 Story's Rep., 169.) Nor is it strange that this should be the case in the nineteenth century, however different it was some generations ago, when we daily witness how the world has been benefited since by the patented inventions and discoveries in steam, in all its wonderful varieties and utilities, and in cleaning, spinning, and weaving cotton by machinery for almost half the human race, and in myriads of other improvements in other things, shedding so benign a light over the age in which we live, and most of them excited and matured only under *the protection secured to their invent- [***709**
ors by an enlightened government.

Some estimate can be formed of the usefulness of the present patent, and its title to favor, when one machine is computed to perform the labor of planing and grooving in one day that would require fifty days by a man, and which is supposed to reduce near seven tenths the expense of such work in every building where the improved method is used—as it ere long will be by the many millions of our own population, and in time over the civilized world. Every honest social system must shield such inventions, and every wise one seeks undoubtedly to encourge them.

To be liberal, then, in the protection of patentees, is only to be just towards the rights of property. To stimulate them in this and other ways to greater exertions of ingenuity and talent is to increase the public wealth, and hasten the progress of practical improvements, as well as of science. And to discountenance encroachments on their rights, and defeat piracies of their useful labors, is calculated in the end to better the condition of every rank in society, and introduce wider and faster all the benefits of a superior state of civilization and the arts.

S. C., 1 Blatchf., 3.
Cited—4 How., 711, 712, 716; 6 How., 481, 486; 9 How., 122, 124; 14 How., 549, 550, 555, 560, 562; 15 How., 212; 17 How., 41; 22 How., 223; 1 Wall., 351; 10 Wall., 380; 18 Wall., 416; 1 Wood. & M., 254, 256, 397, 399; 2 Wood. & M., 44, 528; 3 Wood. & M., 127; 1 Blatchf., 169, 194, 195, 276, 531; 2 Blatchf., 146, 161; 3 Blatchf., 491-493, 498, 499; 4 Blatchf., 303; 6 Blatchf., 89, 90; 10 Blatchf., 92; 16 Blatchf., 457, 466; 1 Cliff., 156, 355; 2 Cliff., 437; 2 Curt., 520; 2 Biss., 66-69; 1 Abb. U. S., 569; 4 McLean, 354, 528; 5 McLean, 163.

ANDREW P. SIMPSON, JOSEPH FORSYTH, AND BAGDAD MILLS, *Appellants*,

v.

JAMES G. WILSON.

Patents—restriction in assignment to selling patented article in certain territory does not prohibit assignee from selling products of machine elsewhere.

The decision of the court in the preceding case of Wilson v. Rousseau *et al.*, namely, that when a patent is renewed under the Act of 1836, an assignee under the old patent has a right to continue the use of the patented machine, but not to vend to others, again affirmed.

An assignment of an exclusive right to use a machine, and to vend the same to others for use, within a specified territory, authorizes the assignee

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to vend elsewhere, out of the said territory, the product of said machine.

The restriction upon the assignee is only that he shall use the machine within the specified territory. There is none as to the sale of the product.

THIS case came up on a certificate of division in opinion between the judges of the Circuit Court of the United States for the District of Louisiana, sitting as a court of equity.

Wilson was the complainant below, who filed a bill, and obtained an injunction against Simpson, Forsyth, and Mills. After sundry proceedings in the case, Forsyth put in a plea, and a rule was obtained, that the plaintiff should show cause why the injunction should not be dissolved. Upon argument, the court dismissed the rule, and the case was set down for hearing by consent of parties; the complainants not admitting the facts alleged in the plea, but for the purpose of raising the questions of law which they involved, and obtaining a speedy decision of the same.

710*] *Upon the argument, the division of opinion arose which will be presently stated.

The facts in the case were these:

The patent for planing, &c., having been obtained by Woodworth in 1828, as has been particularly mentioned in the report of the preceding case of *Wilson* v. *Rousseau et al.*, Forsyth, one of the defendants below, became an assignee under that patent for all its rights within the County of Escambia, in West Florida. This took place in 1836.

Woodworth, the patentee, having died, his administrator, in 1842, obtained a renewal of the patent under the Act of 1836; and in 1843, assigned to Wilson, the complainant below, all the rights under the extended patent for the States of Louisiana, Alabama, and the territory of Florida.

On the 13th of April, 1844, the said Wilson instituted proceedings in equity, in the Circuit Court of Louisiana, against the defendants, on the ground that they infringed on his just rights by setting up and putting in operation the said patented machines in the territory of Florida; and by vending in New Orleans large quantities of dressed lumber, plank, &c., the products of the machines there established.

In May, 1845, the cause came up for hearing, as above stated, when the following points were ordered to be certified to this court, namely:

"J. G. WILSON v. SIMPSON ET AL." No. 1225.

"This case coming on to be heard on demurrer filed to the plea of Joseph Forsyth, one of the defendants, set down for hearing by consent, and the matters of law arising on said plea, the following points became material to the decision, and being considered, the court were divided in opinion on the following points:

"1. Whether, by law, the extension and renewal of the said patent, granted to William Woodworth, and obtained by William W. Woodworth, his executor, inured to the benefit of said defendant, to the extent that said defendant was interested in said patent before such renewal and extension.

"2. Whether, by law, the assignment of an exclusive right to the defendant, by the original patentee, or those claiming under him, to use said machine, and to vend the same to others for use, within the County of Escambia, in the territory of West Florida, did authorize said defendant to vend elsewhere than in said County of Escambia, to wit, in the city of New Orleans, State of Louisiana, plank, boards, and other materials, product of a machine established and used within the said County of Escambia, in the territory of West Florida.

"Wherefore, upon the request of defendants' counsel, it is ordered and directed that the foregoing points of law be certified for the opinion of the Supreme Court of the United States."

*The case was argued by *Mr. Gilpin* **[*711** and *Mr. Westcott* for the defendants below, who were the appellants in this court, and by *Mr. Henderson* and *Mr. R. Johnson* for Wilson.

Mr. Justice NELSON delivered the opinion of the court:

The questions in this case come up on the certificate of a division of opinion in the court below. The judgment of this court in the previous case of *Wilson* v. *Rousseau et al.*, upon the second question certified in that case, disposes of the first question certified here, and is answered accordingly.

The second question certified involves the point, whether or not the assignment of an exclusive right to make and use, and to vend to others, planing machines, within a given territory only, authorizes the assignee to vend elsewhere, out of the said territory, the plank, boards, and other materials, the product of said machines.

The court have no doubt but that it does; and that the restriction in the assignment is to be construed as applying solely to the using of the machine. There is no restriction, as to place, of the sale of the product.

Certificate accordingly to court below.

ORDER.

This cause came on to be heard on the transcript of the record from the Circuit Court of the United States for the District of Louisiana, and on the points and questions on which the judges of the said Circuit Court were opposed in opinion, and which were certified to this court for its opinion agreably to the act of Congress in such case made and provided, and was argued by counsel; on consideration whereof, it is the opinion of this court—

1. That, by law, the extension and renewal of the said patent granted to William Woodworth, and obtained by William W. Woodworth, his executor, did not inure to the benefit of said defendant to the extent that said defendant was interested in said patent before such renewal and extension; but the law saved to persons in the use of machines at the time the extension takes effect the right to continue the use.

2. That an assignment of an exclusive right to use a machine, and to vend the same to others for use, within a specified territory, does authorize an assignee to vend elsewhere, out of the said territory, plank, boards, and other materials, the product of such machine.

It is therefore now here ordered and decreed

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by this court, that it be so certified to the said Circuit Court.

S. C., 9 How., 109.
Cited—9 How., 122-125; 1 Blatchf., 276, 541; 1 Wood. & M., 256; 2 Biss., 67.

712*] *JAMES G. WILSON, *Complainant and Appellant,*
v.
JOSEPH TURNER, JUNIOR, AND JOHN C. TURNER, *Defendants.*

Patents, assignments of—rights of Assignee.

The decision of the court in the two preceding cases, namely, that where a patent is renewed under the Act of 1836 an assignee under the old patent has a right to continue the use of the machine which he is using at the time of the renewal, again affirmed.

THIS case came up by appeal from the Circuit Court of the United States for the District of Maryland, sitting as a court of equity.

The bill was filed by Wilson, as the assignee of William W. Woodworth, the administrator of Woodworth, the patentee, as stated in the report of the preceding case. It set out the patent and assignment, and then prayed for an injunction and account.

The answer referred to the mutual assignment made between Woodworth and Strong on the one part, and Toogood, Halstead, Tyack, and Emmons, of the other part, which was recited in the preceding case, and traced title regularly down from these latter parties to the defendants.

A statement of these facts was agreed upon by counsel, and all the documents set forth at length; and upon this statement, together with the bill and answer, the cause was argued.

At April Term, 1845, the court dismissed the bill, and from this decree the case was brought up by appeal to this court.

It was argued by *Mr. Phelps* and *Mr. Webster* for Wilson, the appellant, and *Mr. Schley* for the appellees, who where the defendants below.

Mr. Justice NELSON delivered the opinion of the court:

The judgment of the court in the previous case of *Wilson* v. *Rousseau et al.* disposes of the questions in this case, and affirms the decree of the Circuit Court.

Aff'g Taney, 278.

WILLIAM W. WOODWORTH, Administrator, &c., AND E. V. BUNN, Assignee, *Complainants and Appellants,*
v.
JAMES BENJAMIN AND ALPHEUS WILSON.

Patent—construction of assignment of—objection—sufficiency of specifications—practice in action for infringement.

An objection to the validity of Woodworth's patent for a planing machine, namely, that he was not the first and original inventor thereof, is not sustained by the evidence offered in this case.

Nor is the objection well founded, that the specifications accompanying the application for a patent are not sufficiently full and explicit, so as to enable a mechanic of ordinary skill to build a machine.

An assignee of the exclusive right to use ten machines within the city of Louisville, or ten miles round, may join his assignor with him in a suit for a violation of the patent right under the circumstances of this case.

*THE bill was filed in this case in the [*713 Circuit Court for the District of Kentucky, by the complainants, setting forth that William Woodworth was the inventor and patentee of a certain planing machine, describing it; also, the extension of the said patent to W. W. Woodworth, as administrator, and that E. V. Bunn, one of the complainants, took an assignment from the said W. W. Woodworth for the exclusive right of making, using, and vending machines for planing, &c., under the extension of the patent, within the limits of the city of Louisville, and in the district of country ten miles around said city.

The bill further charges, that the defendants have, in violation of the rights of the complainants, erected and put in operation in the city of Louisville a planing machine, &c., which machine is, in all its material parts, substantially like and upon the plan of the machine of the complainants, and persist in using the same.

The defendant James Wilson answered the bill, substantially denying most of the material allegations contained in it. The other defendants answered by denying that they had any interest in the machine.

The court granted an injunction, enjoining the defendant James Wilson from using the machine.

Afterwards an application was made to the court, on behalf of the complainants, for a rule upon the defendant, James Wilson, to show cause why an attachment should not be issued against him for a violation of the injunction, which was accordingly granted.

The defendant showed cause by affidavit, in which he affirms that immediately on the service of the injunction he had ceased to use the machine mentioned in the bill, and conformed himself to the order of the court, and that he had purchased and set up Bicknell's planing machine, which he was using, and which was substantially different from the machine of the complainants.

Much testimony was taken in the court below, on the question whether the machine which the defendant had substituted and was using was, in all its material and substantial parts, like Woodworth's, which it is not material to refer to more particularly. A great deal of testimony was also taken, for the purpose of showing that Woodworth was not the original inventor of the complainant's machine, which it is also not necessary to recite.

The cause afterwards came to a hearing on the merits, upon the pleadings and proofs, and also upon the rule previously granted against the defendant, to show cause why an attachment should not issue for a violation of the injunction, and, after consideration, the court dissolved the injunction and dismissed the bill, and discharged the rule to show cause, with costs.

As the opinion of the court refers in general terms to the interest of Woodworth under the

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assignment, as a justification for his being 714*] *joined as a party in the suit, it is proper to set forth the assignment, which was as follows:

Transfer from Woodworth, Administrator, &c., to E. V. Bunn.

"Whereas William Woodworth, now deceased, did, in his lifetime, obtain letters patent, issued under the great seal of the United States, bearing date the 27th day of December, 1828, giving and granting to him, the said Woodworth, his heirs, administrators, and assigns, for and during the term of fourteen years from the date of the said letters patent, the full and exclusve right and liberty of making, constructing, using, and vending to others to be used, a certain improved method for planing, tonguing, grooving, and cutting into mouldings, or either, plank, boards, or any materials, and for reducing the same to an equal width and thickness; and also for facing and dressing brick, and cutting mouldings in, or facing, metallic, mineral, or other substances.

"And whereas William W. Woodworth, administrator of said William Woodworth, hath applied and obtained an extension of said letters patent for the term of seven years from and after the expiration of said patent, to wit, the 27th day of December, 1842, pursuant to an act of Congress in such case made and provided, and hath a certificate of said extension annexed to said patent, signed by the commissioner of patents, under the great seal of the patent office of the United States, and dated November 16th, A. D. 1842. And whereas E. V. Bunn, of the city of Louisville, in the State of Kentucky, hath fully viewed, examined, and considered for himself the said improvement, and of his own motion hath requested and desired the said William W. Woodworth, administrator of said William Woodworth, deceased, to give a license and permission, in writing, for constructing and using machines on the said improved plan in the city of Louisville aforesaid, including the district of country within ten miles of said city, and in no other city, town, or place in the United States, or the territories thereof, on the conditions hereinafter mentioned; and have offered to pay him the sum of fifteen hundred dollars for such license and consent in writing; with which request and desire the said William W. Woodworth, administrator of William Woodworth, deceased, has agreed to comply.

"Now, know all men by these presents, that the said W. W. Woodworth, administrator of William Woodworth, deceased, in consideration of the said sum of fifteen hundred dollars, secured to be paid to him, the said William W. Woodworth, administrator of William Woodworth, deceased, doth hereby give his full consent and permission in writing, and license to the said E. V. Bunn, and to his executors, administrators, and assigns, to construct and use, during the said extension of the aforesaid patent, ten planing machines on the improved plan aforesaid, within the 715*] city of Louisville, *and including the district of country within ten miles of said city, and in no other city, town, or place within the United States or the territories thereof; and also, within said limits, to dispose of the plank or other things dressed and prepared in the said machines; and he doth also hereby authorize and empower the said E. V. Bunn, and his executors, administrators, and assigns, in the name of said Woodworth, administrator aforesaid, or in his own name, to commence and prosecute to final judgment any suit or suits against any person or persons who shall construct or use the said improvements within the said limits, contrary to the true meaning and intent of the aforesaid letters patent, and the extension thereof, and the laws in such case made and provided; and to receive for his own benefit, and at his own proper costs and charges, any penalty or penalties which he may recover. And in consideration of the premises, it is hereby covenanted and agreed, by and between the said William W. Woodworth, administrator of William Woodworth, deceased, his executors, administrators, and assigns, of the one part, and the said E. V. Bunn, his executors, administrators, and assigns, of the other part, as follows, viz:

"1st. That the said William W. Woodworth, administrator of William Woodworth, deceased, his executors or administrators, during the terms aforesaid, shall not, nor with themselves, construct, or use, nor give their license, consent, and permission to any other person than the said E. V. Bunn to construct or use the improved planing machine aforesaid, within the said city of Louisville, or within the district of country within ten miles of said city.

"2d. That the said E. V. Bunn, his executors, administrators and assigns, shall not nor will, during the times aforesaid, construct or use more than ten machines as aforesaid within the limits above mentioned, nor construct or use any such machines, nor sell and dispose of any plank or other thing dressed and prepared in such machine, anywhere else within the United States and the territories thereof; it being declared to be the true intent and meaning of these presents that not more than ten planing machines in the whole shall be constructed and used by virtue of the license, consent, and permission herein given.

"3d. It is understood and agreed that the said William W. Woodworth has entered and filed at the patent office, at Washington, a disclaimer of that part of said patent for the planing machine which claims the reduction of materials, boards, and plank to an equal width and thickness by circular saws; and a lien is retained and renewed on this assignment for the security of the payment of the fifteen hundred dollars—the consideration and purchase money to be paid to said Woodworth

"Signed, sealed, and delivered, this 21st day of June, 1843.

"W. W. WOODWORTH. [L. S.]
"Administrator of W. Woodworth, deceased.

*"The words 'to him in hand paid [*716 by the said' were erased, and the word 'ten,' and the words 'in the name of said Woodworth, administrator aforesaid, or in his own name,' were interlined before the execution of the foregoing instrument in presence of D. E. Sickles."

The cause was argued by *Mr. Latrobe* and

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Mr. Staples for the complainants, Woodworth and Bunn, and by *Mr. Bibb* for the defendants.

Mr. Justice NELSON delivered the opinion of the court:

The objection taken, that the administrator could not apply for an extension of the patent granted to Woodworth, his intestate, under the eighteenth section of the patent law, has been disposed of in the previous case of *Wilson* v. *Rousseau et al.*, and need not be further noticed.

Another objection taken to the right of the complainants to maintain the suit is, that Woodworth was not the first and original inventor of the planing machine, against the using of which the defendant was enjoined.

Without going into the proofs in the case, which are very voluminous, it will be sufficient to state, that after fully considering all the evidence produced bearing upon the question, the court is satisfied that the weight of it is decidedly against the objection, and in favor of the allegation in the bill, that Woodworth was the original inventor of the machine.

It is objected, also, that the specifications accompanying the patent were not sufficiently full and explicit, so as to enable a mechanic of ordinary skill to build a machine. The court is not satisfied, according to the proof in the case, that the objection is well founded, and it cannot be relied on as affording sufficient ground for the dismissal of the bill.

A further objection was taken, that W. W. Woodworth, one of the complainants, was improperly joined with E. V. Bunn, the assignee of the exclusive right in Louisville and ten miles around it. The court is of opinion that the interest of Woodworth in the assignment, as appears from the record, is sufficient to justify his being made a party jointly with the assignee.

Some other objections were taken to the maintenance of the suit on the argument, which it is not material to notice particularly; they have all been considered, and in the judgment of the court afford no sufficient ground for the dismissal of the bill and the dissolving of the injunction.

We think the court erred, and that the decree dismissing the bill, as to the defendant James Wilson, and dissolving the injunction, should be reversed, and that a perpetual injunction should issue.

Cited—7 Wall., 521; 1 Wood. & M., 254, 256; 1 Blatchf., 191, 198, 535; 16 Blatchf., 147; 1 Cliff., 156; 1 Bond., 131, 132.

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GENERAL INDEX

TO THE

FOUR VOLUMES OF HOWARD CONTAINED IN THIS BOOK. FORMED BY CONSOLIDATION.

N. B.—Figures at right of title show volume to whose index it belongs.

Figures in parenthesis refer to marginal paging of the volumes contained in this book respectively, while the black-faced figures indicate the page of this book on which the marginal paging referred to is found.

ADMINISTRATOR—1.

See Executors and Administrators.

ADMIRALTY—2.

See Piracy, and costs.

ADMIRALTY—3.

1. An agreement of consortship between the masters of two vessels engaged in the business known by the name of wrecking, is a contract capable of being enforced in an admiralty court, against property or proceeds in the custody of the court.
Andrews v. Wall, (568) 729

2. The case of Ramsay v. Allegre (12 Wheaton, 611) commented on, and explained.
Id. (*Ib.*) 729

3. Such an agreement extends to the owners and crews, and is not merely personal between the masters.
Id. (*Ib.*) 729

4. If made for an indefinite period, it does not expire with the mere removal of one of the masters from his vessel, but continues until dissolved upon due notice to the adverse party.
Id. (*Ib.*) 729

5. Where there is no other evidence than the answer of its having been a part of the original agreement, that such removal should dissolve the contract, the evidence is not sufficient.
Id. (*Ib.*) 729

6. Whenever proceeds are rightfully in the possession and custody of the admiralty, it is an inherent incident to the jurisdiction of that court to entertain supplemental suits by the parties in interest, to ascertain to whom those proceeds rightfully belong, and to deliver them over to the parties who establish the lawful ownership thereof.
Id. (*Ib.*) 729

ADVERSE POSSESSION—4.

1. Where the original possession by the holder of land is in privity with the title of the rightful owner, in order to enable such holder to avail himself of the statute of limitations, nothing short of an open and explicit disavowal and disclaimer of holding under that title, and assertion of title in himself brought home to the other party, will satisfy the law.
Zeller's Lessee v. Eckert, (289) 979

2. The burden of proof is on the holder to establish such a change in the character of the possession.
Id. (*Ib.*) 979

3. The statute does not begin to run until the possession becomes tortious and wrongful by the disloyal acts of the tenant, which must be open, continued, and notorious, so as to preclude all doubt as to the character of the holding, or the want of knowledge on the part of the owners.
Id. (*Ib.*) 979

4. In this case there was evidence enough given upon this point to authorize the court below to submit the question of adverse possession to the jury, and advise them that a foundation was laid upon which they might presume a grant for the purpose of quieting the title.
Id. (*Ib.*) 979

APPEALS—2.

See practice and writ of error.

APPEAL BOND—2.

1. An appeal bond given to the people or to the relator is good, and if forfeited may be sued upon by either.
Spalding v. The People of New York, (66) 181

2. Where there are many parties in a case below, it is not necessary for them all to join in the appeal bond. It is sufficient if they all appeal and the bond be approved by the court.
Brockett v. Brockett, (238) 251

APPROPRIATION OF PAYMENTS—1.

See Surety.

ASSUMPSIT—1.

1. The action of *assumpsit* for the use and occupation of lands and houses, existed in Virginia anterior to the cession of the District of Columbia to the United States.
Lloyd v. Hough, (153) 83

2. But this action is founded upon contract, either express or implied, and will not lie where the possession has been acquired and maintained under a different or adverse title, or where it was tortious and makes the holder a trespasser.
Id. (*Ib.*) 83

ASSUMPSIT—3.

Since the passage of the Act of Congress of March 3, 1839, chap. 82, which requires collectors of the customs to place to the credit of the Treasurer of the United States all money which they receive for unascertained duties or for duties paid under protest, an action of *assumpsit* for money had and received will not lie against the collector for the return of such duties so received by him.
Cary v. Curtis, (236) 576

ATTACHMENT—3.

The laws of Louisiana, allowing attachments for debts not yet due, relate only to absconding debtors.
Black v. Zacharie, (483) 690

ATTACHMENT—4.

1. Money in the hands of a purser, although it may be due to seamen, is not liable to an attachment by the creditors of those seamen.
Buchanan v. Alexander, (20) 857

2. A purser cannot be distinguished from any other disbursing agent of the government; and the rule is general, that, so long as money remains in the hands of a disbursing officer, it is as much the money of the United States as if it had not been drawn from the treasury.
Id. (*Ib.*) 857

3. A decision of a State court, sanctioning such an attachment, may be revised by this court under the twenty-fifth section of the Judiciary Act.
Id. (*Ib.*) 857

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BANKRUPTCY—1.

1. Upon questions adjourned from the District to the Circuit Court under the "Act to establish a uniform system of bankruptcy throughout the United States," the District Judge cannot sit as a member of the Circuit Court, and, consequently, the points adjourned cannot be brought before this court by a certificate of division.
Nelson v. Carland, (265) 126

2. Nor will an appeal or writ of error lie from the decision of the Circuit Court; and it is conclusive upon the district judge.
Id. (*Ib.*) 126

3. The Bankrupt Act declared to be constitutional by the Circuit Court of Kentucky. Note to Judge Catron's dissentient opinion.
Id. (*Ib.*) 126

BANKRUPTCY—2.

1. Under the late Bankrupt Act of the United States, the existence of a fiduciary debt, contracted before the passage of the act, constitutes no objection to the discharge of the debtor from other debts.
Chapman v. Forsyth and Limerick, (202) 236

2. A factor, who receives the money of his principal, is not a fiduciary within the meaning of the act.
Id. (*Ib.*) 236

3. A bankrupt is bound to state, upon his schedule, the nature of the debt if it be a fiduciary one. Should he omit to do so, he would be guilty of a fraud, and his discharge will not avail him; but if a creditor, in such case, proves his debt and receives a dividend from the estate, he is estopped from afterwards saying that his debt was not within the law.
Id. (*Ib.*) 236

4. But if the fiduciary creditor does not prove his debt, he may recover it afterwards, from the discharged bankrupt, by showing that it was within the exceptions of the act.
Id. (*Ib.*) 236

BANKRUPTS AND BANKRUPTCY—3.

1. In Kentucky, the creditor obtains a lien upon the property of his debtor by the delivery of a *fi. fa.* to the sheriff; and this lien is as absolute before the levy as it is afterwards.
Savage's Assignee v. Best, (111) 518

2. Therefore, a creditor is not deprived of this lien by an act of bankruptcy on the part of the debtor committed before the levy is made, but after the execution is in the hands of the sheriff.
Id. (*Ib.*) 518

3. This court has no revising power over the decrees of the District Court sitting in bankruptcy; nor is it authorized to issue a writ of prohibition to it in any case except where the District Court is proceeding as a court of admiralty and maritime jurisdiction.
Ex-parte Christy, (292) 603

4. The District Court, when sitting in bankruptcy, has jurisdiction over liens and mortgages existing upon the property of a bankrupt, so as to inquire into their validity and extent, and grant the same relief which the State courts might or ought to grant.
Id. (*Ib.*) 603

5. The control of the District Court over proceedings in the State courts upon such liens, is exercised, not over the State courts themselves, but upon the parties, through an injunction or other appropriate proceeding in equity.
Id. (*Ib.*) 603

6. The design of the Bankrupt Act was to secure a prompt and effectual administration of the estate of all bankrupts, worked out by the courts of the United States, without the assistance of State tribunals.
Id. (*Ib.*) 603

7. The phrase in the 6th section "any creditor or creditors who shall claim any debt or demand under the bankruptcy," does not mean only such creditors who come in and prove their debts, but all creditors who have a present subsisting claim upon the bankrupt's estate, whether they have a security or mortgage therefor or not.
Id. (*Ib.*) 603

8. Such creditors have a right to ask that the property mortgaged shall be sold, and the proceeds applied towards the payment of their debts; and the assignee, on the other hand, may contest their claims.
Id. (*Ib.*) 603

9. In the case of a contested claim, the District Court has jurisdiction, if resort be had to a formal bill in equity or other plenary proceeding; and also jurisdiction to proceed summarily.
Id. (*Ib.*) 603

10. The principles established in the case of *Ex-parte The City Bank of New Orleans in the matter of Christy, assignee of Walden*, reviewed and confirmed.
Norton's Assignee v. Boyd, (426) 664

11. But this court does not decide whether or not the jurisdiction of the District Court over all the property of a bankrupt, mortgaged or otherwise, is exclusive, so as to take away from the State courts in such cases.
Id. (*Ib.*) 664

2. Where the defendant below became a bankrupt, this court will not award a *supersedeas* to stay an execution, because the assignee of the bankrupt has his remedy in the Circuit Court.
Black v. Zacharie, (483) 690

BANKS—1.

See Commercial Law.

Whenever a banker has advanced money to another, he has a lien on all the paper securities which are in his hands for the amount of his general balance, unless such securities were delivered to him under a particular agreement.
Bank of the Metropolis v. New England Bank, (234) 115

BILLS OF EXCEPTIONS—4.

The mode in which bills of exceptions ought to be taken, as explained in Walton v. The United States (9 Wheat., 651), and in 4 Peters, 102, will be strictly adhered to by this court.
Brown v. Clarke, (4) 850

BILLS OF EXCHANGE AND PROMISSORY NOTES—2.

1. By the general law merchant, no protest is required to be made upon the dishonor of any promissory note; but it is exclusively confined to foreign bills of exchange.
Burke v. McKay, (66) 181

2. Neither is it a necessary part of the official duty of a notary, to give notice to an indorser of the dishonor of a promissory note.
Id. (*Ib.*) 181

3. But a State law or general usage may overrule the general law merchant in these respects.
Id. (*Ib.*) 181

4. Where a protest is necessary, it is not indispensable that it should be made by a person who is in fact a notary.
Id. (*Ib.*) 181

5. Where the indorser has discharged the maker of a note from liability by a release and settlement, a notice of nonpayment would be of no use to him, and therefore he is not entitled to it.
Id. (*Ib.*) 181

6. A statute of Mississippi allows suit to be brought against the maker and payee, jointly, of a promissory note, by the indorsee.
Dromgoole v. The Farmers' and Merchants' Bank of Mississippi, (241) 252

7. But an action of this kind cannot be maintained in the courts of the United States, although the plaintiff resides in another State, provided the maker and payee of the note both reside in Mississippi.
Id. (*Ib.*) 252

8. Where notes are deposited for collection by way of collateral security for an existing debt, the case does not fall within the strict rules of commercial law, applicable to negotiable paper. It falls under the general law of agency; and the agents are only bound to use due diligence to collect the debts.
Lawrence v. M'Calmont, (427) 326

9. Where the drawer of a bill has no right to expect the payment of it by the acceptor; where, for instance, the drawer has withdrawn, or intercepted funds which were destined to meet the bill, or its payment was dependent upon conditions which he must have known he had not performed, such drawer cannot be entitled to notice of the nonpayment of the bill.
Rhett v. Poe, (457) 338

10. It becomes a question of law, whether due diligence has or has not been used, whenever the facts are ascertained; and therefore there is no error in the direction of a court to the jury that they should infer due diligence from certain facts, where those facts, if found by the jury, amounted in the opinion of the court to due diligence.
Id. (*Ib.*) 338

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11. If the drawer and acceptor are either general partners or special partners in the adventure of which the bill constitutes a part, notice of the dishonor of the bill need not be given to the drawer.
Id. (*Ib.*) 338

12. The strictness of the rule requiring notice between parties to a bill, is much relaxed in cases of collateral security, or guaranty in a separate contract; the omission of such strict notice does not imply injury as a matter of course. The guarantor must prove that he has suffered damage by the neglect to make the demand on the maker and to give notice, and then he is discharged only to the extent of the damage sustained.
Id (*Ib.*) 338

13. A bill of exchange drawn by the Secretary of the Treasury of the United States upon the French government for money due, by a treaty between the two nations, cannot be considered as a bill drawn upon a particular fund, in a commercial sense.
Bank of the United States v. The United States, (711) 439

14. Such a bill, when taken up *supra protest* for the honor of the bank, becomes again the property of the bank in its original character of holder and payee.
Id. (*Ib.*) 439

15. Under the law merchant, the drawer of a foreign bill of exchange is liable, in case of protest, for costs and other incidental charges, and also for re-exchange, whether direct or circuitous. The statute of Maryland, allowing fifteen per cent., fixes this amount in lieu of re-exchange, to obviate the difficulty of proving the price of re-exchange.
Id. (*Ib.*) 439

16. When the bank came into possession of the bill, upon its return, the indorsements were in effect stricken out, and the bank became, in a commercial and legal sense, the holder of the bill.
Id. (*Ib.*) 439

BILLS OF EXCHANGE AND PROMISSORY NOTES—3.

See Commercial Law.

BILLS OF EXCHANGE AND PROMISSORY NOTES—4.

See Commercial Law.

BOND—1.

See Surety.

BONDS—4.

1. By a statute of Florida, where suit is brought upon a bond, the plaintiff need not prove its execution unless the defendant denies it under oath. It also provides that such an instrument may be assigned; that the assignee becomes vested with all the rights of the assignor, and may bring suit in his own name.
Bradford v. Williams, (576) 1109

2. Under this statute, where a joint and several bond was signed by three obligors and made payable to three obligees, one of whom was also one of the obligors, and the obligees assigned the bond, the fact that one of the obligors was also an obligee was no valid defense in a suit brought by the assignee against the two other obligors.
Id. (*Ib.*) 1109

3. The inability of one of the obligees to sue himself did not impair the vitality of the bond, but amounted only to an objection to a recovery in a court of law. The assignment, and ability of the assignee to sue in his own name, removed this difficulty.
Id. (*Ib.*) 1109

4. The statute of Florida places bonds, as far as respects negotiability and the right of the assignee to sue in his own name, upon the same footing as bills of exchange and promissory notes. The case, therefore, falls within the principle of a partner drawing a bill upon his house, or making a note in the name of the firm, payable to his own order, both of which are valid in the hands of a *bona fide* holder. *Id.* (*Ib.*) 1109

BOUNDARIES OF STATES—4.

1. The grant of Massachusetts, confirmed in 1628, included the territory "lying within the space of three English miles on the south part of the Charles River, or of any or every part thereof."
Rhode Island v. Massachusetts, (591) 1116

2. In 1662, the grant of Connecticut called to be bounded on the north by the line of the Massachusetts plantations.
Id. (*Ib.*) 1116

3. In 1663, the grant of Rhode Island called to be bounded on the north by the southerly line of Massachusetts.
Id. (*Ib.*) 1116

4. Whether the measurement of the three miles shall be from the body of the river, or from the head waters of the streams which fall into it, is not clear. The charter may be construed either way without doing violence to its language.
Id. (*Ib.*) 1116

5. The early exposition of it is not to be disregarded, although it may not be conclusive.
Id. (*Ib.*) 1116

6. In 1642, Woodward and Saffrey fixed a station three miles south of the southermost part of one of the tributaries of Charles River.
Id. (*Ib.*) 1116

7. An express order of the crown was not necessary to run this line, as it was not then a case of disputed boundary.
Id. (*Ib.*) 1116

8. In 1702, commissioners were appointed by Massachusetts and Rhode Island to run the boundary line, who admitted the correctness of the former line.
Id. (*Ib.*) 1116

9. In 1710, Rhode Island appointed an agent to conclude the matter on such terms as he might judge most proper, who agreed that the stake set up by Woodward and Saffrey should be considered as the commencement of the line.
Id. (*Ib.*) 1116

10. In 1711, Rhode Island sanctioned the agreement.
Id. (*Ib.*) 1116

11. In 1718, Rhode Island again appointed commissioners with power to settle the line, who agreed that the line should begin at the same place. This was accepted by Massachusetts and Rhode Island, the line run accordingly by commissioners, and the running approved by Rhode Island.
Id. (*Ib.*) 1116

12. The allegation that the commissioners of Rhode Island were mistaken as to a fact, and believed that the stake was within three miles of the main river, and not one of its tributaries, is difficult to establish, and cannot be assumed against transactions which strongly imply, if they do not prove, the knowledge.
Id. (*Ib.*) 1116

13. If the first commission was mistaken, it almost surpasses belief that the second should again be misled. *Id.* (*Ib.*) 1116

14. To sustain the allegation of a mistake, it must be made to appear, not only that the station was not within the charter, but that the commissioners believed it to be within three miles of the river, and that they had no knowledge of a fact as to the location of it, which should have led them to make inquiry on the subject.
Id. (*Ib.*) 1116

15. Even if the calls of the charter had been deviated from, which is not clear, still Rhode Island would be bound, because her commissioners were authorized to compromise the dispute.
Id. (*Ib.*) 1116

16. It is doubtful whether a court of chancery could relieve against a mistake committed by so high an agency in a recent occurrence. It is certain that it could not, except on the clearest proof of mistake. *Id.* (*Ib.*) 1116

17. This mistake is not clearly established, either in the construction of the charter, or as to the location of the Woodward and Saffrey station.
Id. (*Ib.*) 1116

18. Even if the mistake were proved, it would be difficult to disturb a possession of two centuries by Massachusetts under an assertion of right, with the claim admitted by Rhode Island and other colonies in the most solemn form.
Id. (*Ib.*) 1116

19. For the security of rights, whether of States or individuals, long possession, under a claim of title, is protected. And there is no controversy in which this great principle may be invoked with greater justice and propriety, than in a case of disputed boundary.
Id. (*Ib.*) 1116

BREVET RANK—4.

The army regulations under which General Gratiot was removed from West Point to Washington were authorized by law, and his brevet rank did not release him from discharging the duties of his commission proper.
Gratiot v. United States, (80) 884

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CHANCERY—1.

1. If the owner of land recognizes a sale of it, although made by a person who had no authority to sell, there is a privity of contract between the owner and the purchaser, which a court of equity will enforce.
Buchannon et al. v. Upshaw, (56) 46

2. But the owner is entitled to all the advantages of the sale thus recognized.
Id. (*Ib.*) 46

3. A perpetual injunction will be decreed in such case, to prohibit the owner of the legal title from prosecuting his ejectment.
Id. (*Ib.*) 46

4. A deed, absolute on the face of it, is yet sometimes treated as a mortgage.
Morris v. Nixon et al., (118) 69

5. Where a bill substantially charges that there is a fraudulent attempt to hold property under a deed, absolute on the face of it, but intended as a security for money loaned, evidence will be admitted to ascertain the truth of the transaction.
Id. (*Ib.*) 69

6. Where there is proof of parties meeting upon the footing of borrowing and lending, with an offer to secure the lender by a mortgage upon particular property; if a deed of the property, absolute on the face of it, be given to the lender, and the lender also take a bond from the borrower, equity will interpret the deed to be a security for money loaned, unless the lender shall show, by proofs, that the borrower and himself subsequently bargained upon another footing than a loan.
Id. (*Ib.*) 69

2. Where a loan is an inducement for the execution of a deed which is absolute on the face of it, though the loan is not recited as the consideration of the deed, or as any part of it, if the lender or grantee in the deed treats it subsequently as the consideration, or a part of it, equity will declare the deed to be a security for money loaned.
Id. (*Ib.*) 69

8. The answer of one defendant in equity is not evidence in behalf of another defendant.
Id. (*Ib.*) 69

9. If, in equity, it is admitted or proved that one of the documents in a transaction was not intended to be what it purports, it subjects other documents in the same transaction to suspicion.
Id. (*Ib.*) 69

10. A fact tried and decided by a court of competent jurisdiction, cannot be contested again between the same parties; and there is no difference in this respect between a verdict and judgment at common law and a decree of a court of equity.
Bank of the United States et al. v. Beverly et al., (134) 75

11. But an answer in chancery setting up, as a defense, the dismission of a former bill filed by the same complainants, is not sufficient unless the record be exhibited.
Id. (*Ib.*) 75

12. A disposition by a testator of his personal property to purposes other than the payment of his debts, with the assent of creditors, is in itself a charge on the real estate, subjecting it to the payment of the debts of the estate, although no such charge is created by the words of the will.
Id. (*Ib.*) 75

13. Lapse of time is no defense where there is an unexecuted trust to pay debts which have been declared by a court to be unpaid in point of fact.
Id. (*Ib.*) 75

14. There must be conscience, good faith, and reasonable diligence, to call into action the powers of a court of equity.
M'Knight v. Taylor, (161) 86

15. In matters of account, where they are not barred by the Act of Limitations, courts of equity refuse to interfere, after a considerable lapse of time, from considerations of public policy, and from the difficulty of doing entire justice, when the original transactions have become obscure by time, and the evidence may be lost.
Id. (*Ib.*) 86

16. A court of equity, which never is active in relief against conscience or public convenience, has always refused its aid to stale demands, where the party has slept upon his rights for a great length of time. Nothing can call forth this court into activity but conscience; good faith, and reasonable diligence. When these are wanting, the court is passive and does nothing; laches and neglect are always discountenanced; and therefore, from the beginning of this jurisdiction, there was always a limitation of suit in this court.
Bowman et al. v. Wathen et al., (189) 97

17. Every new right of action, in equity, that accrues to a party, whatever it may be, must be acted upon, at the utmost, within twenty years.
Id. (*Ib.*) 97

18. And though the claimant may have been embarrassed by the frauds of others, or distressed, it is not sufficient to take the case out of the rule.
Id. (*Ib.*) 97

19. Where the complainants have long slept upon their rights, this court must remain passive and can do nothing; and this is equally true, whether they knew of an adverse possession, or, through negligence and a failure to look after their interests, permitted the title of another to grow into full maturity.
Id. (*Ib.*) 97

20. Where a decree is passed by the court below against an executor, being the defendant in a chancery suit, and before an appeal is prayed the executor is removed by a court of competent jurisdiction, and an administrator *de bonis non*, with the will annexed, is appointed, all further proceedings, either by execution or appeal, are irregular, until the administrator be made a party to the suit.
Taylor et al. v. Savage, (232) 132

21. If an execution be issued before the proper parties are thus made, it is unauthorized and void, and no right of property will pass by a sale under it.
Id. (*Ib.*) 132

22. The administrator cannot obtain redress by application to this court, but must first be made a party in the court below. This may be done at the instance of either side.
Id. (*Ib.*) 132

23. After he is thus made a party, he may stay proceedings by giving bond, or the complainants may enforce the decree, if the bond be not given in time.
Id. (*Ib.*) 132

24. It is not clear that a complainant, who has appealed from a decree in his favor in the hope of obtaining a larger sum, can, pending the appeal, issue execution upon the decree of the court below.
Id. (*Ib.*) 132

CHANCERY—2.

1. Where a party seeks relief which is mainly appropriate to a chancery jurisdiction, in the Circuit Court of the United States for Louisiana, chancery practice must be followed.
McCollum v. Eager, (61) 179

2. A writ of error is not the appropriate mode of bringing up for review, a decree in chancery. It should be brought up by an appeal.
Id. (*Ib.*) 179

3. An appeal will lie only from a final decree; and not from one dissolving an injunction, where the bill itself is not dismissed.
Id. (*Ib.*) 179

4. The decisions and *dicta* of English judges, and the recent publication of the Record Commissioners in England, examined as to the jurisdiction of chancery over charitable devises anterior to the statute of 43 Elizabeth.
Vidal v. Girard's Executors, (127) 295

5. Where there are many parties in a case below, it is not necessary for them all to join in the appeal bond. It is sufficient if they all appeal and the bond be approved by the court.
Brockett v. Brockett, (228) 251

6. No appeal lies from the refusal of the court below to open a former decree.
Id. (*Ib.*) 251

7. But if the court entertains a petition to open a decree, the time limited for an appeal does not begin to run until the refusal to open it, the same term continuing.
Id. (*Ib.*) 251

8. Where an appeal is prayed in open court, no citation is necessary.
Id. (*Ib.*) 251

9. A court of equity will not interfere, where the complainant has a proper remedy at law, or where the complainant claims a set-off of a debt arising under a distinct transaction, unless there is some peculiar equity calling for relief.
Dade v. Irwin, (229) 306

10. Nor will it interfere where the set-off claimed is old and stale, with regard to which the complainant has observed a long silence, and where the correctness of the set-off is a matter of grave doubt.
Id. (*Ib.*) 306

11. The principles laid down in the case of Tay-

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lor et al. v. Savage (1 Howard, 282), examined and confirmed.
Taylor v. Savage, (395) 313
12. The rights of the parties as they stand when a decree is rendered, are to govern, and not as they stood at any preceding time.
Randel v. Brown, (406) 318
13. The retention of property, after the extinguishment of a lien, becomes a fraudulent possession. *Id.* (*Ib.*) 318
14. A lien cannot arise, where, from the nature of the contract between the parties, it would be inconsistent with the express terms or the clear intent of the contract.
Id. (*Ib.*) 318
15. It is impossible to lay down any general rule as to what constitutes multifariousness in a bill in equity. Every case must be governed by its own circumstances, and the court must exercise a sound discretion.
Gaines et ux. v. Chew et al., (619) 402
16. A bill filed against the executors of an estate and all those who purchased from them, is not, upon that account alone, multifarious.
Id. (*Ib.*) 402
17. Under the Louisiana law, the Court of Probate has exclusive jurisdiction in the proof of wills; which includes those disposing of real as well as personal estate.
Id. (*Ib.*) 402
18. In England, equity will not set aside a will for fraud and imposition, relief being obtainable in other courts.
Id. (*Ib.*) 402
19. Although by the general law, as well as the local law of Louisiana, a will must be proved before a title can be set up under it, yet a court of equity can so far exercise jurisdiction as to compel defendants to answer, touching a will alleged to be spoliated. And it is a matter for grave consideration, whether it cannot go farther and set up the lost will. *Id.* (*Ib.*) 402
20. Where the heir-at-law assails the validity of the will, by bringing his action against the devisee or legatee who sets up the will as his title, the district courts of Louisiana are the proper tribunals, and the powers of a court of chancery are necessary, in order to discover frauds which are within the knowledge of the defendants.
Id. (*Ib.*) 402
21. Express trusts are abolished in Louisiana by the law of that State, but that implied trust, which is the creature of equity, has not been abrogated.
Id. (*Ib.*) 402
22. The exercise of chancery jurisdiction by the Circuit Court of the United States, sitting in Louisiana, does not introduce any new or foreign principle. It is only a change of the mode of redressing wrongs and protecting rights.
Id. (*Ib.*) 402

CHANCERY—8.

1. In cases of trust, where the trustee has violated his trust by an illegal conversion of the trust property, the *cestui que trust* has a right to follow the property into whosoever hands he may find it, not being a *bona fide* purchaser for a valuable consideration, without notice.
Oliver v. Piatt, (333) 622
2. Where a trustee has, in violation of his trust, invested the trust property or its proceeds in any other property, the *cestui que trust* has his option, either to hold the substituted property liable to the original trust, or to hold the trustee himself personally liable for the breach of the trust.
Id. (*Ib.*) 622
3. The option, however, belongs to the *cestui que trust* alone and is for his benefit, and not for the benefit of the trustee.
Id. (*Ib.*) 622
4. If the trustee, after such an unlawful conversion of the trust property, should repurchase it, the *cestui que trust* may, at his option, either hold the original property subject to the trust, or take the substituted property in which it has been invested, in lieu thereof. And the trustee, in such a case, has no right to insist that the trust shall, upon the repurchase, attach exclusively to the original trust property.
Id. (*Ib.*) 622
5. Where the trust property has been unlawfully invested, with other funds of the trustee, in other property, and the latter, in the hands of the trustee, is chargeable *pro tanto* to the amount or value of the original trust property.
Id. (*Ib.*) 622
6. What constitutes a notice of a trust?
Id. (*Ib.*) 622
7. An agent, employed by a trustee in the management of the trust property, and who thereby acquires a knowledge of the trust, is, if he afterwards becomes possessed of the trust property, bound by the trust, in the same manner as the trustee.
Id. (*Ib.*) 622
8. Where, upon the face of the title papers, the purchaser has full means of acquiring complete knowledge of the title from the references therein made to the origin and consideration thereof, he will be deemed to have constructive notice thereof. *Id.* (*Ib.*) 622
9. A co-proprietor of real property, derived under the same title as the other proprietors, is presumed to have full knowledge of the objects and purposes and trusts attached to the original purchase, and for which it is then held for their common benefit.
Id. (*Ib.*) 622
10. A purchaser by a deed quitclaim, without any covenant of warranty, is not entitled to protection in a court of equity as a purchaser for a valuable consideration, without notice; and he takes only what the vendor could lawfully convey.
Id. (*Ib.*) 622
11. A warranty, either lineal or collateral, is no bar to an heir who does not claim the property to which the warranty is attached by descent, but as a purchaser thereof.
Id. (*Ib.*) 622
12. Whether a bill in equity is open to the objection of multifariousness or not, must be decided upon all the circumstances of the particular case. No general rule can be laid down upon the subject; and much must be left to the discretion of the court.
Id. (*Ib.*) 622
13. The objection of multifariousness can be taken by a party to the bill only by demurrer, or plea, or answer, and cannot be taken at the hearing of the cause. But the court itself may take the objection at any time—at the hearing or otherwise. The objection cannot be taken by a party in the appellate court.
Id. (*Ib.*) 622
14. Lapse of time is no bar to a subsisting trust in real property. The bar does not begin to run until knowledge of some overt act of an adverse claim or right set up by the trustee is brought home to the *cestui que trust*. The lapse of any period less than twenty years will not bar the *cestui que trust* of his remedy in equity, although he may have been guilty of some negligence, where the suit is brought against his trustee, who is guilty of the breach of trust, or others claiming under him with notice.
Id. (*Ib.*) 622
15. Where exceptions are taken to a master's report, it is not necessary for the court formally to allow or disallow them on the record. It will be sufficient, if it appears from the record, that all of them have been considered by the court, and allowed or disallowed, and the report reformed accordingly.
Id. (334) 622
16. There is no principle of the common law which forbids individuals from associating together to purchase lands of the United States on joint account at a public sale.
Id. (*Ib.*) 622
17. The Supreme Court has no power to review its decisions, whether in a case at law or in equity. A final decree in chancery is as conclusive as a judgment at law.
Washington Bridge Co. v. Stewart, (413) 658
18. In case of controversy, a court of equity is the proper tribunal to prevent an injurious act by a public officer, for which the law might give no adequate redress, or to avoid a multiplicity of suits or to prevent a cloud from being cast over the title.
Carroll v. Safford, (441) 671
19. The legal title to stock held in corporations situated in Louisiana, does not pass under a general assignment of property, until the transfer is completed in the mode pointed out by the laws of Louisiana, regulating those corporations.
Black v. Zacharie, (483) 690
20. But the equitable title will pass, if the assignment be sufficient to transfer it by the laws of the State in which the assignor resides, and if the laws of the State where the corporations exist do not prohibit the assignment of equitable interests in stock.

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Such an assignment will bind all persons who have notice of it.
Black v. Zacharie, (483) 690
21. The laws of Louisiana do not prohibit the assigment of equitable interests in the State by residents of other States.
Id. (*Ib.*) 690
22. Personal property has no locality. The law of the owner's domicile is to determine the validity of the transfer or alienation thereof, unless there is some positive or customary law of the country where it is found, to the contrary.
Id. (*Ib.*) 690
23. When an issue is directed by a court of chancery, to be tried by a court of law, and in the course of the trial at law, questions are raised and bills of exceptions taken, these questions must be brought to the notice and decision of the Court of Chancery which sends the issue.
Brockett v. Brockett, (691) 786
24. If this is not done, the objections cannot be taken in an appellate court of chancery.
Id. (*Ib.*) 786
25. If the Chancery Court below refers matters of account to a master, his report cannot be objected to in the appellate court, unless exceptions to it have been filed in the court below in the manner pointed out in the seventy-third chancery rule of this court.
Id. (*Ib.*) 786
26. A defendant in ejectment cannot protect himself by setting up the record in a prior chancerty suit between the same parties, by which the plaintiff in the ejectment had been ordered to convey all his title to the defendant in the ejectment, but in consequence of the party being beyond the jurisdiction of the court, no such conveyance had been made.
Lessee of Hickey v. Stewart, (750) 814
27. And this is so, although the Court of Chancery, in following up its decree, had legally issued a *habere facias possessionem*, and put the defendant in ejectment in possession of the land.
Id. (*Ib.*) 814
28. An equitable title is no defense in a suit brought by the United States, to recover possession of land. An imperfect title derived from Spain, before the cession, cannot be supported against a party claiming under a grant from the United States.
United States v. King et al., (773) 824

CHANCERY—4.

1. The holder of a register's certificate of the purchase of a lot in the town of Dubuque, lawfully acquired, and issued by the register under the two acts of 2d July, 1836, and 3d March, 1837, has such an equitable estate in the lot, before the issuing of a patent, as will subject the lot to sale under execution under the statute of Iowa.
Levi v. Thompson, (17) 856
2. The doctrine established in the case of Carroll v. Safford (3 Howard, 441), reviewed and confirmed.
Id. (*Ib.*) 856
3. A policy of insurance contained a stipulation, that if the insured then had, or thereafter should have, any other insurance upon the same property, notice thereof should be given to the company, and the same indorsed upon the policy, or otherwise acknowledged by the company in writing, in default of which the policy should cease.
Carpenter v. Providence Washington Insurance Company, (185) 931
4. A bill was filed in equity by the insured, alleging that notice was given to the insurance company, and praying that the company might be compelled to indorse the notice upon the policy, or otherwise acknowledge the same in writing.
Id. (*Ib.*) 931
5. When the answer of the company, sworn to by the then president, denies the reception of the notice, to the best of his knowledge and belief, the question becomes one of fact and of law; of fact, whether the evidence offered by the complainant is sufficient to sustain the allegation; and of law, whether, if so, this court can compel the company to acknowledge it.
Id. (*Ib.*) 931
6. The answer being responsive to the bill, and denying the allegation, under oath, the general rule is, that the allegation must be proved, not only by the testimony of one witness, but by some additional evidence.
Id. (*Ib.*) 931
7. Several qualifications and limitations of this rule examined.
Id. (*Ib.*) 931
8. The circumstances of this case are such that the general rule applies.
Id. (*Ib.*) 931
9. Two witnesses are produced by the complainant to prove the notice, but neither of them swears positively to it, and the circumstances of the case do not strengthen their testimony.
Id. (*Ib.*) 931
10. The rules by which parties are sometimes allowed to introduce parol evidence with reference to a written contract do not apply to this case, where the parol proof is offered by the complainant, seeking to show a fact which, if true, would establish a breach of duty in the defendants, happening after the original contract was made.
Id. (*Ib.*) 931
11. The question of law which would arise if the notice were sufficiently proved by the complainant need not be decided in this case.
Id. (*Ib.*) 931
12. Although a circuit court, sitting as a court of law, may direct credits to be given on a judgment in favor of the United States, and consequently examine the grounds on which such an entry is claimed, and may direct the execution to be stayed until such an investigation shall be made, yet it cannot entertain a bill, on the equity side, praying that the United States may be perpetually enjoined from proceeding upon such judgment.
United States v. McLemore, (286) 977
13. A bill in chancery, which recites that the complainants had recovered a judgment at law in a court of the United States, upon which an execution had issued and been levied upon certain property by the marshal; that another person, claiming to hold the property, levied upon by virtue of some fraudulent deed of trust, had obtained a process from a State court, by which the sheriff had taken the property out of the hands of the marshal; and praying that the property might be sold, cannot be sustained.
Knox et al. v. Smith, (296) 963
14. If the object had been to set aside the deed of trust as fraudulent, the fraud, with the facts connected with it, should have been alleged in the bill.
Id. (*Ib.*) 963
15. There exists a plain remedy at law. The marshal might have brought trespass against the sheriff, or applied to the court of the United States for an attachment.
Id. (*Ib.*) 963
16. No relief can be given by a court of equity, unless the complainant, by his allegations and proof, has shown that he is entitled to relief.
Id. (*Ib.*) 963
17. A person cannot legally purchase on his own account that which his duty or trust requires him to sell on account of another, nor purchase on account of another that which he sells on his own account. He is not allowed to unite the two opposite characters of buyer and seller.
Michoud et al. v. Girod et al. (503) 1076
18. A purchase, *per interpositam personam*, by a trustee or agent, of the particular property of which he has the sale, or in which he represents another, whether he has an interest in it or not, carries fraud on the face of it.
Id. (*Ib.*) 1076
19. This rule applies to a purchase by executors, at open sale, although they were empowered by the will to sell the estate of their testator for the benefit of heirs and legatees, a part of which heirs and legatees they themselves were.
Id. (*Ib.*) 1076
20. A purchase so made by executors will be set aside.
Id. (*Ib.*) 1076
21. The decisions of the courts of several States, upon this subject, examined and remarked upon.
Id. (*Ib.*) 1076
22. Relaxations of this rule of the civil law, which were made in some countries of Europe, were not adopted by the Spanish law, and of course never reached Louisiana. Nor were those relaxations carried so far as to allow a testamentary or dative executor to buy the property which he was appointed to administer.
Id. (*Ib.*) 1076
23. The maxims and qualifications of the civil law, upon this point, examined.
Id. (*Ib.*) 1076
24. Although courts of equity generally adopt the statutes of limitation, yet, in a case of actual fraud, they will grant relief within the lifetime of either of the parties upon whom the fraud is proved, or within thirty years after it has been dis-

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covered or become known to the party whose rights are affected by it.
Id. (*Ib.*) 1076
25. Within what time a constructive trust will be barred must depend upon the circumstances of the case, and these are always examinable.
Id. (*Ib.*) 1076
26. Acquittances given to an executor, without a full knowledge of all the circumstances, where such information had been withheld by the executor, and menaces and promises thrown out to prevent inquiry, are not binding.
Id. (*Ib.*) 1076

CHANCERY COURT OF MARYLAND—2.

See Maryland and Jurisdiction.

CHEROKEE INDIANS—2.

The tract of country lying on the west of the Tennessee River was not, in 1779, the country of the Cherokee Indians, and was of course subject to be taken up as a part of the waste and unappropriated lands of Virginia.
Porterfield's Ex'rs v. Clark, (76) 185

CHRISTIAN RELIGION—2.

The exclusion of all ecclesiastics from holding or exercising any station or duty in a college, or the limitation of the instruction to be given to the scholars, to pure morality, are not so derogatory to the Christian religion as to make a devise void for the foundation of the college.
Vidal v. Girard's Executors, (127) 205

COMMERCIAL LAW—1.

1. A letter of guaranty, written in the United States, and addressed to a house in England, must be construed according to the laws of that country.
Bell and Grant v. Bruen, (169) 89
2. Extrinsic evidence may be used to ascertain the true import of such an agreement, and its construction is matter of law for the court.
Id. (*Ib.*) 89
3. In bonds, with conditions for the performance of duties, preceded by recitals, the undertaking, although general in its terms, is limited by the recital.
Id. (*Ib.*) 89
4. But commercial letters are not to be construed upon the same principles as bonds, but ought to receive a fair and reasonable interpretation according to the true import of the terms, to what is fairly to be presumed to have been the understanding of the parties; and the presumption is to be ascertained from the facts and circumstances accompanying the entire transaction.
Id. (*Ib.*) 89
5. Where there have been, for several years, mutual and extensive dealings between two banks, and an account current kept between them, in which they mutually credited each other with the proceeds of all paper remitted for collection, when received, and charged all costs of protests, postage, &c.; accounts regularly transmitted from the one to the other and settled upon these principles; and upon the face of the paper transmitted, it always appeared to be the property of the respective banks, and to be remitted by each of them upon its own account; there is a lien for a general balance of account upon the paper thus transmitted, no matter who may be its real owner.
Bank of the Metropolis v. the New England Bank, (234) 115

COMMERCIAL LAW—2.

See Bills of Exchange and Promissory notes, Piracy and Piratical Acts, Bankruptcy, Guarantee, Partnership.

COMMERCIAL LAW—3.

1. Every subsequent security, given for a loan originally usurious, however remote or often renewed is void.
Walker v. Bank of Washington, (62) 494
2. Where there was an application to a bank for a discount upon a note, to be secured collaterally, and the party applying drew checks upon the bank, which were paid before the note was actually discounted; and the bank treated the note, when discounted, as having been so on the day of its date, instead of a subsequent day on which its proceeds were carried to the credit of the party, it was held not to be usury.
Id. (*Ib.*) 494
3. The court below was right in refusing an instruction to the jury that, upon such evidence, they might presume usury as a fact.
Id. (*Ib.*) 494
4. In cases of a written contract, the question of usury is exclusively for the decision of the court.
Id. (*Ib.*) 494
5. This court adheres to the rule laid down in Walton v. Shelly (1 T. R., 296), sustained as it has been by the decisions of this court in The Bank of the United States v. Dunn (6 Peters, 57); The Bank of the Metropolis v. Jones (8 Peters, 12); and Scott v. Lloyd, viz., that a party to a negotiable paper, having given it value and currency by the sanction of his name, shall not afterwards invalidate it by showing, upon his own testimony, that the consideration on which it was executed was illegal.
Henderson v. Anderson, (73) 499
6. When a creditor, residing in Louisiana, drew bills of exchange upon his debtor, residing in South Carolina, which bills were negotiated to a third person and accepted by the drawee, the creditor had no right to lay an attachment upon the property of the debtor, until the bills had become due, were dishonored, and taken up by the drawer.
Black v. Zacharie, (483) 690
7. By the drawing of the bills a new credit was extended to the debtor for the time to which they ran. *Id.* (*Ib.*) 690
8. The laws of Louisiana, allowing attachments for debts not yet due, relate only to absconding debtors, and do not embrace a case like the above.
Id. (*Ib.*) 690
9. The legal title to stock held in corporation situated in Louisiana, does not pass under a general assignment of property, until the transfer is completed in the mode pointed out by the laws of Louisiana regulating those corporations.
Id. (*Ib.*) 690
10. But the equitable title will pass, if the assignment be sufficient to transfer it by the laws of the State in which the assignor resides, and if the laws of the State where the corporations exist do not prohibit the assignment of equitable interests in stock. Such assignment will bind all persons who have notice of it.
Id. (*Ib.*) 690
11. The laws of Louisiana do not prohibit the assignment of equitable interests in the State, by residents of other States.
Id. (*Ib.*) 690
12. Personal property has no locality. The law of the owner's domicil is to determine the validity of the transfer or alienation thereof, unless there is some positive or customary law of the country where it is found, to the contrary.
Id. (*Ib.*) 690
13. Where a general objection is made, in the court below, to the reception of testimony, without stating the grounds of the objection, this court considers it as vague and nugatory; nor ought it to have been tolerated in the court below.
Camden v. Doremus, (515) 705
14. Where, at the time of the indorsement and transfer of a negotiable note, an agreement was made that the holder should send it for collection to the bank at which it was, on its face, made payable, and in the event of its not being paid at maturity, should use reasonable and due diligence to collect it from the drawer and prior indorsers, before resorting to the last indorser, the holder is bound to conditions beyond those which are implied in the ordinary transfer and receipt of commercial instruments.
Id. (*Ib.*) 705
15. Evidence of the general custom of banks to give previous notice to the payer of the time when notes will fall due, was properly rejected, unless the witness could testify as to the practice of the particular bank at which the note was made payable. *Id.* (*Ib.*) 705
16. A presentment and demand of payment of the note, at maturity, within banking hours, at the bank where the note was made payable, was a sufficient compliance with the contract to send it to the bank for collection.
Id. (*Ib.*) 705
17. The record of a suit brought by the holder against the maker and prior indorsers was proper evidence of reasonable and due diligence to collect the amount of the note from them; and it was a proper instruction, that if the jury believed that the prior indorsers had left the State and were insolvent, the holder of the note was not bound to send executions to the counties where these indorsers resided at the institution of the suit.
Id. (*Ib.*) 705

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18. The diligent and honest prosecution of a suit to judgment with a return of *nulla bona*, has always been regarded as one of the extreme tests of due diligence.
Camden v Doremus, (515) 705
19. And the ascertainment, upon correct and sufficient proofs, of entire and notorious insolvency, is recognized by the law as answering the demand of due diligence, and as dispensing with the more dilatory evidence of a suit.
Id. (*Ib.*) 705
20. If the holder cannot obtain a judgment against the maker for the whole amount of the note, in consequence of the allowance of a set-off as between the maker and one of the prior indorsers, this is no bar to a full recovery against the last indorser, provided the holder has been guilty of no negligence.
Id. (*Ib.*) 705
21. Whenever, by express agreement of the parties, a sub-agent is to be employed by an agent to receive money for the principal; or where an authority to do so may fairly be implied from the usual course of trade, or the nature of the transaction; the principal may treat the sub-agent as his agent, and when he has received the money, may recover it in an action for money had and received.
Wilson & Co. v. Smith, (763) 820
22. If, in such a case, the sub-agent has made no advances and given no new credit to the agent on account of the remittance of the bill, the sub-agent cannot protect himself against such an action by passing the amount of the bill to the general credit of the agent, although the agent may be his debtor.
Id. (*Ib.*) 820

COMMERCIAL LAW—4.

1. Under the statutes of Mississippi, providing for the admission of the evidence of a notary public with regard to a protested note, directing the form of proceeding which the notary shall pursue, and providing further that justices of the peace may, in certain cases, perform the duties of notaries public, it was proper to read in evidence the original paper of the acting notary, although the record was made out at a time subsequent to that when the protest was actually made.
Brandon v. Loftus, (127) 905
2. By the law merchant, when a demand of payment is made upon the drawee of a foreign bill of exchange, the bill itself must be exhibited.
Musson v. Lake, (262) 967
3. Neither the statutes of Louisiana, nor the decisions of the courts of that State, have changed the law in this respect.
Id. (*Ib.*) 967
4. The statutes and decisions examined.
Id. (*Ib.*) 967
5. If, therefore, the notarial protest does not set forth the fact that the bill was presented to the drawee, it cannot be read in evidence to the jury.
Id. (*Ib.*) 967
6. Even if the laws of Louisiana, where the drawee resided, had made this change in the law merchant, it would not affect the contract in the present case, which is a suit against an indorser residing in Mississippi, where the contract between him and all subsequent indorsees was made, and where the law merchant has not been changed.
Id. (*Ib.*) 967
7. In an action brought by the indorsee against the indorser of a promissory note, which had been deposited in a bank for collection, the notary public who made the protest is a competent witness, although he has given bond to the bank for the faithful performance of his duty.
Cookendorfer v. Preston, (317) 992
8. He is also competent to testify as to his usual practice.
Id. (*Ib.*) 992
9. The cases reported in 9 Wheaton, 582, 11 Wheaton, 430, and 1 Peters, 25, reviewed.
Id. (*Ib.*) 992
10. At the time when these decisions were made, it was the usage in the city of Washington to allow four days of grace upon notes discounted by banks, and also upon notes merely deposited for collection.
Id. (*Ib.*) 992
11. But since then the usage has been changed as to notes deposited for collection, and been made to conform to the general law merchant, which allows only three days of grace.
Id. (*Ib.*) 992
12. Although evidence is not admissible to show that usage was in fact different from that which it was established to be by judicial decisions, yet it may be shown that it was subsequently changed.
Id. (*Ib.*) 992
13. In the case of a protested note, it is not necessary for the holder himself to give notice to the indorser, but a notary or any other agent may do it.
Harris v. Robinson, (336) 1000
14. The object of the rule which requires the notice to come from the holder is to enable him, as the only proper party, either to fix or waive the liability of indorsers.
Id. (*Ib.*) 1000
15. Where a note was handed to a notary for protest by a bank, and it did not appear whether the bank or the last indorser was the real holder of the note, and the notary made inquiries from the cashier and others not unlikely to know, respecting the residence of the prior indorsers, and then sent notices according to the information thus received, it was sufficient to bind such prior indorsers.
Id. (*Ib.*) 1000
16. If the last indorser was the holder, the cashier of the bank was his agent for collecting the note, and the evidence showed that in fact the last indorser knew nothing more than the cashier.
Id. (*Ib.*) 1000
17. The cases on this subject examined.
Id. (*Ib.*) 1000
18. The facts being found by a jury, the question, whether or not due diligence was used, is one of law for the court.
Id. (*Ib.*) 1000
19. If due diligence is used in sending the notice to the indorser, it is immaterial whether it is received or not.
Id. (*Ib.*) 1000
20. The statutes of Alabama require the negotiability and character of bills of exchange, foreign and inland, and promissory notes, payable in bank, to be governed by the general commercial law.
Smyth v. Strader et al., (404) 1031
21. If a partner draws notes in the name of the firm, payable to himself, and then indorses them to a third party for a personal and not a partnership consideration, the first indorsee cannot maintain an action upon them against the firm, if he knew that the notes were antedated.
Id. (*Ib.*) 1031
22. But if the first indorsee passes them away to a second indorsee before the maturity of the notes, in the due course of business, and the second indorsee has no knowledge of the circumstances of their execution and first indorsement, he may be entitled to recover against the firm, although the partner who drew the notes committed a fraud by antedating them.
Id. (*Ib.*) 1031
23. But if the second indorsee received the notes after their maturity, or out of the ordinary course of business, or under circumstances which authorize an inference that he had knowledge of the fraud in their execution or first indorsement, he cannot recover.
Id. (*Ib.*) 1031
24. These things are matters of evidence for the jury.
Id. (*Ib.*) 1031
25. Evidence is admissible to show that, in an account current between the first and second indorsee, no credit was given in it for the notes when they were passed from the first to the second indorsee.
Id. (*Ib.*) 1031
26. So, evidence of drawing and redrawing between the first and second indorsee, alluded to in the account current, is admissible.
Id. (*Ib.*) 1031
27. The testimony of one of the partners, offered for the purpose of proving the fraud committed by the drawer of the notes, is not admissible. This court again recognizes the rule upon this subject established in the case of Henderson v. Anderson (3 Howard, 73).
Id. (*Ib.*) 1031
28. The partner offered as a witness, was a party upon the record, and thus, also, disqualified.
Id. (*Ib.*) 1031

COMPROMISE ACT—3.

1. The Act of Congress of March 2d, 1833, commonly called the Compromise Act, did not, prospectively, repeal all duties upon imports after the 30th of June, 1842.
Aldridge et al. v. Williams, (9) 469
2. Repealing only such parts of previous acts as

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were inconsistent with itself, it left in force, after the 30th of June, 1842, the same duties which were levied on the 1st of June, 1842.
Id. (*Ib.*) 469

3. Duties were directed, by the Act of 1833, to be levied according to a home valuation, "under such regulations as may be prescribed by law." This phrase embraces all regulations lawfully existing at the time the home valuation went into operation, whether made before or after the passage of the Act of 1833.
Id. (*Ib.*) 469

4. And the regulations established in the 7th and 8th sections of the Act of 1832 are sufficient for the correct performance of the duty.
Id. (*Ib.*) 469

5. The regulations perscribed by the Secretary of the Treasury, under a power given to him by the 9th section of the Act of 1832, are also "regulations prescribed by law."
Id. (*Ib.*) 469

CONFLICT OF LAWS—4.

1. Where a person domiciled in England died, leaving property both in England and Pennsylvania, and the executor took out letters testamentary in both countries, in a suit in England against the executor by the administrator of a deceased claimant, the parties were restricted in the limits of the country to which their letters extended.
Aspden v. Nixon, (467) 1059

2. The executor could not rightfully transmit the Pennsylvania assets to be distributed by a foreign jurisdiction.
Id. (*Ib.*) 1059

3. So, the administrator of the deceased claimant, acting under letters granted in England, only represented the intestate to the extent of these English letters, and could not be known as a representative in Pennsylvania.
Id. (*Ib.*) 1059

4. Two suits, therefore, one in England, between the executor and the administrator of a deceased claimant, acting under English letters, and the other in Pennsylvania, between the executor and another administrator of the claimant, acting under Pennsylvania letters, are suits between different parties. And neither the decree nor proceedings in the English suit are competent evidence in the American suit. The property in controversy is different in the two suits.
Id. (*Ib.*) 1059

5. A judgment or decree set up as a bar by plea, or relied on as evidence by way of estoppel, to be conclusive, must have been made,
1. By a court of competent jurisdiction, upon the same subject matter.
2. Between the same parties.
3. For the same purpose.
6. On either ground, the evidence in the English suit is incompetent to prove anything with regard to the Pennsylvania assets.
Id. (*Ib.*) 1059

7. Although, in cases peculiarly circumstanced, one jurisdiction administering assets may, as matter of comity, transmit them to a foreign jurisdiction, yet they cannot be sent to England where a suit is pending in this country for the American assets. A decree of the High Court of Chancery in England, purporting to distribute assets so situated, would be treated as void for want of jurisdiction.
Id. (*Ib.*) 1059

8. The Circuit Court of the United States, sitting in Pennsylvania, is bound by the same rules which govern the local tribunals of the State, and would require a devisee to give security to refund in case a debt should afterwards be proved against the testator. Other provisions of the laws of that State would also embarrass a court in exercising the comity referred to.
Id. (*Ib.*) 1059

9. Under the influence of similar laws, the courts of the several states have been so much restrained as to render the exercise of comity among each other little more than a barren theory. More could not be required between the courts of this country and England.
Id. (*Ib.*) 1059

10. There having been no evidence introduced in the English suit to establish the heirship of the claimant, the decision of the court there, dismissing the bill, is not conclusive as to the title. What effect those proceedings ought to have in this country, this court will not now decide. It only decides that the evidence in support of the title is not barred in the Circuit Court of Pennsylvania.
Id. (*Ib.*) 1059

11. The judgment of a foreign court upon a question of title cannot preclude a claimant from introducing evidence in a second suit, in another country, for other property. Such a proposition is not recognized either by the jurisprudence of the United States or of Great Britain; nor is the opinion of this court in conflict with the established comity of nations.
Id. (*Ib.*) 1059

CONSTITUTIONAL LAW—1.

1. A person in custody under a *capias ad satisfaciendum*, issued under the authority of the Circuit Court of the United States, cannot legally be discharged from imprisonment by a State officer, acting under a State insolvent law.
Duncan v. Darst et al., (301) 139

2. A State law, passed subsequently to the execution of a mortgage, which declares that the equitable estate of the mortgageor shall not be extinguished for twelve months after a sale, under a decree in chancery, and which prevents any sale, unless two thirds of the amount at which the property has been valved by appraisers shall be bid therefor, is within the clause of the tenth section of the first article of the Constitution of the United States, which prohibits a State from passing a law impairing the obligation of contracts.
Bronson v. Kinzie et al., (311) 143

CONSTITUTIONAL LAW—2.

1. A citizen of one State has a right to sue upon the Sheriff's bond of another State, and to use the name of the governor for the purpose, although the parties to the bond are the sheriff and governor, both citizens of the same State, provided the party for whose use the suit is brought is a citizen of a different State from the sheriff.
McNutt v. Bland, (9) 159

2. A sheriff has no right to discharge a prisoner in custody by process from the Circuit Court, unless such discharge is sanctioned by an act of Congress, or the mode of it adopted as a rule by the Circuit Court of the United States.
Id. (*Ib.*) 159

3. A marshal and his sureties cannot be made responsible, by a mere motion to the court, for money collected, and twenty-five per cent. damages, where such damages are not recognized by the process acts of Congress.
Gwin v. Breedlove, (29) 167

4. But the marshal is liable to have judgment entered against himself by motion, and in that motion residence of the parties need not be averred in order to give jurisdiction to the court.
Id. (*Ib.*) 167

5. A marshal who receives bank notes in satisfaction of an execution must account to the plaintiff in gold or silver; the Constitution of the United States recognizing only gold and silver as a legal tender.
Id. (*Ib.*) 167

6. A marshal has no right to receive bank notes in discharge of an execution unless authorized so to do by the plaintiff.
Griffin et al. v. Thompson, (244) 253

7. A citizen of one State can sue a corporation which has been created by, and transacts its business in another State (the suit being brought in the latter State) although some of the members of the corporation are not citizens of the State in which the suit is brought, and although the State itself may be a member of the corporation.
Louisville, Cincinnati and Charleston Railroad Company v. Letson, (497) 353

8. A corporation created by, and transacting business in a State, is to be deemed an inhabitant of the State, capable of being treated as a citizen, for all purposes of suing and being sued, and an averment of the facts of its creation and the place of transacting business, is sufficient to give the Circuit courts jurisdiction.
Id. (*Ib.*) 353

9. A law of the State of Illinois, providing that a sale shall not be made of property levied on under an execution, unless it will bring two thirds of its valuation, according to the opinion of three householders, is unconstitutional and void.
McCracken v. Hayward, (608) 397

10. The case of Bronson v. Kinzie (1 Howard, 311), reviewed and confirmed.
Id. (*Ib.*) 397

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CONSTITUTIONAL LAW—3.

See Jurisdiction.

1. A public officer, acting from a sense of duty in a matter where he is required to exercise discretion, is not liable to an action for an error of judgment.

Kendall v. Stokes et al., (87) 506

2. The charter of a bank is a franchise, which is not taxable, as such, if a price has been paid for it which the Legislature accepted.

Gordon v. Appeal Tax Court, (133) 529

3. But the corporate property of the bank is separable from the franchise, and may be taxed, unless there is a special agreement to the contrary.

Id. (*Ib.*) 529

4. The Legislature of Maryland, in 1821, continued the charters of several banks to 1845, upon condition that they would make a road and pay a school tax. This would have exempted their franchise, but not their property, from taxation.

Id. (*Ib.*) 529

5. But another clause in the law provided, that upon any of the aforesaid banks accepting of and complying with the terms and conditions of the act, the faith of the State was pledged not to impose any further tax or burden upon them during the continuance of their charters under the act.

Id. (*Ib.*) 529

6. This was a contract relating to something beyond the franchise, and exempted the stockholders from a tax levied upon them as individuals, according to the amount of their stock.

Id. (*Ib.*) 529

7. Under the acts of Congress ceding to Pennsylvania that part of the Cumberland Road which is within that State, and the acts of Pennsylvania accepting the surrender, a carriage, whenever it is carrying the mail, must be held to be laden with the property of the United States, within the true meaning of the compact, and consequently exempted from the payment of tolls.

Searight v. Stokes, (151) 537

8. But this exemption does not apply to any other property conveyed in the same vehicle, nor to any person traveling in it, unless he is in the service of the United States and passing along in pursuance of orders from the proper authority.

Id. (*Ib.*) 537

9. Nor can the United States claim an exemption for more carriages than are necessary for the safe, speedy, and convenient conveyance of the mail.

Id. (*Ib.*) 537

10. The stipulation contained in the 6th section of the Act of Congress, passed on the 2d of March, 1819, for the admission of the State of Alabama into the Union, viz.: "that all navigable waters within the said State shall forever remain public highways, free to the citizens of said State, and of the United States, without any tax, duty, impost, or toll therefor, imposed by said State," conveys no more power over the navigable waters of Alabama, to the government of the United States, than it possesses over the navigable waters of other States under the provisions of the Constitution.

Pollard's Lessee v. Hagan, (212) 565

11. And it leaves as much right in the State of Alabama over them as the original States possess over navigable waters within their respective limits.

Id. (*Ib.*) 565

12. The shores of navigable waters, and the soils under them, were not granted by the Constitution to the United States, but were reserved to the States respectively; and the new States have the same rights, sovereignty, and jurisdiction over this subject as the original States.

Id. (*Ib.*) 565

13. The United States never held any municipal sovereignty, jurisdiction, or right of soil in and to the territory of which Alabama, or any of the new States, were formed, except for temporary purposes, and to execute the trusts created by the acts of the Virginia and Georgia Legislatures, and the deeds of cession executed by them to the United States, and the trust created by the Treaty of the 30th April, 1803, with the French Republic, ceding Louisiana.

Id. (*Ib.*) 565

14. Upon the admission of Alabama into the Union, the right of eminent domain, which had been temporarily held by the United States, passed to the State. Nothing remained in the United States but the public lands.

Id. (*Ib.*) 565

15. The United States now hold the public lands in the new States by force of the deeds of cession and the statutes connected with them, and not by any municipal sovereignty which it may be supposed they possess, or have received by compact with the new States for that particular purpose.

Id. (*Ib.*) 565

16. That part of the compact respecting the public lands is nothing more than the exercise of a constitutional power vested in Congress, and would have been binding on the people of the new States, whether they consented to be bound or not.

Id. (*Ib.*) 565

17. Under the Florida treaty the United States did not succeed to those rights which the King of Spain had held by virtue of his royal prerogatives, but possessed the territory subject to the institutions and laws of its own government.

Id. (*Ib.*) 565

18. By the acts of Congress under which Alabama was erected a territory and a State, the common law was extended over it to the exclusion of all other law, Spanish or French.

Id. (*Ib.*) 565

19. The Treaty of 1795 was not a cession of territory by Spain to the United States, but the recognition of a boundary line, and an admission, by Spain, that all the territory on the American side of the line was originally within the United States.

Id. (*Ib.*) 565

20. The United States have never admitted that they derived title from the Spanish government to any portion of territory included within the limits of Alabama; for, by the Treaty of 1795, Spain admitted that she had no claim to any territory above the thirty-first degree of north latitude, and the United States derived its title to all below that degree from France, under the Louisiana treaty.

Id. (*Ib.*) 565

21. It results from these principles that the right of the United States to the public lands, and the power of Congress to make all needful rules and regulations for the sale and disposition thereof, conferred no power to grant land in Alabama which was below usual high water-mark at the time Alabama was admitted into the Union.

Id. (*Ib.*) 565

22. The State of Maryland, in 1836, passed a law directing a subscription of $3,000,000 to be made to the capital stock of the Baltimore and Ohio Railroad Company, with the following proviso: "That if the said company shall not locate the said road in the manner provided for in this act, then, and in that case they shall forfeit $1,000,000 to the State of Maryland for the use of Washington County."

State of Maryland v. Baltimore and Ohio Railroad Company, (534) 714

23. In March, 1841, the State passed another act repealing so much of the prior act as made it the duty of the company to construct the road by the route therein prescribed, remitting and releasing the penalty, and directing the discontinuance of any suit brought to recover the same.

Id. (*Ib.*) 714

24. The proviso was a measure of State policy, which it had a right to change, if the policy was afterwards discovered to be erroneous, and neither the commissioners, nor the county, nor any one of its citizens acquired any separate or private interest under it, which could be maintained in a court of justice. *Id.* (*Ib.*) 714

25. It was a penalty, inflicted upon the company as a punishment for disobeying the law; and the assent of the company to it, as a supplemental charter, is not sufficient to deprive it of the character of a penalty.

Id. (*Ib.*) 714

26. A clause of forfeiture in a law is to be construed differently from a similar clause in an engagement between individuals. A Legislature can impose it as a punishment, but individuals can only make it a matter of contract.

Being a penalty imposed by law, the Legislature had a right to remit it.

Id. (*Ib.*) 714

27. A law of the State of Indiana, passed after an execution was issued, requiring that property should be appraised and not sold unless it brought a certain amount, could not avoid the deed of the sheriff in a case where the property was sold without appraisement.

Gantly's Lessee v. Ewing, (707) 794

28. Under the Acts of Congress and of the State of Ohio, relating to the surrender and acceptance of the Cumberland Road, a toll charged upon passen-

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gers traveling in the mail stages, without being charged also upon passengers traveling in other stages, is against the contract, and void.
Neil, Moore & Co. v. The State of Ohio, (720) 800

29. It rests altogether in the discretion of the Postmaster-General, to determine at what hours the mail shall leave particular places and arrive at others, and to determine whether it shall leave the same place only once a day or more frequently.
Id. (*Ib.*) 800

30. It is not, therefore, the mere frequency of the departure of carriages, carrying the mail, that constitutes an abuse of the privilege of the United States, but the unnecessary division of the mail bags amongst a number of carriages in order to evade the payment of tolls.
Id. (*Ib.*) 800

CONSTRUCTION OF STATUTES—3.

See Duties, Lead Mines, Constitutional Law, Bankruptcy, Marine Corps, Lands—Public.

1. The court, in construing an act, will not consider the motives, or reasons, or opinions, expressed by individual members of Congress, in debate, but will look, if necessary, to the public history of the times in which it was passed.
Aldridge et al. v. Williams, (9) 469

2. The mere construction of a will by a State court, does not, as the construction of a statute of the State, constitute a rule of decision for the courts of the United States. If such construction by a State court had been long acquiesced in, so as to become a rule of property, this court would follow it.
Lane v. Vick, (464) 681

3. A clause of forfeiture in a law is to be construed differently from a similar clause in an engagement between individuals. A Legislature can impose it as a punishment, but individuals can only make it a matter of contract.
State of Maryland v. Baltimore and Ohio Railroad Company, (534) 714

4. Being a penalty imposed by law, the Legislature has a right to remit it.
Id. (*Ib.*) 714

5. Statutes *in pari materia* should be taken into consideration in construing a law. If a thing contained in a subsequent statute be within the reason of a former statute, it shall be taken to be within the meaning of that statute.
United States v. Freeman, (556) 724

6. And if it can be gathered from a subsequent statute *in pari materia* what meaning the Legislature attached to the words of a former statute, this will amount to a legislative declaration of its meaning, and will govern the construction of the first statute.
Id. (*Ib.*) 724

7. The meaning of the Legislature may be extended beyond the precise words used in the law, from the reason or motive upon which the Legislature proceeded, from the end in view, or the purpose which was designed; the limitation of the rule being, that to extend the meaning to any case, not included within the words, the case must be shown to come within the same reason upon which the law-maker proceeded, and not a like reason.
Id. (*Ib.*) 724

8. In affirmative statutes, such parts of the prior as may be incorporated into the subsequent statute, as consistent with it, must be considered in force.
Davies v. Fairbairn, (636) 760

9. If a subsequent statute be not repugnant in all its provisions to a prior one, yet if the latter statute clearly intended to prescribe the only rules which should govern, it repeals the prior one.
Id. (*Ib.*) 760

10. Under the application of these rules, the law of Virginia, passed in 1776, authorizing the mayor of a city to take the acknowledgment of a *feme covert* to a deed, is not repealed by the Act of 1785, or that of 1796.
Id. (*Ib.*) 760

11. The Act of Congress of the 29th April, 1816, confirming certain claims to land to the extent of a league square, restricted it to that quantity, and cannot be construed as confirming the residue.
United States v. King et al., (773) 824

CONSTRUCTION OF STATUTES—4.

1. There were two statutes of the State of Michigan, both passed on the same day, namely, the 12th of April, 1827. One was "An Act concerning deeds and conveyances," which directed that such deeds or conveyances should be recorded in the office of register of probate for the county, or register for the city, where such lands, &c., were situated. This act became operative from its passage.
Beals v. Hale, (37) 865

2. Another was "An Act concerning mortgages," which provided "that every mortgage, being proven or acknowledged according to law, may be registered in the county in which the lands or tenements so mortgaged are situated." This act did not go into operation until several months after its passage.
Id. (*Ib.*) 865

3. In the case in question, there were two mortgages, both including the same property, in the city of Detroit, Wayne County, one of which was recorded in the city registry, and the other in the county registry.
Id. (*Ib.*) 865

4. These statutes are not so contrary or repugnant to each other as necessarily to imply a contradiction. Both can stand.
Id. (*Ib.*) 865

5. The recording of the prior mortgage in the county registry was sufficient to give it validity and priority.
Id. (*Ib.*) 865

6. Statutes which apparently conflict with each other are to be reconciled, as far as may be, on any fair hypothesis, and validity given to each if it can be and is necessary to conform to usages under them, or to preserve the titles to property undisturbed.
Id. (*Ib.*) 865

7. The United States have adopted the principle originally established by European nations, namely, that the aboriginal tribes of Indians in North America are not regarded as the owners of the territories which they respectively occupied. Their country was divided and parceled out as if it had been vacant and unoccupied land.
United States v. Rogers, (567) 1105

8. If the propriety of exercising this power were now an open question, it would be one for the law making and political department of the government, and not the judicial.
Id. (*Ib.*) 1105

9. The Indian tribes residing within the territorial limits of the United States are subject to their authority, and where the country occupied by them is not within the limits of any one of the States, Congress may, by law, punish any offense committed there, no matter whether the offender be a white man or an Indian.
Id. (*Ib.*) 1105

10. The twenty-fifth section of the Act of 30th June, 1834, extends the laws of the United States over the Indian country, with a proviso that they shall not include punishment for "crimes committed by one Indian against the person or property of another Indian."
Id. (*Ib.*) 1105

11. This exception does not embrace the case of a white man who, at mature age, is adopted into an Indian tribe. He is not an "Indian," within the meaning of the law.
Id. (*Ib.*) 1105

12. The treaty with the Cherokees, concluded at New Echota, in 1835, allows the Indian Council to make laws for their own people or such persons as have connected themselves with them. But it also provides that such laws shall not be inconsistent with acts of Congress. The Act of 1834, therefore, controls and explains the treaty.
Id. (*Ib.*) 1105

13. It results from these principles, that a plea set up by a white man, alleging that he had been adopted by an Indian tribe, and was not subject to the jurisdiction of the Circuit Court of the United States, is not valid.
Id. (*Ib.*) 1105

14. By a statute of Florida, where suit is brought upon a bond, the plaintiff need not prove its execution unless the defendant denies it under oath. It also provides that such an instrument may be assigned; that the assignee becomes vested with all the rights of the assignor, and may bring suit in his own name.
Bradford v. Williams, (576) 1109

15. Under this statute, where a joint and several bond was signed by three obligors and made payable to three obligees, one of whom was also one of the obligors and the obligees assigned the bond, the fact that one of the obligors was also an obligee, was no valid defense in a suit brought by the assignee against the two other obligors.
Id. (*Ib.*) 1109

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16. The inability of one of the obligees to sue himself did not impair the vitality of the bond, but amounted only to an objection to a recovery in a court of law. The assignment, and ability of the assignee to sue in his own name, removed this difficulty.
Bradford v. Williams, (576) 1109
17. The statute of Florida places bonds, as far as respects negotiability and the right of the assignee to sue in his own name, upon the same footing as bills of exchange and promissory notes. The case, therefore, falls within the principle of a partner drawing a bill upon his house, or making a note in the name of the firm, payable to his own order, both of which are valid in the hands of a *bona fide* holder.
Id. (*Ib.*) 1109

CORPORATIONS—2.

See Jurisdiction.

CORPORATIONS—3.

1. The legal title to stock held in corporations situated in Louisiana does not pass under a general assignment of property, until the transfer is completed in the mode pointed out by the laws of Louisiana, regulating those corporations.
Black v. Zacharie, (483) 690
2. But the equitable title will pass, if the assignment be sufficient to transfer it by the laws of the State in which the assignee resides, and if the laws of the State where the corporations exist do not prohibit the assignment of equitable interests in stock. Such an assignment will bind all persons who have notice of it.
Id. (*Ib.*) 690

CORPORATIONS—4.

1. A corporation, created by the laws of another State, can sue in Alabama upon a contract made in that State.
Tombigbee Railroad v. Kneeland, (16) 855
2. The decision of this court in 13 Peters, 519, reviewed and confirmed.
Id. (*Ib.*) 855

COSTS—2.

1. Costs in the admiralty are in the sound discretion of the court; and no appellate court should interfere with that discretion, unless under peculiar circumstances.
Harmony et al. v. The United States, (210) 339
2. Although not *per se* the proper subject of an appeal, yet they can be taken notice of incidentally, as connected with the principal decree.
Id. (*Ib.*) 339

COSTS—4.

A decree or judgment cannot be entered against the government for costs.
United States v. McLemore, (286) 977

DECLARATION OF PARTIES—1.

See Marriage.

DEED—1.

See Chancery.

DEED—4.

See Ejectment.

DEVISE—2.

Where it appears, from the context of a will, that a testator intended to dispose of his whole estate, and to give his residuary legatee a substantial, beneficial interest, such legatee will take real as well as personal estate, although the word "devisee" be not used.
Burwell v. Cawood, (560) 378

DEVISE—3.

1. Newit Vick made the following devises, viz.:
"2d. I will and bequeath unto my beloved wife, Elizabeth Vick, one equal share of all my personal estate, as is to be divided between her and all of my children, as her own right, and at her own disposal during her natural life; and also, for the term of her life on earth, the tract of land at the Open Woods on which I now reside, or the tracts near the river, as she may choose, reserving two hundred acres, however, on the upper part of the uppermost tract, to be laid off in town lots at the discretion of my executrix and executors.
"3d. I will and dispose to each of my daughters, one equal porportion with my sons and wife, of all my personal estate as they come of age or marry; and to my sons, one equal part of said personal estate as they come of age, together with all of my lands, all of which lands I wish to be appraised, valued, and divided when my son Westley arrives at the age of twenty-one years, the said Westley having one part, and my son William having the other part of the tracts unclaimed by my wife, Elizabeth; and I bequeath to my son Newit, at the death of my said wife, that tract which she may prefer to occupy. I wish it to be distinctly understood, that that part of my estate which my son Hartwell has received shall be valued, considered as his, and as a part of his portion of my estate.
"I wish my executors, furthermore, to remember, that the town lots now laid off, and hereafter to be laid off, on the aforementioned two hundred acres of land, should be sold to pay my just debts, or other engagements, in preference to any other of my property, for the use and benefit of all my heirs."
From the provisions of the will it appears not to have been the intention of the testator to include the town lots in the devise of his lands to his sons.
But these town lots must be sold, after the payment of debts, for the use and benefit of all the heirs of the testator.
Larve v. Vick, (464) 681
2. Where a testator devised certain property to his infant daughter, to be delivered over to her when she should arrive at the age of eighteen years, and the daughter, at the age of sixteen, married the executor who had the principal management of the estate, and possession of the property devised, he must be considered as holding it as executor, and not as husband.
Price v. Sessions, (624) 755
3. The executors had no power to deliver the property to the daughter, or to her guardian, or to her husband, before the happening of the contingency mentioned in the will.
Id. (*Ib.*) 755
4. The law of the State of Mississippi, providing that a wife should retain such property in her own right, notwithstanding her coverture, having gone into operation before the daughter arrived at the age of eighteen years, the distribution to her must be considered to have been made under that law.
Id. (*Ib.*) 755
5. The property, therefore, cannot be held responsible for the husband's debts.
Id. (*Ib.*) 755

DEVISE—4.

1. Under a will which devised land to the son of the testator, and provided that the widow should continue in possession and occupation of the premises until the son arrived at the age of fifteen years, she was entitled to their possession and enjoyment until the time when the child would have reached the age of fifteen if he had lived, although he died before that time.
Zeller's Lessee v. Eckert, (289) 979
2. Her possession, therefore, was not adverse to the heirs of the child, during that period.
Id. (*Ib.*) 979

DISBURSING OFFICERS—4.

1. Money in the hands of a purser, although it may be due to seamen, is not liable to an attachment by the creditors of those seamen.
Buchanan v. Alexander, (20) 857
2. A purser cannot be distinguished from any other disbursing agent of the government; and the rule is general, that, so long as money remains in the hands of a disbursing officer, it is as much the money of the United States as if it had not been drawn from the treasury.
Id. (*Ib.*) 857
3. A decision of a State court, sanctioning such an attachment, may be revised by this court, under the twenty-fifth section of the Judiciary Act.
Id. (*Ib.*) 857
4. The 67th article of the General Regulations of the Army, published in 1821, recognizes two disbursing officers upon fortifications; namely, the agent of fortifications and the superintending engineer. Where there is no agent, the superintending engineer can be required to perform his duty for a compensation which is fixed by the army regulations. The receipt of a sum of money by the superintending engineer, and custody of it until it could be turned over to the agent, will not justify a charge of two and one half per cent. commission. And in case of such a charge, there is no foundation for a question of usage to be left to the jury.
Gratiot v. United States, (336) 824

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5. In this particular case, the charges made by General Gratiot for collecting money (as stated in the sixth, seventh, and eighth items of his account), were already included in his charge for disbursing, contained in the second item, because when disbursing these sums he was acting as agent for fortifications as well as superintending engineer, which duty the department had a right to require him to perform at a fixed compensation, which had already been allowed. The court below were right in refusing to permit evidence in support of these charges to go to the jury, because the only evidence was the transcript, which was not sufficient in law.
Id. (*Ib.*) 884

6. The charge of two and one half per cent., as contained in the second item of the account, was unauthorized by law, because it consisted either of charges of commission upon money which had come into his hands for stoppages, or for remittances made to him as disbursing agent, as above described.
Id. (*Ib.*) 884

7. The charge of a commission of two and one half per cent. for disbursements other than those on forts Monroe and Calhoun, as contained in the third item of his account, was a charge for disbursing in the character of superintending engineer, acting also as agent for fortifications, and is not allowed by law.
Id. (*Ib.*) 884

8. The charge for extra official services, as contained in the fourteenth item of the account, is the same which this court substantially rejected when this case was formerly under consideration, reported in 15 Peters, except the charge for superintendence relative to the northern boundary of Ohio. Excepting this, the other services were within the ordinary special duties of chief engineer: and there being no proof of what these extra official services had been except the account itself, the court below did not err in excluding it from the jury.
Id. (*Ib.*) 884

9. The charge for extra official services was against law, because the duties performed necessarily belonged to the office of chief engineer, and if any services were performed beyond the duties of that office, it was necessary that evidence should be introduced to show what had been the chief engineer's personal as well as official agency.
Id. (*Ib.*) 884

10. It was the province of the court below to decide, as matter of law, what were the duties of the chief engineer, and to judge whether any evidence had been introduced tending to show that General Gratiot had performed any services not appertaining to his station as chief engineer.
Id. (*Ib.*) 884

11. The Army Regulations, under which General Grotiot was removed from West Point to Washington, were authorized by law, and his brevet rank did not release him from discharging the duties of his commission proper.
Id. (*Ib.*) 884

DUTIES—3.

See Compromise Act.

1. An act of Congress imposing a duty upon imports must be construed to describe the article upon which the duty is imposed, according to the commercial understanding of the terms used in the law in our own markets at the time when the law was passed.
Curtis v. Martin, (106) 516

2. The duty, therefore, imposed by the Act of 1832 upon cotton bagging, cannot properly be levied upon an article which was not known in the market as cotton bagging in 1832, although it may subsequently be called so.
Id. (*Ib.*) 516

3. When an importer means to contest the payment of duties, it is not necessary for him to give a written notice thereof to the collector.
Swartwout v. Gihon, (110) 517

4. The question of notice is a fact for the jury, and it makes no difference, for the purposes for which it is required, whether it is written or verbal.
Id. (*Ib.*) 517

5. It is the right of an officer of the customs to seize goods which are suspected to have been introduced into the country in violation of the revenue laws, not only in his own district, but also in any other district than his own.
Taylor et al. v. The United States, (197) 559

6. And it is wholly immaterial who makes the seizure, or whether it was irregularly made or not, or whether the cause assigned originally for the seizure be that for which the condemnation takes place, provided the adjudication is for a sufficient cause.
Id. (*Ib.*) 559

7. In the trial of such a case the officers of the customs who made the seizure are competent witnesses.
Id. (*Ib.*) 559

8. A bill of lading, entry, and owner's oath concerning other goods than those seized, may be admitted as a link in the chain of evidence to show a privity between the parties to commit a fraud upon the revenue.
Id. (*Ib.*) 559

9. When a witness on the part of the United States stated that his firm were importers of cloths, and was asked, upon a cross-examination, to state the extent of their importations, to which he answered, "formerly we imported large quantities of woolens; for three or four years past we have imported but a few packages annually," it was a proper question on the part of the United States, "whether there was anything in the state of the market which caused the alteration."
Id. (*Ib.*) 559

10. It was also a proper question, whether other goods than those seized were lying in the custom-house at New York, under circumstances from which the jury might infer a connivance between parties inconsistent with fair dealing.
Id. (*Ib.*) 559

11. An invoice of other goods entered at another port, but marked like those seized, was also properly admitted as strengthening the evidence of the true ownership of packages with this mark.
Id. (*Ib.*) 559

12. To rebut the proof of a general usage of an allowance of five per cent. for measurement, other invoices were properly introduced in which there was no such allowance.
Id. (*Ib.*) 559

13. Where a witness was introduced to prove such usage, and had verified his own invoices, it was admissible to read a letter which had been addressed to the witness and was annexed to one of the invoices.
Id. (*Ib.*) 559

14. Revenue laws, for the prevention of fraud, for the suppression of a public wrong, or to effect a public good, are not, in a strict sense, penal acts, although they impose a penalty. But they ought to be so construed as most effectually to accomplish the intention of the Legislature in passing them, instead of being construed with great strictness in favor of the defendant.
Id. (*Ib.*) 559

15. Concealment and undervaluation of goods are good grounds, amongst others, for a decision of the court, that probable cause of prosecution existed.
Id. (*Ib.*) 559

16. The 68th section of the Act of 1799 reaches cases where, by a false and fraudulent undervaluation, less than the amount of duties required by law has been paid as well as those where no duties at all have been paid.
Id. (*Ib.*) 559

17. Since the passage of the Act of Congress of March 3d, 1839, ch. 82, sec. 2, which requires collectors of the customs to place to the credit of the Treasurer of the United States all money which they receive for unascertained duties or for duties paid under protest, an action of *assumpsit* for money had and received will not lie against the collector for the return of such duties so received by him.
Cary v. Curtis, (236) 576

18. In what other modes the claimant can have access to the courts of justice, this court is not called upon in this case to decide.
Id. (*Ib.*) 576

DUTIES—4.

1. Upon the trial of a cause where goods had been seized upon suspicion of being fraudulently imported, and the United States had shown sufficient ground for an opinion of the court that probable cause existed for the prosecution, and notice had been given to the claimant to produce his books and accounts relating to those goods, it was proper for the court to instruct the jury that, if the claimant had withheld the testimony of his accounts and transactions with the parties abroad, from whom he received the goods, they were at liberty to pre-

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sume that, if produced, they would have operated unfavorably to his cause.
Clifton v. The United States, (242) 957
2. The doctrine laid down in 2 Evans's Pothier, 149, cited and approved, namely: "That if the weaker and less satisfactory evidence is given and relied on in support of a fact, when it is apparent to the court and jury that proof of a more direct and explicit character was within the power of the party, the same caution which rejects the secondary evidence will awaken distrust and suspicion of the weaker and less satisfactory, and it may well be presumed, that if the more perfect exposition had been given, it would have laid open deficiencies and objections which the more obscure and uncertain testimony was intended to conceal."
Id. (*Ib.*) 957
3. The principle established in the case of Wood v. The United States (16 Peters, 342) reviewed and confirmed, namely: "That if goods are fraudulently invoiced, they are not exempted from forfeiture by having been appraised in the custom-house at valuations exceeding the prices in the invoices, and delivered to the importers on payment of the duties assessed upon such increased valuations."
Id. (*Ib.*) 957
4. If the information contains several counts, founded on the following acts, namely, the sixty-sixth section of the Act of 1799, the fourth section of the Act of 1830, and the fourteenth section of the Act of 1832, the defectiveness of the counts upon the acts of 1830 and 1832 would be no ground for reversing a judgment of condemnation, provided the count is good which is founded upon the Act of 1799; because one good count is sufficient to uphold a general verdict and judgment.
Id. (*Ib.*) 957
5. The difference between these sections explained.
Id. (*Ib.*) 957
6. In this case, therefore, it is unnecessary to decide what averments are required in counts resting upon the acts of 1830 and 1832, or whether the counts are or are not void from generality.
Id. (*Ib.*) 957
7. In the trial of a cause where goods had been seized upon suspicion of being fraudulently imported, it was proper to allow to go to the jury, as evidence, appraisements of the goods made either by the official appraisers or appraisers acting under an appeal, they being present to verify the papers. The objection that the appraisements had not been made in presence of the jury was not sufficient.
Buckley v. The United States, (251) 961
8. Such papers are documents or public writings, not judicial, and may be used as evidence under the rules which regulate all that class of papers.
Id. (*Ib.*) 961
9. Other invoices of other goods imported by the party are admissible. The decision on this point in Wood v. The United States (16 Peters, 359, 360) confirmed.
Id. (*Ib.*) 961
10. It was proper to show, in such a case, that the agent of the claimant had sold goods for him at prices which yielded profits, which other persons, engaged in the same trade, averred could not fairly have been made in the then state of the market.
Id. (*Ib.*) 961
11. The court is the tribunal to determine, from the evidence, whether or not there was probable cause for the seizure.
Id. (*Ib.*) 961
12. In order to sustain counts in the information, founded on the acts of 1830 and 1832, it is not necessary that they should contain averments of the special circumstances of the examination of the goods and detection of the fraud under the authority of the collector. The language of the court in Wood's case re-examined, explained, and controlled.
Id. (*Ib.*) 961
13. The court below was right in instructing the jury, that, under such an information, they were not restricted in the condemnation of the goods to any entered goods which they found to be undervalued, but that they might find either the whole package or the invoice, forfeited, though containing other goods correctly valued, provided they should find that such package or invoice had been made up with intent to defraud the revenue.
Id. (*Ib.*) 961
14. Under the Act of 1832, the collector had power to direct wool to be appraised, for the purpose of ascertaining whether or not it was entitled to be imported free from duty; the exemption depending upon its value not exceeding eight cents per pound at the place of exportation.
Rankin v. Hoyt, (327) 996
15. Although it was necessary for the collector to request the appraisers to act, and no such request appears in the record, yet the legal presumption is, that the collector and appraisers did their duty, he requesting their action and they complying.
Id. (*Ib.*) 996
16. And the collector's subsequent adoption of the proceedings of the appraisers is tantamount to having requested them.
Id. (*Ib.*) 996
17. It was the duty of the collector to be guided by such an appraisement, and a subsequent verdict of a jury, finding that the value of the wool was under eight cents per pound, cannot be considered as rendering his acts illegal.
Id. (*Ib.*) 996
18. The importer had a right to appeal to another board of appraisers, differently constituted, and if he did not choose to resort to them, he cannot, with much grace, afterwards complain that an over-estimate existed.
Id. (*Ib.*) 996

EJECTMENT—1.

In an action of ejectment, if the plaintiff count upon a lease to himself from a person whom the evidence shows to have been dead at the time, it is bad.
Connor v. Bradley et al., (211) 105
2. It is a settled rule at common law, that where a right of re-entry is claimed on the ground of forfeiture for nonpayment of rent, there must be proof of a demand of the precise sum due at a convenient time before sunset on the day when the rent is due upon the land, in the most notorious place of it, even though there be no person on the land to pay.
Id. (*Ib.*) 105
3. In proceeding under the statute of 4 Geo. II., it must be alleged and proved that there was no sufficient distress upon the premises on some day or period between the time at which the rent fell due, and the day of the demise; and if the time when, according to the proofs, there was not a sufficient distress upon the premises, be subsequent to the day of the demise, it is bad.
Id. (*Ib.*) 105

EJECTMENT—4.

1. In an action of ejectment, where two of the plaintiff's lessors were married woman, and the demise was laid in the declaration to have been on the 1st of January, 1815, it was necessary to establish to the satisfaction of the jury that the marriage took place before that day, inasmuch as their husbands were stated to have joined in the demise.
Garrard v. Lessee of Reynolds, (123) 903
2. Two depositions, taken in 1818, were given in evidence, one of which stated the death of the father of the women to have taken place "upwards of twenty years ago," and the other "about twenty-eight years ago." Both of the depositions, when enumerating the children of the deceased, mentioned the fact of the marriage, without saying when such marriage took place.
Id. (*Ib.*) 903
3. In giving its instructions to the jury, the court remarked that "the depositions should be favorably construed." After retiring, the jury returned into court and inquired what was meant by the instruction that the "depositions should be favorably construed," when the court informed them, that "where a suit was brought by A and B, as man and wife, and a witness proved them man and wife shortly after the suit was brought, without proving the time at which they were intermarried, it might well be inferred that they were man and wife when the suit was instituted; and if there was an ambiguity in the deposition of William Rawle (the witness), it was in the power of the jury to find that the two *femes covert* had intermarried before the 1st of January, 1815."
Id. (*Ib.*) 903
4. The jury were further told, that "the depositions had been referred to the court, on a motion, on the part of the defendant, for a nonsuit, for want of proof of heirship and intermarriage of the daughters of Reynolds, at the date of the demise, 1 January, 1815; and that it seemed to the court that William Rawle (the witness) referred to the persons who where the heirs of Reynolds at the time of his

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death, and not at the time the deposition was taken, and refused the nonsuit; but the jury were not bound by the construction given by the court, and could give the deposition any construction they saw proper.
Id. (*Ib.*) 903

5. No exception having been taken to the opinion of the court overruling the motion for a nonsuit, the question whether, as matter of law, there was any evidence to be submitted to the jury, going to establish the intermarriage at or before the time of the demise laid in the declaration, was not before this court.
Id. (*Ib.*) 903

6. And in the submission to the jury of the question of fact, whether or not the evidence proved the marriage before that time, there was no interference with the province of the jury, or violation of any rule of law, the question having been left open for their finding.

7. There was, therefore, no error in the proceedings of the court below.
Id. (*Ib.*) 903

8. A bond for the conveyance of land does not transfer the legal title, so as to serve as a defense in an action of ejectment, and such a bond, when signed by married women, neither confers a legal nor equitable right upon the obligees.
Agricultural Bank of Mississippi et al. v. Rice et al., (225) 949

9. In order to convey by grant, the party possessing the right must be the grantor, and use apt and proper words to convey to the grantee.
Id. (*Ib.*) 949

10. If, therefore, the title to land is in married women, and a deed for the land recites the names of the husbands, as grantors, purporting to convey in right of their wives, the deed is insufficient to convey the title of the wives.
Id. (*Ib.*) 949

11. Nor is such a deed made effective by its being signed and sealed by the wives. The interests of the husbands is conveyed by it, but nothing more.
Id. (*Ib.*) 949

12. A receipt of money, subsequently, by the female grantors, does not pass the legal title, nor give effect to a deed, which, as to them, was utterly void.
Id. (*Ib.*) 949

ESTATE FOR LIFE—2.

What words constitute it, as distinguished from a fee-simple conditional.
Shriver's Lessee v. Lynn, (43) 172

EVIDENCE—1.

1. The declarations of a deceased member of a family that the parents of it never were married, are admissible in evidence, whether his connection with that family was by blood or marriage.
Jewell's Lessee v. Jewell, (219) 108

2. The acts and declarations of the parties being given in evidence on both sides, on the question of marriage, an advertisement announcing their separation and appearing in the principal commercial newspaper of the place of their residence immediately after their separation, is part of the *res gesta*, and admissible in evidence. Whether or not it was inserted by the party, and if it was, what were his motives, are questions of fact for the jury.
Id. (*Ib.*) 108

3. If a written contract between the parties be offered in evidence, the purport of which is to show that the parties lived together on another basis than marriage, and the opposite party either denies the authenticity of the paper or alleges that it was obtained by fraud; the question, whether there was a marriage or not, is still open to the jury upon the whole of the evidence.
Id. (*Ib.*) 108

4. It is legal evidence that the President specially authorized and directed, in writing, the Secretary of the Treasury to make advances of public money, and that such paper was destroyed when the treasury building was burned. It is sufficient, if the witness states his belief that it was so destroyed.
Williams v. United States, (290) 135

5. The dockets and records of a court, showing that money had been received by the marshal or his deputies, under executions, are evidence in a suit against his securities.
Id. (*Ib.*) 135

EVIDENCE—3.

1. When a party to negotiable paper has given it value and currency by the sanction of his name, he shall not afterwards invalidate it, by showing, upon his own testimony, that the consideration on which it was executed was illegal.
Henderson v. Anderson, (73) 499

2. In the trial of a cause for the seizure of goods for the violation of the revenue laws, the officers who made the seizure are competent witnesses.
Taylor et al. v. The United States, (197) 559

3. A bill of lading, entry, and owner's oath, concerning other goods than those seized, may be admitted as a link in the chain of evidence to show a privity between the parties to commit a fraud upon the revenue.
Id. (*Ib.*) 559

See Duties.

4. Where a general objection is made, in the court below, to the reception of testimony, without stating the grounds of the objection, the court consider it as vague and nugatory; nor ought it to have been tolerated in the court below.
Camden v. Doremus, (515) 705

EVIDENCE—4.

1. Under the statutes of Mississippi, providing for the admission of the evidence of a notary public with regard to a protested note, directing the form of proceeding which the notary shall pursue, and providing further that justices of the peace may, in certain cases, perform the duties of notaries public, it was proper to read in evidence the original paper of the acting notary, although the record was made out at a time subsequent to that when the protest was actually made.
Brandon v. Loftus, (127) 905

2. Upon the trial of a cause where goods had been seized upon suspicion of being fraudulently imported, and the United States had shown sufficient ground for an opinion of the court that probable cause existed for the prosecution, and notice had been given to the claimant to produce his books and accounts relating to those goods, it was proper for the court to instruct the jury, that, if the claimant had withheld the testimony of his accounts and transactions with the parties abroad, from whom he received the goods, they were at liberty to presume that, if produced, they would have operated unfavorably to his cause.
Clifton v. The United States, (242) 957

3. The doctrine laid down in 2 Evans's Pothier, 149, cited and approved, namely: "That if the weaker and less satisfactory evidence is given and relied on in support of a fact, when it is apparent to the court and jury that proof of a more direct and explicit character was within the power of the party, the same caution which rejects the secondary evidence will awaken distrust and suspicion of the weaker and less satisfactory, and it may well be presumed, that if the more perfect exposition had been given, it would have laid open deficiencies and objections which the more obscure and uncertain testimony was intended to conceal."
Id. (*Ib.*) 957

4. The principle established in the case of Wood v. The United States (16 Peters, 342) reviewed and confirmed, namely: "That if the goods are fraudulently invoiced, they are not exempted from forfeiture by having been appraised in the custom-house at valuations exceeding the prices in the invoices, and delivered to the importers on payment of the duties assessed upon such increased valuations."
Id. (*Ib.*) 957

5. In the trial of a cause where goods had been seized upon suspicion of being fraudulently imported, it was proper to allow to go to the jury, as evidence, appraisements of the goods, made either by the official appraisers or appraisers acting under an appeal, they being present to verify the papers. The objection that the appraisements had not been made in presence of the jury was not sufficient.
Buckley v. The United States, (251) 961

6. Such papers are documents of public writings, not judicial, and may be used as evidence, under the rules which regulate all that class of papers.
Id. (*Ib.*) 961

7. Other invoices of other goods imported by the party are admissible. The decision on this point in Wood v. The United States (16 Peters, 359, 360) confirmed.
Id. (*Ib.*) 961

8. It was proper to show, in such a case, that the agent of the claimant had sold goods for him at prices which yielded profits, which other persons, engaged in the same trade, averred could not fairly have been made in the then state of the market.
Id. (*Ib.*) 961

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9. The court is the tribunal to determine, from the evidence, whether or not there was probable cause for the seizure.
Buckley v. The United States, (251) 961
10. If the notarial protest does not set forth the fact that the bill was presented to the drawee, it cannot be read in evidence to the jury.
Musson v. Lake, (282) 967
11. In an action brought by the indorsee against the indorser of a promissory note, which had been deposited in a bank for collection, the notary public who made the protest is a competent witness, although he has given bond to the bank for the faithful performance of his duty.
Cookendorfer v. Preston, (317) 992
12. He is also competent to testify as to his usual practice.
Id. (*Ib.*) 992
13. Although evidence is not admissible to show that usage was in fact different from that which it was established to be by judicial decisions, yet it may be shown that it was subsequently changed.
Id. (*Ib.*) 992
14. The statutes of Alabama require the negotiability and character of bills of exchange, foreign and inland, and promissory notes, payable in bank, to be governed by the general commercial law.
Smyth v. Strader et al., (404) 1031
15. If a partner draws notes in the name of the firm, payable to himself, and then indorses them to a third party for a personal and not a partnership consideration, the first indorsee cannot maintain an action upon them against the firm, if he knew that the notes were antedated.
Id. (*Ib.*) 1031
16. But if the first indorsee passes them away to a second indorsee before the maturity of the notes, in the due course of business, and the second indorsee has no knowledge of the circumstances of their execution and first indorsement, he may be entitled to recover against the firm, although the partner who drew the notes committed a fraud by antedating them.
Id. (*Ib.*) 1031
17. But if the second indorsee received the notes after their maturity, or out of the ordinary course of business, or under circumstances which authorize an inference that he had knowledge of the fraud in their execution or first indorsement, he cannot recover.
Id. (*Ib.*) 1031
18. These things are matters of evidence for the jury.
Id. (*Ib.*) 1031
19. Evidence is admissible to show that, in an account current between the first and second indorsee, no credit was given in it for the notes when they were passed from the first to the second indorsee.
Id. (*Ib.*) 1031
20. So, evidence of drawing and redrawing between the first and second indorsee, alluded to in the account current, is admissible.
Id. (*Ib.*) 1031
21. The testimony of one of the partners, offered for the purpose of proving the fraud committed by the drawer of the notes, is not admissible. This court again recognizes the rule upon this subject established in the case of Henderson v. Anderson (3 Howard, 73).
Id. (*Ib.*) 1031
22. The partner offered as a witness was a party upon the record, and thus, also, disqualified.
Id. (*Ib.*) 1031

EXECUTION—2.

See Practice.

EXECUTION—3.

1. A law of the State of Indiana, directing "that real and personal estate, taken in execution, shall sell for the best price the same will bring at public auction and outcry, except that the fee-simple of real estate shall not be sold to satisfy any execution or executions, until the rents and profits for the term of seven years of such real estate shall have been first offered for sale at public auction and outcry; and if such rents and profits will not sell for a sum sufficient to satisfy such execution or executions, then the fee-simple shall be sold," is not merely directory to the sheriff, but restrictive of his power to sell the fee-simple.
Gantly's Lessee v. Ewing, (707) 794
2. If he sells the fee-simple without having previously offered the rents and profits, his deed is void.
Id. (*Ib.*) 794
3. A marshal is not authorized by law to receive anything, in discharge of an execution, but gold and silver, unless the plaintiff authorizes him to receive something else.
McFarland v. Gwin, (717) 799
4. The case of Griffin *et al.* v. Thompson (2 Howard, 244), reviewed and confirmed.
Id. (*Ib.*) 799
4. A marshal, like a sheriff, is bound, after the expiration of his term of office, to complete an execution which has come to his hands during his term; and an execution is never completed until the money is made and paid over to the plaintiff, if it is practicable to make it.
Id. (*Ib.*) 799

EXECUTION—4.

1. In cases of conflicting executions issued out of the federal and State courts, a priority is given to that under which there is an actual seizure of the property first.
Brown v. Clarke, (4) 850
2. Although, by the law of Alabama, where an execution has issued during the lifetime of a defendant, but has not been actually levied, an *alias* or *pluries* may go after his death, and the personal estate of the deceased levied upon and sold to satisfy the judgment, yet, this is not so with respect to the real estate.
Erwin's Lessee v. Dundas, (58) 875
3. By the common law, the writ of *fieri facias* had relation back to its *teste*, and if the execution was tested during the lifetime of a deceased defendant, it might be taken out and levied upon his goods and chattels after his death.
Id. (*Ib.*) 875
4. But if an execution issues and bears *teste* after the death of the defendant, it is irregular and void, and cannot be enforced against either the real or personal property of the defendant. The judgment must first be revived against the heirs or devisees in the one case, or personal representatives in the other.
Id. (*Ib.*) 875
5. Such is the settled law where there is but one defendant.
Id. (*Ib.*) 875
6. Where there are two defendants, one of whom has died, the judgment cannot be enforced by execution against the real estate of the survivor alone; and as it has to issue against the real estate of both, the real estate of the deceased is protected by the same law which would govern the case if he had been the sole defendant. The judgment must be revived by *scire facias*.
Id. (*Ib.*) 875
7. Before and since the Statute of Westminster 2d (which subjected lands to an *elegit*), a judgment against two defendants survived against the personal estate of the survivor, and execution could be taken out against him, within a year, without a *scire facias*.
Id. (*Ib.*) 875
8. But before the real estate of the deceased can be subjected to execution, the judgment, which does not survive as to the real estate, must be revived against the surviving defendant, and against the heirs, devisees, and terre-tenants of the deceased.
Id. (*Ib.*) 875
9. The interest of new parties would otherwise be liable to be suddenly devested without notice.
Id. (*Ib.*) 875

EXECUTORS AND ADMINISTRATORS—1.

See Chancery.
1. If an executor, in distributing an estate, assigns to one of the distributees a mortgage which is for a greater amount than his share, the distributee is not bound to make up the difference in case the mortgaged property sells for less than the amount of the mortgage.
Hammond's Adm. v. Lewis, Ex'r of Washington, (14) 30
2. A disposition by a testator of his personal property to purposes other than the payment of his debts, with the assent of creditors, is in itself a charge on the real estate, subjecting it to the payment of the debts of the estate, although no such charge is created by the words of the will.
Bank of the United States et al. v. Beverly et al., (134) 75

EXECUTORS AND ADMINISTRATORS—3

See Practice, Devise.

EXECUTORS AND ADMINISTRATORS—4.

1. The decision of this court in the case of Price

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v. Sessions (3 Howard, 624) reviewed and confirmed.
Paige v. Sessions, (122) 903

2. Where a person domiciled in England died, leaving property both in England and Pennsylvania, and the executor took out letters testamentary in both countries, in a suit in England against the executor by the administrator of a deceased claimant, the parties were restricted to the limits of the country to which their letters extended.
Aspden v. Nixon, (467) 1059

3. The executor could not rightfully transmit the Pennsylvania assets to be distributed by a foreign jurisdiction.
Id. (*Ib.*) 1059

4. So, the administrator of the deceased claimant, acting under letters granted in England, only represented the intestate to the extent of these English letters, and could not be known as a representative in Pennsylvania.
Id. (*Ib.*) 1059

5. Two suits, therefore, one in England, between the executor and the administrator of a deceased claimant, acting under English letters, and the other in Pennsylvania, between the executor and another administrator of the claimant, acting under Pennsylvania letters, are suits between different parties. And neither the decree nor proceedings in the English suit are competent evidence in the American suit. The property in controversy is different in the two suits.
Id. (*Ib.*) 1059

6. A judgment or decree set up as a bar by plea, or relied on as evidence by way of estoppel, to be conclusive, must have been made,
1. By a court of competent jurisdiction, upon the same subject matter.
2. Between the same parties.
3. For the same purpose.
7. On either ground, the evidence in the English suit is incompetent to prove anything with regard to the Pennsylvania assets.
Id. (*Ib.*) 1059

8. Although, in cases peculiarly circumstanced, one jurisdiction administering assets may, as matter of comity, transmit them to a foreign jurisdiction, yet they cannot be sent to England where a suit is pending in this country for the American assets. A decree of the High Court of Chancery, in England, purporting to distribute assets so situated, would be treated as void for want of jurisdiction.
Id. (*Ib.*) 1059

9. The Circuit Court of the United States, sitting in Pennsylvania, is bound by the same rules which govern the local tribunals of that State, and would require a devisee to give security to refund in case a debt should afterwards be proved against the testator. Other provisions of the laws of that State would also embarrass a court in exercising the comity referred to.
Id. (*Ib.*) 1059

10. Under the influence of similar laws, the courts of the several States have been so much restrained as to render the exercise of comity among each other little more than a barren theory. More could not be required between the courts of this country and England.
Id. (*Ib.*) 1059

11. There having been no evidence introduced in the English suit to establish the heirship of the claimant, the decision of the court there, dismissing the bill, is not conclusive as to the title. What effect those proceedings ought to have in this country, this court will not now decide. It only decides, that the evidence in support of the title is not barred in the Circuit Court of Pennsylvania.
Id. (*Ib.*) 1059

12. The judgment of a foreign court upon a question of title cannot preclude a claimant from introducing evidence in a second suit, in another country, for other property. Such a proposition is not recognized either by the jurisprudence of the United States or of Great Britain; nor is the opinion of this court in conflict with the established comity of nations.
Id. (*Ib.*) 1059

13. A person cannot legally purchase on his own account that which his duty or trust requires him to sell on account of another, nor purchase on account of another that which he sells on his own account. He is not allowed to unite the two opposite characters of buyer and seller.
Michaud v. Girod, (503) 1076

14. A purchase *per interpositam personam*, by a trustee or agent, of the particular property of which he has the sale, or in which he represents another, whether he has an interest in it or not, carries fraud on the face of it.
Id. (*Ib.*) 1076

15. This rule applies to a purchase by executors, at open sale, although they were empowered by the will to sell the estate of their testator for the benefit of heirs and legatees, a part of which heirs and legatees they themselves were.
Id. (*Ib.*) 1076

16. A purchase so made by executors will be set aside.
Id. (*Ib.*) 1076

17. The decisions of the courts of several States, upon this subject, examined and remarked upon.
Id. (*Ib.*) 1076

18. Relaxations of this rule of the civil law, which were made in some countries of Europe, were not adopted by the Spanish law, and of course never reached Louisiana. Nor were those relaxations carried so far as to allow a testamentary or dative executor to buy the property which he was appointed to administer.
Id. (*Ib.*) 1076

19. The maxims and qualifications of the civil law, upon this point, examined.
Id. (*Ib.*) 1076

20. Although courts of equity generally adopt the statutes of limitation, yet, in a case of actual fraud, they will grant relief within the lifetime of either of the parties upon whom the fraud is proved, or within thity years after it has been discovered or become known to the party whose rights are affected by it.
Id. (*Ib.*) 1076

21. Within what time a constructive trust will be barred must depend upon the circumstances of the case, and these are always examined.
Id. (*Ib.*) 1076

22. Acquittances given to an executor, without a full knowledge of all the circumstances, where such information had been withheld by the executor, and menaces and promises thrown out to prevent inquiry, are not binding.
Id. (*Ib.*) 1076

FEME COVERT—3.

Where property devised to a woman who afterwards married, was held not to be responsible for her husband's debts.
Price v. Sessions, (624) 755

FEMES COVERT—4.

1. A bond for the conveyance of land does not transfer the legal title, so as to serve as a defense in an action of ejectment, and such a bond, when signed by married women, neither confers a legal or equitable right upon the obligees.
Agricultural Bank of Mississippi et al. v. Rice et al., (225) 949

2. In order to convey by grant, the party possessing the right must be the grantor, and use apt and proper words to convey to the grantee.
Id. (*Ib.*) 949

3. If, therefore, the title to land is in married women, and a deed for the land recites the names of the husbands, as grantors, purporting to convey in right of their wives, the deed is insufficient to convey the titles of the wives.
Id. (*Ib.*) 949

4. Nor is such a deed made effective by its being signed and sealed by the wives. The interest of the husbands is conveyed by it, but nothing more.
Id. (*Ib.*) 949

5. A receipt of money, subsequently, by the female grantors, does not pass the legal title, nor give effect to a deed, which, as to them, was utterly void.
Id. (*Ib.*) 949

FLORIDA—1.

See Lands, Public.

FORTHCOMING BOND—4.

See Judgment.

FRAUD—2.

An action for money had and received will lie against a person who has received the proceeds of a lottery ticket which he had fraudulently caused to be drawn as a prize.
Catts v. Phalen and Morris, (376) 306

GUARANTEE—1.

See Commercial Law.

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GUARANTEE—2.

1. Whether a guarantee is a continuing one or not.
Lawrence v. McCalmont, (426) 326

2. The principles laid down in the case of Bell v. Bruen (1 Howard, 169, 186), which should govern the construction of commercial guaranties, reviewed and confirmed.
Id. (*Ib.*) 326

3. A valuable consideration, however small or nominal, if given or stipulated for in good faith, is, in the absence of fraud, sufficient to support an action on any parol contract, and this is equally true as to contracts of guaranty as to others.
Id. (*Ib.*) 326

4. The question, whether or not the guarantor had sufficient notice of the failure of the principals to pay the debt, was a question of fact for the jury.
Id. (*Ib.*) 326

5. The strictness of the rule requiring notice between parties to a bill or note, is much relaxed in cases of collateral security or of guarantee in a separate contract; the omission of such strict notice does not imply injury as a matter of course. The guarantor must prove that he has suffered damage by the neglect to make the demand on the maker, and to give notice, and then he is discharged only to the extent of the damage sustained.
Rhett v. Poe, (457) 338

HABEAS CORPUS—3.

Neither the Supreme Court, nor any other court of the United States, or judge thereof, can issue a *habeas corpus* to bring up a prisoner, who is in custody under a sentence or execution of a State court, for any other purpose than to be used as a witness.
Ex-parte Dorr, (108) 514

HEARSAY EVIDENCE—1.

See Marriage.

IMPRISONMENT FOR DEBT—1.

A person in custody under a *capias ad satisfaciendum* issued under the authority of the Circuit Court of the United States, cannot legally be discharged from imprisonment by the State officer, acting under a State insolvent law.
Duncan v. Darst et al., (301) 139

IMPRISONMENT FOR DEBT—2.

A sheriff has no right to discharge a prisoner in custody by process from the Circuit Court, unless such discharge is sanctioned by an act of Congress, or the mode of it adopted as a rule by the Circuit Court of the United States.
McNutt v. Bland, (9) 159

INSTRUCTIONS—2.

A court is not bound to grant an instruction prayed for, when it is merely a recital of general or abstract principles, and not accompanied by, or founded upon, a statement of the testimony.
Rhett v. Poe, (457) 338

INSURANCE—4.

1. A policy of insurance contained a stipulation, that if the insured then had, or thereafter should have, any other insurance upon the same property, notice thereof should be given to the company, and the same indorsed upon the policy, or otherwise acknowledged by the company in writing, in default of which the policy should cease.
Carpenter v. Providence Washington Insurance Company. (185) 931

2. A bill was filed in equity by the insured, alleging that notice was given to the insurance company, and praying that the company might be compelled to indorse the notice upon the policy, or otherwise acknowledge the same in writing.
Id. (*Ib.*) 931

3. When the answer of the company, sworn to by the then president, denies the reception of the notice, to the best of his knowledge and belief, the question becomes one of fact and of law; of fact, whether the evidence offered by the complainant is sufficient to sustain the allegation; and of law, whether, if so, this court can compel the company to acknowledge it.
Id. (*Ib.*) 931

4. The answer being responsive to the bill, and denying the allegation, under oath, the general rule is, that the allegation must be proved, not only by the testimony of one witness, but by some additional evidence.
Id. (*Ib.*) 931

5. Several qualifications and limitations of this rule examined.
Id. (*Ib.*) 931

6. The circumstances of this case are such that the general rule applies.
Id. (*Ib.*) 931

7. Two witnesses are produced by the complainant to prove the notice, but neither of them swears positively to it, and the circumstances of the case do not strengthen their testimony.
Id. (*Ib.*) 931

8. The rules by which parties are sometimes allowed to introduce parol evidence with reference to a written contract do not apply to this case, where the parol proof is offered by the complainant, seeking to show a fact which, if true, would establish a breach of duty in the defendants, happening after the original contract was made.
Id. (*Ib.*) 931

9. The question of law which would arise if the notice were sufficiently proved by the complainant need not be decided in this case.
Id. (*Ib.*) 931

INTEREST—1.

In the settlement of an account between the owner of land and the holder, interest begins to run against the latter from the time when the owner asserted his title to the land.
Buchannon et al. v. Upshaw, (56) 46

JUDGMENT—4.

1. By the law of Mississippi, a judgment is a lien upon personal as well as real estate from the time of its rendition.
Brown v. Clarke, (4) 850

2. Where there has been a judgment, an execution levied upon personal property, and a forthcoming bond, the property levied upon is released by the bond, and the lien of the judgment destroyed.
Id. (*Ib.*) 850

3. If, therefore, after this, another judgment be entered against the original defendant, this second judgment is a lien upon the property which has been released by the bond.
Id. (*Ib.*) 850

4. The lien thus acquired by the second judgment is not destroyed by subsequently quashing the forthcoming bond. The effect of such quashing is not to revive the first judgment, and thus restore the lien which was superseded by the execution of the bond.
Id. (*Ib.*) 850

5. If the forthcoming bond had been shown to have been void *ab initio*, the result would be different.
Id. (*Ib.*) 850

6. Where there are two defendants, one of whom has died, the judgment cannot be enforced by execution against the real estate of the survivor alone; and as it has to issue against the real estate of both, the real estate of the deceased is protected by the same law which would govern the case if he had been the sole defendant. The judgment must be revived by *scire facias*.
Erwin's Lessee v. Dundas, (58) 875

7. Before and since the Statute of Westminster 2d (which subjected lands to an *elegit*), a judgment against two defendants survived against the personal estate of the survivor, and execution could be taken out against him, within a year, without a *scire facias*.
Id. (*Ib.*) 875

8. But before the real estate of the deceased can be subjected to execution, the judgment, which does not survive as to the real estate, must be revived against the surviving defendant, and against the heirs, devisees, and terre-tenants of the deceased.
Id. (*Ib.*) 875

9. The interest of new parties would otherwise be liable to be suddenly devested without notice.
Id. (*Ib.*) 875

JURISDICTION—2.

1. A citizen of one State has a right to sue on the sheriff's bond of another State, and to use the name of the governor for the purpose, although the governor and sheriff are citizens of the same State, provided the party for whose use the suit is brought is a citizen of a different State from the Sheriff.
McNutt v. Bland, (9) 159

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2. A sheriff has no right to discharge a prisoner in custody by process from the Circuit Court, unless such discharge is sanctioned by an act of Congress, or the mode of it adopted as a rule by the Circuit Court of the United States.
Id. (*Ib.*) 159
3. A sale ordered by a court, in a case where it had not jurisdiction, must be considered as inadvertently done, or as an unauthorized proceeding; and, in either branch of the alternative, as a nullity.
Shriver's Lessee v. Lynn et al., (43) 172
4. But where the court had jurisdiction, the record must be received as conclusive of the rights adjudicated.
Id. (*Ib.*) 172
5. The original jurisdiction of this court does not extend to the case of a petition by a private individual, for a *habeas corpus* to bring up the body of his infant daughter, alleged to be unlawfully detained from him.
Ex-parte Barry, (65) 180
6. Where the plaintiff in the court below claims $2,000 or more, and the ruling of the court is for a less sum, he is entitled to a writ of error.
Knapp v. Banks, (73) 184
7. But the defendant is not entitled to such writ where the judgment against him is for a less sum than $2,000 at the time of the rendition thereof.
Id. (*Ib.*) 184
8. A statute of Mississippi allows suit to be brought against the maker and payee jointly, of a promissory note, by the indorsee.
Dromgoole v. Farmers' and Mechanics' Bank of Mississippi, (241) 252
9. But an action of this kind cannot be maintained in the courts of the United States, although the plaintiff resides in another State, provided the maker and payee both reside in Mississippi.
Id. (*Ib.*) 252
10. By a law of Michigan, passed in 1818, the county courts had power, under certain circumstances, to order the sale of the real estate of a deceased person for the payment of debts and legacies. It was for that court to decide upon the existence of the facts which gave jurisdiction; and the exercise of the jurisdiction warrants the presumption that the facts which were necessary to be proved were proved.
Grignon's Lessee v. Astor, (319) 283
11. A distinction exists between courts of limited and of general jurisdiction: in the former the record must show that the jurisdiction was rightfully exercised; in the latter it will be presumed that it existed, where the record is silent.
Id. (*Ib.*) 283
12. This court has jurisdiction, under the twenty-fifth section of the Judiciary Act, in a Missouri land cause, where the title is not to be determined by Spanish laws alone, but where the construction of an act of Congress is involved to sustain the title.
Chouteau v. Eckhart, (344) 293
13. This court has not the power so to alter a former mandate of the court as to direct lands in Florida, which had not been offered for sale, under the President's proclamation, to be included within a survey, as well as those lands which had been so offered.
Ex-parte Sibbald, (455) 337
14. A citizen of one State can sue a corporation which has been created by, and transacts its business in, another State (the suit being brought in the latter State), although some of the members of the corporation are not citizens of the State in which the suit is brought, and although the State itself may be a member of the corporation.
Louisville, Cincinnati, and Charleston Railroad Company v. Letson, (497) 353
15. A corporation created by, and transacting business in a State, is to be deemed an inhabitant of the State, capable of being treated as a citizen for all purposes of suing and being sued; and an averment of the fact of its creation, and the place of its residence is sufficient to give the Circuit Courts jurisdiction.
Id. (*Ib.*) 353
See Practice.

JURISDICTION—S.

See Admiralty.
1. The Circuit Court of the United States has jurisdiction where a promissory note is made by a citizen of one State, payable to another citizen of the same State or bearer, and the party bringing the suit is a citizen of a different State; although upon the face of the note it was expressed to be for the use of persons residing in the State in which the maker and payee lived.
Bonnaffee v. Williams, (574) 732
2. Where the citizenship of the parties gives jurisdiction, and the legal right to sue is in the plaintiff, the court will not inquire into the residence of those who may have an equitable interest in the claim.
Id. (*Ib.*) 732
3. This court has not jurisdiction, under the 25th section of the Judiciary Act, of a question whether an ordinance of the corporate authorities of New Orleans does or does not impair religious liberty.
Permoli v. First Municipality, (589) 739
4. The Constitution of the United States makes no provision for protecting the citizens of the respective States in their religious liberties; this is left to the State constitutions and laws.
Id. (*Ib.*) 739
5. The Act of February 20th, 1811, authorizing the people of the territory of Orleans to form a constitution and State government, contained, in the third section thereof, two provisos; one in the nature of instructions how the constitution was to be formed, and the other, reserving to the United States the property in the public lands, their exemption from State taxation, and the common right to navigate the Mississippi.
Id. (*Ib.*) 739
6. The first of these provisos was fully satisfied by the Act of 1812, admitting Louisiana into the Union, "on an equal footing with the original States." The conditions and terms referred to in the act of admission referred solely to the second proviso, involving rights of property and navigation.
Id. (*Ib.*) 739
7. The Act of 1805, ch. 83, extending to the inhabitants of the Orleans territory, the rights, privileges, and advantages secured to the northwestern territory by the ordinance of 1787, had no further force after the adoption of the State constitution of Louisiana, than other acts of Congress, organizing the territorial government, and standing in connection with the ordinance. They are none of them in force unless they were adopted by the State constitution.
Id. (*Ib.*) 739
8. The treaty by which Louisiana was ceded to the United States, recognized complete grants, issued anterior to the cession, and a decision of a State court against the validity of a title set up under such a grant, would be subject to revisal by this court under the 25th section of the Judiciary Act.
McDonogh v. Millaudon, (693) 787
9. But if the State court only applies the local laws of the State to the construction of the grant, it is not a decision against its validity, and this court has no jurisdiction.
Id. (*Ib.*) 787
10. Congress, in acting upon complete grants, recognized them as they stood; and the Act of 11th May, 1820, confirming such as were recommended for confirmation by the register and receiver, had no reference to any particular surveys.
Id. (*Ib.*) 787
11. A decision of a State court, therefore, which may be in opposition to one of these surveys, is not against the validity of a title existing under an act of Congress, and this court has no jurisdiction in such a case.
Id. (*Ib.*) 787
12. The doctrine of this court in 1 Peters, 340, reviewed and confirmed, viz., "that the jurisdiction of any court exercising authority over a subject may be inquired into in every other court where the proceedings of the former are relied on, and brought before the latter by the party claiming the benefit of such proceeding."
Lessee of Hickey v. Stewart, (750) 814
13. Where the matter in dispute is below the amount necessary to give jurisdiction to this court, the writ of error must be dismissed, on motion.
Winston v. The United States, (771) 823
14. Where a bill was filed on the equity side of the court below, to enjoin the marshal from levying an execution upon certain property, which execution was for a less sum than two thousand dollars, an appeal from a decree dismissing the bill will not lie to this court, although the entire value of the property may be more than two thousand dollars.
Ross v. Prentiss, (771) 824
15. The jurisdiction of the court does not depend upon the amount of any contingent loss or damage which one of the parties may sustain by a decision

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against him, but upon the amount in dispute between them.
Ross v. Prentiss, (771) 824

JURISDICTION—4.

See Practice.
1. It was the province of the court below to decide, as matter of law, what were the duties of the chief engineer, and to judge whether any evidence had been induced tending to show that General Gratiot had performed any services not appertaining to his station as chief engineer.
Gratiot v. United States, (80) 884
2. The jurisdiction of this court, when a case is brought up from a State court under the twenty-fifth section of the Judiciary Act, does not extend to questions of evidence ruled by that court, unless it is sought to give such evidence effect for other purposes over which this court has jurisdiction.
Mackay et al. v Dillon. (421) 1038
3. The second section of the Act of the 29th of May, 1830, providing, that "if two or more persons be settled upon the same quarter-section, the same may be divided between the two first actual settlers, if by a north and south, or east and west, line the settlement or improvement of each can be included in a half-quarter section," refers only to tracts of land containing one hundred and sixty acres, and does not operate upon one containing only one hundred and thirty-three acres.
Downes v. Scott, (500) 1075
4. Therefore, where tenants in common of a tract of one hundred and thirty-three acres applied to a State court for a partition under the above act, the judgment of that court cannot be reviewed by this court, when brought up by writ of error under the twenty-fifth section of the Judiciary Act, because the right asserted does not arise under an act of Congress.
Id. (*Ib.*) 1075
5. The writ of error must be dismissed.
Id. (*Ib.*) 1075
6. The United States have adopted the principle originally established by European nations, namely, that the aboriginal tribes of Indians in North America are not regarded as the owners of the territories which they respectively occupied. Their country was divided and parcelled out as if it had been vacant and unoccupied land.
United States v. Rogers, (567) 1105
7. If the propriety of exercising this power were now an open question, it would be one for the law making and political department of the government, and not the judicial.
Id. (*Ib.*) 1105
8. The Indian tribes residing within the territorial limits of the United States are subject to their authority, and where the country occupied by them is not within the limits of any one of the States, Congress may, by law, punish any offense committed there, no matterwhether the offender be a white man or an Indian.
Id. (*Ib.*) 1105
9. The twenty-fifth section of the Act of 30th June, 1834, extends the laws of the United States over the Indian country, with a proviso that they shall not include punishment for "crimes committed by one Indian against the person or property of another Indian."
Id. (*Ib.*) 1105
10. This exception does not embrace the case of a white man who, at mature age, is adopted into an Indian tribe. He is not an "Indian" within the meaning of the law.
Id. (*Ib.*) 1105
11. The treaty with the Cherokees, concluded at New Echota, in 1835, allows the Indian Council to make laws for their own people or such persons as have connected themselves with them. But it also provides that such laws shall not be inconsistent with acts of Congress. The Act of 1834, therefore, controls and explains the treaty.
Id. (*Ib.*) 1105
12. It results from these principles, that a plea set up by a white man, alleging that he had been adopted by an Indian tribe, and was not subject to the jurisdiction of the Circuit Court of the United States, is not valid.
Id. (*Ib.*) 1105

JURY—1.

1. In case of a collision of vessels, the question, by whose fault the accident happened, is a question of fact for the jury to decide upon the whole of the evidence.
Smith et al. v. Condry, (28) 35
2. Extrinsic evidence may be used to ascertain the true import of an agreement of guarantee, and its construction is matter of law for the court.
Bell and Grant v. Bruen, (169) 89
3. An advertisement, announcing the separation of persons who had been living together as man and wife, being allowed to be given in evidence under the circumstances of the case, the questions whether or not it was inserted by the party, and if so, what were his motives, are questions of fact for the jury.
Jewell's Lessee v. Jewell, (219) 108
4. If a written contract between the parties be offered in evidence, the purport of which is to show that the parties lived together on another basis than marriage, and the opposite party either denies the authenticity of the paper, or alleges that it was obtained by fraud, the question whether there was a marriage or not is still open to the jury upon the whole of the evidence.
Id. (*Ib.*) 108

JURY—2.

1. The question, whether or not the guarantor had sufficient notice of the failure of the principals to pay the debt, is a question of fact for the jury.
Lawrence v. McCalmont, (426) 396
2. It becomes a question of law whether due diligence has or has not been used, with regard to the collection of a bill of exchange, whenever the facts are ascertained; and therefore there is no error in the direction of a court to a jury that they should infer due diligence from certain facts, where those facts, if found by the jury, amounted, in the opinion of the court, to due diligence.
Rhett v. Poe, (457) 328
3. The exact time of the birth of a petitioner for freedom is a fact for the jury; and a prayer to the court which would have excluded the consideration of that fact was properly refused.
Adams v. Roberts, (486) 349

LANDS, PUBLIC—1.

1. The certificate of the secretary of the Spanish Governor of Florida is *prima facie* evidence of the existence of a grant of land.
United States v. Acosta, (24) 33
2. The Spanish Governor had authority to issue such a grant.
Id. (*Ib.*) 33
3. In the case of a grant made before the 24th of January, 1818, it is valid, although the survey was not made until after that day, provided the survey was made before the exchange of flags.
Id. (*Ib.*) 33
4. It is not a good objection to such a grant that the metes and bounds were not set forth.
Id. (*Ib.*) 33
5. A grant of land, "bounded east by the River Mobile," covers the ground between high water and low water-marks.
City of Mobile v. Emanuel, (95) 60

LANDS, PUBLIC—2.

1. The tract of country lying on the west of the Tennessee River was not Cherokee country in 1779, but was liable to be taken up, under the laws of Virginia, as waste and unappropriated land.
Porterfield's Ex'rs v. Clark, (76) 135
2. The Kentucky Act of 1809 applied to the Chickasaw country on the west of the Tennessee River as far as treaties would permit; and upon the extinguishment of the Indian title, this act, together with all the other laws, was extended over the country.
Id. (*Ib.*) 135
3. A confirmation of a grant of land in Missouri, under the Act of 1836, to the original claimant and his legal representatives, inures, by way of estoppel, to his assignee.
Stoddard et al. v. Chambers, (284) 269
4. To bring a case within the second section of the Act of 1836, so as to avoid a confirmation, the opposing location must be shown to have been made under a law of the United States.
Id. (*Ib.*) 269
5. The holder of a New Madrid certificate had a right to locate it only on public lands which had been authorized to be sold. If it was located on lands which were reserved from sale at the time of issuing the patent, the patent is void.
Id. (*Ib.*) 269
6. There was no reservation from sale of the land claimed under a French or Spanish title be-

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tween May, 1829, and July, 1832. A location under a New Madrid certificate, upon any land claimed under a French or Spanish title, not otherwise reserved, made in this interval, would have been good.
Id. (*Ib.*) 269
7. If two patents be issued by the United States for the same land, and the first in date be obtained fraudulently or against law, it does not carry the legal title.
Id. (*Ib.*) 269
8. A patent is a mere ministerial act, and if it be issued for land reserved from sale by law, it is void.
Id. (*Ib.*) 269
9. A title to land becomes a legal title when a claim is confirmed by Congress. Such confirmation is a higher evidence of title than a patent, because it is a direct grant of the fee, which had been previously in the United States.
Grignon's Lessee v. Astor, (319) 283
10. The obligation of perfecting titles under Spanish concessions, which was assumed by the United States in the Louisiana treaty, was a political obligation, to be carried out by the legislative department of the government. Congress, in confirming or rejecting claims, acted as the successor of the intendant-general; and both exercised, in this respect, a portion of sovereign power.
Chouteau v. Echart, (344) 293
11. The Act of Congress passed on the 13th of June, 1812, confirming the titles and claims of certain towns and villages to village lots and commons, gave a title which is paramount to a title held under an old Spanish concession, confirmed by Congress in 1836.
Id. (*Ib.*) 293
12. This court has not the power so to alter a former mandate of the court, as to direct lands in Florida, which had not been offered for sale under the President's proclamation, to be included within a survey, as well as those lands which had been so offered.
Ex-parte Sibbald, (455) 337
13. Where a treaty with the Indians provides that reservations of land shall be made for two different classes of persons, and that the President shall have the power to make selections for the orphan children of the Indians, he cannot select a reservation made by any of the two classes first mentioned.
Sally Ladiga v. Roland et al., (581) 387
14. A grandmother, living with her grandchildren, is the head of a family, and entitled to a reservation: and if the President select this reservation, his act is a nullity.
Id. (*Ib.*) 387
15. It is the settled doctrine of the Judicial Department of the government, that the Treaty of 1819 with Spain ceded to the United States no territory west of the River Perdido. It had already been acquired under the Louisiana treaty.
Pollard's Lessee v. Files, (591) 391
16. In the interval between the Louisiana treaty and the time when the United States took possession of the country west of the Perdido, the Spanish government had the right to grant permits to settle and improve by cultivation, or to authorize the erection of establishments for mechanical purposes.
Id. (*Ib.*) 391
17. These incipient concessions were not disregarded by Congress, but are recognized in the Acts of 1804, 1812, and 1819; and, as claims, are within the Act of 1824.
Id. (*Ib.*) 391
18. That Act (of 1824) gave a title to the owners of old water lots, in Mobile, only where an improvement was made on the east side of Water Street, and made by the proprietor of the lot on the west side of that street. Such person could not claim as riparian proprietor, or where his lot had a definite limit on the east.
Id. (*Ib.*) 391

LANDS, PUBLIC—3.

See Constitutional Law, Lead Mines.
1. Under the Act of 1815, a New Madrid certificate could be located upon lands before they were offered at public sale under a proclamation of the President, or even surveyed by the public surveyor.
Barry v. Gamble, (82) 479
2. The Act of 1822 recognized locations of this kind, although they disregarded the sectional lines by which the surveys were afterwards made.
Id. (*Ib.*) 479
3. Under the acts of 1805, 1806, and 1807, it was necessary to file the evidences of an incomplete claim under French or Spanish authority, which bore date anterior to the 1st of October, 1800, as well as those which were dated subsequent to that day; and in cases of neglect, the bar provided in the acts applied to both classes.
Id. (*Ib.*) 479
4. A title resting on a permit to settle and warrant of survey, dated before the 1st of October, 1800, without any settlement or survey having been made, was an incomplete title and within these acts.
Id. (*Ib.*) 479
5. And although the acts of 1824 and 1828 removed the bar as it respected the United States, yet, having excepted such lands as had been sold or otherwise disposed of by the United States, and saved the rights or title of adverse claimants, these acts protected a New Madrid claim which had been located whilst the bar continued.
Id. (*Ib.*) 479
6. In making an entry of land, where mistakes occur which are occasioned by the impracticability of ascertaining the relative positions of the objects called for, the court will correct those mistakes, so as to carry out the intentions of the locator.
Croghan's Lessee v. Nelson, (187) 554
7. There is no principle of the common law which forbids individuals from associating together to purchase lands from the United States, on joint account, at public sale.
Oliver v. Piatt, (333) 622
8. When the purchaser of land from the United States has paid for it, and received a final certificate, it is taxable property, according to the statutes of Michigan, although a patent has not yet been issued.
Carroll v. Safford, (441) 671
9. Taxation upon lands so held is not a violation of the ordinance of 1787, as an "interference with the primary disposition of the soil by Congress," nor is it "a tax on the lands of the United States." The State of Michigan could rightfully impose the tax.
Id. (*Ib.*) 671
10. It was competent for the State to assess and tax such lands at their full value, as the absolute property of the holder of the final certificate, and in default of payment, to sell them as if he owned them in fee.
Id. (*Ib.*) 671
11. In case of controversy, a court of equity is the proper tribunal to prevent an injurious act by a public officer, for which the law might give no adequate redress, or to avoid a multiplicity of suits, or to prevent a cloud from being cast over the title.
Id. (*Ib.*) 671
12. Where this court has affirmed the title to lands in Florida, and referred, in its decree, to a particular survey, it would not be proper for the court below to open the case for a rehearing, for the purpose of adopting another survey.
Chaires v. United States, (611) 749
13. The court below can only execute the mandate of this court. It has no authority to disturb the decree, and can only settle what remains to be done.
Id. (*Ib.*) 749
14. The Act of the 26th of May, 1830, providing for the final settlement of land claims in Florida, must be construed to contain the same limitation of time within which claims were to be presented, as that provided by the Act of 23d of May, 1828.
United States v. Marvin, (620) 153
15. That limitation was one year. The courts of Florida, therefore, had no right to receive a petition for the confirmation of an incomplete concession after the 26th of May, 1831.
Id. (*Ib.*) 753
16. The case in 15 Peters, 329, examined and distinguished from the present.
Id. (*Ib.*) 753
17. Under the acts of Congress, providing for the subdivision of the public lands, and the instructions of the Secretary of the Treasury, made under the Act of 24th April, 1820, entitled "An Act making further provision for the sale of the public lands," it is the duty of the surveyor-general to lay out a fractional section in such a manner that an entire quarter-section may be had if the fraction will admit of it.
Brown's Lessee v. Clements, (650) 767
18. The surveyor-general has no right to divide a fractional section by arbitrary lines, so as to pre-

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vent a regular quarter-section from being taken up.
Brown's Lessee v. Clements, (650) 767
19. The treaty by which Louisiana was ceded to the United States, recognized complete grants issued anterior to the cession, and the decision of a State court against the validity of a title set up under such a grant, would be subject to revisal by this court, under the 25th section of the Judiciary Act.
McDonogh v. Millaudon, (693) 787
20. But if the State court only applies the local laws of the State to the construction of the grant, it is not a decision against its validity, and this court has no jurisdiction.
Id. (*Ib.*) 787
21. Congress, in acting upon complete grants, recognized them as they stood: and the Act of 11th May, 1820, confirming such as were recommended for confirmation by the register and receiver, had no reference to any particular surveys.
Id. (*Ib.*) 787
22. A decision of a State court, therefore, which may be in opposition to one of these surveys, is not against the validity of a title existing under an act of Congress, and this court has no jurisdiction in such a case.
Id. (*Ib.*) 787
23. By the Treaty of 1795, between the United States and Spain, Spain admitted that she had no title to land north of the thirty-first degree of latitude, and her previous grants of land, so situated, were of course void. The country, thus belonging to Georgia, was ceded to the United States, in 1802, with a reservation that all persons who were actual settlers on 27th October, 1795, should have their grants confirmed. Congress provided a board of commissioners to examine these grants, and declared that their decision should be final.
Lessee of Hickey v. Stewart, (750) 814
24. The Court of Chancery of the State of Mississippi had no authority to establish one of these grants which had not been brought within the provisions of the act of Congress. The claim itself being utterly void, and no power having been conferred by Congress on that court to take or exercise jurisdiction over it, for the purpose of imparting to it legality, the exercise of jurisdiction was a mere usurpation of judicial power, and the whole proceeding of the court void.
Id. (*Ib.*) 814
25. The certificate of survey alleged to have been given by Trudeau, on the 14th of June, 1797, and brought forward to sustain a grant to the Marquis de Maison Rouge, declared antedated and fraudulent.
United States v. King et al., (773) 824
26. The circumstance that a copy of this paper was delivered by the Spanish authorities in 1803, is not sufficient to prevent its authenticity from being impeached.
Id. (*Ib.*) 824
27. Leaving this certificate out of the case, the instruments executed by the Baron de Carondelet in 1795 and 1797, have not the aid of any authentic survey to ascertain and fix the limits of the land, and to determine its location.
Id. (*Ib.*) 824
28. This court has repeatedly decided, and in cases, too, where the instrument contained clear words of grant, that if the description was vague and indefinite, and there was no official survey to give it a certain location, it could create no right of private property in any particular parcel of land, which could be maintained in a court of justice.
Id. (*Ib.*) 824
29. An equitable title is no defense in a suit brought by the United States. An imperfect title derived from Spain, before the concession, cannot be supported against a party claiming under a grant from the United States.
Id. (*Ib.*) 824
30. The Act of Congress of the 29th April, 1816, confirming the grant to the extent of a league square, restricted it to that quantity, and cannot be construed as confirming the residue.
Id. (*Ib.*) 824
31. *Quære:* Whether the acceptance, by the claimant, of this league square, affected his title to the residue.
Id. (*Ib.*) 824

LANDS, PUBLIC—4.

1. The holder of a register's certificate of the purchase of a lot in the town of Dubuque, lawfully acquired, and issued by the register under the two acts of 2d July, 1836, and 3d March, 1837, has such an equitable estate in the lot, before the issuing of a patent, as will subject the lot to sale under execution under the statute of Iowa.
Levi v. Thompson, (17) 856
2. The doctrine established in the case of Carroll v. Safford (3 Howard, 441), reviewed and confirmed.
Id. (*Ib.*) 856
3. The decision of a State court upon the merits of a controversy between two parties, one of whom had sold, and the other purchased, an interest in lands which, it was thought, could be acquired as Indian reservations under a treaty with the United States, cannot be reviewed by this court under the twenty-fifth section of the Judiciary Act.
Maney v. Porter, (55) 873
4. The party against whom the State court decided, instead of setting up an interest under the treaty, expressly averred that no rights had been obtained.
Id. (*Ib.*) 873
5. In such a case, this court has no jurisdiction.
Id. (*Ib.*) 873
6. Under the former government of Louisiana, the regulations of O'Reilly, Gayoso, and Morales recognized the equitable claim of the owners of tracts of land fronting on rivers, &c., to a portion of the public lands which were back of them, and after the cession, the United States did so also.
Jordan et al. v. Barrett et al., (169) 924
7. The Act of Congress passed on the 3d of March, 1811 extended to the front owner a preference to enter the land behind him. That act also provided, that where, owing to a bend in the river, each claimant could not obtain a tract equal in quantity to the tract already owned by him, the principal deputy-surveyor of each district, under the superintendence of the surveyor of the public lands south of the State of Tennessee, should divide the vacant land amongst the claimants in such a manner as to him might seem most equitable.
Id. (*Ib.*) 924
8. The Act of March 2d, 1805, had extended the power of the surveyor of lands south of Tennessee over the Territory of Orleans, and the Act of April 27th, 1806, had directed him to appoint two principal deputies, one for each district of the Territory of Orleans.
Id. (*Ib.*) 924
9. The Act of March 3d, 1831, directed the appointment of a surveyor-general of public lands in Louisiana, after the 1st of May, 1831.
Id. (*Ib.*) 924
10. In March, 1832, therefore, the surveyor of public lands south of Tennessee had no power to approve a survey.
Id. (*Ib.*) 924
11. The Act of 1811 reserved for the public all such back lands as were not correctly taken up under that act by the proprietors of river fronts: and those who did not enter their claims in time did not lose whatever equity they may have had before the passage of the act.
Id. (*Ib.*) 924
12. An unauthorized survey by one of the claimants did not confer upon him any additional rights.
Id. (*Ib.*) 924
13. In executing the acts of 1820 and 1832, claimants were allowed to pay for the largest amount which they claimed, but the precise amount due on the exact quantity of land to which they were entitled could not appear until the final survey.
Id. (*Ib.*) 924
14. When the land was laid out into ranges, townships, &c., the survey of township No. 11, approved by H. S. Williams, Surveyor-General of Louisiana, settled the rights of parties in that township.
Id. (*Ib.*) 924
15. A possession of any part of these back lands, anterior to this survey, cannot be set up as a defense under the laws of Louisiana, because the lands belonged to the United States, and those persons in possession were trespassers.
Id. (*Ib.*) 924
16. Under the Act of 1805, providing for the appointment of commissioners to examine and decide on certain claims to land, and the Act of 1812, confirming those claims, Congress did not intend to adopt the boundary lines of the claims according to the surveys which had been laid before the commissioners; nor adopt, for any purpose, the evidence which had been presented to the board.
Mackay et al. v. Dillon, (421) 1033

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17. A decision of the court below, cutting off all proof of the correctness or incorrectness of such surveys, was therefore erroneous.
Id. (*Ib.*) 1038

18. A survey, made at the instance of the inhabitants of St. Louis, for the purpose of presenting their claim to commons, in due form, to the board of commissioners, was in its nature a private survey, not binding on the United States, and having no binding influence on the title of subsequent litigants.
Id. (*Ib.*) 1038

19. A private survey of land, claimed under an old Spanish concession and presented to the board of commissioners appointed under the Act of 1805, is not conclusive against the party presenting it to show the boundaries of the claim, but is proper evidence to go to the jury, who are to decide upon its limits.
Les Bois v. Bramell, (449) 1051

20. Under the acts of 1824, 1826, and 1828, the District Court of Missouri was authorized to receive petitions of claimants to land, until the 26th of May, 1829. In 1831, when claims which had not been presented were standing under a bar, Congress confirmed the title of the inhabitants of the town of St. Louis to the adjacent commons. This act was valid, unless the opposing claimant then possessed a vested interest which was protected by the Louisiana treaty.
Id. (*Ib.*) 1051

21. By the third article of that treaty, the inhabitants were to be protected in their property.
Id. (*Ib.*) 1051

22. But land held under a concession and survey was not finally severed from the royal domain and converted into private property.
Id. (*Ib.*) 1051

23. The power of granting the public domain was in Morales, who resided in New Orleans. His regulations were in force in Upper Louisiana, and by them the title to land held under a concession and survey was not perfected until ratified by him and a final grant issued.
Id. (*Ib.*) 1051

24. This power was in a great degree a political power, and, by the treaty, the United States assumed the same exclusive right to deal with the title, in their political and sovereign capacity. The courts of justice cannot, without legislation, execute the power, because the holder of an incomplete title has no standing in court.
Id. (*Ib.*) 1051

25. A confirmatory act, passed by Congress in 1836, does not reach back to the original concession, and exclude grants of the same land made in the intermediate time, either by Congress itself, or a board of commissioners, or the District Court, acting under its authority.
Id. (*Ib.*) 1051

26. In the Act of 1836, Congress had in view the situation of persons whose titles were, by that act, confirmed to lands which had been previously granted to others, and, in order to meet the case, provided that such confirmed claimants might take up, elsewhere, an amount of public land equal to that which they lost.
Id. (*Ib.*) 1051

27. The Confirmatory Act of 1836 must therefore be construed to exclude the commons which had been granted, by previous acts, to the town of St. Louis. *Id.* (*Ib.*) 1051

28. These acts, and a survey by the proper public officer in 1832, placed the title of the town in the same condition as if a patent had been issued.
Id. (*Ib.*) 1051

29. The second section of the Act of the 29th of May, 1830, providing, that "if two or more persons be settled upon the same quarter-section, the same may be divided between the two first actual settlers, if by a north and south, or east and west, line the settlement or improvement of each can be included in a half quarter-section," refers only to tracts of land containing one hundred and sixty acres, and does not operate upon one containing only one hundred and thirty-three acres.
Downes v. Scott, (500) 1051

30. Therefore, where tenants in common of a tract of one hundred and thirty-three acres applied to a State court for a partition under the above act, the judgment of that court cannot be reviewed by this court, when brought up by writ of error under the twenty-fifth section of the Judiciary Act, because the right asserted does not arise under an act of Congress.
Id. (*Ib.*) 1075

31. The writ of error must be dismissed.
Id. (*Ib.*) 1075

LEAD MINES—3.

1. The Act of Congress entitled "An Act to create additional land districts in the States of Illinois and Missouri, and in the territory north of the State of Illinois," approved June 26th, 1834, does not require the President of the United States to cause to be offered for sale the public lands containing lead mines situated in the land districts created by said act.
United States v. Gear, (120) 523

2. The said act does not require the President to cause said lands containing lead mines to be sold, because the 5th section of the Act of the 3d March, 1807, entitled "An Act making provision for the disposal of the public lands situated between the United States military tract and the Connecticut reserve, and for other purposes," is still in full force. *Id.* (*Ib.*) 523

3. The lands containing lead mines, in the Indiana territory, or in that part of it made into new land districts by the Act of 26th June, 1834, are not subject, under any of the pre-emption laws which have been passed by Congress, to a pre-emption by settlers upon the public lands.
Id. (*Ib.*) 523

4. The 4th section of the Act of 1834 does in no way repeal any part of the 5th section of the Act of the 3d March, 1807, by which the lands containing lead mines were reserved for the future disposal of the United States, by which grants for lead mine tracts, discovered to be such before they may be bought from the United States, are declared to be fraudulent and null, and which authorized the President to lease any lead mine which had been, or might be, discovered in the Indiana territory, for a term not exceeding five years.
Id. (*Ib.*) 523

5. The land containing lead mines, in the districts made by the Act of 1834, are not subject to pre-emption and sale under any of the existing laws of Congress.
Id. (*Ib.*) 523

6. Digging lead ore from the lead mines upon the public lands of the United States, is such a waste as entitles the United States to a writ of injunction to restrain it.
Id. (*Ib.*) 523

LEXI LOCI CONTRACTUS—4.

See Commercial Law.

LIBEL—3.

1. In an action for a libel it is not indispensable to use the word "maliciously" in the declaration. It is sufficient if words of equivalent power or import are used.
White v. Nicholls, (266) 591

2. Every publication, either by writing, printing, or pictures, which charges upon or imputes to any person that which renders him liable to punishment, or which is calculated to make him infamous, or odious, or ridiculous, is *prima facie* a libel, and implies malice in the author and publisher towards the person concerning whom such publication is made.
Id. (*Ib.*) 591

3. Proof of malice cannot, in these cases, be required of the party complaining, beyond the proof of the publication itself; justification, excuse, or extenuation, if either can be shown, must proceed from the defendant.
Id. (*Ib.*) 591

4. Privileged communications are an exception; and the rule of evidence, as to such cases, is so far changed as to require of the plaintiff to bring home to the defendant the existence of malice as the true motive of his conduct.

Privileged communications are of four kinds:

1. Wherever the author and publisher of the alleged slander acted in the *bona fide* discharge of a public or private duty, legal or moral, or in the prosecution of his own rights or interest.

2. Anything said or written by a master in giving the character of a servant who has been in his employment.

3. Words used in the course of a legal or judicial proceeding, however hard they may bear upon the party of whom they are used.

4. Publications duly made in the ordinary mode of parliamentary proceedings, as a petition printed and delivered to the members of a committee appointed by the House of Commons to hear and examine grievances.
Id. (266) 591

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5. But in these cases the only effect of the change of the rule is to remove the usual presumption of malice. It then becomes incumbent on the party complaining to show malice, either by the construction of the spoken or written matter, or by facts and circumstances connected with that matter, or with the situation of the parties, adequate to authorize the conclusion.
White v. Nicholls, (266) 591
6. Proof of express malice, so given, will render the publication, petition, or proceeding, libelous. Falsehood and the absence of probable cause will amount to proof of malice.
Id. (*Ib.*) 591
7. The jury being the tribunal to determine whether this malice did, or did not mark the publication, the alleged libel should be submitted to them, and the court below erred in withholding it.
Id. (*Ib.*) 591

LIEN—1.

See Banks.

LIEN—2.

"A lien cannot arise, where, from the nature of the contract between the parties, it would be inconsistent with the express terms or the clear intent of the contract."
Randal v. Brown, (406) 318

LIMITATIONS—2.

The courts in Kentucky having decided that an entry was required to give title on a military warrant, this court decides that the legislative grant of Virginia to her officers and soldiers would not, of itself, prevent the statute of limitations of Kentucky from attaching.
Porterfield's Ex'rs v. Clark, (76) 185

LIMITATIONS—3.

1. Where there has been a tenancy in common, if the tenants in possession only claim the undivided interest which was held by their immediate grantors, it is not adverse to the remaining part of the title, and such persons cannot avail themselves of the statute of limitations.
Clymer's Lessee v. Dawkins, (674) 778
2. But if the occupants entered into possession and held the lands for more than twenty years before the commencement of the suit, by a purchase and claim thereof in entirety and severalty, and not an undivided part thereof in co-tenancy, it is an adverse possession, and the statute of limitations is a good plea.
Id. (*Ib.*) 778

LIMITATION—4.

1. Where the original possession by the holder of land is in privity with the title of the rightful owner, in order to enable such holder to avail himself of the statute of limitations, nothing short of an open and explicit disavowal and disclaimer of holding under that title, and assertion of title in himself brought home to the other party, will satisfy the law.
Zeller's Lessee v. Eckert, (289) 979
2. The burden of proof is on the holder to establish such a change in the character of the possession.
Id. (*Ib.*) 979
3. The statute does not begin to run until the possession becomes tortious and wrongful by the disloyal acts of the tenant, which must be open, continued, and notorious, so as to preclude all doubt as to the character of the holding, or the want of knowledge on the part of the owners.
Id. (*Ib.*) 979
4. In this case there was evidence enough given upon this point to authorize the court below to submit the question of adverse possession to the jury, and advise them that a foundation was laid upon which they might presume a grant for the purpose of quieting the title.
Id. (*Ib.*) 979
5. Although courts of equity generally adopt the statutes of limitation, yet, in a case of actual fraud, they will grant relief within the lifetime of either of the parties upon whom the fraud is proved, or within thirty years after it has been discovered or become known to the party whose rights are affected by it.
Michoud v. Girod, (503) 1076
6. Within what time a constructive trust will be barred must depend upon the circumstances of the case, and these are always examinable.
Id. (*Ib.*) 1076

LIMITATION OF ACTIONS—1.

1. The statute of limitation of Virginia, passed in 1785, barred the right of entry, unless suit was brought within twenty years next after the cause of action accrued. The savings are infancy, coverture, &c., and such persons are barred if they do not bring their action within ten years next after their disabilities shall be removed.
Mercer's Lessee v. Selden, (37) 38
2. Disabilities which bring a person within the exceptions of the statute cannot be piled one upon another; but a party, claiming the benefit of the proviso, can only avail himself of the disability existing when the right of action first accrued.
Id. (*Ib.*) 38
3. What constitutes an adverse possession.
Id. (*Ib.*) 38
4. The legal right of an owner of land, although he has recognized a sale of it, is not destroyed by lapse of time, or his right to bring an ejectment barred, provided he has, in the mean time, brought suit upon the securities which he took when he recognized the sale.
Buchannon et al. v. Upshaw, (56) 46
5. Lapse of time is no defense where there is an unexecuted trust to pay debts, which a court of competent jurisdiction has decided to be unpaid in point of fact.
Bank of the United States v. Beverly, (134) 75
6. There must be conscience, good faith, and reasonable diligence, to call into action the powers of a court of equity.
McKnight v. Taylor, (161) 86
7. In matters of account, where they are not barred by the Act of limitations, courts of equity refuse to interfere after a considerable lapse of time, from considerations of public policy, and from the difficulty of doing entire justice, when the original transactions have become obscured by time, and the evidence may be lost.
Id. (*Ib.*) 86
8. A court of equity which is never active in relief against conscience or public convenience, has always refused its aid to stale demands where the party has slept upon his rights for a great length of time.
Bowman et al. v. Wathen et al., (189) 97
9. Therefore, from the beginning of this jurisdiction, there was always a limitation of suit in this court.
Id. (*Ib.*) 97
10. Every new right of action, in equity, that accrues to a party, whatever it may be, must be acted upon, at the utmost, within twenty years.
Id. (*Ib.*) 97
11. Though the claimant may have been embarrassed by the frauds of others, or distressed, it is not sufficient to take the case on of the rule.
Id. (*Ib.*) 97
12. And it is the same whether the party knew of an adverse possession, or, through negligence and a failure to look after their interests, permitted the title of another to grow into full maturity.
Id. (*Ib.*) 97

LOCAL LAW—1.

See Limitation and Actions.
1. Where a collision of vessels occurs in an English port, the rights of the parties depend upon the provisions of the British statutes then in force; and if doubts exist as to their true construction, this court will adopt that which is sanctioned by their own courts.
Smith et al. v. Condry, (28) 35
2. A letter of guarantee written in the United States, and addressed to a house in England, must be construed according to the laws of the country.
Bell and Grant v. Bruen, (169) 89
3. The law of the State of Alabama, which authorizes securities to require of the creditor forthwith to put the bond in suit against the principal, and absolves the security, unless the creditor commences suit against the principal, does not include a case where the parties (principal and security) unite in a joint and several sealed bills.
Ellis et al. v. Jones, Admr. of Taylor, (197) 100

MAISON ROUGE—3.

1. The certificate of survey alleged to have been given by Trudeau, on the 14th of June, 1797, and brought forward to sustain a grant to the Marquis de Maison Rouge, declared to be antedated and fraudulent.
United States v. King et al., (773) 834

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2. Leaving the certificate out of the case, the instruments executed by the Baron de Carondelet in 1795 and 1797, have not the aid of any authentic survey to ascertain and fix the limits of the land and determine its location.
Id. (*Ib.*) 824

MANDAMUS—3.

1. Where a party has resorted to and obtained a *mandamus*, he cannot afterwards proceed in another suit for the same cause of action.
Kendall v. Stokes et al., (87) 506

MARINE CORPS—3.

A brevet field officer of the marine corps is not entitled by law to brevet pay and rations, by reason of his commanding a separate post or station, if the force under his command would not entitle a brevet field officer of infantry of a similar grade to brevet pay and rations.
United States v. Freeman, (556) 724

2. The Act of 1834, chap. 132, does not repeal the 1st section of the Act of 1818, regulating the pay and emoluments of brevet officers.
Id. (*Ib.*) 724

3. The 5th section of the Act of 30th June, 1834, is a repeal of the joint resolution of the two houses of Congress of the 25th May, 1832, respecting the pay and emoluments of the marine corps.
Id. (*Ib.*) 724

4. By force of the Army Regulation No. 1125, authorizing the issues of double rations to officers commanding departments, posts, and arsenals, a brevet field officer of marines is entitled to double rations. But the fact must be shown that he had such a command of a post or arsenal at which double rations had been allowed according to the army regulations.
Id. (*Ib.*) 724

5. The fact of appropriations having been made by Congress for double rations does not determine what officers are entitled to them.
Id. (*Ib.*) 724

6. A brevet field officer of the marine corps, commanding a separate post, without a command equal to his brevet rank, is not entitled to brevet pay and emoluments. But if such brevet officer is a captain in the line of his corps, and in the actual command of a company, whether he is in the command of a post or not, he is entitled to the compensation given by the 2d section of the Act of the 2d March, 1827.
Id. (*Ib.*) 724

MARRIAGE—1.

1. The declarations of a deceased member of a family that the parents of it never were married, are admissible in evidence whether his connection with that family was by blood or marriage.
Jewell's Lessee v. Jewell, (219) 108

2. The acts and declarations of the parties being given in evidence on both sides on the question of marriage, an advertisement announcing their separation, and appearing in the principal commercial paper of the place of their residence, immediately after their separation, is part of the *res gesta*, and admissible in evidence. Whether or not it was inserted by the party, and if it was, what were his motives, are questions of fact for the jury.
Id. (*Ib.*) 108

3. If a written contract between the parties be offered in evidence, the purport of which is to show that the parties lived together under another basis than marriage, and the opposite party either denies the authenticity of the paper, or alleges that it was obtained by fraud, the question, whether there was a marriage or not, is still open to the jury upon the whole of the evidence.
Id. (*Ib.*) 108

4. The court, being equally divided, were unable to express an opinion upon the following questions, viz.: 1. Whether, "if, before any sexual connection between the parties, they, in the presence of her family and friends, agreed to marry, and did afterwards live together as man and wife," it was a legal marriage, and the tie indissoluble even by mutual consent; and, 2. Whether, "if the contract be made *per verba de presenti*, and remains without cohabitation, or if made *per verba de futuro*, and be followed by consummation," it amounts to a valid marriage, which the parties (being competent as to age and consent) cannot dissolve, and is equally as binding as if made *in facie ecclesiæ*.
Id. (*Ib.*) 108

MARSHAL—3.

1. A marshal is not authorized by law to receive anything, in discharge of an execution, but gold and silver, unless the plaintiff authorizes him to receive something else.
McFarland v. Gwin, (717) 799

2. A marshal, like a sheriff, is bound, after the expiration of his term of office, to complete an execution which has come to his hands during his term; and an execution is never completed until the money is made and paid over to the plaintiff, if it is practicable to make it.
Id. (*Ib.*) 799

MARSHAL—4.

See Practice.

1. A bill in chancery, which recites that the complainants had recovered a judgment at law in a court of the United States, upon which an execution had issued and been levied upon certain property by the marshal; that another person, claiming to hold the property levied upon by virtue of some fraudulent deed of trust, had obtained a process from a State court, by which the sheriff had taken the property out of the hands of the marshal, and praying that the property might be sold, cannot be sustained.
Knox v. Smith, (298) 983

2. If the object had been to set aside the deed of trust as fraudulent, the fraud, with the facts connected with it, should have been alleged in the bill.
Id. (*Ib.*) 983

3. There exists a plain remedy at law. The marshal might have brought trespass against the sheriff, or applied to the court of the United States for an attachment.
Id. (*Ib.*) 983

MARYLAND—1.

A bequest of freedom to a slave, under the laws of Maryland, stands on the same principles with a bequest over to a third person. Such a bequest is a specific legacy.
Williams v. Ash, (1) 25

MARYLAND—2.

1. Under a statute of Maryland, passed in 1785, the Chancellor can decree a sale of land upon the application of only a part of the heirs interested; and as he had jurisdiction, the record must be received as conclusive of the rights adjudicated.
Shriver's Lessee v. Lynn, (43) 172

2. The decree of the Chancellor must be construed to conform to the sale prayed for in the petition, and authorized by the will; and a sale beyond that is not rendered valid by a final ratification.
Id. (*Ib.*) 172

MASSACHUSETTS—4.

See Boundaries of States.

MISSISSIPPI—2.

Statutes of Mississippi construed.
McNutt v. Bland, (9) 159
Gwin v. Breedlove, (29) 167

MORTGAGE—1.

1. Where a mortgage is assigned by an executor to a distributee of an estate, and the property sells for less than the nominal amount, the distributee is not responsible for the difference, in case he has acted with good faith and diligence.
Hammond's Adm'r v. Lewis, Ex'r of Washington, (14) 30

2. A State law, passed subsequently to the execution of a mortgage, which declares that the equitable estate of the mortgageor shall not be extinguished for twelve months after a sale under a decree in chancery, and which prevents any sale unless two-thirds of the amount at which the property has been valued by appraisers shall be bid therefor, is within the clause of the tenth section of the first article of the Constitution of the United States, which prohibits a State from passing a law impairing the obligation of contracts.
Bronson v. Kinzie et al., (311) 143

MORTGAGES—4.

1. There were two statutes of the State of Michigan, both passed on the same day, namely, the 12th of April, 1827. One was "An Act concerning deeds and conveyances," which directed that such deeds or conveyances should be recorded in the office of register of probate for the county, or register for the city, where such lands, &c., were situated. This act became operative from its passage.
Beals v. Hale, (37) 865

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2. Another was "An Act concerning mortgages," which provided "that every mortgage being proven or acknowledged according to law, may be registered in the county in which the lands or tenements so mortgaged are situated." This act did not go into operation until several months after its passage.
Beals v Hale, (37) 865
3. In the case in question, there were two mortgages, both including the same property, in the city of Detroit, Wayne County, one of which was recorded in the city registry, and the other in the county registry.
Id. (*Ib.*) 865
4. These statutes are not so contrary or repugnant to each other as necessarily to imply a contradiction. Both can stand.
Id. (*Ib.*) 865
5. The recording of the prior mortgage in the county registry was sufficient to give it validity and priority.
Id. (*Ib.*) 865
6. Statutes which apparently conflict with each other are to be reconciled, as far as may be, on any fair hypothesis, and validity given to each if it can be and is necessary to conform to usages under them, or to preserve the titles to property undisturbed.
Id. —— (*Ib.*) 865

NEGROES AND SLAVES—1.

A slave is capable of receiving a bequest of freedom upon the happening of a contingency which is not too remote. Such a bequest is a specific legacy.
Williams v. Ash, (1) 25

NEGROES AND SLAVES—2.

1. An inhabitant of Washington County, in the District of Columbia, cannot purchase a slave in Alexandria County, and carry him into Washington County for sale. If he does, the slave will become entitled to his freedom.
Rhodes v. Bell, (397) 314
2. When the record does not show whether or not the two attesting witnesses to a deed of manumission in Virginia were present in court at the time when the grantor acknowledged it, and the deed itself is forty years old, it would be error in the court to instruct the jury that the petitioner was not entitled to freedom.
Adams v. Roberts, (486) 349
3. The exact time of the birth of the petitioner was a fact for the jury; and a prayer to the court which would have excluded the consideration of that fact was properly refused.
Id. (*Ib.*) 349

PARTNERSHIP—2.

1. Although, by the general rule of law, every partnership is dissolved by the death of one of the partners, where the articles of copartnership do not stipulate otherwise, yet either one may, by his will, provide for the continuance of the partnership after his death; and in making this provision, he may bind his whole estate or only that portion of it already embarked in the partnership.
Burwell v. Cawood et al., (560) 378
2. But it will require the most clear and unambiguous language, demonstrating in the most positive manner that the testator intended to make his general assets liable for all debts contracted in the continued trade after his death, to justify the court in arriving at such a conclusion.
Id. (*Ib.*) 378
3. A jury cannot, as a matter of direction from the court, presume the existence of a deed from one of the members of a firm to the firm, upon secondary evidence that from the books of the partnership it appeared that various acts of ownership over the property were exercised by the firm.
Hanson et al. v. Eustace's Lessee, (653) 416

PATENT RIGHTS—1.

1. If a person employed in the manufactory of another, while receiving wages, makes experiments at the expense and in the manufactory of his employer; has his wages increased in consequence of the useful result of the experiments; makes the article invented and permits his employer to use it, no compensation for its use being paid or demanded, and then obtains a patent, these facts will justify the presumption of a license to use the invention.
M'Clurg et al. v. Kingsland et al., (202) 102
2. Such an unmolested and notorious use of the invention prior to the application for a patent, will bring the case within the provisions of the 7th section of the Act of 1839, ch. 88.
Id. (*Ib.*) 102
3. The assignees of a patent right take it subject to the legal consequences of the previous acts of the patentee.
Id. (*Ib.*) 102
4. The 14th and 15th sections of the Act of 1836, ch. 357, prescribe the rules which must govern on the trial of actions for the violations of patent rights; and these sections are operative, so far as they are applicable, notwithstanding the patent may have been granted before the passage of the Act of 1836.
Id. (*Ib.*) 102
5. The words, "any newly invented machine, manufacture, or composition of matter," in the 7th section of the Act of 1839, have the same meaning as "invention," or "thing patented."
Id. (*Ib.*) 102

PATENTS—4.

1. Where a defective patent had been surrendered, and a new one taken out, and the patentee brought an action for a violation of his patent right, laying the infringement at a date subsequent to that of the renewed patent, proof of the use of the thing patented during the interval between the original and renewed patents will not defeat the action.
Stimpson v. Westchester Railroad Company, (380) 1020
2. The seventh section of the Act of March 3, 1839, has exclusive reference to an original application for a patent, and not to a renewal of it.
Id. (*Ib.*) 1020
3. An original patent being destroyed by the burning of the patent office, and the only record of the specifications being a publication in the Franklin Journal, the claim is not limited by that publication, because the whole of the specifications are not set forth in it.
Id. (*Ib.*) 1020
4. Whether a renewed patent, after a surrender of a defective one, is substantially for a different invention, is a question for the jury, and not for the court.
Id. (*Ib.*) 1020
5. As the thirteenth section of the Act of 1836 provides for the renewal of a patent, where it shall be "inoperative or invalid by reason of a defective or insufficient description or specification," "if the error shall have arisen by inadvertence, accident, or mistake, and without any fraudulent or deceptive intention," the fact of the granting of the renewed patent closes all inquiry into the existence of inadvertence, accident, or mistake, and leaves open only the question of fraud for the jury.
Id. (*Ib.*) 1020
6. The eighteenth section of the Patent Act of 1836 authorized the extension of a patent, on the application of the executor or administrator of a deceased patentee.
Wilson v. Rousseau, (646) 1141
7. Such an extension does not inure to the benefit of assignees under the original patent, but to the benefit of the administrator (when granted to an administrator), in his capacity as such. But those assignees who were in the use of the patented machine at the time of the renewal have still a right to use it.
Id. (*Ib.*) 1141
8. The extension could be applied for and obtained by the administrator, although the original patentee had, in his lifetime, disposed of all his interest in the then existing patent. Such sale did not carry anything beyond the term of the original patent.
Id. (*Ib.*) 1141
9. A covenant by the patentee, made prior to the law authorizing extensions, that the covenantee should have the benefit of any improvement in the machinery, or alteration or renewal of the patent, did not include the extension by an administrator, under the Act of 1836. It must be construed to include only renewals obtained upon the surrender of a patent on account of a defective specification. Parties to contracts look to established and general laws, and not to special acts of Congress.
Id. (*Ib.*) 1141
10. A plaintiff, therefore, who claims under an assignment from the administrator, can maintain a suit against a person who claims under the covenant.
Id. (*Ib.*) 1141
11. An assignee of an exclusive right to use two

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machines within a particular district can maintain an action for an infringement of the patent within that district, even against the patentee.
Id. (*Ib.*) 1141

12. In the case of Woodworth's planing machine, the patent granted to the administrator was founded upon a sufficient specification and proper drawings, and is valid.
Id. (*Ib.*) 1141

13. The decision of the Board of Commissioners, to whom the question of renewal is referred, by the Act of 1836, is not conclusive upon the question of their jurisdiction to act in a given case.
Id. (*Ib.*) 1141

14. The Commissioner of Patents can lawfully receive a surrender of letters patent for a defective specification, and issue new letters patent upon an amended specification, after the expiration of the term for which the original patent was granted, and pending the existence of an extended term of seven years. Such surrender and renewal may be made at any time during such extended term.
Id. (*Ib.*) 1141

15. The decision of the court in the preceding case of Wilson v. Rousseau *et al.*, namely, that when a patent is renewed under the Act of 1836, an assignee under the old patent has a right to continue the use of the patented machine, but not to vend others, again affirmed.
Simpson v. Wilson, (709) 1169

16. An assignment of an exclusive right to use a machine, and to vend the same to others for use, within a specified territory, authorizes the assignee to vend elsewhere, out of the said territory, the product of said machine.
Ib. (*Ib.*) 1169

17. The restriction upon the assignee is only that he shall use the machine within the specified territory. There is none as to the sale of the product.
Id. (*Ib.*) 1169

18. The decision of the court in the two preceding cases, namely, that where a patent is renewed under the Act of 1836, an assignee under the old patent has a right to continue the use of the machine which he is using at the time of the renewal, again affirmed.
Wilson v. Turner, (712) 1171

19. An objection to the validity of Woodworth's patent for a planing machine, namely, that he was not the first and original inventor thereof, is not sustained by the evidence offered in this case.
Woodworth v. Wilson, (712) 1171

20. Nor is the objection well founded, that the specifications accompanying the application for a patent are not sufficiently full and explicit, so as to enable a mechanic of ordinary skill to build a machine.
Id. (*Ib.*) 1171

21. An assignee of the exclusive right to use ten machines within the city of Louisville, or ten miles round, may join his assignor with him in a suit for a violation of the patent right, under the circumstances of this case.
Id. (*Ib.*) 1171

PENNSYLVANIA—2.

The jurisdiction of chancery over charitable devises, as it existed in England, prior to the statute 43 Elizabeth, was part of the common law in force in Pennsylvania, although no court having equity powers existed capable of enforcing such trusts.
Vidal v. Girard's Executors, (127) 205

PIRACY AND PIRATICAL ACTS—2.

1. Under the Act of Congress of 1819, any armed vessel may be seized which shall have attempted or committed any piratical aggression, &c., and the proceeds of the vessel, when sold, divided between the United States and the captors, at the discretion of the court.
Harmony et al. v. The United States, (210) 239

2. It is no matter whether the vessel be armed for offense or defense, provided she commits the unlawful acts specified.
Id. (*Ib.*) 239

3. To bring a vessel within the act, it is not necessary that there should be either actual plunder or an intent to plunder; if the act be committed from hatred, or an abuse of power, or a spirit of mischief, it is sufficient.
Id. (*Ib.*) 239

4. The word "piratical" in the act is not to be limited in its construction to such acts as by the laws of nations are denominated piracy, but includes such as pirates are in the habit of committing.
Id. (*Ib.*) 239

5. A piratical aggression, search, restraint, or seizure, is as much within the act as a piratical depredation.
Id. (*Ib.*) 239

6. The innocence or ignorance on the part of the owner of these prohibited acts will not exempt the vessel from condemnation.
Id. (*Ib.*) 239

7. The condemnation of the cargo is not authorized by the Act of 1819. Neither does the law of nations require the condemnation of the cargo for petty offenses, unless the owner thereof co-operates in, and authorizes, the unlawful act. An exception exists in the enforcement of belligerent rights.
Id. (*Ib.*) 239

8. Where the innocence of the owners was established, it was proper to throw the costs upon the vessel which was condemned, to the exclusion of the cargo which was liberated.
Id. (*Ib.*) 239

PLEADING—1.

1. A plaintiff may, in an action in form *ex delicto* against several defendants, enter a *nolle prosequi* against one of them. But in actions in form *ex contractu*, unless the defense be merely in the personal discharge of one of the defendants, a *nolle prosequi* cannot be entered as to one defendant without discharging the other.
United States v. Linn, (104) 64

2. A plea alleging merely that seals were affixed to a bond without the consent of the defendant, without also alleging that it was done with the knowledge, or by the authority or direction of the plaintiffs, is not sufficient.
Id. (*Ib.*) 64

3. A plea which has on the face of it two intendments, ought to be construed most strongly against the party who pleads it.
Id. (*Ib.*) 64

4. A party who claims under an instrument which appears on its face to have been altered, is bound to explain the alteration; but not so, when the alteration is averred by the opposite party, and it does not appear upon the face of the instrument.
Id. (*Ib.*) 64

5. Where the plea is bad and the demurrer is to the plea, the court, having the whole record before them, will go back to the first error.
Id. (*Ib.*) 64

6. Where the date of a surety bond is subsequent to the appointment of the principal to office, the declaration should allege that the money collected by the principal remained in his hands at the time when the surety bond was executed.
Id. (*Ib.*) 64

6. The action of *assumpsit* for the use and occupation of lands and houses existed in Virginia anterior to the cession of the District of Columbia to the United States.
Lloyd v. Hough, (153) 83

8. But this action is founded upon contract, either express or implied, and will not lie where the possession has been acquired and maintained under a different or adverse title, or where it was tortious, and makes the holder a trespasser.
Id. (*Ib.*) 83

9. The court will not express an opinion upon a matter of defense which was not brought to the consideration of the court below.
Bell and Grant v. Bruen, (169) 89

10. The law of the State of Alabama which authorizes securities to require of the creditor forthwith to put the bond in suit against the principal, and absolve the security unless the creditor commences suit and uses due diligence to collect the debt from the principal, does not include a case where the parties (principal and security) unite in a joint and several sealed bill.
Ellis et al. v. Jones, Admr. of Taylor, (197) 100

11. In an action of ejectment, if the plaintiff count upon a lease to himself from a person whom the evidence shows to have been dead at the time, it is bad.
Connor v. Bradley et al., (211) 105

12. It is a settled rule at common law, that where a right of re-entry is claimed on the ground of forfeiture for nonpayment of rent, there must be proof of a demand of the precise sum due, at a convenient time before sunset, on the day when the

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rent is due, upon the land, in the most notorious place of it, even though there be no person on the land to pay.
Connor v. Bradley et al., (211) 105
13. In proceeding under the statute of 4 Geo. II., it must be alleged and proved, that there was no sufficient distress upon the premises on some day or period between the time at which the rent fell due and the day of the demise; and if the time when, according to the proofs, there was not a sufficient distress upon the premises, be subsequent to the day of the demise, it is bad.
Id. (*Ib.*) 105
14. After pleading the general issue, it is too late to take advantage of a defect in the writ, or a variance between the writ and declaration.
McKenna v. Fisk, (241) 117
15. Actions of trespass, except those for injury to real property, are transitory in their character.
Id. (*Ib.*) 117
16. Where the writ mentions a trespass with force and arms upon the storehouse of the plaintiff, and a seizure and destruction of goods, it covers a transitory as well as a local action.
Id. (*Ib.*) 117
17. In transitory actions, a venue is laid to show where the trial is to take place. It is a legal fiction, devised for the furtherance of justice, and cannot be traversed.
Id. (*Ib.*) 117
18. In such actions, such a venue is good without stating where the trespass was in fact committed, with a *scilicet* of the county where the action is brought.
Id. (*Ib.*) 117
19. In the absence of statutory provisions, the courts in the District of Columbia must apply the principles of the common law to such actions, the pleadings, and the proofs.
Id. (*Ib.*) 117

PLEAS AND PLEADING—3.

See Libel.

PLEAS AND PLEADINGS—4.

1. This court can notice a material and incurable defect in the pleadings and verdict, as they are represented in the record to have existed in the court below, although such defect is not noticed in the bill of exceptions, nor suggested by the counsel in argument here.
Garland v. Davis, (131) 907
2. When a declaration sounds in tort and the plea is *non assumpsit*, such a plea would be bad, on demurrer. If not demurred to, and the case goes to trial (the issue and verdict following the plea), the defect is so material that it is not cured by verdict, under the statute of jeofails.
Id. (*Ib.*) 907
3. Bad pleas, which are cured by verdict, are those which, although they would be bad on demurrer because wrong in form, yet still contain enough of substance to put in issue all the material parts of the declaration.
Id. (*Ib.*) 907
4. The provision by Congress, in relation to amendments, which is found in the 32d section of the Judiciary Act of 1789, is similar to that of 32 Hen. VIII., but certainly not broader.
Id. (*Ib.*) 907
5. The issue was an immaterial issue.
Id. (*Ib.*) 907
6. The opinion of this court in Patterson v. The United States (2 Wheaton, 221) reviewed and reaffirmed, namely, "Whether the jury find a general or a special verdict, it is their duty to decide the very point in issue, and although the court in which it is tried may give form to a general finding, so as to make it harmonize with the issue, yet if it appear to that court, or to the appellate court, that the finding is different from the issue, or is confined only to a part of the matter in issue, no judgment can be rendered on the verdict."
Id. (*Ib.*) 907
7. This principle applies equally to a plea varying from the substance of the declaration.
Id. (*Ib.*) 907
8. In this case, the verdict does not find any of the misfeasance charged upon the defendant.
Id. (*Ib.*) 907
9. If the merits of the case were passed upon in the court below, it was illegally done, because no evidence was competent except such as related to the promise described in the declaration.
Id. (*Id.*) 907
10. This court abstains from awarding a repleader, for the reasons stated in the opinion, but remands the case so that the pleadings may be amended.
Id. (*Ib.*) 907
11. Where a count in a declaration is defective on account of dates being left blank, but the party has pleaded and gone to trial, the presumption is that the proof supplied the defect.
Stockton et al. v. Bishop, (155) 918
12. In an action on the case for injury sustained by the oversetting of a stage coach, although the declaration does not set out the payment of any passage money, nor any promise or undertaking on the part of the defendants to carry the plaintiff safely, yet if it states that the plaintiff became a passenger for certain rewards to the defendants, and thereupon it was their duty to use due and proper care that the plaintiff should be safely conveyed, and if the breach was well assigned, and the cause went on to plea, issue, trial, and verdict, the defect in the declaration is cured by the 32d section of the Judiciary Act of 1789.
Id. (*Ib.*) 918
13. The "right of the cause and matter in law" being with the plaintiff in the court below, the judgment of that court must be affirmed.
Id. (*Ib.*) 918
14. If the information contains several counts, founded on the following acts, namely, the sixty-sixth section of the Act of 1799, the fourth section of the Act of 1830, and the fourteenth section of the Act of 1832, the defectiveness of the counts upon the acts of 1830 and 1832 would be no ground for reversing a judgment of condemnation, provided the count is good which is founded upon the Act of 1799; because one good count is sufficient to uphold a general verdict and judgment.
Clifton v. The United States, (242) 957
15. The difference between these sections explained.
Id. (*Ib.*) 957
16. In this case, therefore, it is unnecessary to decide what averments are required in counts resting upon the acts of 1830 and 1832, or whether the counts are or are not void from generality.
Id. (*Ib.*) 957
17. In order to sustain counts in the information, founded on the acts of 1830 and 1832, it is not necessary that they should contain averments of the special circumstances of the examination of the goods and detection of the fraud under the authority of the collector. The language of the court in Wood's case re-examined, explained, and controlled.
Buckley v. The United States, (251) 961
18. The court below was right in instructing the jury, that, under such an information, they were not restricted in the condemnation of the goods to any entered goods which they found to be undervalued, but that they might find either the whole package or the invoice forfeited, though containing other goods correctly valued, provided that they should find that such package or invoice had been made up with intent to defraud the revenue.
Id. (*Ib.*) 961

PRACTICE—1.

See Chancery and Pleading.

1. Whether or not a record contains a bill of exceptions or statement of facts by the court, according to the practice of Louisiana, by which any question of law is brought up for revision in such a form as to enable this court to decide upon it; and whether or not there is a mass of various and conflicting testimony in relation to facts, upon which no jurisdiction can be exercised upon a writ of error; are questions to be decided only upon the final hearing of the cause.
Minor et al. v. Tillotson, (287) 134
2. The court will not go into this inquiry upon a motion to dismiss the writ of error, before the case is taken up for argument.
Id. (*Ib.*) 134
3. The dockets and records of a court, showing that money had been received by the marshal or his deputies, under executions, are good evidence in a suit against his securities.
Williams v. United States, (290) 135

PRACTICE—2.

See Appeal Bond, Constitutional Law.

1. An appeal bond given to the people or to the relator is good, and, if forfeited, may be sued upon by either.
Spalding v. The People of New York, (66) 181
2. Where the plaintiff in the court below claims

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$2,000 or more, and the ruling of the court is for a less sum, he is entitled to a writ of error.
Knapp v. Banks, (73) 184

3. But the defendant is not entitled to such writ where the judgment against him is for a less sum than $2,000 at the time of the rendition thereof.
Id. (*Ib.*) 184

4. An execution, issued in the court below, after a writ of error has been sued out, a bond given, and a citation issued, all in due time, may be quashed either in the court below or this court—these things operating as a stay of execution.
Stockton and Moore v. Bishop, (74) 184

5. A title may be tried in Virginia, Kentucky, and Tennessee, as effectually upon a *caveat* as in any other mode; and the parties, as also those claiming under them, are estopped by the decision.
Porterfield's Ex'rs v. Clark, (76) 185

6. No appeal lies from the refusal of the court below to open a former decree.
Brockett v. Brockett, (238) 251

7. But if the court entertains a petition to open a decree, the time limited for an appeal does not begin to run until the refusal to open it, the same term continuing.
Id. (*Ib.*) 251

8. When an appeal is prayed in open court, no citation is necessary.
Id. (*Ib.*) 251

9. A marshal has no right to receive bank notes in discharge of an execution, unless authorized to do so by the plaintiff.
Griffin v. Thompson, (244) 253

10. If the marshal does receive such papers, the court, in the exercise of its powers to correct the irregularities of its officers, will refuse a motion of the defendant to have satisfaction entered on the judgment, and refuse also to quash a second *fieri facias*.
Id. (*Ib.*) 253

11. If the marshal receives bank notes in the discharge of an execution, and the plaintiff sanctions it either expressedly or impliedly, he is bound by it, and a motion to quash the return ought to be refused.
Buckhannan et al. v. Tinnin, (258) 259

12. A court may strike out an order arresting a judgment, and may suffer the verdict to be amended within a reasonable time.
Matheson's Administrators v. Grant's Administrator, (263) 261

13. The necessity of a *profert* of letters of administration depends upon the local laws of a State.
Id. (*Ib.*) 261

14. Where the declaration alleges a partnership, and the jury find a general verdict, they must be presumed to have found that fact; and proof that the chose in action was indorsed in blank is sufficient to sustain a declaration counting upon an administration. The plaintiff has a right to elect the character in which he sues.
Id. (*Ib.*) 261

15. A question of amendment of the declaration is a question for the discretion of the court below.
Id. (*Ib.*) 261

16. An action for money had and received will lie, when brought by lottery contractors, against a person who has caused a ticket to be fraudulently drawn as a prize.
Catts v. Phalen and Morris, (376) 306

17. The distinction between writs of error and appeals cannot be overthrown by an agreement of counsel in the court below, that all the evidence in the cause shall be introduced and considered as a statement of facts.
Minor v. Tillotson, (392) 312

18. Where there are two defendants, and one of them dies after the commencement of the term of the Supreme Court, judgment may be entered against both as of a day prior to the death, *nunc pro tunc*. If the death shall have occurred before the commencement of the term, and the cause of action survives, judgment will be entered against the survivor upon a suggestion on the record of the death.
McNutt v. Bland, (28) 166

19. Where the Circuit Court, by a rule, adopts the process pointed out by a State law, there must be no essential variance between them. Such a variance is a new rule, unknown to any act of Congress or the State law professedly adopted.
McCracken v. Hayward, (608) 397

20. A refusal to produce books and papers under a notice, lays the foundation for the introduction of secondary evidence of their contents, but affords neither presumptive nor *prima facie* evidence of the fact sought to be proved by them.
Hanson et al. v. Eustace's Lessee, (653) 416

21. A jury cannot, as a matter of direction from the court, presume the existence of a deed from one of the members of a firm to the firm, upon secondary evidence that from the books of the partnership it appeared that various acts of ownership over the property were exercised by the firm.
Id. (*Ib.*) 416

22. Nor are the jury at liberty, in such a case, to consider a refusal to furnish books and papers as one of the reasons upon which to presume a deed; and an instruction from the court, which permits them to so do, is erroneous.
Id. (*Ib.*) 416

PRACTICE—3.

1. There was a judgment against an administrator of assets *quando acciderint*.

2. Upon this judgment a *scire facias* was issued, containing an averment that goods, chattels, and assets had come to the hands of the defendant.

3. Upon this *scire facias* there was a judgment by default; execution was issued, and returned *nulla bona*.

4. A *scire facias* was then accorded against the administrator to show cause why the plaintiffs should not have execution *de bonis propriis*.

5. It was then too late to plead that the averment in the first *scire facias* did not state that assets had come into the hands of the administrator subsequent to the judgment *quando*.
Dickson v. Williamson, (57) 491

6. A judgment by default against an executor or administrator is an admission of assets to the extent charged in the proceeding against him.
Id. (*Ib.*) 491

7. If a party fail to plead matter in bar to the original action, and judgment pass against him, he cannot afterwards plead it in another action founded on that judgment; nor in a *scire facias*.
Id. (*Ib.*) 491

8. A demurrer reaches no further back than the proceedings remain *in fieri*, or under the control of the court.
Id. (*Ib.*) 491

9. Before a case can be dismissed under the 21st rule, regulating equity practice, there must exist, in the technical sense, a plea or demurrer on the part of the defendant, which the plaintiff shall not have replied to or set down for hearing before the second term of the court after filing the same.
Poultney et al. v. City of LaFayette et al., (81) 503

10. The complainant, if he chooses, may go to the hearing on bill and answer.
Id. (*Ib.*) 503

11. After a reference, an award, and the reception of the money awarded, another suit cannot be maintained on the original cause of action, upon the ground that the party had not proved, before the referee, all the damages he had sustained, or that his damage exceeded the amount which the arbitrator awarded.
Kendall v. Stokes, (87) 506

12. Where a party has a choice of remedies for a wrong done, selects one, proceeds to judgment, and reaps the fruits of his judgment, he cannot afterwards proceed in another suit for the same cause of action.
Id. (*Ib.*) 506

13. This is especially true where the party has resorted to a *mandamus*, because it is not issued where the law affords a party any other adequate mode of redress. To allow him to maintain another suit for the same cause of action would be inconsistent with the decision of the court which awards the *mandamus*.
Id. (*Ib.*) 506

14. An application for a writ of error, prayed for without the authority of the party concerned, but at the request of his friends, cannot be granted.
Ex-parte Dorr, (103) 514

15. The objection of multifariousness can be taken by a party to the bill only by demurrer, or plea, or answer, and cannot be taken at the hearing of the cause. But the court itself may take the objection at any time—at the hearing or otherwise. The objection cannot be taken by a party in the appellate court.
Oliver v. Piatt, (333) 622

16. Where exceptions are taken to a master's report, it is not necessary for the court formally to allow or disallow them on the record. It will be

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sufficient if it appears from the record that all of them have been considered by the court and allowed or disallowed, and the report reformed accordingly.
Oliver v. Platt, (333) 622
17. After a case has been decided upon its merits, and remanded to the court below, if it is again brought up on a second appeal, it is then too late to allege that the court had not jurisdiction to try the first appeal.
Washington Bridge Co. v. Stewart, (413) 658
18. The Supreme Court has no power to review its decisions, whether in a case at law or in equity. A final decree in chancery is as conclusive as a judgment at law.
Id. (*Ib.*) 658
19. An affirmance by a divided court, either upon a writ of error or appeal, is conclusive upon the rights of the parties.
Id. (*Ib.*) 658
20. Where the court below awarded a *supersedeas* to stay execution, but afterwards revoked that order on account of the insufficiency of the security, the Supreme Court will not interfere by granting a *supersedeas*.
Black v. Zacharie, (483) 690
21. Nor will it interfere on account of the bankruptcy of the defendant, because the assignee of the bankrupt has his remedy in the Circuit Court.
Id. (*Ib.*) 690
22. Where a general objection is made in the court below to the reception of testimony, without stating the grounds of the objection, this court considers it as vague and nugatory; nor ought it to have been tolerated in the court below.
Camden v. Doremus, (515) 705
23. If the citation be signed by the clerk, and not by a judge of the Circuit Court, or a justice of the Supreme Court, the case will, on motion, be dismissed.
The United States v. Hodge, (534) 714
24. The 38th rule of court forbids the insertion of the whole of the charge of the court to the jury in a general bill of exceptions, but requires that the part excepted to shall be specifically set out.
Stimpson v. Westchester Railroad Company, (553) 722
25. This court has not the power to correct any errors or omissions which may have been made in the Circuit Court in framing the exception; nor can it regard any part of the charge as the subject matter of revision, unless the judges, or one of them, certify under his seal, that it was excepted to at the trial.
Id. (*Ib.*) 722
26. If the omission of a part of the charge, which was in fact embraced in the exception, is a mere clerical error, the party will be entitled to a *certiorari*, upon producing a copy of the exception, properly certified.
Id. (*Ib.*) 722
27. But in no case can the exception certified under the seals of the judges of the Circuit Court be altered or amended.
Id. (*Ib.*) 722
28. Where this court has affirmed the title to lands in Florida, and referred, in its decree to a particular survey, it would not be proper for the court below to open the case for a rehearing, for the purpose of adopting another survey.
Chaires v. The United States, (611) 749
29. The court below can only execute the mandate of this court. It has no authority to disturb the decree, and can only settle what remains to be done.
Id. (*Ib.*) 749
30. A court is not bound to give instructions to the jury in the terms required by either party; it is sufficient if as much thereof are given as are applicable to the evidence before the jury, and the merits of the case as presented by the parties.
Clymer's Lessee v. Dawkins, (674) 778
31. When an issue is directed by a court of chancery, to be tried by a court of law, and, in the course of the trial at law, questions are raised and bills of exceptions taken, these questions must be brought to the notice and decision of the Court of Chancery which sends the issue.
Brockett v. Brockett, (691) 786
32. If this is not done, the objections cannot be taken in an appellate court of chancery.
Id. (*Ib.*) 786
33. If the Chancery Court below refers matters of account to a master, his report cannot be objected to in the appellate court, unless exceptions to it have been filed in the court below in the manner pointed out in the 73d chancery rule of this court.
Id. (*Ib.*) 786
34. Where a cause has been pending in this court for two terms, a writ of *certiorari* sent down at the instance of the defendant in error, to complete the record, and the defendant in error then moves to dismiss the case upon the ground that the clerk of a State court issued the writ of error, and one of the judges of that court signed the citation, the motion comes too late.
McDonogh v. Millaudon, (698) 787
35. Where the matter in dispute is below the amount necessary to give jurisdiction to this court, the writ of error must be dismissed, on motion.
Winston v. The United States, (771) 823
36. Where a bill was filed on the equity side of the court below, to enjoin the marshal from levying an execution upon certain property, which execution was for a less sum than $2,000, an appeal from a decree dismissing the bill will not lie to this court, although the entire value of the property may be more than $2,000.
Ross v. Prentiss, (771) 824
37. The jurisdiction of the court does not depend upon the amount of any contingent loss or damage which one of the parties may sustain by a decision against him, but upon the amount in dispute between them.
Id. (*Ib.*) 824

PRACTICE—4.

1. A plaintiff has a right to direct a deputy-marshal to receive a certain description of money in satisfaction of an execution.
Gwinn v. Buchanan, Hagan & Co., (1) 849
2. But the deputy-marshal then acts as agent of the plaintiff, and not as agent of the marshal.
Id. (*Ib.*) 849
3. If, therefore, the plaintiff, when he does this, gives to the deputy-marshal other instructions, which are disobeyed, the marshal himself is not responsible, but the plaintiff must look to the deputy.
Id. (*Ib.*) 849
4. By the law of Mississippi, a judgment is a lien upon personal as well as real estate from the time of its rendition.
Brown v. Clarke, (4) 850
5. Where there has been a judgment, an execution levied upon personal property, and a forthcoming bond, the property levied upon is released by the bond, and the lien of the judgment destroyed.
Id. (*Ib.*) 850
6. If, therefore, after this, another judgment be entered against the original defendant, this second judgment is a lien upon the property which has been released by the bond.
Id. (*Ib.*) 850
7. The lien thus acquired by the second judgment is not destroyed by subsequently quashing the forthcoming bond. The effect of such quashing is not to revive the first judgment, and thus restore the lien which was superseded by the execution of the bond.
Id. (*Ib.*) 850
8. If the forthcoming bond had been shown to have been void *ab initio*, the result would be different.
Id. (*Ib.*) 850
9. In cases of conflicting executions issued out of the federal and State courts, a priority is given to that under which there is an actual seizure of the property first.
Id. (*Ib.*) 850
10. The mode in which bills of exceptions ought to be taken, as explained in Walton v. The United States (9 Wheat., 651), and in 4 Peters, 102, will be strictly adhered to by this court.
Id. (*Ib.*) 850
11. A judgment of a State court ordering money in the hands of a disbursing officer of the United States, to be attached, may be revised by this court under the twenty-fifth section of the Judiciary Act.
Buchanan v. Alexander, (20) 857
12. The decision of a State court upon the merits of a controversy between two parties, one of whom had sold, and the other purchased, an interest, in lands which, it was thought, could be acquired as Indian reservations under a treaty with the United States, cannot be reviewed by this court under the twenty-fifth section of the Judiciary Act.
Maney v. Porter, (55) 873
13. The party against whom the State court decided, instead of setting up an interest under the treaty,

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expressly averred that no rights had been obtained.
Id. (*Ib.*) 873
14. In such a case this court has no jurisdiction.
Id. (*Ib.*) 873
15. No exception having been taken to the opinion of the court overruling the motion for a nonsuit, the question whether, as matter of law, there was any evidence to be submitted to the jury, going to establish the intermarriage at or before the time of the demise laid in the declaration, was not before this court.
Garrard v. Lessee of Reynolds, (123) 903
16. And in the submission to the jury of the question of fact, whether or not the evidence proved the marriage before that time, there was no interference with the province of the jury, or violation of any rule of law, the question having been left open for their finding.
Id. (*Ib.*) 903
17. This court can notice a material and incurable defect in the pleadings and verdict, as they are represented in the record to have existed in the court below, although such defect is not noticed in the bill of exceptions, nor suggested by the counsel in argument here.
Garland v. Davis, (131) 907
18. When a declaration sounds in tort and the plea is *non assumpsit*, such a plea would be bad, on demurrer. If not demurred to, and the case goes to trial (the issue and verdict following the plea), the defect is so material that it is not cured by verdict, under the statute of jeofails.
Id. (*Ib.*) 907
19. Bad pleas, which are cured by verdict, are those which, although they would be bad on demurrer because wrong in form, yet still contain enough of substance to put in issue all the material parts of the declaration.
Id. (*Ib.*) 907
20. The provision by Congress, in relation to amendments, which is found in the thirty-second section of the Judiciary Act of 1789, is similar to that of 32 Hen. VIII., but certainly not broader.
Id. (*Ib.*) 907
21. The issue was an immaterial issue.
Id. (*Ib.*) 907
22. The opinion of this court in Patterson v. The United States (2 Wheaton, 221), reviewed and re-affirmed, namely: "Whether the jury find a general or a special verdict, it is their duty to decide the very point in issue, and although the court in which it is tried may give form to a general finding, so as to make it harmonize with the issue, yet if it appear to that court, or to the appellate court, that the finding is different from the issue, or is confined only to a part of the matter in issue, no judgment can be rendered on the verdict.
Id. (*Ib.*) 907
23. This principle applies equally to a plea varying from the substance of the declaration.
Id. (*Ib.*) 907
24. In this case, the verdict does not find any of the misfeasance charged upon the defendant.
Id. (*Ib.*) 907
25. If the merits of the case were passed upon in the court below, it was illegally done, because no evidence was competent except such as related to the promise described in the declaration.
Id. (*Ib.*) 907
26. This court abstains from awarding a repleader, for the reasons stated in the opinion, but remands the case so that the pleadings may be amended.
Id. (*Ib.*) 907
27. A decree or judgment cannot be entered against the government for costs.
The United States v. McLemore, (286) 977
28. The whole charge of the judge to the jury is incorporated into this record. This mode of making up the error books is exceedingly inconvenient and embarrassing to the court, and is a departure from familiar and established practice.
Zeller's Lessee v. Eckert, (289) 979
29. So far as error is founded upon the bill of exceptions incorporated into the record, it lies only to exceptions taken at the trial, and to the ruling of the law by the judge, and to the admission or rejection of evidence. And only so much of the evidence as may be necessary to present the legal questions thus raised and noted should be carried into the bill of exceptions. All beyond serves to encumber and confuse the record, and to perplex and embarrass both court and counsel.
Id. (*Ib.*) 979
30. The earlier forms under the statute, giving the bill of exceptions, are models which it would be wise to consult and adhere to.
Id. (*Ib.*) 979
31. The practice of excepting, generally, to a charge of the court to the jury, without setting out, specifically, the points excepted to, censured. The writ of error not dismissed, only on account of the peculiar circumstances of the case.
Stimpson v. Westchester Railroad Co., (380) 1020
32. Where there has been no service of a citation, or no final judgment in the court below, the case must be dismissed on motion.
Brown v. Union Bank of Florida, (465) 1058
33. After a case has been called, and placed at the foot of the docket, the court cannot take it up, on motion, and assign a day for its argument, when other cases, of great public importance, have already been assigned for what may be the remainder of the term.
Barry v. Mercein, (574) 1108
34. Upon the admission of Florida as a State, the records of the former territorial Court of Appeals were directed by a law of the State to be deposited for safe keeping with the clerk of the Supreme Court of the State.
Hunt v. Pelau, (589) 1115
35. No writ of error can be issued to bring up a record thus situated, the territorial court being defunct, and the Supreme Court of the State not holding the records as part of its own records, nor exercising judicial power over them.
Id. (*Ib.*) 1115
36. Nor could a law of the State have declared the records of a court of the United States to be a part of the records of its own State court, nor have authorized any proceedings upon them.
Id. (*Ib.*) 1115
37. If the record were to be brought up under the fourteenth section of the Act of 1789, it would be of no avail, because there is no court to which the mandate of this court could be transmitted.
Id. (*Ib.*) 1115
38. After a case has been docketed and dismissed under the forty-third rule of court, and the plaintiff in error sues out another writ of error, this court will, when the case appears to require it, order a *supersedeas* to stay all proceedings pending the second writ of error.
Hardeman v. Anderson, (640) 1138
39. The *supersedeas* is issued under the fourteenth section of the Act of the 24th of September, 1783.
Id. (*Ib.*) 1138
40. In order to entitle a party to have a case docketed and dismissed, under the forty-third rule of court, the certificate of the clerk of the court below must set forth an accurate titling of the case.
Holliday v. Batson, (645) 1140

PRESIDENT OF THE UNITED STATES—1.

1. The Act of Congress passed January 31st, 1823, prohibiting the advance of public money in any case whatsoever to the disbursing officers of government, except under the special direction of the President, does not require the personal and ministerial performance of this duty, to be exercised in every instance by the President under his own hand.
Williams v. The United States, (290) 135
2. Such a practice, if it were possible, would absorb the duties of the various departments of the government in the personal action of the one chief executive officer, and be fraught with mischief to the public service.
Id. (*Ib.*) 135
3. The President's duty, in general, requires his superintendence of the administration, yet he cannot be required to become the administrative officer of every department and bureau, or to perform, in person, the numerous details incident to services which, nevertheless, he is, in a correct sense, by the Constitution and laws required and expected to perform.
Id. (*Ib.*) 135
4. It is legal evidence that the President specially authorized and directed, in writing, the Secretary of the Treasury to make such advances, and that such paper was destroyed when the treasury building was burned. It is sufficient if the witness states his belief that it was so destroyed.
Id. (*Ib.*) 135

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PRIVITY OF CONTRACT—1.

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RECEIVER OF PUBLIC MONEY—3.

The felonious taking and carrying away the public moneys in the custody of a receiver of public moneys, without any fault or negligence on his part, does not discharge him and his sureties, and cannot be set up as a defense to an action on his official bond.
The United States v. Prescott, (578) 734

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SURETY—1.

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1. The law of the State of Alabama, passed in 1821 ch. 26, sec. 5, which authorizes securities to require of the creditor forwith to put the bond in suit against the principal, and absolves the security unless the creditor commences suit and uses due diligence to collect the debt from the principal, does not include a case where the parties (principal and security) unite in a joint and several sealed bill.
Ellis et al. v. Jones, Admr. of Taylor, (197) 100

2. When a collector is continued in office for more than one term, but gives different sureties, the liability of the sureties is to be estimated just as if a new person had been appointed to fill the second term.
The United States v. Irving et al., (250) 120

3. When the accounts of a collector are returned to the treasury quarterly, and the date of the commencement and expiration of his term of office is on some intermediate day between the beginning and end of the quarter, a restatement and treasury transcript of his account up to the end of his term, is legal evidence in a suit against the sureties.
Id. (*Ib.*) 120

4. Such a restatement does not falsify the general accounts, but arranges the items of debits and credits so as to exhibit the transactions of the collector during the four years for which the sureties were responsible.
Id. (*Ib.*) 120

5. The amount charged to the collector at the commencement of his second term is only *prima facie* evidence against the sureties.
Id. (*Ib.*) 120

6. But payments into the treasury of moneys accruing and received in the second term, should not be applied to the extinguishment of a balance apparently due at the end of the first term. Payments made in the subsequent term of moneys received on duty bonds, or otherwise, which remained charged to the collector as of the preceding official term, should be so applied.
Id. (*Ib.*) 120

7. The settlement of quarterly accounts at the treasury, running on in a continued series, is not conclusive. The officers of the treasury cannot, by any exercise of their discretion, enlarge or restrict the obligation of the collector's bond. Much less can they, by the mere fact of keeping an account current, in which debits and credits are entered as they occur, and without any express appropriation of payments, affect the rights of sureties.
Id. (*Ib.*) 120

8. The dockets and records of a court, showing that money had been received by the marshal or his deputies, under executions, are good evidence in a suit against his securities.
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TENANCY IN COMMON—3.

1. The entry and possession of one tenant in common, is ordinarily deemed the entry and possession of all the tenants; and this presumption will prevail in favor of all, until some notorious act of ouster or adverse possession by the party so entering is brought home to the knowledge or notice of the others. When this occurs, the possession is from that period treated as adverse to the other tenants.
Clymer's Lessee v. Dawkins, (674) 778

2. Such a notorious ouster or adverse possession may be by any overt act *in pais* of which the other tenants have due notice, or the assertion in any proceeding at law of a several and distinct claim or title. If an attempt be made to obtain a partition, although the legal proceedings by which it is effected may be invalid or defective, still, being a matter of public notoriety, the co-tenant is bound at his peril to take notice of the claim to adverse possession thus set up.
Id. (*Ib.*) 778

3. If the tenants in possession only claim the undivided interest which was held by their immediate grantors, it is not adverse to the remaining part of the title, and such persons cannot defend themselves in ejectment by giving in evidence an outstanding title elder than that under which they claim; nor can they avail themselves of the statute of limitations.
Id. (*Ib.*) 778

4. But if the occupants entered into possession and held the lands for more than twenty years before the commencement of the suit, by a purchase and claim thereof in entirety and severalty, and not an undivided part thereof in co-tenantcy, it is an adverse possession, and the statute of limitations is a good plea.
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TITLE—2.

1. A title may be tried in Virginia, Kentucky, and Tennessee, upon a *caveat*.
Porterfield's Ex'rs v. Clark, (76) 185

2. A deed of land in Missouri, in 1804, attested by two witnesses, purporting to have been executed in the presence of a syndic, presented to the commissioners of the United States in 1811, and again brought forward as the foundation of a claim before the commissioner in 1835, must be considered as evidence for a jury.
Stoddart v. Chambers, (284) 200

3. A confirmation under the Act of 1836, to the briginal claimant and his legal representatives, enured, by way of estoppel, to his assignee.
Id. (*Ib.*) 200

4. A title to land becomes a legal title when a claim is confirmed by Congress. Such confirmation is a higher evidence of title than a patent, because it is a direct grant of the fee, which had been previously in the United States.
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1. The corporation of the city of Philadelphia, having power, under its charter, to take real and personal estate by deed and by devise, can also take it in trust.
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2. Nor is there any positive objection, in point of law, to a corporation taking property upon a trust not strictly within the scope of the direct purposes of its institution, but collateral to them.
Id. (*Ib.*) 205

3. The trusts mentioned in the will of Stephen Girard are of an eleemosynary nature, and charitable uses, in a judicial sense.
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Id. (*Ib.*) 992
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Id. (*Ib.*) 992
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Smith et al. v. Condry, (28) 35
2. By the English statutes, as interpreted in their courts, the master or owner of a vessel, trading to or from the port of Liverpool, is not answerable for damages occasioned by the fault of the pilot.
Id. (*Ib.*) 35
3. The actual damage sustained by the party at the time and place of injury, and not probable profits at the port of destination, ought to be the measure of value in damages, in cases of collision as well as in cases of insurance.
Id. (*Ib.*) 35
4. By whose fault the accident happened, is a question of fact for the jury, to be decided by them upon the whole of the evidence.
Id. (*Ib.*) 35
5. If a ship be at anchor with no sails set, and in a proper place for anchoring, and another ship, under sail, occasion damages to her, the latter is liable.
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Porterfield's Ex'rs v. Clark, (76) 185
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Id. (*Ib.*) 185
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Clark v. Graham (6 W., 577), **5, 334**
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Cestui que trust may follow property;
Sale by collusion, does not prevent *cestui que trust* from asserting his title as to purchaser with notice:
A **purchase at request** of another, makes purchaser a trustee upon payment of money advanced on the purchase;
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Person acquiring title **as agent** of another, **trust** will be **implied,** not within the statute of frauds;
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Deed from *cestui que trust* to trustee, ward to guardian, heir to executor, **void.**
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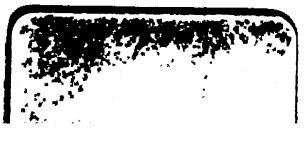

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